THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

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Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899
Appellate Case No. 2020-000662

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Mary Margaret Devey, Individually and as Personal Representative of the Estate of Robert L. Devey, …….. Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; Metropolitan Life Insurance Company; and Rite Aid of South Carolina, Inc. …….. Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc., are the ……. Appellants.

*And*

Terran Dupree, …… Respondent,

v.

Johnson & Johnson; Johnson & Johnson Consumer, Inc.; CVS Pharmacy, Inc.; Piggly Wiggly Carolina Company, Inc.; and Rite Aid of South Carolina, Inc. …… Defendants,

Of which Johnson & Johnson and Johnson & Johnson Consumer, Inc. are the …… Appellants.

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**RESPONDENTS' MEMORANDUM IN OPPOSITION TO IMMEDIATE APPEAL**

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On April 13, 2020, Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc. ("Appellants") filed a Notice of Appeal asking this Court to reverse the Honorable Jean H. Toal's March 13, 2020 Order consolidating Mr. Devey's mesothelioma case and Miss Dupree's mesothelioma case (collectively "mesothelioma victims") for a jury trial to begin on November 9, 2020. Because a consolidation order is an interlocutory ruling, which does not affect a "substantial right," Judge Toal's consolidation ruling is not immediately appealable, and Appellants' appeal should be dismissed without further briefing.

## INTRODUCTION

Asbestos personal injury, survival action, and wrongful death cases are replete with the same factual scenarios, defendants, experts, and testimony. In each case, the defendants' experts assert that there is no meaningful asbestos exposure; only certain types of asbestos fibers cause mesothelioma; and only mesotheliomas located in certain bodily organs are asbestos-related. The plaintiffs' experts contradict that testimony with scientifically-backed testimony that very low levels of asbestos exposure have been found to cause mesothelioma in humans; all commercial forms of asbestos fibers can cause mesothelioma; and asbestos exposure has been shown to cause all types of mesothelioma (pleural, peritoneal, pericardial).

In the Devey and Dupree cases at issue, each of these two cases represents a victim of mesothelioma, which is alleged to have developed due to asbestos exposure from regular and frequent use of Johnson's Baby Powder. Each mesothelioma victim was diagnosed with mesothelioma and received medical care for the disease. Each of the cases is venued in Charleston County with a date-certain trial to begin November 9, 2020, and both cases have been following the same scheduling order deadlines for discovery. Similarly, these cases involve the same

defendants: Johnson & Johnson and Johnson & Johnson Consumer, Inc. Moreover, the exact same South Carolina attorneys are involved in both cases.

The experts involved in the cases also overlap. Dr. William Longo (materials scientist), Dr. Arnold Brody (general medical causation), and Dr. Terry Spear (industrial hygienist) are experts for the mesothelioma victims in both cases. Each case also involves a pathologist, either Dr. John Maddox or Dr. Richard Kradin (specific medical causation). Additionally, because the defendants are the same in both cases, Appellants have retained and disclosed overlapping defense experts in both cases.

At the circuit court level, on February 13, 2020, Respondents filed a Joint Motion to consolidate these actions for trial. Appellants filed a brief in opposition on March 3, 2020. On March 13, 2020, Judge Toal held a hearing on several pending motions in various asbestos cases, including the Motion to consolidate. Armed with the experience of presiding over three (3) separate two-week asbestos jury trials that went to verdict involving the Appellants and after reading the briefs and considering the oral arguments from both sides, Judge Toal consolidated the Devey and Dupree cases for trial. Appellants now attempt to immediately appeal her interlocutory ruling and ask this Honorable Court to reverse her consolidation order.

## ARGUMENT

Judge Toal's consolidation ruling is not immediately appealable. An appeal ordinarily may be pursued only after a party has obtained final judgment. Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993). An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review is usually considered an interlocutory order from which no immediate appeal is allowed. Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). The determination of whether a party

may immediately appeal an interlocutory order issued before or during trial is governed primarily by South Carolina Code § 14-3-330. The provisions of Section 14-3-330, including subsection (2), "have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); see Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable as affecting a substantial right).

1. A circuit court's order consolidating two cases involving a common venue, common parties, and common issues of fact and law for jury trial is an interlocutory order that is not immediately appealable and does not deprive litigants of the substantial right to a "mode of trial" to which they are entitled.

An order consolidating cases for trial is a non-final, interlocutory order, which is generally not appealable. See South Carolina Public Service Authority v. Arnold, 287 S.C. 584, 340 S.E.2d 535 (1986) (Supreme Court stating that it granted the motion to dismiss the appeal on the grounds that the consolidation order was interlocutory and not appealable); cf. St. Francis Xavier Hosp. v. Ruscon/Abco, 285 S.C. 584, 587, 330 S.E.2d 548, 550 (Ct. App. 1985) (holding that an order denying consolidation of pending arbitration proceedings is not immediately appealable). It appears that Appellants move this Court to entertain this appeal pursuant to South Carolina Code Section 14-3-330(2), allowing appeal from an interlocutory order "affecting a substantial right." An order affects a substantial right when "such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993); S.C. Code § 14-3-330(2). However, Judge Toal's consolidation order does not affect a "substantial right" of Appellants as defined by Section 14-3-330(2).

While an order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable, McLaughlin v. Strickland, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983), mere avoidance of trial is not a substantial right entitling a party to immediate appeal of an interlocutory order. Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). Here, Appellants' wish to avoid a consolidated jury trial involving common questions of law and fact is likewise not a substantial right that gives rise to an immediate appeal of an interlocutory order. As the Supreme Court has made clear, a consolidation order does not merge separate claims or remove the separate identity of distinct causes of action. See Ellis v. Oliver, 307 S.C. 365, 367, 415 S.E.2d 400 (1992). "**The merger of actions under consolidation is never so complete as to deprive any party of a substantial right**." Id. (emphasis added).

Appellants erroneously attempt to equate Judge Toal's consolidation ruling, in which she consolidated two cases for jury trial involving the same defendants and common issues, with a deprivation of their constitutional right to a jury trial or "mode of trial." The Supreme Court's "traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case." Salmonsen v. CGD, Inc., 377 S.C. 442, 453, 661 S.E.2d 81, 87 (2008). Put simply, Judge Toal's ruling did not deprive Appellants of a "mode of trial" to which they are entitled because they have not been deprived the right to a jury trial in these law cases. A jury will still determine the facts in the Dupree and Devey cases independently and render an appropriate verdict in each case. Judge Toal's consolidation order is no different than other discretionary rulings by trial judges on issues such as bifurcation and severance, which determine how the jury trial will proceed but, nonetheless, do not deprive the litigants of a "mode of trial" to which they are entitled. See, e.g., Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 533 S.E.2d

331 (2000) (An order bifurcating issues for trial is not immediately appealable as it does not amount to a denial of a mode of trial); North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp., 294 S.C. 27, 362 S.E.2d 308 (Ct. App. 1987), aff'd in part; reversed in part, 298 S.C. 514, 381 S.E.2d 903 (1989) (Because an order refusing severance and separate trials does not affect a substantial right, it is ordinarily not immediately appealable). While Appellants' main contention appears to be a lack of fairness, "an abuse of discretion, if any, which deprives [appellants] of a fair trial can be corrected on appeal following trial on all issues." Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000) (emphasis added).

"The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 94, 529 S.E.2d 11 (2000). This policy further supports dismissal of this appeal, as Judge Toal's ruling to consolidate Dupree and Devey for jury trial does not deprive Appellants of a "mode of trial" to which they are entitled nor does it affect a substantial right under Section 14-3-330(2). A decision by this Court to allow immediate appellate review of Judge Toal's consolidation order would represent a significant departure from this state's established appealability jurisprudence. As such, the instant appeal should be dismissed.

## CONCLUSION

Based on the forgoing, this Honorable Court should DISMISS Appellants' erroneous attempt to appeal Judge Toal's interlocutory order consolidating the Devey and Dupree cases for jury trial.

Respectfully submitted,

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