

PHILADELPHIA COURT OF COMMON PLEAS
PETITION/MOTION COVER SHEET

CONTROL NUMBER: 18072825 (RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)

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ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE: 07/30/2018
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July Term, 2013
 Month Year
 No. 01491

PERIGO ETAL VS ETHICON WOMEN'S HEALTH & UROLOGY A

Name of Filing Party:
ETHICON, INC. -DFT
JOHNSON & JOHNSON-DFT

INDICATE NATURE OF DOCUMENT FILED:
 Petition (*Attach Rule to Show Cause*) Motion
 Answer to Petition Response to Motion

Has another petition/motion been decided in this case? Yes No
Is another petition/motion pending? Yes No

If the answer to either question is yes, you must identify the judge(s):
THE HONORABLE ARNOLD NEW/THE HONORABLE KENNETH

TYPE OF PETITION/MOTION (see list on reverse side) MISCELLANEOUS MOTION/PETITION	PETITION/MOTION CODE (see list on reverse side) MTMIS
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ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding):

<p>I. CASE PROGRAM</p> <p>OTHER PROGRAM</p> <p>Court Type: <u>MASS TORT</u> Case Type: <u>MT - PELVIC MESH</u></p>	<p>II. PARTIES (<i>required for proof of service</i>) (Name, address and telephone number of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)</p> <p>LEE B BALEFSKY KLINE & SPECTER 1525 LOCUST ST. 19TH FLOOR , PHILADELPHIA PA 19102</p> <p>ANDREW P REEVE ONE LOGAN SQUARE SUITE 2000 , PHILADELPHIA PA 19103</p> <p>KIMBERLY GUSTAFSON BUENO SCOTT DOUGLASS & MCCONNICO LLP 303 COLORADO ST SUITE 2400 , AUSTIN TX 78701</p> <p>PAUL S ROSENBLATT BUTLER SNOW LLP 1020 HIGHLAND COLONY PKWY , RIDGELAND MS 39157</p> <p>DANIEL R HIGGINBOTHAM THOMAS COMBS & SPANN PLLC 300 SUMMERS ST SUITE 1380 , CHARLESTON WV 25301</p>
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III. OTHER

By filing this document and signing below, the moving party certifies that this motion, petition, answer or response along with all documents filed, will be served upon all counsel and unrepresented parties as required by rules of Court (see PA. R.C.P. 206.6, Note to 208.2(a), and 440). Furthermore, moving party verifies that the answers made herein are true and correct and understands that sanctions may be imposed for inaccurate or incomplete answers.

 (Attorney Signature/Unrepresented Party) July 23, 2018 JOSEPH E. ONEIL (Attorney I.D. No.)
 (Date) (Print Name)

The Petition, Motion and Answer or Response, if any, will be forwarded to the Court after the Answer/Response Date. No extension of the Answer/Response Date will be granted even if the parties so stipulate.

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Ethicon, Inc. and Johnson & Johnson

IN RE: PELVIC MESH LITIGATION

Diana Perigo,

Plaintiff,

v.

Ethicon, Inc., *et al.*,

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
TRIAL DIVISION

JULY TERM 2013
NO. 1491

**MOTION OF DEFENDANTS ETHICON, INC. AND JOHNSON & JOHNSON FOR
RECUSAL OF JUDGE KENNETH J. POWELL, JR.**

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Filing Date: July 23, 2018

Response Date: July 30, 2018

Control No.:

Case ID: 130701491
Control No.: 18072825

IN RE: PELVIC MESH LITIGATION

Diana Perigo,
Plaintiff,
v.
Ethicon, Inc., *et al.*,
Defendants.

**PHILADELPHIA COUNTY
COURT OF COMMON PLEAS
TRIAL DIVISION**

**JULY TERM 2013
NO. 1491**

ORDER

AND NOW, this ___ day of _____ 2018, upon consideration of the Motion of Defendants Ethicon, Inc. and Johnson & Johnson for Recusal of the Honorable Kenneth J. Powell, Jr. from presiding over the trial of Diana Perigo, July Term 2013, No. 1491 and any responses thereto, it is hereby **ORDERED** that the motion is **GRANTED**.

BY THE COURT:

, J.

VIA ELECTRONIC FILING, HAND DELIVERY AND EMAIL

The Honorable Kenneth J. Powell, Jr.
Court of Common Pleas of Philadelphia County
City Hall, Room 544
Philadelphia, PA 19107
Kenneth.Powell@courts.phila.gov and barry.scotton@courts.phila.gov

**Re: *Perigo v. Ethicon Women's Health & Urology, a Division of Ethicon, Inc.,
and Johnson & Johnson, July Term 2013, No. 1491***

Dear Judge Powell:

In accordance with mass tort motion procedure, Defendants Ethicon, Inc. and Johnson & Johnson submit this Motion for Recusal.

EXECUTIVE SUMMARY

We have come to understand that Your Honor's mother is a plaintiff in a suit that is currently proceeding against Johnson & Johnson companies. She is raising claims, such as design defect and failure to warn, in a Philadelphia mass-tort litigation, which will address legal and evidentiary issues that are likely to be similar to the ones at issue in the upcoming *Perigo* trial; both cases involve issues of product liability law, causation, and admissibility of expert testimony, and both cases involve claims for punitive damages. Accordingly, this Court will be called on to make rulings in the *Perigo* case that could bear on your mother's case and place Your Honor in a difficult circumstance. Ethicon and Johnson & Johnson respectfully submit that Your Honor's mother's pending lawsuit against Johnson & Johnson companies is a sufficient ground to warrant recusal from the *Perigo* trial under Rule of Judicial Conduct 2.11, which does not depend on actual partiality. The language in that rule was changed in 2014 from "should," which some had construed as discretionary, to "shall," "which connotes an obligation." 207 Pa. Code, § 15-4 (Formal Opinion of the Ethics Committee of the Pennsylvania Conference of State Trial Judges).

Rule 2.11. Disqualification.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding

The Court has not previously disclosed the existence of your mother's lawsuit in the course of the pelvic mesh mass tort litigation. *See* Rule 2.7, cmt. 3 ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal, even if the judge believes there is no proper basis for disqualification or recusal"); Rule 2.11, cmt. 5 (same).

Taken together, Your Honor's mother's pending lawsuit, the overlap in issues, and the lack of disclosure, raise serious concerns about the appearance of impropriety that justify recusal to assure a fair trial and to avoid, at a minimum, an appearance of partiality under the Rules of Judicial Conduct.

ARGUMENT

A fair trial in a fair tribunal is a requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstance and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge...not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Such a stringent

rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way “justice must satisfy the appearance of justice.”

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted).

The Code of Judicial Conduct extends those principles and provides practical guidance for judges. The standard under the Code is “public confidence.” *See* Code of Judicial Conduct, Preamble (3) (judicial conduct at all times should be “in a manner that garners the highest level of public confidence in their independence, fairness, impartiality, integrity, and competence”); Rule 1.2 (acting “at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”). That requires more than abstaining from improper conduct; it also requires avoiding conduct that “creates the appearance of impropriety.” Rule 1.2, cmt. 1. As such, a judge is subject to greater scrutiny than other public officers. *Id.*, cmt. 2. Moreover, the commentary to the Rules makes clear that the Rules are framed in general terms because “it is not practicable to list all . . . conduct” that “appears to compromise the independence, integrity, and impartiality of a judge.” *Id.*, cmt. 3.

As a trial judge, Your Honor is entitled to tremendous respect, and your position vests you with great authority in, *inter alia*, crafting jury instructions, assessing credibility, and making evidentiary rulings. The position Your Honor holds entitles you to great deference from appellate courts; indeed, many of your rulings will be reviewed only for an abuse of discretion. But the fact that Your Honor’s mother has a pending lawsuit against Johnson & Johnson companies on a similar subject matter, and which may implicate similar issues, is a sufficient ground for recusal. *See Gordon v. Reliant Energy, Inc.*, 141 F. Supp. 2d 1041, 1045-46 (S.D. Cal. 2001) (recusal warranted in case sharing similar claims, even though the judge had no direct

interest in the proceeding). The direct familial relation gives rise to an objective “appearance of impropriety.” See Rule 1.2, cmt. 1.

Other jurisdictions have concluded that recusal is warranted in similar situations. In *Mississippi Commission on Judicial Performance v. Bowen*, 123 So.3d 381 (Miss. 2013), for example, a judge mentioned two weeks into an asbestos exposure trial against Union Carbide, that his father “might have been tested for asbestosis” when, in fact, the judge’s father had filed two asbestosis lawsuits, and both parents had settled claims with Union Carbide and other defendants. *Id.* at 383. That trial court was asked to but did not rule on a recusal motion, and it was deemed denied. *Id.* The Mississippi Supreme Court removed the judge from the case, finding that a “reasonable person, knowing all the circumstances, would have doubts regarding Judge Bowen’s impartiality in the case.” *Id.*¹

And in *In re Advisory Letter No. 7-11 of the Supreme Court Advisory Committee on Extrajudicial Activities*, 61 A.3d 136 (N.J. 2013), the Supreme Court of New Jersey found that a “reasonable, fully informed person” who knew that a judge’s son was a police officer in the same municipality where the judge presides would “have doubts about Judge Boyd’s impartiality in deciding a case that pits the credibility of a Perth Amboy police officer against that of a litigant,” *id.* at 143, and it ruled that “Judge Boyd may not sit on any case involving the Perth Amboy Police Department nor may he serve as Chief Judge supervising the two judges who adjudicate

¹ *Bowen* quotes, *inter alia*, Mississippi’s Canon 3E(1)(a), which states that judges “should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where: the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.” *Id.* at 383-84 n.3. Pennsylvania states it as a fact. “Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.” Rule 2.11, Cmt. 1.

matters pertaining to Perth Amboy Police Department officers and employees.” *Id.* at 144. The Court recognized that the question was not whether a judge put in such a position could be fair, but the perception of the draw toward favoring those on the side of the family member.

It would not be unnatural for any father to ponder the consequences of his decisions on the life and career of his son—even if he were to do his best to disregard such extraneous considerations in deciding a case. It is the appearance of the conflict between public duty and filial ties that will strain public confidence in the integrity of the judicial process. The issue is not whether Judge Boyd can faithfully maintain impartiality in cases involving Perth Amboy police officers who serve with his son. The workings of his mind cannot be put on display. That is why public perception matters. Judges must appear to be impartial, for in a democracy the standing of our system of justice depends on the people’s confidence in the judicial process.

Id. at 143-44.

The jury selection context is also instructive. A prospective juror with a conflict of this sort would indisputably be stricken for cause, because prejudice is presumed if a juror “has a close familial, financial, or situational relationship with a participant in the litigation.” *Shinal v. Toms*, 162 A.3d 429, 443 & n.17 (Pa. 2017). As here, the assessment of jurors is also based on appearance: “[e]ven if the juror believes himself or herself able to remain objective and to rule without bias, the relationship may be so close that it appears biased. In such circumstances, the law errs on the side of removal in order to ensure the appearance of an objective jury.” *Id.* at 444.

In *Shinal*, the relationship was “remote” and “indirect,” *id.* at 443, 448 (describing employment relationships pursuant to which the prospective jurors were employed by companies owned by the same ultimate corporate parent as the company that employed the defendant); *id.* at 448 (holding that “it was incumbent upon the trial court to engage the jurors in questioning to reveal whether they believed that their or their family member’s current or former employer would be financially harmed by an adverse verdict or whether the relationship would affect the

jurors' respective abilities to be impartial"). Here, in contrast, the relationship is direct: Your Honor's mother's case against Johnson & Johnson companies implicates issues that could very well arise in the current litigation.

The Code of Judicial Conduct also contemplates that judges would disclose any matter that a party "might reasonably consider relevant to a possible motion for disqualification or recusal." Rule 2.7, cmt. 3. The threshold for disclosure under the rules is lower than the threshold for disqualification. *See* Rule 2.7, cmt. 3 ("A judge should disclose on the record information that the judge believes the parties or their lawyers *might reasonably consider* relevant to a possible motion for disqualification or recusal, *even if the judge believes there is no proper basis for disqualification or recusal.*" (emphasis added)); Rule 2.11 cmt. 5 (same); *In Interest of McFall*, 617 A.2d 707, 711, 712 (Pa. 1992) (relevant question is "whether it was a denial of the appellees' right to a fair and impartial tribunal for a judge to preside over their cases without revealing circumstances that raise questions as to her impartiality"). That disparity makes sense in light of disclosure rule's goal of ensuring the availability of all information "the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification or recusal," Rule 2.7, cmt. 3, so that the parties can either move to disqualify or recuse, or can waive a potentially disqualifying circumstance, Rule 2.11(C). Ethicon and Johnson & Johnson respectfully submit that disclosure was required under these standards and in the circumstances presented here.

In sum, given all of the above "circumstances and relationships," *Murchison*, 349 U.S. at 136, between Your Honor's mother's case and this case, there is an appearance of partiality and prejudice that is too high, and that warrants a trial before another judge.

CONCLUSION

For the reasons set forth above, to maintain both fairness and impartiality and the appearance of fairness and impartiality, Ethicon and Johnson & Johnson respectfully request that Your Honor grant this Motion for Recusal.

Dated: July 23, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 2018, I caused a true and correct copy of Defendants Ethicon, Inc. and Johnson & Johnson's Motion of Defendants Ethicon, Inc. and Johnson & Johnson for Recusal of Judge Kenneth J. Powell, Jr. to be electronically served by the Court in accordance with Pa.R.C.P. 205.4(g) and to be served via electronic mail on counsel of record, as follows:

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