

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM DARLINGTON COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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Case No. 2017-CP-16-0400

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

v.

Johnson & Johnson and Johnson & Johnson Consumer  
Inc.,

Respondents

Appellants.

RECEIVED  
OCT 25 2018  
SC Court of Appeals

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**APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL**

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The South Carolina Supreme Court held in Hagood v. Sommerville, 362 S.C. 191 (2005), that orders which affect a party's substantial right to proceed with counsel of its choice are immediately appealable. This is exactly the situation here. The circuit court suddenly scheduled the trial less than three weeks out, during a period when the court knew that Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s ("J&J-CI") choice of lead counsel was unavailable. Neither plaintiffs nor the court below have even claimed any exigency or other need to rush this trial, which is in fact a retrial. This case was first tried in May 2018, ending in a hung jury and a mistrial. And since early June there has been no discussion of any date for the retrial, much less an expedited date. The simple solution is to schedule the trial at a time when all counsel are available, rather than at a time which deprives J&J-CI of their right to counsel of their choice.

As a result of the court's order, not only *may* J&J-CI appeal, it *must* appeal now under Hagood. Accordingly, the motion to dismiss this appeal is without any basis and should be denied.

### **BACKGROUND**

1. In this case, plaintiffs erroneously claim that Bertila Boyd-Bostic's death due to mesothelioma was caused by her use of J&J-CI baby powder. The claim is based on the false assertion that the baby powder contains asbestos. The case was commenced on May 22, 2017, and was tried in Darlington County from May 14 to 25, 2018.

J&J-CI selected Michael Brown as lead counsel for that trial. As lead counsel, Mr. Brown developed Defendants' trial strategy and trial themes. Affidavit of Michael Brown, October 11, 2018, at ¶ 6(g) (attached as Exhibit B to Defendants' Objection to Proposed Order, attached hereto as Exhibit 2) ("Aff."). He presented half the opening statement and all of the closing argument. Aff. ¶ 5(a)-(b). He conducted the cross examination of witnesses, including two of plaintiff's experts and one fact witness. Aff. ¶ 5(c)-(d). He conducted direct examination of defense witnesses, including Defendants' corporate representative and Defendants' industrial hygiene expert. Aff. ¶ 5(e). And he argued evidentiary issues to the circuit court. Aff. ¶ 5(f). In addition to this publicly visible trial work, he worked behind the scenes with other members of the defense team preparing direct and cross examination of witnesses. Aff. ¶ 5(g). And his work preparing for the trial was substantial, requiring him to among other things analyze pleadings, discovery, voluminous deposition transcripts, and relevant precedent. Aff. ¶ 6(a)-(n).

At the trial, Louis Hems served a limited role as local counsel for J&J-CI. Mr. Hems did not present opening or closing arguments. Nor did Mr. Hems examine any witnesses on direct or cross examination.

The trial ended with a hung jury on May 25, 2018.

2. Because of his role as lead counsel and his familiarity with the case, J&J-CI retained Michael Brown to play the same lead counsel role in any retrial of the Boyd-Bostic case. Aff. ¶ 4. J&J-CI also again retained Louis Hems to serve the role as local counsel in any retrial.

3. Since early June—nearly four months—Respondents’ counsel did nothing to reschedule a trial for the case. During that period, they did not ask the circuit court to place this case on any active or pending trial docket. As a result, the Boyd-Bostic case did not appear on any Asbestos Trial Docketing Order or any proposed Order.

During that time, counsel for Respondents were presumably busy working on another case in Charleston County—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. The parties in Wills agreed to a trial date of November 5, 2018.

On October 8, 2018, less than a month before the Wills trial date, Respondents’ counsel sought to switch the positions of the two cases. Respondents’ counsel submitted a “Motion for Date Certain” proposing that Wills be continued and Boyd-Bostic be tried in its place, with a trial starting November 5, which J&J-CI opposed

That same day, the circuit court held an unrecorded telephonic hearing on the motion. At the end of the call, the court asked Respondents’ counsel to draft an order setting November 5, 2018, as a date certain for trial. Respondents’ counsel submitted a draft order (attached hereto as Exhibit 1).

The next day, on October 12, J&J-CI filed an objection to the proposed order (attached hereto as Exhibit 2). The objection stated that proposed order incorrectly characterized lead counsel in Boyd-Bostic as the same as lead counsel in Wills. The objection explained that Mr. Brown was J&J-CI’s lead counsel in the prior Boyd-Bostic trial and that he was likewise J&J-CI’s

choice as lead counsel for any retrial in Boyd-Bostic. Mr. Brown was not involved, however, in any way in the Wills case.

The objection further detailed how Mr. Brown was unavailable to prepare for or attend a November 5 trial in Boyd-Bostic because he is scheduled to be lead counsel in another case in Illinois. Mr. Brown is trial counsel in Kohr v. AW Chesterton in the Circuit Court of Cook County Illinois, 16-L-008842, and that trial is set to begin in that case on October 31, 2018. Aff. ¶ 8. He also will be trial counsel in Teresa Leavitt v. Johnson & Johnson, et al., in Alameda County, California, Docket # G17882401. Trial is set to begin in that case on December 3, 2018. Aff. ¶ 8. As a result of preparing for the Kohr trial, he is not available to prepare for or present the Boyd-Bostic trial as lead counsel, now that it has been scheduled for Monday, November 5, 2018. Aff. ¶ 9.

Because a November 5 trial date for Boyd-Bostic would have the effect of denying J&J-CI its right to counsel of its choice, the objection explained that it was improper and in violation of the substantial right recognized in Hagood v. Sommerville, 362 S.C. 191 (2005). The objection further asserted that a November 5 trial date would violate Rule 40(b), SCRPC.

3. On October 16, the Circuit Court sent an email to counsel (attached hereto as Exhibit 3):

Dear Counsel: I have read the Objection to Proposed Order submitted by Johnson & Johnson. I will be signing the Proposed Order of Mr. Swett tomorrow and denying the Objection of Johnson & Johnson. I am not in my office today or I would sign and file these orders now. Trial in this matter will commence Nov. 5 as previously indicated by my rulings at our telephone conference. I am holding open Oct. 29, 2018 as a date for any PreTrial matters. Please advise. With my best regards, Jean Toal

No order was, however, forthcoming the next day from the circuit court, and no scheduling order regarding Boyd-Bostic was issued or a jury pulled for that case. At that time, Chief Justice Beatty appointed Judge Toal as Circuit Judge to preside over a term of the Court of Common Pleas for Darlington County for the weeks of November 5 and 17, 2018. (Order attached hereto as Exhibit 4). The Chief Justice's order did not instruct Judge Toal to try Boyd-Bostic specifically; indeed, it did not mention Boyd-Bostic at all.

4. On October 19, the circuit court issued a scheduling order setting Boyd-Bostic for trial on November 5, 2018. (Attached hereto as Exhibit 5). The October 19 order incorrectly claimed that Chief Justice Beatty's order appointed the court to retry Boyd-Bostic specifically. The order was also improperly captioned as a denial of a motion to continue trial, when no such motion was ever filed.

The October 19 order continued: "The main thrust of [the objection] 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."

The order further stated that because two of Respondents' counsel are state senators, postponing the trial into the spring would prejudice Respondents.

5. Because the October 19 order did not mention the objection based on Rule 40, SCRPC, on October 22, 2018, J&J-CI filed a Rule 59(e) Motion (attached hereto as Exhibit 6). The court denied the Rule 59(e) Motion that same day. (Order attached hereto as Exhibit 7). The court said that because the case was put on the docket "in March or April of 2018" before the trial in May,

Rule 40 did not prevent it from setting the trial date as it did even though it did not provide the required 30-days notice.

6. The next day, October 23, J&J-CI filed a Notice of Appeal, and sought a stay from the circuit court.

7. Later that day the circuit court again emailed counsel (attached hereto as Exhibit 8):

Dear Counsel: While I am not sure this matter is immediately appealable, it's facts being very different from Hagood v. Sommerville, the 2007 decision of our Supreme Court on appealability of an order disqualifying a party's attorney cited in Defendant's Appeal filed this afternoon. I also wonder whether or not Chief Justice Beatty's Order of Oct. 17, 2018 setting the case for a term and day certain and appointing me to preside can be appealed or stayed given it's separate status under the South Carolina Constitution. Be all that as it may, I will regard this matter as stayed at the moment. I would hope that the counsel will seek an immediate answer from the Court of Appeals so that I will know how to proceed with the Pretrial scheduled for Monday, Oct. 29, 2014 in Charleston as well as the trial Nov. 5, 2018 in Darlington. Best regards, Jean Toal

8. On October 24, Respondents filed a motion in this Court to dismiss the appeal.

### **ARGUMENT**

This Court's order setting the retrial less than 17 days away at a time when J&J-CI's chosen lead counsel, Michael Brown, is unavailable to prepare for and attend trial, due to another prescheduled trial, violates Defendants' right to proceed with the attorney of their choosing. The order is therefore immediately appealable. S.C. Code Ann. § 14-3-330(2); Hagood v. Sommerville, 362 S.C. 191 (2005) (order that has the effect of denying the right of counsel of the

client's choosing in a civil case is the denial of a substantial right and subject to an immediate appeal). Indeed, under Hagood an appeal is required to preserve J&J-CI's objection to the deprivation of its right to proceed with the lead counsel of its choice. Thus, this appeal is proper and timely.

**I. The October 19 Order Is Subject To An Immediate Appeal Because It Deprives J&J-CI Of Its Right to Counsel of Its Choice**

A party has a right to take an immediate appeal from an "order affecting a substantial right." S.C. Code Ann. § 14-3-330(2). The South Carolina Supreme Court has "repeatedly held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Hagood v. Sommerville, 362 S.C. 191, 196 (2005). The Hagood Court ruled that an order having the effect of denying a party's "right to proceed with a lawyer of his choosing" is one such "substantial right" that permits an immediate appeal. Id. at 195. The Court explained, "[t]he right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case." Id. at 195-96. "Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right." Id. at 196. The Court further held that the objecting party *must* take an immediate appeal to assert an objection to an order having the effect of denying them their counsel of choice. Id. at 198.

Hagood's reasoning fully supports the right to appeal in this case.<sup>1</sup> In concluding that an order that has the effect of depriving a party of its right to proceed with the counsel of its choosing is

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<sup>1</sup> Respondents begin their Motion to Dismiss with a distraction, spending nearly two pages recounting the pre-trial remand history of the first trial in this case. Respondents

immediately appealable, the Hagood Court cited four reasons: “(1) the importance of the party’s right to counsel of his choice in an adversarial system; (2) the importance of the attorney-client relationship, which demands a confidential, trusting relationship that often develops over time; (3) the unfairness in requiring a party to pay another attorney to become familiar with a case and repeat preparatory actions already completed by the preferred attorney; and (4) an appeal after final judgment would not adequately protect a party’s interests because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney.” Id. at 197. Each of these reasons apply in this case.

First, the Supreme Court’s citation to a “party’s right to counsel of his choice in an adversarial system” applies fully here. J&J-CI selected Mr. Brown as lead counsel in the prior trial in this case, which resulted in a hung jury. The client has again retained him to serve as lead counsel over any retrial. While it is understandable why Respondents would like to preclude him as counsel, in hopes of a better result, it is J&J-CI’s fundamental right to choose its own counsel.

Second, Mr. Brown has developed a relationship and trust with the client. In Hagood’s terms, J&J-CI has a “confidential, trusting relationship” that has “develop[ed] over time.” 362 S.C. at 197. Here, the relationship is substantial given Mr. Brown’s his extensive preparation for and participation in the original trial as lead counsel, and the favorable results obtained.

Third, given Mr. Brown’s familiarity with the case and his role as lead counsel in the prior trial, it would be especially unfair to “require[e J&J-CI] to pay another attorney to become familiar

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mischaracterize J&J-CI’s good-faith efforts to remove the case to federal court upon learning that Rite-Aid was fraudulently joined to avoid diversity. In any event, the dispute over diversity has nothing to do with the appealability of the October 19 order at issue here. Moreover, plaintiffs’ counsel are the ones who sought to avoid trial at the eleventh hour. J&J-CI was prepared to go to trial in the Wills case on November 5 as scheduled before plaintiffs’ counsel abruptly refused to provide Mr. Wills for a deposition and moved to continue the case in favor of the Boyd-Bostic case.

with [the] case and repeat” Mr. Brown’s work. Id. Mr. Brown led the first trial and in that role evaluated what strategies were successful or not successful, gauging the jury’s reaction. And there are numerous unique issues in this case, including that Ms. Boyd-Bostic suffered from an extremely rare form of mesothelioma that is not even caused by asbestos.

Finally, J&J-CI’s interests in selecting their own lead counsel can only be protected by an immediate appeal. As Hagood explains, a party not only has the right to immediately appeal to protect its right to its counsel of choice, it *must* immediately appeal or “any later objection in a subsequent appeal will be waived.” Id. at 198.

Respondents claim that Hagood is inapposite, trying to limit that ruling to its specific facts. This argument fails to give any weight to Hagood’s rationale. The Supreme Court agreed with the argument that the order there was “immediately appealable under S.C. Code Ann. § 14-3-30(2) because it *affects* a substantial right, namely, the right to proceed with a lawyer of his choosing.” 362 S.C. at 195 (emphasis added). The focus in Hagood was the order’s *effect* on Petitioner’s substantial right, not how the order itself was styled. Id. at 199 (holding order immediately appealable because “it *affects* a substantial right”) (emphasis added). Similarly, the circuit court’s order here is immediately appealable because it affects the same substantial right at issue in Hagood: J&J-CI’s right to have its chosen counsel represent it at trial.

Here, it is undeniable that the effect of the October 19 order is to deny J&J-CI its right to have Mr. Brown serve as lead counsel at the retrial. As J&J-CI informed the circuit court, Mr. Brown is simply not available to prepare for or attend a November 5 retrial of this case. Mr. Brown is trial counsel in Kohr v. AW Chesterton in the Circuit Court of Cook County Illinois, 16-L-008842, and that trial is set to begin in that case on October 31, 2018. Aff. ¶ 8. He also will be trial counsel in Leavitt v. Johnson & Johnson, et al., in Alameda County, California, Docket # G17882401. Trial is

set to begin in that case on December 3, 2018. Aff. ¶ 8. As a result of preparing for the Kohr case, he is not available to prepare for or present the Boyd-Bostic trial as lead counsel, now that it has been scheduled for Monday, November 5, 2018. Aff. ¶ 9.

Respondents argue that Mr. Brown must choose “which trial he wishes to participate in.” By scheduling this retrial when both the court and Respondent’s counsel knew that Mr. Brown was unavailable due to another long scheduled trial, however, the October 19 order prevented J&J-CI from having the benefit of the counsel of its choice. No one could have predicted or expected trial in this case would go forward in November 5, 2018. As noted above, Respondents delayed nearly five months following the May mistrial in this case before asking the circuit court to re-schedule the case for trial on less than 30-days notice. To fault Mr. Brown and to force him to choose between clients after arranging his calendar in good faith is simply unfair to him and prejudicial to the fundamental right of J&J-CI to proceed with counsel of their choice.

Notably, Respondents cannot even defend the circuit court’s suggestion that Mr. Hems was lead counsel. At the prior trial, Mr. Hems served a limited role as local counsel for J&J-CI. Mr. Hems did not present opening or closing arguments. He did not examine any witnesses on direct or cross examination. Indeed, the court could not even call him a true lead counsel, instead referring to him as “South Carolina lead counsel.” (Exhibit 5 at 2).

There is a reason Respondents do not defend the suggestion that Mr. Hems was lead counsel. The record is the record. And that record shows that Mr. Brown’s role was critical in the first Boyd-Bostic trial. He developed Defendants’ trial strategy and trial themes. Aff. ¶ 6(g). He presented the half the opening statement and all of the crucial closing argument. Aff. ¶ 5(a)-(b). He conducted the cross examination of witnesses, including two of plaintiff’s experts and one fact witness. Aff. ¶ 5(c)-(d). He conducted direct examination of defense witnesses, including Defendants’ corporate

representative and Defendants' industrial hygiene expert. Aff. ¶ 5(e). And he argued evidentiary issues to the circuit court. Aff ¶ 5(f). In addition to this publicly visible work, he worked behind the scenes with other members of the defense team preparing direct and cross examination of witnesses. Aff ¶ 5(g). And his work preparing for the trial was substantial, requiring him to among other things analyze pleadings, discovery, voluminous deposition transcripts, and precedent. Aff. ¶ 6(a)-(n).

And Respondents do not in fact contest that, because of his role as lead counsel and his familiarity with the case and his success in the prior trial, J&J-CI has selected Mr. Brown to play the same lead counsel role in any retrial of Boyd-Bostic. Aff. ¶ 4.

Nor do Respondents seek to defend the incorrect statement in their proposed order, stating that Wills and Boyd-Bostic involve "the same lead attorneys." (Exhibit 1 at 1). In fact, Mr. Brown is not counsel in and has nothing to do with the Wills case.

Finally, Respondents' overstate the consequences of allowing this appeal to go forward. This is not a case of an out-of-state attorney trying to sabotage a circuit court's scheduling by surreptitiously seeking out conflicting court dates in other jurisdictions. Instead, Mr. Brown did everything a reasonable attorney with cases in multiple jurisdictions could to ensure his obligations in other cases did not conflict with his obligations here. He could not have expected Respondents would suddenly want this trial to go forward in 17 days after Respondents spent nearly half a year without so much as suggesting a pretrial schedule. Neither the circuit court nor Respondents have presented any pressing need to try Boyd-Bostic within the next eleven days, as opposed to scheduling the case in 2019 after the legislative session, when lead counsel for all parties could schedule the case and make proper arrangements.

Any claim that Plaintiffs' counsel Marlon Kimpson and Gerald Malloy's participation in the trial would be "hindered" due to their positions as state senators is irrelevant and makes no sense. The

order is appealable because it affects *J&J-CI's* right to counsel of its choice, no matter what conflicts plaintiffs may have. And, in any event, the solution is simple. If the trial is rescheduled for May or thereafter in 2019, the legislative session would have no bearing on their availability. Moreover, Mr. Malloy did not even appear as counsel of record in the first trial, and Mr. Kimpson role was limited to only examining two witnesses. Any “disadvantage[]” to Plaintiffs, in any event, could be easily avoided by setting the trial when all counsel can be present with a May trial date. (Exhibit 5 at 3).

Notably, this case involves a deceased plaintiff and so there is not the same imperative for speed here as there might be if the plaintiff were alive. The circuit court’s October 19 Asbestos Trial Docketing Order recognizes that distinction. It provides the order of cases “will be readjusted as needed if living cases are filed or upon a showing of good cause.” (Attached hereto as Exhibit 9).

Instead of rushing to switch Boyd-Bostic and Wills, 17 days before trial, and without so much as a scheduling hearing, the circuit court should have asked the parties for their availability and worked to find a trial date suitable to both. The circuit court’s unjustified haste in setting Boyd-Bostic for trial has deprived J&J-CI of its counsel of choice and the October 19 order having that effect is immediately appealable.

Finally, Respondents are incorrect in arguing that Chief Justice Beatty’s order sets November 5, 2018, as the trial date in this case. That order does not even mention Boyd-Bostic; instead, it merely appoints Jude Toal to oversee a trial in Darlington County on November 5, 2018 without identifying a specific case. (Exhibit 4). Thus, Respondents are incorrect that the Chief Justice’s Order alone sets the trial date for this case. Instead, the circuit court’s Order is responsible for setting the trial date, and it is that order and the related administrative order which J&J-CI has properly appealed to this Court.

## II. The Order Violates Rule 40(b), SCRCP.

In their motion to dismiss this appeal, Respondents also raise the issue of whether the circuit court complied with Rule 40(b), SCRCP. To be clear, that issue goes to an additional argument supportive of the merits of J&J-CI's appeal. The primary basis for this Court's jurisdiction over this appeal is the denial of the substantial right of a party to proceed with their counsel of choice. The Rule 40 error, however, also supports the right to appeal. If denying a party the right to counsel provides a right to appeal, all the more so an order providing less than the required 30-days notice before a trial should likewise support an appeal right.

And it is clear that the October 19 order violated Rule 40(b), SCRCP. Rule 40(b) permits calling a case to trial "no earlier than 30 days from the date the case first appears on the Jury Trial Roster." Here, the October 19 scheduling order was issued a mere *17 days* before the trial date.

Respondents claim that the Order's November 5, 2018 trial date satisfies the rule mandating at least 30-days' notice because the case was put on the Jury Trial Roster before it was tried in May, 2018. That makes no sense. The rule is designed to foster predictability and regularity to allow attorneys and the court to manage their schedules. Plaintiffs' reading turns that on its head, creating chaos and uncertainty that invites scheduling conflicts.

Plaintiffs' interpretation would allow the court to reset retrial after long hiatus with even only a one- or two- day notice. Under Respondents' interpretation, neither party would have any reasonable expectation about the timing of a case—so long as the case had been added to the Jury Trial Roster six months, a year, or several years prior, a court could schedule trial without warning and without recourse. Similarly, under Respondents' reading a case that momentarily appeared and was then removed from the Jury Trial Roster could be set for trial at any time after the 30-day period with one day's notice, even if the case had not appeared on the Jury Trial Roster for months

or even years. The Rule is properly read as requiring a case to be placed on the current Jury Trial Roster for 30 consecutive days before it can be reset for trial. Boyd-Bostic was not on any Jury Trial Roster, much less one for Darlington County, when the circuit court set it for trial on November 5.


This Court need not reach this issue in deciding whether it has jurisdiction over this appeal, but if it does this Court should hold that the October 19 order violates Rule 40.

### **CONCLUSION**

For the reasons set forth above, Respondents' Motion to Dismiss this appeal should be denied.

SIGNATURE PAGE TO FOLLOW.

October 25, 2018

BY: 

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## ADDENDUM

For ease of reference, the Exhibits referred to in this Opposition are listed below:

Exhibit 1: Plaintiffs' Proposed Scheduling Order, October 11, 2018

Exhibit 2: Defendants' Objection to Proposed Order, October 12, 2018

Exhibit 3: Email from Judge Toal, October 16, 2018

Exhibit 4: Order from Chief Justice Beatty Appointing Judge Toal Over Darlington County, October 17, 2018

Exhibit 5: Scheduling Order, October 19, 2018

Exhibit 6: Defendants' Rule 59(e) Motion to Reconsider, October 22, 2018

Exhibit 7: Order Denying Defendants' Rule 59(e) Motion, October 22, 2018

Exhibit 8: Email from Judge Toal, October 23, 2018

Exhibit 9: Asbestos Trial Docketing Order, October 19, 2018

# EXHIBIT 1



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.

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

\_\_\_\_\_, 2018  
Columbia, South Carolina

# EXHIBIT 2

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 ANTOINE T. BOSTIC, Individually and as )  
 Personal Representative of the Estate of )  
 BERTILA DELORA BOYD-BOSTIC, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 IMERYS TALC AMERICA, INC., et al., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FOURTH JUDICIAL CIRCUIT  
 C/A NO.: 2017-CP-16-0400

**OBJECTION TO PROPOSED ORDER  
 AND SUPPLEMENTAL MEMORANDUM  
 OPPOSING MOTION FOR DATE CERTAIN**

Johnson & Johnson and Johnson & Johnson Consumer, Inc. (hereinafter "Defendants"), by and through their undersigned counsel, object to the proposed Scheduling Order Setting Trial Date of November 5, 2018 (attached hereto as **Exhibit A**) that was submitted to the Honorable Jean H. Toal on October 11, 2018 by Plaintiff's counsel, W. Christopher Swett (hereinafter the "Order").

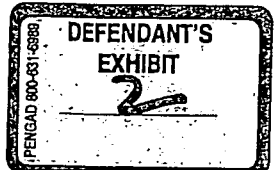
**BRIEF STATEMENT OF PROCEDURAL BACKGROUND**

The *Boyd-Bostic* case was initially filed on May 22, 2107 and tried on May 14, 2018. Since the mistrial on May 25, 2018, Plaintiffs' counsel had not petitioned the Court to place the *Boyd-Bostic* case on any active or pending trial docket. Likewise, since the mistrial, the *Boyd-Bostic* case did not appear on any executed Asbestos Trial Docketing Order or any related proposed Order.

On October 8, 2018, Plaintiff's counsel submitted a Motion for Date Certain, proposing that the *Wills* case be continued and that the *Boyd-Bostic* case be tried in place of the *Wills* case on November 5, 2018. This Court expeditiously agreed to hear Plaintiff's motion at a telephonic hearing that same day. There was no court reporter at the hearing. Defendants' submitted a

TRUE CERTIFIED COPY  
*Scott B. Jupp*  
 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.

FILED  
 OCT 12 PM 3:41  
 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.



Memorandum in Opposition to Plaintiff's Motion for Date Certain prior to the hearing that afternoon.

At the conclusion of the October 8, 2018 hearing, this Court expressed its intention to grant Plaintiff's motion, requesting Plaintiff's counsel draft an Order setting a date certain trial date of November 5, 2018. On October 11, 2018, Plaintiff's counsel submitted Plaintiff's proposed Order. Defendants hereby object to the proposed Order, for the arguments made at the hearing and in its prior memorandum, as well as the arguments contained herein.

#### ARGUMENT

The proposed Order states as justification that "no party will be prejudiced by the November 5, 2018 trial setting," that "there are no outstanding issues in *Boyd-Bostic*," and that the *Wills* case and the *Boyd-Bostic* case "involve the same lead attorneys." Each of these statements are false, inaccurate, and misleading.

As an initial matter, the proposed Order's statements as to lack of prejudice and the "same lead attorneys" are factually incorrect. As stated in the Defendants' Memorandum in Opposition to Plaintiff's Motion for a Date-Certain Trial, Date of November 5, 2018 (attached hereto as **Exhibit B**), Plaintiffs' assertion that defense counsel is the same in *Boyd-Bostic* as in *Wills* is inaccurate. In fact, the *Wills* and *Boyd-Bostic* defense teams are entirely separate and distinct in both attorneys and law firms. John Ewald, Esq. of Orrick, Herrington & Sutcliffe, LLP in New York and Billy Martin, Esq. of Barnes & Thornburg, LLP in the District of Columbia represent Defendants in *Wills*, whereas Michael A. Brown of Nelson Mullins Riley & Scarborough in Maryland represents Defendants in *Boyd-Bostic*. Michael Brown is not and has not been involved in the preparation of the *Wills* case that was set for trial on November 5, 2018. Additionally, Bruce Bishop and Eric Cook of Willcox & Savage in Virginia were part of

the Defendants' trial team in *Boyd-Bostic* and have no involvement in the *Wills* case. For these reasons, the *Wills* and *Boyd-Bostic* cases do not involve "the same lead attorneys."

A client in a civil case has a right to choose its own lead counsel. See *Hagood v. Sommerville*, 362 S.C. 191 (2005). Here, Defendants have carefully selected Michael A. Brown as their lead trial counsel for the *Boyd-Bostic* case. Mr. Brown played a critical and active role during the first trial of the *Boyd-Bostic* case in May of 2018 (See Affidavit of Michael A. Brown attached hereto as **Exhibit C**). The Defendants intend for Mr. Brown to have the same critical, irreplaceable, and active role in the retrial of *Boyd-Bostic*. As noted in the Affidavit of Michael A. Brown attached hereto, he is not available for retrial of *Boyd-Bostic* on November 5, 2018.

It is undeniable that the *Boyd-Bostic* case is complex litigation. In order to zealously represent Defendants at trial, trial counsel must spend the requisite time analyzing the facts of the case, including but not limited to all pleadings, discovery, fact witness depositions, expert witness depositions, and related reports, prior to even developing trial strategies to present the case to the jury.

Four weeks to prepare for a complex litigation case is a grossly inadequate amount of time to enable a new trial team to prepare the case for retrial. To require such will not "serve the ends of justice" as the proposed Order suggests; rather, it would result in undue prejudice to Defendants.

The proposed Order contends that "there are no outstanding issues and the *Boyd-Bostic* case is ready for retrial." Not even twenty-four hours after the October 8, 2018 hearing, Plaintiff's counsel served his Notice of Deposition of Dr. John C. Maddox, Plaintiff's medical expert in the *Boyd-Bostic* case. (See Plaintiff's Notice of Deposition of Dr. Maddox, attached hereto as **Exhibit D**).



Respectfully submitted,

BY: Louis P. Hems

Louis P. Hems (3087)  
Christina Lore Perrin (79931)  
Ryan Conner (101702)  
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October 12, 2018  
Charleston, South Carolina

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CLERK OF COURT  
DANIELSON COURT, S.C.

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, )  
 )  
Plaintiff, )

CASE NO. 2017-CP-16-0400

vs. )

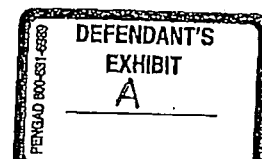
**SCHEDULING ORDER SETTING  
TRIAL DATE OF NOVEMBER 5, 2018**

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 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.

Since 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.

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

\_\_\_\_\_, 2018  
Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 ANTOINE T. BOSTIC, Individually and as )  
 Personal Representative of the Estate of )  
 BERTILA DELORA BOYD-BOSTIC, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 IMERYS TALC AMERICA, INC., et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

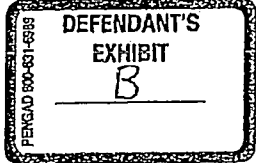
IN THE COURT OF COMMON PLEAS  
 FOR THE FOURTH JUDICIAL CIRCUIT  
 C/A NO.: 2017-CP-16-0400

AFFIDAVIT OF  
 MICHAEL A. BROWN, ESQ.

Michael A. Brown, being over eighteen (18) years of age, after first being duly sworn on under oath, hereby say and depose as follows:

1. I graduated Georgetown University Law Center in 1989, and I am currently a partner with the law firm of Nelson Mullins Riley and Scarborough, LLP, in Baltimore, Maryland. I am familiar with the events, pleadings, and discovery in this action, and if called upon as a witness, I could and would testify competently to the matters stated herein of my own personal knowledge.
2. I handle complex cases involving, among other things, product liability defense and mass tort litigation.
3. The above captioned case went to trial on May 14, 2018, and resulted in a mistrial after a hung jury.
4. I was lead counsel on the trial. Due to my familiarity with the case, my clients Johnson & Johnson and Johnson & Johnson Consumer Inc. have retained me to play the same role in any re-trial as I played in the first trial.
5. Throughout the two-week trial, my role included the following:
  - a. I presented half the opening statement. In that opening statement I addressed, among others, the following critical issues in the case:
    - i. Johnson & Johnson baby powder did not contain asbestos;
    - ii. Johnson & Johnson acted responsibly in marketing the baby powder;

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- iii. The testimony that the jury would hear regarding talc mines;
  - iv. The difference between industrial talc and cosmetic talc;
  - v. That millions upon millions of people have used Johnson & Johnson baby powder and have not contracted disease because there is no asbestos in the Johnson & Johnson baby powder;
  - vi. The difference between asbestiform talc versus non-asbestiform talc;
  - vii. That Johnson & Johnson used four different techniques to determine if asbestos fibers were in the Johnson & Johnson baby powder;
  - viii. The testimony of Dr. John Hopkins; and
  - ix. That there are no epidemiology studies establishing that asbestos causes pericardial mesothelioma.
- b. I presented the closing argument.
  - c. I conducted Voir Dire and cross-examined of the following Plaintiff expert witnesses:
    - i. Dr. Arnold Brody; and
    - ii. Dr. John Maddox.
  - d. I cross-examined the following Plaintiff's fact witness:
    - i. Beverly Boyd Caraway
  - e. I conducted the direct-examination and redirect-examination of the following defense expert witnesses:
    - i. Dr. John Hopkins, Johnson & Johnson's Corporate Representative; and
    - ii. Dana Hollins MPH, CIH, Johnson & Johnson's Industrial Hygiene Expert.
  - f. I addressed and argued against the admission of exhibits into evidence.
  - g. I worked with other members of the Johnson & Johnson and Johnson & Johnson Consumer, Inc. trial team in preparing direct and cross examination of witnesses.
6. In order to play this leading role at trial, I spent numerous hours preparing. That preparation included:
- a. Analyzing all pleadings;

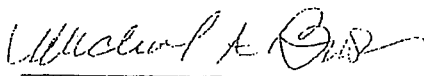
- b. Analyzing all discovery including but not limited to Answers to Interrogatories, Responses to Requests for Production, medical records, and expert reports;
- c. Analyzing voluminous deposition transcripts of Plaintiff, Plaintiff's fact witnesses and expert witnesses;
- d. Analyzing voluminous deposition transcripts of the Johns & Johnson expert witnesses;
- e. Analyzing voluminous deposition transcripts of Dr. John Hopkins, the Johnson & Johnson Corporate Representative;
- f. Reviewing the South Carolina case law;
- g. Developing Johnson & Johnson trial strategy and trial themes;
- h. Formulating the Johnson and Johnson Opening Statement;
- i. Preparing expert witnesses to testify at trial;
- j. Meeting with Dr. John Hopkins, the Corporate Representative, to proper him to give testify at trial;
- k. Drafting direct examination questions for Dr. John Hopkins;
- l. Meeting with defense expert, Dana M. Hollins, MPH, CIH to prepare her to give testimony at trial;
- m. Drafting the direct examination questions for Dana Hollins
- n. Drafting and the Johnson & Johnson Closing Argument.

7. I understand that on October 8, 2018, Judge Jean Toal stated in a telephone conference that she was granting Plaintiff's Motion for Date Certain which Plaintiff served on October 8, 2018, setting retrial of the above-captioned case on November 5, 2018. This was very surprising to me when I learned of this because *Boyd-Bostic* was not on any trial roster at the time.

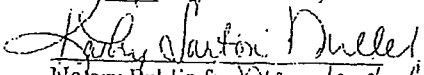
8. I will be trial counsel in *Kohr v. AW Chesterton* in the Circuit Court of Cook County Illinois, 16-L-008842. Trial is set to begin in that case on October 31, 2018. I will also be trial counsel in *Teresa Leavitt v. Johnson & Johnson, et al.*, in Alameda County, California, Docket # G17882401. Trial is set to begin in that case on December 3, 2018.

9. As a result of preparing for the trial in Cook County, Illinois, I am not available to prepare for or present the *Boyd-Bostic* trial as lead counsel now that it has been scheduled for trial on Monday, November 5, 2018.

FURTHER DEPONENT SAYETH NOT.

  
Michael Brown, Esq.

Sworn to and subscribed before me  
This 11 day of October, 2018

  
Notary Public for Maryland, City of Bethesda  
My Commission Expires: 7/6/19

STATE OF SOUTH CAROLINA )  
 COUNTY OF DARLINGTON )  
 ANTIONE BOSTIC, Individually and as )  
 Personal Representative of the Estate of )  
 BERTILA BEDLORA BOYD-BOSTIC )  
 Plaintiffs, )  
 v. )  
 JOHNSON & JOHNSON, et al., )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FOURTH JUDICIAL CIRCUIT  
 C/A NO.: 2017-CP-16-0400  
 DEFENDANT JOHNSON & JOHNSON  
 AND JOHNSON & JOHNSON  
 CONSUMER, INC.'S MEMORANDUM  
 IN OPPOSITION TO PLAINTIFFS'  
 MOTION FOR DATE-CERTAIN TRIAL  
 DATE OF NOVEMBER 5, 2018

Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. (hereinafter "Defendants"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Plaintiffs' Motion for a Date-Certain Trial Date of November 5, 2018:

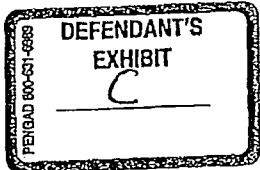
For the reasons stated herein, Defendants respectfully request that this honorable Court order the following: (i) denial of Plaintiffs' request to transfer *Boyd-Bostic* to the November 5, 2018 jury trial roster; (ii) denial of Plaintiffs' request for a continuance of the *Wills* case; and (iii) that Plaintiffs produce Walter Kyle Wills for a deposition, and that his testimony not be limited to damages.

**INTRODUCTION**

Plaintiff's attempt to set *Boyd-Bostic* for a November 5, 2018 trial date should be denied. Under SCRCP 40(b), a case must be on the Jury Trial Roster for at least thirty days before it can be set for trial. *Boyd-Bostic* is not on any Jury Trial Roster. And contrary to Plaintiff's assertions, *Boyd-Bostic* does not involve the exact same attorneys as *Wills*. Trial counsel for the two cases are different, and Michael Brown—a critical part of the *Boyd-Bostic* defense team—is unavailable for trial on November 5. He has a trial set to start on October 31.

Though plaintiffs' counsel has only filed a motion in *Boyd-Bostic*, he indicated his intention to move for a continuance in *Wills* on the ground that Mr. Wills is not available for a deposition.

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 SOUTH CAROLINA



This is simply gamesmanship. Counsel already agreed to a deposition for Mr. Wills for today, Monday, October 8. But on Friday, October 5, counsel informed defendants that he was unavailable on that date—or any date over the course of the next month—and that they intended to substitute *Boyd Bostic* for *Wills*. The motion does not provide any explanation or evidence for his sudden unavailability.

These cases should move forward as planned. *Boyd-Bostic* should not be moved earlier. *Wills* should continue on its current schedule. And Mr. Wills should appear for a deposition.

#### ARGUMENT

**I. The Boyd-Bostic Case Should Not Be Transferred to the November 5, 2018 Jury Roster.**

Plaintiffs' Motion asks this Court to transfer *Boyd-Bostic* to the November 5, 2018 jury roster. A November 5 trial date for *Boyd-Bostic* would violate SCRCP 40(b) and would prejudice defendants since *Boyd-Bostic* trial counsel is not available on that date.

SCRCP 40(b) requires a case to be on the Jury Trial Roster for at least thirty days prior to any trial date:

Trial shall be had no earlier than thirty days from the date the case first appears on the Jury Trial Roster. Cases shall be called for trial in the order in which they are placed on the Jury Trial Roster, unless the court in a Scheduling Order has set a date certain for the trial, or, after the case has been set on the Jury Trial Roster, the court, upon motion, grants a continuance[.]

Here, *Boyd-Bostic* is not on any Jury Trial Roster—indeed, there is no Jury Trial Roster in Darlington County for trial beginning November 5, 2018. And, even if *Boyd-Bostic* were on a Jury Trial Roster, SCRCP 40(b) prohibits setting a trial date earlier than thirty days from the date the case first appears on the Jury Trial Roster. This effectively eliminates November 5, 2018 as a trial date for *Boyd-Bostic*.

In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E.2d 906 (1994). If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002). Here there is no ambiguity. *Boyd-Bostic* cannot be set for trial on November 5, 2018.

Plaintiffs' Motion should also be denied because moving the *Boyd-Bostic* trial to November 5, 2018, would seriously prejudice Defendants, for two reasons. *First*, Plaintiffs' assertion that Defense counsel is the same in *Boyd-Bostic* as in *Wills* is incorrect. John Ewald and Billy Martin will be representing Defendants in *Wills*, whereas Michael Brown is counsel in *Boyd-Bostic*. Mr. Brown is a critical part of the defense team and is unavailable for trial in *Boyd-Bostic* on that date. Mr. Brown is going to be trying the *Kohr v. AW Chesterton* case in Circuit Court of Cook County Illinois, 16-L-008842, which is set to start trial on October 31, 2018. He is also trial counsel in *Teresa Leavitt v. Johnson & Johnson, et al.*, in Alameda County, California, Docket # G17882401, which is set for trial on December 3, 2018.

*Second*, *Boyd-Bostic* and *Wills* cannot be so easily substituted for each other. As Plaintiffs' counsel regularly argues at hearings and in motions, asbestos claims are each vastly different from each other; thus, substituting one asbestos case for another on such short notice would seriously prejudice Defendants. Here, there are significant differences between *Boyd-Bostic* and *Wills* which make substituting one for the other untenable, and further prevents Defendants' medical experts from merely reiterating their opinions. For example, *Wills* is a case of pleural mesothelioma, but *Boyd-Bostic* involves pericardial mesothelioma. Furthermore, alternative exposures in *Wills* focus on military exposures and elementary school exposures, but alternative exposures in *Boyd-Bostic*

focus on construction and automotive friction product exposures. As a result, the medical experts' testimony differs substantially between the two cases. Likewise, causation and exposure testimony differ substantially between the two cases. Defendants' experts are currently preparing for the unique attributes of the *Wills* case. Placing *Boyd-Bostic* on the jury roster for November 5, 2018, or any jury roster in 2018, would cause financial hardship, undue burden, undue expense, and undue prejudice to Defendants, and therefore Plaintiffs' Motion should be denied.

Finally, Plaintiffs' counsel's plan to substitute *Boyd-Bostic* for *Wills* overlooks the proposed replacement order set by this Court's Trial Docket for November 5, 2018, which Plaintiffs' counsel, among others, drafted. (See Theile McVey's September 17, 2018 electronic correspondence attached hereto as **Exhibit 1**). Should this Court continue *Wills*, the replacement case is *Poole* (and, if not *Poole*, then *Caldwell*). (See Trial Docket attached hereto as **Exhibit 2**). *Boyd-Bostic* is not a replacement for any of these cases because, as noted above, it does not even appear on the Trial Docket for November 5, 2018. This Court should therefore deny Plaintiffs' motion.

## II. The *Wills* Case Should Not Be Continued.

Plaintiffs Motion effectively asks for a continuance of the *Wills* case based on the unavailability of Walter Kyle Wills. For over a year, Defendants have been trying to take the deposition of Mr. Wills. Plaintiffs finally agreed to make Mr. Wills available for today, Monday October 8, 2018. Then last Friday (October 5), Plaintiffs' pulled Mr. Wills without explanation and without offering another day for Mr. Wills to sit for his deposition. Plaintiffs offer no evidence or explanation for why Mr. Wills is suddenly unavailable. This is hardly sufficient to justify either Plaintiffs' request to continue the *Wills* case or Plaintiffs' gamesmanship with Mr. Wills' deposition. Plaintiffs' motion should be denied.

As further background: On August 31, 2017, Defendants sent a letter to Plaintiffs requesting to take the depositions of all fact witnesses. (See August 31, 2017 Letter attached hereto as Exhibit 3). Over the course of the following year, Defendants continued to request dates for the deposition of Mr. Wills over the phone. On September 21, 2018, Defendants in writing again asked to depose Mr. Wills. (See September 21, 2018 correspondence attached hereto as Exhibit 4).

Finally, on September 26, 2018, Plaintiffs' counsel agreed to make Mr. Wills available for his deposition on October 8, 2018, but noted that his deposition would be limited to damages.<sup>1</sup> (See September 26, 2018 correspondence attached hereto as Exhibit 5). The following day, on September 27, 2018, Defendants produced a Notice of Deposition of Walter Kyle Wills. (See Notice of Deposition for October 8, 2018 attached hereto as Exhibit 6).

Then suddenly on October 5, 2018, Plaintiffs' counsel notified Defense Counsel that Mr. Wills was no longer available for his deposition on October 8, 2018, that he is not available for his deposition on any other day between October 8, 2018 and trial on November 5, 2018, and that Plaintiffs' counsel intended to file a Motion to Substitute the *Boyd-Bostic* case in place of the *Wills* case. (See October 5, 2018 electronic correspondence attached hereto as Exhibit 7).

Plaintiffs can offer no valid justification for delaying the deposition of Mr. Wills for over a year. SCRCP 40(i) concerns requests for continuances and authorizes the court to grant such requests only for good and sufficient cause. *Jones v. Doe*, 372 S.C. 53, 640 S.E.2d 514 (Ct. App.

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<sup>1</sup> Plaintiffs' counsel's assertions that Mr. Wills would be produced only as a damages witness and would not offer any testimony as to exposure(s) is improper. The South Carolina Rules of Civil Procedure provide various methods by which parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense. Rule 26(a), (b)(1), SCRCP. *City of Columbia v. ACLU*, 323 S.C. 384, 475 S.E.2d 747, 749 (1996). The South Carolina Rules of Civil Procedure permit a party to fully investigate the merits of the opposing party's case. *Patterson v. McNeill-Patterson & Assoc., Inc.*, 312 S.C. 471, 441 S.E.2d 328, 329 (Ct. App. 1994). Without question, examining Walter Wills as to alternative exposures is relevant to the subject matter, directly relates to Defendants' defenses in this claim, and permits a full investigation of the opposing party's case, i.e. that Joyce Wills' only asbestos exposure was to Johnson & Johnson baby powder.

2006). Here, Plaintiffs have not demonstrated either good or sufficient cause. Moreover, to justify a continuance, the moving party must show not only the absence of some material evidence but also due diligence on his part to obtain it. *Reiland v. Southland Equipment Serv., Inc.*, 330 S.C. 617, 638, 500 S.E.2d 145, 156 (Ct. App. 1998) (disagreed with on other grounds); *Hudson v. Blanton*, 282 S.C. 70, 316 S.E.2d 432, (Ct. App. 1984). There has been no due diligence by Plaintiffs in obtaining the deposition testimony of Mr. Wills.

### CONCLUSION

Defendants respectfully request that this honorable Court deny Plaintiffs' motion, in whole. *Boyd-Bostic* should not be transferred to the November 5, 2018 Jury Trial Roster, or any other Jury Trial Roster in discordance with the timelines established in the South Carolina Rules of Civil Procedure, and the *Wills* case should not be continued.

Defendants request that this Court order the deposition of Walter Kyle Wills, that his deposition not be limited to damages, and that the *Wills*' trial proceed as scheduled on November 5, 2018. Alternatively, Defendants request that this honorable Court dismiss the *Wills* case against Johnson & Johnson and Johnson & Johnson Consumer, Inc., with prejudice.

Defendants reserve the right to make additional arguments at a hearing on this matter.

Respectfully submitted,

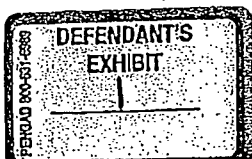
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Attorneys for Johnson & Johnson and  
Johnson & Johnson Consumer, Inc.

October 8, 2018  
Charleston, South Carolina

Jenifer Canaday

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**From:** Theile McVey <TMcVey@kassellaw.com>  
**Sent:** Monday, September 17, 2018 4:29 PM  
**To:** aaikman@barnwell-whaley.com; Toal, Jean; abl@karstvonoiste.com; ABullock@kilpatricktownsend.com; ageddes@nexsenpruet.com; aheins@mrhfmlaw.com; alindsay@sowellgray.com; amelvin@leathbouchlaw.com; andrew@hartfirm.com; anna.marsh@mgclaw.com; aries@smithlaw.com; ashley.brathwaite@elliswinters.com; Ashley.cuttino@ogletreedeakins.com; ASRogers@ewhlaw.com; atwilley@gwblawfirm.com; AWhitworth@mgmlaw.com; bcomer@collinsandlacy.com; ben.joyce@hoodlaw.com; bfairey@faireylaw.com; bgraham@wallacegraham.com; BI@maronmarvel.com; bjolivet@dobllp.com; bmagram@mgsattorneys.com; bob.calamari@nelsonmullins.com; bobbyjr.hood@hoodlaw.com; brian@brianbevonlaw.com; bwagner@barnwell-whaley.com; bwakeham@yclaw.com; bwalker@gwblawfirm.com; byntema@goldbergsegalla.com; Carla.Cerchione@wbd-us.com; carolyn.blackwell@nelsonmullins.com; cbona@smithlaw.com; ccollier@hptylaw.com; cgriffin@hptylaw.com; chartley@mrhfmlaw.com; chill@sgpblaw.com; Christie Perrin; christopher.jaros@klgates.com; cioffi@blankrome.com; ckiger@smithlaw.com; clg@karstvonoiste.com; clogan@turnerpadget.com; CMassenburg@mgmlaw.com; cmcqueen@richardsonplowden.com; courtney.shytle@bowmanandbrooke.com; cpegler@roecassidy.com; cscott@leathbouchlaw.com; csimons@smithlaw.com; cswett@motleyrice.com; cthrasher@gwblawfirm.com; ctowers@gwblawfirm.com; cwalker@walkerreibold.net; cwarsofsky@motleyrice.com; daddison@hedrickgardner.com; dasmith@greenvillecounty.org; david.traylor@nelsonmullins.com; dbarfield@pbhfirm.com; dburkoff@huntermaclean.com; dbutler@rpwb.com; dcollins@wcsr.com; dconner@hsblawfirm.com; dcox@barnwell-Whaley.com; deirdre.mccool@nelsonmullins.com; dell.chappell@nelsonmullins.com; dharris@goldbergsegalla.com; dhenderson@dobllp.com; Diane.carnes@smithmoorelaw.com; dmcdowell@sgpblaw.com; Dolores.Catapano@rtt-law.com; Douglas.Pratt-Thomas@rtt-law.com; dqattlebaum@hsblawfirm.com; drelyea@wcsr.com; drheney@gwblawfirm.com; dwhite@gwblawfirm.com; ecain@mrhfmlaw.com; elizabethtaylor@piercesloan.com; Elizabeth Moultrie; epk@karstvonoiste.com; eprzybysz@sgpblaw.com; Eric@greenvillesclaw.com; ermoore@murphygrantland.com; eshofner@hptylaw.com; fgordon@mgsattorneys.com; FOcel@maronmarvel.com; fpatterson@vllawfirm.com; fritz@j-dlaw.com; gculbreath@gwblawfirm.com; George.james@mgclaw.com; gggreen@wwhgd.com; greg.horton@wbd-us.com; greg@hartfirm.com; gwyn.martin@klgates.com; Heather.Chiovaro@wbd-us.com; jalderman@wcsr.com; jase.glenn@nelsonmullins.com; jbrown@turnerpadget.com; jbynum@holcombebomar.com; jcagle@mrhfmlaw.com; jcarroll@carrollweiss.com; jcuttino@gwblawfirm.com; jdavis@yclaw.com; jdean@dobllp.com; jdoxey@hptylaw.com; jdungee@gwblawfirm.com; jelliott@richardsonplowden.com; Jenni.jokerst@nelsonmullins.com; Jenny.jordan@nelsonmullins.com; jfrazier@leathbouchlaw.com; jgragg@wwhgd.com; jherrick@motleyrice.com; jholder@dobllp.com; jholmes@gwblawfirm.com; jhounshell@sgpblaw.com; jhughes@wallacegraham.com; JHugo@mgmlaw.com; jim.clement@hoodlaw.com; Jlay@gwblawfirm.com; jledlie@motleyrice.com; jmtechman@ewhlaw.com; jmyrick@buistmoore.com; jnelson@dmclaw.com; joe.fornadel@nelsonmullins.com; john.hawk@wbd-us.com; josephinehicks@parkerpoe.com; jowens@yclaw.com; jpitts@mrhfmlaw.com; JRiggins@mgmlaw.com; jsibley@hptylaw.com; jthoensen@richardsonplowden.com;



To:

Julie.Wallace@wbd-us.com; kadija.berry@mgclaw.com;  
Karen.kolb@smithmoorelaw.com; Katie.burris@klgates.com;  
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kjones@wcsr.com; kln@maronmarvel.com; kmunson@wcsr.com;  
kreeg@reeglawfirm.com; kristamcguire@parkerpoe.com; ksmith@huntermaclean.com;  
kurt.rozelsky@smithmoorelaw.com; kwarner@smithlaw.com; kwinn@motleyrice.com;  
landrae@motleyrice.com; leah.parker@lewisbrisbois.com;  
linda.wilson@nelsonmullins.com; Louis HERNs; lwike@wallacegraham.com;  
lyoung@hptylaw.com; mark.karasik@bakermckenzie.com;  
mark.phillips@nelsonmullins.com; Mark.Wall@WallTempleton.com;  
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mbuha@mrhfmllaw.com; melinda.accardo@hoodlaw.com; mgriffin@bradley.com;  
michael.bogle@wbd-us.com; michael.sullivan@wbd-us.com;  
Mjordan@nexsenpruet.com; mkalwajtys@dougallfirm.com;  
mmcdonald@hsblawfirm.com; montana.stambaugh@ogletreedeakins.com;  
MPearson@mgmlaw.com; mtillman@wcsr.com; mtodd@sowellgray.com;  
mwallace@wallacegraham.com; mweiss@carrollweiss.com;  
Natalie.butrym@nelsonmullins.com; natalie.levanway@formanwatkins.com;  
nfisher@proffittcox.com; nick.charles@nelsonmullins.com;  
nlaybourn@huntermaclean.com; oharton@hptylaw.com; pamcgrath@ewhlaw.com;  
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pmcleod@rpwb.com; pmk@karstvonoiste.com; pnapoli@napolilaw.com;  
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rem@swblaw.com; ren@cs-law.com; rgilsenan@wcsr.com; rgitelman@napolilaw.com;  
rguerry@motleyrice.com; rluenefeld@ewhlaw.com; rlindley@vonbriesen.com;  
rmorton@wcsr.com; rmoussa@dobllp.com; rob.moseley@smithmoorelaw.com;  
robert.meriwether@nelsonmullins.com; Jenifer Canaday; robinspitz@piercesloan.com;  
rstepp@sowellgray.com; rtate@gwblawfirm.com; russ.abrams@klgates.com;  
rwarren@hptylaw.com; ryan.gilsenan@wbd-us.com;  
salbenberg@richardsonplowden.com; sarah.schrodetzki@WallTempleton.com;  
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sgladden@richardsonplowden.com; shouseal@wcsr.com; skozick@kernodlelaw.com;  
sleblanc@motleyrice.com; smashelkar@wwhgd.com; sms@karstvonoiste.com;  
souzts@turnerpadget.com; spugh@richardsonplowden.com;  
ssammataro@turnerpadget.com; sstone@dobllp.com;  
Stephanie.flynn@smithmoorelaw.com; stewart@blankrome.com;  
susan.collings@nelsonmullins.com; swilliamson@vwlawfirm.com;  
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tbranham@dobllp.com; tcundari@sowellgray.com; tdahms@vonbriesen.com;  
tdougall@dougallfirm.com; teamdollargeneral@mgmlaw.com; tedge@vwlawfirm.com;  
thbeggs@mrhfmllaw.com; tim.peck@smithmoorelaw.com; tjolly@TurnerPadget.com;  
Theile McVey; toddrainsford@phsm.net; tom@thhpc.com;  
trippett.boineau@mgclaw.com; trish.koester@nelsonmullins.com;  
twillingham@hptylaw.com; vhampton@sowellgray.com;  
VStorey@richardsonplowden.com; wac@roecassidy.com; walker.barnes@hoodlaw.com;  
wbarnes@holcombebomar.com; wcollins@dougallfirm.com;  
wharte@richardsonplowden.com; willeary@piercesloan.com; yfortner@wcsr.com;  
ymcleod@leathbouchlaw.com; Berry, Walker; Jamie Rutkoski; tbranham@dobllp.com;  
jdean@dobllp.com; jholder@dobllp.com; Aaron Chapman; eprzybysz@sgpblaw.com  
Proposed Cases set from November 2018 to November 5 2019

Subject:

**Attachments:**

Proposed Cases set from November 2018 to November 5 2019.pdf

**Counsel:**

Please find attached a proposed trial block schedule from November 2018 until November 2019. Chris Swett and I met and conferred with the defense counsel in the small asbestos group. While defense counsel in that small group did not consent to these trial blocks, they have had an opportunity to raise objections to the proposal to Chief Justice Toal. Chief Justice Toal has asked that we circulate to the entire asbestos bar our proposal.

Therefore, please find attached the proposal. I am also copying Chief Justice Toal and Walker Berry on this email. Please let me know if you have any questions or concerns of if you have difficulty opening the attachment. Best,  
Theile

Theile McVey  
Kassel McVey  
Post Office Box 1476  
1330 Laurel Street  
Columbia, South Carolina 29202  
803.256.4242  
[tmcvey@kasselaw.com](mailto:tmcvey@kasselaw.com)  
[www.kasselmvey.com](http://www.kasselmvey.com)



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

\*\*\* 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

\_\_\_\_\_, 2018

Columbia, South Carolina.

PIERCE, HERNS, SLOAN & WILSON, LLC

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T.A.C. HARGROVE II

MEMBER SC & VA BAR

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JOSEPH C. WILSON, IV †  
JAMES G. KENNEDY  
WILLIAM P. EARLY •  
SONALY K. HENDRICKS †  
GREGG MEYERS ▲  
\* MEMBER SC & FL BAR  
• CERTIFIED SC CIRCUIT  
COURT MEDIATOR  
† MEMBER SC, FL & GA BAR  
‡ SPECIAL COUNSEL  
▲ OF COUNSEL  
• MEMBER SC & TN BAR

August 31, 2017

Via Email Only

W. Christopher Swett, Esquire  
Motley Rice LLC  
28 Bridgeside Blvd  
Mt. Pleasant, SC 29464

Re: Joyce F. Wills and Walter K. Wills v. Johnson & Johnson, et al.  
Civil Action No.: 2017-CP-40-02806  
Our File No.: 4001000176JJ

Dear Chris:

Please allow this letter to serve as our request for dates to depose the following witnesses:

- Any fact witnesses that you anticipate will testify at the trial of this case;
- Any witnesses known to you that may offer testimony as to Johnson & Johnson or Johnson & Johnson Consumer, Inc., even if you do not know at this time whether the witness will testify at trial; and
- Any expert witness(es) on whom you intend to rely or whom you anticipate will testify at the trial of this case.

If you have any questions or want to discuss these matters further, please feel free to contact me.

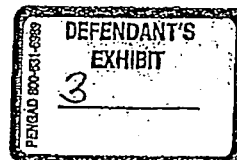
Sincerely,



Louis P. Herns

LPH/haw  
Enclosure

cc: All Known Defense Counsel (via email only)



# MILLIGAN HERNs

*A Limited Liability Corporation*  
721 Long Point Road, Suite 401  
Mt. Pleasant, SC 29464

Thomas H. Milligan\*\*  
Louis P. HERNs  
Christie Perrin  
Ryan Conner

Telephone number: (843) 971-6750  
Facsimile number: (843) 971-6509  
Website: [www.milliganlawfirm.com](http://www.milliganlawfirm.com)

\*SC Certified Mediator  
\*SC Certified Arbitrator

Writer's email: [louis@milliganlawfirm.com](mailto:louis@milliganlawfirm.com)

September 21, 2018

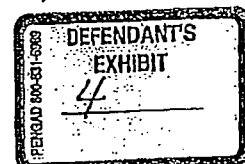
W. Christopher Swett, Esquire  
Motley Rice LLC  
28 Bridgeside Boulevard  
P. O. Box 650001  
Mt. Pleasant, SC 29464

Re: Joyce F. Wills and Walter K. Wills v. Johnson & Johnson, et al.  
Civil Action No.: 2018-CP-001660  
Our File No.: 255.18017

Dear Chris:

I was surprised to see the assertion in your September 17, 2018 email that "[d]iscovery is closed in Wills. No further discovery can occur." The Johnson & Johnson defendants disagree with Plaintiffs' position with respect to Plaintiffs' fact witnesses. As you know, we have repeatedly sought to schedule the depositions of Plaintiffs' fact witnesses since our August 31, 2017 letter to you, yet Plaintiffs have continually avoided putting up any fact witness for deposition except Mrs. Joyce Wills. During our various phone calls on the issue, you have repeatedly changed the fact witnesses you would offer for testimony at trial, including the dates of their depositions. Ultimately, you offered Courtney Lapham for deposition on April 5, 2018, but the deposition was tabled in light of the preference trial date assigned to *Boyd-Bostic*.

I again write to request a date to take the deposition of Plaintiff Walter K. Wills, who is the individual bringing the action on behalf of his decedent wife, Mrs. Joyce Wills along with any other fact witnesses you intend to offer for testimony at Trial. With the November 5, 2018 trial date looming, these depositions need to be scheduled immediately. Once you provide a date, I will reserve a conference room at a local hotel in Greenville, TN and serve the Notice of Deposition. If you intend to call any of the children to testify at trial, Paul Wills, David Wills or Courtney Lapham, please provide me with dates to take their depositions. I understand that the children reside in different cities; Paul Wills, Houston, TX; David Wills, Nashville, TN and





**Jenifer Canaday**

---

**From:** LeBlanc, Sarah <sleblanc@motleyrice.com>  
**Sent:** Wednesday, September 26, 2018 7:46 PM  
**To:** Louis HERN; Jenifer Canaday; Christie Perrin  
**Cc:** Swett, W. Christopher; Finch, Nate; Young, Kelli; Clark, Meredith K.  
**Subject:** Wills v. Johnson & Johnson, 2018-CP-10-01660

Dear Counsel,

Plaintiffs offer Walter K. Wills and Courtney W. Lapham for deposition on Monday, October 8<sup>th</sup> in one of the following locations:

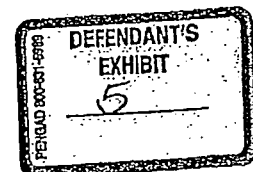
Southpark - Charlotte, NC The Marriott Renaissance, Marriott or Double Tree Suites.

These two witnesses are damages witnesses only. They have no PID testimony. Please let us know if you accept this tender no later than close of business Monday October 1<sup>st</sup>.

Sarah LeBlanc | Paralegal | Motley Rice LLC  
28 Bridgeside Blvd. | Mt. Pleasant, SC 29464  
o. 843.216.9207 | f. 843.216.9450 | [sleblanc@motleyrice.com](mailto:sleblanc@motleyrice.com)

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
C/A NO.: 2018-CP-10-01660

WALTER K. WILLS, INDIVIDUALLY,  
AND AS PERSONAL REPRESENTATIVE  
OF THE ESTATE OF JOYCE F. WILLS, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
JOHNSON & JOHNSON, et al. )  
 )  
Defendants )

NOTICE OF DEPOSITION FOR WALTER K. WILLS, INDIVIDUALLY, AND AS  
PERSONAL REPRESENTATIVE OF THE ESTATE OF JOYCE F. WILLS

TO THE PLAINTIFFS AND ALL COUNSEL:

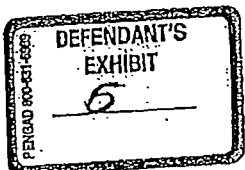
Please take notice that defendants will take the deposition of WALTER WILLS, Individually, and as Personal Representative of the Estate of Joyce F. Wills, under oath, in each of the above-referenced case on Monday, October 8, 2018 beginning at 10:00a.m.

Location: TBD, Southpark – Charlotte, North Carolina

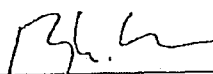
The deposition will take place before a certified court reporter and will continue from day to day until completed pursuant to the South Carolina Rules of Civil Procedure.

Dial In Information:

Dial In Number: (605) 472-5654  
Access Code: 600490



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721 Long Point Road  
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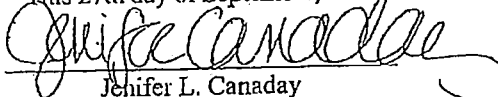
BY:  for Louis P. Herns  
Louis P. Herns (3087)  
Counsel for the Defendants Named Herein

September 27, 2018  
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by mailing or hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 27th day of September, 2018,

  
Jennifer L. Canaday

**Jenifer Canaday**

---

**From:** Swett, W. Christopher <cswett@motleyrice.com>  
**Sent:** Friday, October 5, 2018 4:51 PM  
**To:** Louis HERNs  
**Cc:** LeBlanc, Sarah; Jenifer Canaday  
**Subject:** RE: EXTERNAL-RE: Wills Depo's and Boyd Bostic

Thanks Louis for getting back to me... just as a heads up, we will file a motion with Justice Tol and the Court on Monday to substitute the Boyd-Bostic case as the #1 case for trial in the November Trial term in the place of the Wills case. I will note J&J does not consent.

W. Christopher Swett | Attorney at Law | Motley Rice LLC  
28 Bridgeside Blvd. | Mt. Pleasant, SC 29464  
o. 843.216.9149 | f. 843.216.9450 | cswett@motleyrice.com

**From:** Louis HERNs <Louis@milliganlawfirm.com>  
**Sent:** Friday, October 5, 2018 4:45 PM  
**To:** Swett, W. Christopher <cswett@motleyrice.com>  
**Cc:** LeBlanc, Sarah <sleblanc@motleyrice.com>; Jenifer Canaday <Jenifer@milliganlawfirm.com>  
**Subject:** EXTERNAL-RE: Wills Depo's and Boyd Bostic

Chris,

My client has gotten back to me regarding the questions you raised during our phone conversation this morning.

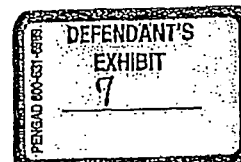
Johnson & Johnson does not agree to continuing the Wills case, which is set for trial on November 5, 2018, and substituting the Boyd-Bostic case for trial in its place during the month of November.

Johnson & Johnson will require the depositions of both Mr. Wills and Mrs. Lapham before they present testimony at the trial of the Wills case.

Have a good weekend. Hope you get to make it home.

Louis

MILLIGAN  HERNs



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Milligan Hems, PC  
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From: Swett, W. Christopher <[cswett@motleyrice.com](mailto:cswett@motleyrice.com)>  
Sent: Friday, October 5, 2018 12:42 PM  
To: Louis Hems <[Louis@milliganlawfirm.com](mailto:Louis@milliganlawfirm.com)>  
Cc: LeBlanc, Sarah <[sleblanc@motleyrice.com](mailto:sleblanc@motleyrice.com)>  
Subject: Wills Depo's and Boyd Bostic

Louis,

Thanks for discussing these cases with me this morning. Let me know when J&J has a position on the Boyd Bostic trial potential in November. Call me anytime today. I plan to try to get something out to the Court today regarding either Wills or Boyd Bostic.

We need to cancel the depositions in Wills scheduled for this Monday Oct 8. They can no longer move forward on that date. I don't have another option available at this time.

Thanks

W. Christopher Swett | Attorney at Law Motley Rice LLC  
[28 Bridgeside Blvd. | Mt. Pleasant, SC 29464](#)  
o. [843.216.9149](tel:843.216.9149) | f. [843.216.9450](tel:843.216.9450)  
[cswett@motleyrice.com](mailto:cswett@motleyrice.com)

Sent from my iPhone

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# EXHIBIT 3

**Louis HERNs**

---

**From:** Toal, Jean <JToal@sccourts.org>  
**Sent:** Tuesday, October 16, 2018 4:11 PM  
**To:** Finch, Nate; Jenifer Canaday; Herrick, John; Andrae, Lane  
**Cc:** Swett, W. Christopher; LeBlanc, Sarah; Berry, Walker; Louis HERNs; Christie Perrin; Ryan Conner  
**Subject:** RE: EXTERNAL-Boyd-Bostic

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Counsel: I have read the Objection to Proposed Order submitted by Johnson & Johnson. I will be signing the Proposed Order of Mr. Swett tomorrow and denying the Objection of Johnson & Johnson. I am not in my office today or I would sign and file these orders now. Trial in this matter will commence Nov. 5 as previously indicated by my rulings at our telephone conference. I am holding open Oct. 29, 2018 as a date for any PreTrial matters. Please advise. With my best regards, Jean Toal

**From:** Finch, Nate [mailto:nfinch@motleyrice.com]  
**Sent:** Monday, October 15, 2018 3:25 PM  
**To:** Jenifer Canaday <Jenifer@milliganlawfirm.com>; Herrick, John <jherrick@motleyrice.com>; Andrae, Lane <landrae@motleyrice.com>  
**Cc:** Toal, Jean <JToal@sccourts.org>; Swett, W. Christopher <cszett@motleyrice.com>; LeBlanc, Sarah <sleblanc@motleyrice.com>; Berry, Walker <wberry@sccourts.org>; Louis HERNs <Louis@milliganlawfirm.com>; Christie Perrin <Christie@milliganlawfirm.com>; Ryan Conner <Ryan@milliganlawfirm.com>  
**Subject:** Re: EXTERNAL-Boyd-Bostic

Please add John Herrick and Lane Andrae (both cc above) to all pleadings and correspondence concerning the Boyd-Bostic case.

Sent from my iPhone

On Oct 15, 2018, at 12:52 PM, Jenifer Canaday <Jenifer@milliganlawfirm.com> wrote:

Please find attached filed copies of the Affidavit of Mike Brown and Objection to Proposed Order and Supplemental Memorandum Opposing Motion for Date Certain.

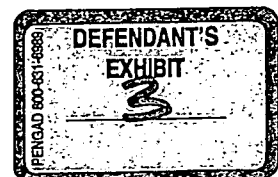
Best,

*Jenifer L. Canaday*

Jenifer L. Canaday  
Paralegal

MILLIGAN <image001.jpg> HERNs

721 Long Point Road, Suite 401



Mount Pleasant, SC 29464  
Phone: 843-971-6750  
Fax: 843-971-6509  
Email: [jenifer@milliganlawfirm.com](mailto:jenifer@milliganlawfirm.com)

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<Filed OBJ to Order - Date Certain.pdf>

<Filed Mike Brown Affidavit.pdf>

Confidential & Privileged

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# EXHIBIT 4

# The Supreme Court of South Carolina

---

## ORDER

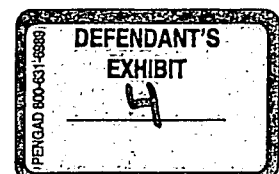
---

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 Hofer 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.

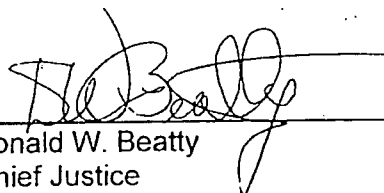
IT IS FURTHER ORDERED that a term of the Court of Common Pleas/Common Pleas Non-Jury for Darlington County for the week of November 5, 2018 be held and that the Honorable Jean Hofer Toal, retired Chief Justice of the Supreme Court, be assigned as a Circuit Judge to preside over this term. Pursuant to 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 Hofer 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 Hoefer 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 Hoefer 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 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, )  
 )  
Plaintiff, )

CASE NO. 2017-CP-16-0400

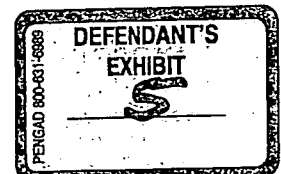
vs. )

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 5<sup>th</sup> and November 12<sup>th</sup> 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 8<sup>th</sup> 2018, the undersigned conducted a telephone conference granting Plaintiff's motion for dates certain setting retrial of this case for November 5<sup>th</sup> and November 12<sup>th</sup> 2018. On October 12<sup>th</sup> 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 5<sup>th</sup> and 12<sup>th</sup> 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 5<sup>th</sup> and November 12<sup>th</sup> 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

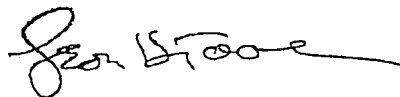
**October 29-** Parties exchange final exhibit lists and page/lines designations

**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

# The Supreme Court of South Carolina

---

## ORDER

---

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

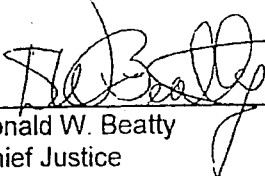
IT IS ORDERED that a nonjury term of the Court of Common Pleas for the Fourth Judicial Circuit for the day of October 29, 2018 be held and that the Honorable Jean Hoefer Toal, retired Chief Justice of the Supreme Court, be assigned as a Circuit Judge to preside over this term. Pursuant to this appointment, 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 Hoefer 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 Hoefer 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 Hofer 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 Hofer 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 6

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF DARLINGTON )  
 )  
 ANTIONE BOSTIC, Individually and as )  
 Personal Representative of the Estate of )  
 BERTILA BEDLORA BOYD-BOSTIC )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 JOHNSON & JOHNSON, et al., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 FOR THE FOURTH JUDICIAL CIRCUIT  
 C/A NO.: 2017-CP-16-0400

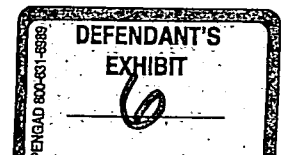
DEFENDANT JOHNSON & JOHNSON  
 AND JOHNSON & JOHNSON  
 CONSUMER, INC.'S  
 RULE 59(e) MOTION

FILED  
 2018 OCT 22 PM 5:59  
 SCOTT B. SWETT  
 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.

Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc. ("Defendants"), by and through their undersigned counsel, respectfully submit this Motion, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, with regard to this Court's Order entitled "Scheduling Order Setting Trial Date of November 5, 2018 and Denial of Defendants' Motion to Continue and Objection to Date Certain," received October 19, 2018. This Order should be vacated, altered, and amended to deny the Plaintiffs' Motion for Date-Certain Trial Date of November 5, 2018 filed on October 8, 2018.

Defendants' rights to counsel of their choice and to a fair hearing are being severely prejudiced by the rulings and procedures in this matter. This Court indicated orally on an unrecorded phone call on October 8, 2018 that it intended to set the retrial of this case less than four weeks from the date of the call. Such an order would violate Rule 40, SCRPC, and the re-trial would be held at a time when this Court knows that lead trial counsel Michael Brown is unavailable, due to another prescheduled trial, which violates Defendants' fundamental right to proceed with the attorney of their choosing. After the unrecorded phone call, Mr. Swett for Plaintiff proposed a written order setting the case for trial. Defendants filed an Objection to the proposed order and supplemental memorandum opposing the motion to set the trial for November 5, accompanied by an affidavit of Michael A.

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 Scott B. Swett  
 CLERK OF COURT/RMC  
 DARLINGTON COUNTY, S.C.



Brown, detailing his lead role in the earlier trial and that the client has again designated him as lead counsel for any retrial.

After receiving these papers, this Court sent an email on October 16, 2018 stating that the Court would be issuing the written Order proposed by Mr. Swett and denying the Defendants' Objections on October 17, 2018. (See **Exhibit A**, written correspondence between counsel and the Court dated October 16, 2018). The Court also stated that the reason it had not yet entered the Plaintiff's Proposed Order: "I am not in my office today or I would sign and file these orders now." *Id.*

When the Defendants never received the Order setting the trial on November 5 as promised on October 17, or by the close of business on October 18, the Defendants through counsel emailed the Court and requested that the Order issue immediately, noting that the Defendants planned to appeal the Order and seek a stay. (See **Exhibit B**, written correspondence between counsel and the Court Dated October 18, but sent after 5pm, EST).

Near the close of business on Friday, October 19, this Court issued the Order entitled "Scheduling Order Setting Trial Date of November 5, 2018 and Denial of Defendants' Motion to Continue and Objection to Date Certain," which was not the draft order prepared by Mr. Swett. As an initial matter, there was no setting of this re-trial and continuance motion. Rather, the re-trial appeared on no docket anywhere and then, on October 8, 2018 Plaintiffs sought to set the re-trial of this case on November 5, 2018, to which Defendants objected as set forth above. Hence, it is improper to call the Order a "denial of a continuance motion."

In that mislabeled order, this Court addressed, erroneously, the arguments made by the Defendants as to the deprivation of its lead trial counsel Michael Brown by its Order setting this case for November 5, 2018. The Court, however, wholly failed to even address the argument by

Defendants (despite their request that the Court do so) that any such order here violates Rule 40 of the South Carolina Rule of Civil Procedure. The Defendants do not waive their right to insist that Rule 40 be followed in this case. Again, the Defendants request that this Court consider the Rule and deny the Plaintiff's motion to set this case for re-trial on November 5, 2018. The Court's October 19 Order should be vacated.

Further, the Court's order is in error and the Court has abused its discretion in that it cites a justification of its order as "were this trial to be scheduled in the spring," the ability of lawyers Marlon Kimpson and Gerald Malloy's efforts as counsel for the Plaintiff would be "hindered" due to the legislative session<sup>1</sup>. All the Court need do to avoid this issue is schedule the case for May or thereafter in 2019 and this is a complete non-issue.

Further, while the Court states that Louis Hems was "South Carolina lead counsel" in this case, this does not justify the Court's order here. The record speaks for itself that Mr. Hems was not lead trial counsel. He did not present the opening or closing, or examine any witness, Plaintiff or Defense. The record of the trial itself, and the affidavit of Michael A. Brown, demonstrate the Court is in error in finding "no prejudice" to the Defendants' right to choose their counsel because Louis Hems is involved in this matter. Regardless, Rule 40 prohibits the order of this Court here<sup>2</sup>.

---

<sup>1</sup> Marlon Kimpson examined two witnesses, and Gerald Malloy did not appear as counsel of record in the trial.

<sup>2</sup> It is also noted the Order recites that the Chief Justice of the Supreme Court authorized that the *Boyd-Bostic* trial take place on November 5, 2018. This is not accurate. The Chief Justice's order merely empowers this Court to hear a case in Darlington on that date. The Chief Justice did not specifically order the *Boyd Bostic* case to proceed in Darlington on that date, hence the reason this Court has issued an order setting this case for that date. This Court's order is erroneous and violates Rule 40 and deprives the Defendants of the lead trial counsel of their choice.

**CONCLUSION**

This trial should not go forward on November 5, 2018, based on all of the filings and reasons set forth therein, including this filing. The Defendants respectfully request that the Court issue its ruling on this Rule 59(e) Motion by the close of business on Tuesday, October 23, 2018.

**FILED**  
2018 OCT 22 PM 2:59  
SCOTT B. SUGGS  
CLERK OF COURT/FM/C  
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,  
*Scott B. Suggs*  
CLERK OF COURT/FM/C  
DARLINGTON COUNTY, S.C.

(Signature Page to follow.)

Respectfully submitted,

BY: Louis P. Hems

Louis P. Hems (3087)  
Christina Lore Perrin (79931)  
Ryan Conner (101702)  
**MILLIGAN & HERNS, PC**  
721 Long Point Road  
Mt. Pleasant, SC 29464  
PH: (843) 971-6750  
Fax: (843) 971-6509  
E-Mail: louis@milliganlawfirm.com

Michael A. Brown  
**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**  
100 S. Charles Street  
Suite 1200  
Baltimore, MD 21201  
PH: (443)-392-9401  
Email: mike.brown@nelsonmullins.com

Attorneys for Johnson & Johnson and  
Johnson & Johnson Consumer, Inc.

Oct. 22, 2018  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

I certify that on this date a copy of the foregoing was served on each party or  
counsel of record by mailing or hand delivery in the manner prescribed by  
the applicable Rule of Civil Procedure.

This 22 day of October, 2018

Jenifer L. Canaday  
Jenifer L. Canaday

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2018 OCT 22 PM 2:58  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

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Scott B. Suggs  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

**Louis Herns**

**From:** Toal, Jean <JToal@sccourts.org>  
**Sent:** Tuesday, October 16, 2018 4:11 PM  
**To:** Finch, Nate; Jenifer Canaday; Herrick, John; Andrae, Lane  
**Cc:** Swett, W. Christopher; LeBlanc, Sarah; Berry, Walker; Louis Herns; Christie Perrin; Ryan Conner  
**Subject:** RE: EXTERNAL-Boyd-Bostic

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Counsel: I have read the Objection to Proposed Order submitted by Johnson & Johnson. I will be signing the Proposed Order of Mr. Swett tomorrow and denying the Objection of Johnson & Johnson. I am not in my office today or I would sign and file these orders now. Trial in this matter will commence Nov. 5 as previously indicated by my rulings at our telephone conference. I am holding open Oct. 29, 2018 as a date for any PreTrial matters. Please advise. With my best regards, Jean Toal

**From:** Finch, Nate [mailto:nfinch@motleyrice.com]  
**Sent:** Monday, October 15, 2018 3:25 PM  
**To:** Jenifer Canaday <Jenifer@milliganlawfirm.com>; Herrick, John <jherrick@motleyrice.com>; Andrae, Lane <landrae@motleyrice.com>  
**Cc:** Toal, Jean <JToal@sccourts.org>; Swett, W. Christopher <cszett@motleyrice.com>; LeBlanc, Sarah <sleblanc@motleyrice.com>; Berry, Walker <wberry@sccourts.org>; Louis Herns <Louis@milliganlawfirm.com>; Christie Perrin <Christie@milliganlawfirm.com>; Ryan Conner <Ryan@milliganlawfirm.com>  
**Subject:** Re: EXTERNAL-Boyd-Bostic

Please add John Herrick and Lane Andrae (both cc above) to all pleadings and correspondence concerning the Boyd-Bostic case.

Sent from my iPhone

On Oct 15, 2018, at 12:52 PM, Jenifer Canaday <Jenifer@milliganlawfirm.com> wrote:

Please find attached filed copies of the Affidavit of Milke Brown and Objection to Proposed Order and Supplemental Memorandum Opposing Motion for Date Certain.

Best,

*Jenifer L. Canaday*

Jenifer L. Canaday  
Paralegal

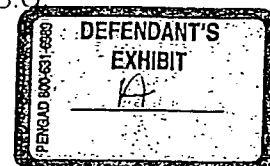
MILLIGAN <image001.jpg> HERNES

721 Long Point Road, Suite 401

TRUE CERTIFIED COPY,

*Scott B. Suggs*

CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.



FILED  
2018 OCT 22 PM 5:58  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

Mount Pleasant, SC 29464  
Phone: 843-971-6750  
Fax: 843-971-6509  
Email: [jenifer@milliganlawfirm.com](mailto:jenifer@milliganlawfirm.com)

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<Filed OBJ to Order - Date Certain.pdf>

<Filed Mike Brown Affidavit.pdf>

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**Louis HERNs**

---

**From:** Louis HERNs  
**Sent:** Thursday, October 18, 2018 6:25 PM  
**To:** Toal, Jean; Finch, Nate; Jenifer Canaday; Herrick, John; Andrae, Lane  
**Cc:** Swett, W. Christopher; LeBlanc, Sarah; Berry, Walker; Christie Perrin; Ryan Conner  
**Subject:** RE: EXTERNAL-Boyd-Bostic  
**Attachments:** Proposed Order setting Boyd-Bostic for Trial.docx

Dear Judge Toal,

I am writing to follow-up on your e-mail of October 16, 2018 in which you indicated that the parties were going to receive, on October 17, 2018, an executed Order that was forwarded to you by Chris Swett setting the Boyd-Bostic case for trial on November 5, 2018 in Darlington County. In addition to setting the case for trial on November 5, 2018, the Order would deny the Objections to the Proposed Order that I filed and sent on behalf of the Johnson & Johnson entities.

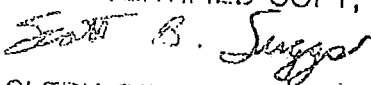
I would like to request that you sign and forward the Order to the parties and the Darlington County Clerk as soon as possible. Johnson & Johnson intends to promptly file an appeal of the Order once received, and seek a stay. The case of *Hagood v. Sommerville* requires that Johnson & Johnson immediately appeal the Order, which would deprive Johnson & Johnson of its lead trial counsel of choice who previously served in that role in May, or else lose any right to complain about the deprivation. In addition, setting the case at this time for trial on November 5, 2018 would be violative of SCRPC 40(b).

If I have somehow missed it, and Order was signed and forwarded, I apologize, and request that the Order be sent to me again.

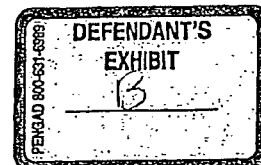
Louis

MILLIGAN  HERNs

Louis P. HERNs, Esq.  
Milligan HERNs, PC  
721 Long Point Road  
Suite 401  
Mt. Pleasant SC 29464  
(843) 971-6750  
(843) 834-2377 (Cell)  
[louis@milliganlawfirm.com](mailto:louis@milliganlawfirm.com)

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DARLINGTON COUNTY, S.C.

FILED  
2018 OCT 22 PM 2:59  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.



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Sent: Tuesday, October 16, 2018 4:11 PM

To: Finch, Nate <nfinch@motleyrice.com>; Jenifer Canaday <Jenifer@milliganlawfirm.com>; Herrick, John <jherrick@motleyrice.com>; Andrae, Lane <landrae@motleyrice.com>

Cc: Swett, W. Christopher <cswett@motleyrice.com>; LeBlanc, Sarah <sleblanc@motleyrice.com>; Berry, Walker <wberry@sccourts.org>; Louis Hems <Louis@milliganlawfirm.com>; Christie Perrin <Christie@milliganlawfirm.com>; Ryan Conner <Ryan@milliganlawfirm.com>

Subject: RE: EXTERNAL-Boyd-Bostic

Dear Counsel: I have read the Objection to Proposed Order submitted by Johnson & Johnson. I will be signing the Proposed Order of Mr. Swett tomorrow and denying the Objection of Johnson & Johnson. I am not in my office today or I would sign and file these orders now. Trial in this matter will commence Nov. 5 as previously indicated by my rulings at our telephone conference. I am holding open Oct. 29, 2018 as a date for any PreTrial matters. Please advise. With my best regards, Jean Toal

From: Finch, Nate [<mailto:nfinch@motleyrice.com>]

Sent: Monday, October 15, 2018 3:25 PM

To: Jenifer Canaday <Jenifer@milliganlawfirm.com>; Herrick, John <jherrick@motleyrice.com>; Andrae, Lane <landrae@motleyrice.com>

Cc: Toal, Jean <JToal@sccourts.org>; Swett, W. Christopher <cswett@motleyrice.com>; LeBlanc, Sarah <sleblanc@motleyrice.com>; Berry, Walker <wberry@sccourts.org>; Louis Hems <Louis@milliganlawfirm.com>; Christie Perrin <Christie@milliganlawfirm.com>; Ryan Conner <Ryan@milliganlawfirm.com>

Subject: Re: EXTERNAL-Boyd-Bostic

Please add John Herrick and Lane Andrae (both cc above) to all pleadings and correspondence concerning the Boyd-Bostic case.

Sent from my iPhone

On Oct 15, 2018, at 12:52 PM, Jenifer Canaday <Jenifer@milliganlawfirm.com> wrote:

Please find attached filed copies of the Affidavit of Mike Brown and Objection to Proposed Order and Supplemental Memorandum Opposing Motion for Date Certain.

Best,

*Jenifer L. Canaday*

Jenifer L. Canaday  
Paralegal

MILLIGAN <image001.jpg> HERNES

721 Long Point Road, Suite 401  
Mount Pleasant, SC 29464  
Phone: 843-971-6750  
Fax: 843-971-6509  
Email: [jenifer@milliganlawfirm.com](mailto:jenifer@milliganlawfirm.com)

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<Filed OBJ to Order - Date Certain.pdf>

<Filed Mike Brown Affidavit.pdf>

Confidential & Privileged

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# EXHIBIT 7

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, )  
 )  
Plaintiff, )

CASE NO. 2017-CP-16-0400

vs. )

**ORDER DENYING DEFENDANTS'**  
**RULE 59(e) MOTION**

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

In response to the Court's order of October 19, 2018 confirming the Court's ruling of October 8, 2018 announcing the retrial in this case would commence on November 5, 2018 and continuing on the week of November 12, 2018, Defendant, Johnson & Johnson, has filed a Rule 59 motion requesting that this order be vacated, altered and amended on the grounds that Defendants 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 a retrial on the dates assigned. Defendant further contends that the order for retrial violates Rule 40 of the South Carolina Rules of Civil Procedure.

The Court's order of October 19, 2018 fully explains the balancing of interests which led the Court to find the Defendant's fundamental right to an attorney of their choosing would not be violated by the inability of Mr. Brown to participate in the retrial of their case commencing on November 5, 2018. Johnson & Johnson was represented in the May trial of this matter by at least eight attorneys including two members of Mr. Brown's firm, Mitchell Brown Esq. and A. Mattison



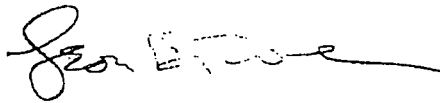
Bogan Esq., each of whom are highly experienced trial and appellate lawyers, as well as by other national counsel who have participated in numerous trials involving these same issues on behalf of Johnson & Johnson and participated in the trial of this matter in May 2018. Among the four attorneys who 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 Hems, lead counsel for Defendants, which accompanies Defendants' Rule 59 motion, for reconsideration of the Court's order of October 19, 2018. Mr. Hems 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 8<sup>th</sup> 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 8

## Louis HERNs

---

**From:** Toal, Jean <JToal@sccourts.org>  
**Sent:** Tuesday, October 23, 2018 3:47 PM  
**To:** Jenifer Canaday; Kitchings, Jenny  
**Cc:** Swett, W. Christopher; Louis HERNs; Berry, Walker; Finch, Nate; LeBlanc, Sarah; Andrae, Lane; Herrick, John; ssuggs@darcoosc.net; Christie Perrin; Ryan Conner  
**Subject:** Re: Bostic v. Johnson & Johnson, 2017-CP-16-00400, Notice of Appeal filed by Defendant in the SC Court of Appeals at 1:58pm on Oct. 23, 2018  
**Attachments:** image001.jpg  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Counsel: While I am not sure this matter is immediately appealable, it's facts being very different from Hagood v. Sommerville, the 2007 decision of our Supreme Court on appealability of an order disqualifying a party's attorney cited in Defendant's Appeal filed this afternoon. I also wonder whether or not Chief Justice Beatty's Order of Oct. 17, 2018 setting the case for a term and day certain and appointing me to preside can be appealed or stayed given it's separate status under the South Carolina Constitution. Be all that as it may, I will regard this matter as stayed at the moment. I would hope that the counsel will seek an immediate answer from the Court of Appeals so that I will know how to proceed with the Pretrial scheduled for Monday, Oct. 29, 2014 in Charleston as well as the trial Nov. 5, 2018 in Darlington. Best regards, Jean Toal

Sent from my iPad

On Oct 23, 2018, at 1:58 PM, Jenifer Canaday  
<Jenifer@milliganlawfirm.com<mailto:Jenifer@milliganlawfirm.com>> wrote:

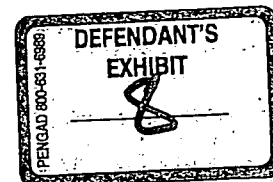
Good Afternoon,

Please find attached a copy of correspondence with the Notice of Appeal to the Court of Appeals regarding the above-referenced matter. The Appeal has been filed with the Court as of this afternoon. A copy will be sent via U.S. Mail also. In addition, we will send a filed copy once it is received.

Thank you,

Jenifer L. Canaday

Jenifer L. Canaday  
Paralegal



MILLIGAN <image001.jpg> HERNS

721 Long Point Road, Suite 401

Mount Pleasant, SC 29464

Phone: 843-971-6750

Fax: 843-971-6509

Email: [jenifer@milliganlawfirm.com](mailto:jenifer@milliganlawfirm.com)<<mailto:jenifer@milliganlawfirm.com>>

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<Boyd-Bostic - Clerk ltr filing Notice of Appeal -10.23.18.pdf> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# EXHIBIT 9

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**

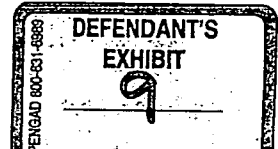
James Michael Hill (KM/DOB) living Meso (Richland)\*\*\*  
Taylor (KM/DOB) living Meso (Richland)\*\*\*  
Linda Nolen (KM/DOB) Deceased Meso (Richland)  
Ella Greene (KM/DOB) Deceased Meso (Richland)  
Tracy Thompson (KM/DOB) Deceased Meso (Richland)

**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

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.

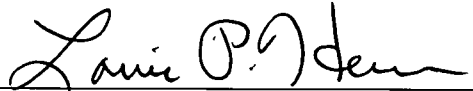
**PROOF OF SERVICE**

I certify that I have served the Appellants' Opposition to Motion to Dismiss Appeal by deposited a copy of it in the United States Mail, postage pre-paid, on October 25, 2018, addressed to his attorney of record, W. Christopher Sweet, Motley Rice, 28 Bridgeside Blvd, Mt. Pleasant, SC 29464, on October 25, 2018.

**(Signature on following page)**

**RECEIVED**  
OCT 25 2018  
SC Court of Appeals

October 25, 2018

BY:   
Louis P. Hems (3087)  
Christina Lore Perrin (79931)  
Ryan Conner (101702)  
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Michael A. Brown  
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Email: [mike.brown@nelsonmullins.com](mailto:mike.brown@nelsonmullins.com)

Attorneys for Johnson & Johnson and  
Johnson & Johnson Consumer, Inc.

Other Counsel of Record:  
W. Christopher Swett, Esquire  
Motley Rice LLC  
28 Bridgeside Boulevard  
Mt. Pleasant, SC 29464  
T: (843) 216-9000  
[cswett@motleyrice.com](mailto:cswett@motleyrice.com)

MILLIGAN  HERNs

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Thomas H. Milligan\*  
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Christie Perrin  
Ryan Conner

Telephone number: (843) 971-6750  
Facsimile number: (843) 971-6509  
Website: [www.milliganlawfirm.com](http://www.milliganlawfirm.com)

\*SC Certified Mediator  
°SC Certified Arbitrator

Writer's email: [louis@milliganlawfirm.com](mailto:louis@milliganlawfirm.com)

October 25, 2018

**VIA HAND DELIVERY:**

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

RECEIVED  
OCT 25 2018  
SC Court of Appeals

Re: Antoine Bostic, Individually, and as Personal Representative of the Estate of  
Bertila Delora Boyd-Bostic v. Johnson and Johnson, et. al.  
Civil Action No.: 2017-CP-16-0400  
Our File No.: 255.18003

Dear Ms. Kitchings:

Enclosed for filing please find the original and three (3) copies of Appellants' Opposition to Motion to Dismiss Appeal in the above-referenced matter. Once this pleading has been filed, please return a time-stamped copy in the enclosed self-addressed, stamped envelope.

By copy hereof, I am providing plaintiff's counsel with a copy of the same.

Sincerely,



Louis P. HERNs

LPH/jlc

Enclosures

cc: Honorable Jean H. Toal (w/enc.)(via e-mail and via U.S. Mail)  
Honorable Scott Suggs, Darlington County Clerk of Court (w/enc.) (via e-mail and via U.S. Mail)  
W. Christopher Swett, Esquire (w/enc.) (via e-mail and via U.S. Mail)