

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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Apr 23 2020

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899

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.;  
Imerys Talc America, Inc. f/k/a Luzenac America, Inc.;  
Piggly Wiggly Carolina Company, Inc.; CVS Pharmacy,  
Inc.; Rite Aid of South Carolina, Inc.,..... Defendants,

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

**MOTION TO TRANSFER OR CERTIFY CASE FROM THE COURT OF APPEALS**

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc. (together, "J&J") move to certify these cases for review prior to determination by the Court of Appeals. This Court has discretion to certify any

case pending before the Court of Appeals and transfer the case for review by this Court before it has been determined by the Court of Appeals. *See* Rule 204(b), SCACR. “Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” *Id.*

#### GROUNDS FOR MOTION TO CERTIFY

The circuit court consolidated two very different cases (*Dupree* and *Devey*) for a single trial. The Certiorari Petition filed simultaneously with this motion provides the background on the cases and explains why their consolidation is prejudicial and legally erroneous. In each case, the plaintiff or decedent asserts that his or her disease was caused by asbestos allegedly present in Johnson’s Baby Powder. But the similarities end there. These cases could not be more different. *Devey* involves a decedent who developed pleural mesothelioma (mesothelioma in the lining of the lung) and was 70 years old at the time of his death. By his own admission, he worked with asbestos at a Garlock facility—a company that manufactured asbestos-containing materials. *Dupree* involves a 20-year-old woman who developed peritoneal mesothelioma (mesothelioma in the lining of the abdomen). This type of mesothelioma is significantly less linked to asbestos, particularly in women. Consolidation of these two cases is unfair and prejudices J&J.

The consolidation order affects the mode of trial and therefore is immediately appealable. In fact, if not appealed immediately, J&J risks waiving the issue. *Lester v. Dawson*, 327 S.C. 263, 266 (1997) (“[T]he failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.”). But in the event the order is not immediately appealable, J&J has simultaneously filed an interlocutory Certiorari Petition, which only this Court can grant. This creates an odd procedural situation. The direct appeal, along with the question of immediate appealability, is pending in the Court of Appeals. But the Certiorari Petition is pending in this

Court. It is better for all the issues—appealability, the writ, and the merits—to be decided by the same court. And this is the only Court that can provide that forum. If the consolidation order is deemed immediately appealable, the Petition for Writ of Certiorari review becomes unnecessary.

While the general rule is that an appeal may only be perused after a final judgment, certain orders “affecting a substantial right” are immediately appealable. S.C. Code § 14-3-330(b). “In a well-established exception to the general rule,” this Court “repeatedly ha[s] held that the denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right.” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005).

For example, the denial of the right to a trial by jury is immediately appealable. *Lester v. Dawson*, 327 S.C. 263, 267 (1997). Similarly, an “order granting a motion to disqualify a party’s attorney in a civil case affects a substantial right and may be immediately appealed.” *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005). And “orders establishing [an] ‘opt-in’ notification procedure “in the context of class actions are immediately appealable because they affect substantial rights and the mode of trial. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 452, 661 S.E.2d 81, 87 (2008).

Consolidating cases for trial affects a substantial right and should similarly be considered immediately appealable. The consolidated trial is fundamentally unfair and accordingly deprives J&J of its Due Process rights. As discussed more fully in the Certiorari Petition, consolidation unfairly allows the plaintiffs to bolster their allegations simply by stacking the allegations on top of each other. As just one example, a key question at trial is whether Johnson’s Baby Powder contains asbestos. J&J of course maintains it does not. But if a jury hears the claims of multiple plaintiffs who used Johnson’s Baby Powder and subsequently developed mesothelioma, they may well unfairly assume that there *must* be something to the plaintiffs’ allegations.

But it may be difficult to ascertain after trial whether this sort of reasoning influenced the jury. Accordingly, an appeal only after the final judgment is not adequate to protect J&J's interests. *See Hagood*, 362 S.C. at 197 (“[A]n 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.”). That is just one example of the prejudice to J&J, which is more fully laid out in its Certiorari Petition.

The immediate appealability of this kind of consolidation order is a novel question which this Court should consider. This Court mentioned the appealability of a consolidation order in *South Carolina Public Service Authority v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986). In *Arnold*, the Court noted that, earlier in the proceedings, it had dismissed an interlocutory appeal of the consolidation order at issue in that case. But *Arnold* does not control.

First, the Court issued the *Arnold* opinion after the South Carolina Public Service Authority appealed a final judgment against it, and the Court considered only two issues in the appeal: (1) whether a case remains stayed in the trial court when the appellate court has dismissed an appeal but a petition for rehearing remains pending; and (2) whether the trial court properly consolidated the cases. *Id.* at 585–86, 340 S.E.2d at 536–37. The Court merely recited its dismissal of the interlocutory appeal as the fact forming the basis for its holding that the dismissal of the appeal restored jurisdiction to the circuit court in spite of the appellant's petition for rehearing. *Id.* at 586, 340 S.E.2d at 537.

Second, although the consolidation order in *Arnold* predated the South Carolina Rules of Civil Procedure, the consolidation at issue was analogous to permissive joinder under the current rules, which allow all persons to join as plaintiffs—or to be joined as defendants—if any right to relief at issue arose “out of the same transaction, occurrence, or series of transactions or

occurrences and if any question of law or fact common to [all plaintiffs or all defendants] will arise in the action.” *See* Rule 20(a), SCRC.P.

In *Arnold*, the trial court consolidated condemnation actions filed by a single plaintiff—a state agency—against six adjacent landowners *at the landowners’ request*. *Id.* Condemnation actions asserted by a single state agency against six adjacent landowners arise out of the same series of transactions or occurrences and have common questions of fact and law. *See id.* Further, the six defendant landowners *consented* to the consolidation. *Id.* at 585, 340 S.E.2d at 536 (“The landowners moved to consolidate the actions for trial”). Accordingly, this Court’s determination in *Arnold*—that the consolidation order at issue in that proceeding was not appealable—is logical. *That* consolidation order merely consolidated six nearly identical claims the state agency asserted against adjacent landowners.

In contrast, the appealed order in this case consolidated two unique cases filed by different plaintiffs arising from different occurrences and based on different sets of facts, and is thus not controlled by *Arnold*. Ultimately, “by its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). This Court has stressed that appealability is controlled by the *effect* of an order, rather than its label. *See Wetzell v. Woodside Dev. Ltd. P’ship*, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (noting an order granting a motion to set aside an entry of default is generally not immediately appealable, but the effect of the order at issue was equivalent to an order granting a motion to dismiss, and the order was therefore immediately appealable).

Further, the consolidation order in this case forces J&J to try two unrelated cases simultaneously, which deprives J&J of its right to a fair jury trial in each case—thus affecting J&J’s substantial rights. As such, the consolidation order regarding these two separate matters

infringes on and diminishes the Defendant's right to a jury trial in each matter, with respect to each Plaintiff. In South Carolina, the State Constitution requires that the right to a jury trial be fully protected. *See* S.C. CONST. art. I, § 14 ("The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by his counsel or by both.").

J&J is entitled to a fair jury trial in *each* case. The improper consolidation of these two disparate cases prejudices J&J by depriving it of this right. As noted above, the two cases consolidated for trial involve different injuries, different types of exposure, different durations of exposure, different mitigation, different diagnoses, and different defenses. The conflation of these two disparate cases into a single trial deprives J&J of a meaningful jury trial in either of the cases, resulting in an order affecting the mode of trial that is immediately appealable, and must be immediately appealed. *See e.g., Hagood, Salmonsens, supra.*

This Court should certify the appeal so it can address both appealability and the merits. That procedure would be similar to the Court's order in *Mosley v Alston*, No. 2019-001056. *See* Ex. 1 (order directing the parties to brief issues). That case involved a circuit court's discovery order. The Court ordered briefing on (1) whether the matter "involve[d] exceptional circumstances warranting the issuance of a common law writ of certiorari," (2) whether "a contempt order for failing to comply with a discovery order should be required before an appeal may be taken to review a discovery order, and (3) if a contempt order is not required, "what limitations should be placed on the ability to take an immediate appeal from a discovery order." Here too the Court can address whether a writ is warranted and immediate appealability together.

CONCLUSION

J&J respectfully requests that the Court grant this motion, transfer the case from the South Carolina Court of Appeals, and determine the order granting consolidation is immediately appealable.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Appellants Johnson & Johnson and Johnson &  
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Columbia, South Carolina

April 23, 2020

**EXHIBIT 1**  
**(2019.10.03 Order)**

# The Supreme Court of South Carolina

Mark C. Mosley, Respondent,

v.

Christine Alston, Personal Representative of the Estate of Robert Alston, DaVita, Inc. d/b/a DaVita Walterboro Dialysis #3073, DVA healthcare Renal Care, Inc., DVA Renal Healthcare, Inc. DaVita Healthcare Partners, Inc., and Howard Elj,

Of which, DaVita, Inc., DVA Healthcare Renal Care, Inc. DVA Renal Healthcare, Inc., DaVita Healthcare Partners, Inc., and Howard Elj are, Petitioners.

Appellate Case No: 2019-001056

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## ORDER

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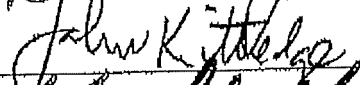

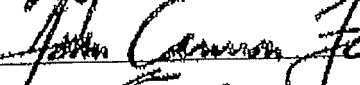
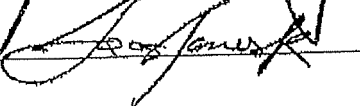
Petitioners have filed a petition for an extraordinary writ to review a discovery order of the circuit court. Respondent opposes the petition. We grant the petition and direct the parties to brief the following issues:

- (1) Does this matter involve exceptional circumstances warranting the issuance of a common law writ of certiorari to review the discovery order?
- (2) Should a contempt order for failing to comply with a discovery order be required before an appeal may be taken to review a discovery order?
- (3) If a contempt order is not required before a discovery order may be reviewed on appeal, what limitations should be placed on the ability to take an immediate appeal from a discovery order?

The parties shall, within twenty (20) days of the date of this order, agree on the content of an appendix in this matter. Within thirty (30) days after agreement on the appendix, Petitioners shall serve their brief(s) and the appendix on Respondent

and file fifteen (15) copies of the brief(s) and fifteen (15) copies of the appendix with the Clerk of this Court, with one copy of the brief(s) and appendix filed unbound. The Petitioners must also file with the Clerk proof that the brief(s) has been served, and a certificate that the brief(s) complies with Rule 211(b), SCACR. Within thirty (30) days after service of Petitioners' brief(s), Respondent shall serve his brief on Petitioners and file with the Clerk fifteen (15) copies of the brief, one copy of which shall be filed unbound. Any *amicus curate* briefs shall be served and filed within thirty (30) days after service of Respondent's brief.

The parties will be advised if the Court wishes to schedule oral argument in this matter.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina

October 3, 2019

cc:

Martin S. Driggers, Jr., Esquire  
Richard Edward McLawhorn, Jr., Esquire  
John E. Parker, Esquire  
William Franklin Barnes, III, Esquire  
Michael T. Coulter, Esquire  
H. Woodrow Gooding, Esquire  
The Honorable Perry Buckner  
The Honorable Mylinda D. Nettles

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
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Jean H. Toal, Circuit Court Judge

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Inc.; Rite Aid of South Carolina, Inc.,..... Defendants,

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Consumer, Inc. are the ..... Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley &  
Scarborough LLP, attorneys for Johnson & Johnson and Johnson & Johnson Consumer, Inc., do

hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleading(s): **Motion to Transfer or Certify**

Served: MOTLEY RICE LLC  
W. Christopher Swett  
28 Bridgeside Blvd.  
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April 23, 2020



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April 23, 2020

**Via U.S. Mail, Facsimile, and E-Filing**

The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
1231 Gervais Street  
Columbia, SC 29201

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**Apr 23 2020**

**SC Court of Appeals**

RE: Mary Margaret Devey v. Johnson & Johnson et al. *and* Terran Dupree v. Johnson & Johnson et al.  
Civil Action Nos. 2018-CP-10-00790 & 2018-CP-10-02899  
Our File Nos. 003501.01848 & 003501.01849

Dear Mr. Shearouse:

Enclosed please find a Motion to Transfer or Certify the above-referenced matter to the Supreme Court. Appellants Johnson & Johnson and Johnson & Johnson Consumer, Inc. filed the Notice of Appeal in this matter earlier today and have not yet received an appellate case number from the Court of Appeals. We are submitting the original Motion to Transfer or Certify and a check for the \$50.00 filing fee to the Court via U.S. Mail. Pursuant to the Supreme Court's orders addressing the operation of the appellate courts during the coronavirus emergency, we are also submitting copies of the Motion to Transfer or Certify to the Court via facsimile and via the new e-filing system

By copy of this letter, we are notifying the Court of Appeals of this filing and serving a copy of the filing on all counsel of record.

Respectfully,

A handwritten signature in cursive script, appearing to read 'Nick Charles'.

Nicholas A. Charles

The Honorable Daniel E. Shearouse  
April 23, 2020  
Page 2

Enclosure

cc: W. Christopher Swett, Esquire  
Amy Harmon Geddes, Esquire  
Mark H. Wall, Esquire  
Moffatt G. McDonald, Esquire  
W. David Conner, Esquire  
Scott E. Frick, Esquire  
Louis P. Hems, Esquire  
The Honorable Jenny Abbott Kitchings