

PHILADELPHIA COURT OF COMMON PLEAS  
**PETITION/MOTION COVER SHEET**

<b>CONTROL NUMBER:</b> <p style="text-align: center;">18072825</p> <b>(RESPONDING PARTIES MUST INCLUDE THIS NUMBER ON ALL FILINGS)</b>
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ASSIGNED TO JUDGE:	ANSWER/RESPONSE DATE:
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July Term, 2013  
 Month Year  
 No. 01491

PERIGO ETAL VS ETHICON WOMEN'S HEALTH & UROLOGY A

Name of Filing Party:  
DIANA PERIGO-PLF

**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):*

TYPE OF PETITION/MOTION (see list on reverse side)		PETITION/MOTION CODE (see list on reverse side)
ANSWER (MOTION/PETITION) FILED		MTANS
ANSWER / RESPONSE FILED TO (Please insert the title of the corresponding petition/motion to which you are responding): MTMIS - MISCELLANEOUS MOTION/PETITION		
<b>I. CASE PROGRAM</b>  OTHER PROGRAM  Court Type: <u>MASS TORT</u> Case Type: <u>MT - PELVIC MESH</u>	<b>II. PARTIES</b> ( <i>required for proof of service</i> ) (Name, address and <b>telephone number</b> of all counsel of record and unrepresented parties. Attach a stamped addressed envelope for each attorney of record and unrepresented party.)  LEE B BALEFSKY KLINE & SPECTER 1525 LOCUST ST. 19TH FLOOR , PHILADELPHIA PA 19102 ANDREW P REEVE ONE LOGAN SQUARE SUITE 2000 , PHILADELPHIA PA 19103 KIMBERLY GUSTAFSON BUENO SCOTT DOUGLASS & MCCONNICO LLP 303 COLORADO ST SUITE 2400 , AUSTIN TX 78701 PAUL S ROSENBLATT BUTLER SNOW LLP 1020 HIGHLAND COLONY PKWY , RIDGELAND MS 39157 DANIEL R HIGGINBOTHAM THOMAS COMBS & SPANN PLLC 300 SUMMERS ST SUITE 1380 , CHARLESTON WV 25301	
<b>III. OTHER</b>		

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.

\_\_\_\_\_ July 24, 2018 \_\_\_\_\_ MICHAEL A. TRUNK \_\_\_\_\_  
 (Attorney Signature/Unrepresented Party) (Date) (Print Name) (Attorney I.D. No.)

**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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DIANA PERIGO

vs.

ETHICON WOMEN'S HEALTH &  
UROLOGY, A DIVISION OF ETHICON,  
INC., et al

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JULY TERM, 2013

NO. 001491

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2018, it is hereby Ordered and  
Decreed that Defendants' Motion to Recuse Judge Kenneth J. Powell, Jr. is \_\_\_\_\_.

BY THE COURT:

\_\_\_\_\_  
J.

**KLINE & SPECTER, PC**  
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Attorneys for Plaintiff

DIANA PERIGO

vs.

ETHICON WOMEN'S HEALTH &  
UROLOGY, A DIVISION OF ETHICON,  
INC., et al

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JULY TERM, 2013

NO. 001491

**PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS'  
MOTION TO RECUSE JUDGE KENNETH J. POWELL, JR.**

Plaintiff's response to Defendants, Ethicon, Inc. and Johnson & Johnson's Recusal of  
Judge Kenneth J. Powell, Jr is incorporated by reference.

Respectfully submitted,

**KLINE & SPECTER, P.C.**

Dated: July 24, 2018

BY: 

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DIANA PERIGO

vs.

ETHICON WOMEN'S HEALTH &  
UROLOGY, A DIVISION OF ETHICON,  
INC., et al

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JULY TERM, 2013

NO. 001491

**PLAINTIFF'S RESPONSE TO DEFENDANTS, ETHICON, INC. AND JOHNSON &  
JOHNSON'S RECUSAL OF JUDGE KENNETH J. POWELL, JR.**

The plaintiff leaves to the sound discretion of Judge Powell the question of recusal and notes the following:

First, Johnson & Johnson articulates no reason for recusal. An empty allegation is made that there are issues common to this case and another case involving another Johnson & Johnson product in another jurisdiction involving Judge Powell's mother, but no example of this alleged commonality is given.

Moreover, during a recent status conference, Johnson & Johnson asked Judge New to recuse Judge Powell in cases involving transvaginal mesh. Judge New responded unfavorably to the request. Instead of filing a motion to recuse Judge Powell with Judge New and knowing the

likely order of Judge New, Johnson & Johnson instead filed this motion with Judge Powell. This appears to be judge shopping.

Johnson & Johnson also appears to have engaged in judge shopping in the Superior Court recently in related transvaginal mesh litigation. See Exhibit A at p. 9.

Respectfully submitted,

KLINE & SPECTER, P.C.



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SHANIN SPECTER

Date: 7/24/18

**KLINE & SPECTER, PC**  
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DIANA PERIGO

vs.

ETHICON WOMEN'S HEALTH &  
UROLOGY, A DIVISION OF ETHICON,  
INC., et al

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

JULY TERM, 2013

NO. 001491

**CERTIFICATE OF SERVICE**

I hereby certify that on the date indicated below, a copy of the foregoing that Plaintiff's Response to Defendants, Ethicon, Inc. and Johnson & Johnson's Recusal of Judge Kenneth J. Powell, Jr., was served via electronic filing on the following counsel:

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**KLINE & SPECTER, P.C.**

Dated: 7/24/18

By: Michele Emley



IN THE SUPERIOR COURT OF PENNSYLVANIA

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SHARON CARLINO and CHARLES  
CARLINO,

Plaintiff/Appellee/  
Cross-appellant,

v.

ETHICON, INC., et al.,

Defendants/Appellants/  
Cross-appellees.

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**RESPONSE TO MOTION FOR CONTINUANCE AND TO  
SCHEDULE ARGUMENT BEFORE EN BANC PANEL**

Defendants Ethicon, Inc. and Johnson & Johnson (“Ethicon”) have moved to (a) continue the oral argument scheduled for August 8, 2018; and (b) reschedule the argument before an *en banc* panel, which would decide the case in the first instance. The Court should deny the motion for several reasons.

**I. Factual background**

The instant case involves pelvic injuries suffered by Sharon Carlino from being implanted with Gynecare Tension Free Vaginal Tape. Defendants Ethicon and J&J designed and manufactured this device, which was implanted in Ms. Carlino to address conditions such as stress urinary incontinence. Unfortunately, the device caused Ms.

Carlino to experience significant pain that affects daily activities and sexual intercourse. Her incontinence also returned with worse symptoms.

Ms. Carlino filed suit against J&J and Ethicon in June 2013. Trial commenced in January 2016 and resulted in a verdict in Ms. Carlino's favor. The jury awarded compensatory damages of \$3.25 million to Ms. Carlino and \$250,000 to her husband. It also assessed \$10 million in punitive damages against Defendants. After denial of their post-trial motion and entry of judgment, Defendants filed a notice of appeal in April 2016.

On appeal, Defendants raise seven issues for this Court's consideration. They seek jnov as to the entire case. Alternatively, they seek jnov as to the punitive verdict only. They seek a new trial on three evidentiary and instructional grounds—the preclusion of evidence relating to the Food and Drug Administration; the preclusion of certain deposition testimony of the treating physician; and the trial court's instruction on design defect. They seek remittitur of the compensatory verdict. In addition, Defendants argue that they are not subject to the personal jurisdiction of the Pennsylvania courts in this litigation. As the Panel is aware, Defendant's assignments have been the subject of extensive briefing. All will be before the Court at the August 8 oral argument.

The Prothonotary initially set Ms. Carlino's case for oral argument on February 6, 2018. As that date approached, the Court *sua sponte* continued the argument given the pendency in the Superior Court of another appeal involving a mesh verdict against

Defendants—*Hammons v. Ethicon, Inc.*, No. 1522 and 1526 EDA 2016. *Carlino* and *Hammons* are both part of a mass tort program coordinated by the Philadelphia County Court of Common Pleas and docketed at In re: Pelvic Mesh Litigation, February Term 2014, No. 829. Both *Carlino* and *Hammons* challenge the same order of Judge New concerning personal jurisdiction. This Order was entered on March 30, 2015. Entered on the master docket of the mass tort program, the Order denied Defendants’ global motion to dismiss for lack of jurisdiction numerous cases where the plaintiff was from a state other than Pennsylvania. Judge New denied the motion because of the record showing Defendants’ activities in Pennsylvania itself related to mesh litigation.

Like *Carlino*, *Hammons* was a mesh trial resulted in a compensatory and punitive verdict against Defendants. On appeal in *Hammons*, the Defendants pursued a range of trial issues and also pursued reversal of the March 2015 order denying dismissal of all cases involving out-of-state plaintiffs on personal jurisdiction grounds. A panel heard oral argument in *Hammons* in October 2017. A decision on the appeal was pending as the *Carlino* argument approached, which prompted the *sua sponte* continuance. As the *Carlino* panel explained: “To avoid inconsistent decision, we *sua sponte* continue oral argument in the above-captioned appeals until a decision in *Hammons*. Accordingly, we direct the Prothonotary to continue this matter and place it on the next available argument panel convening in the Eastern District.” *See* Order entered January 25, 2018 (docket attached hereto as Exhibit “A”).

On June 19, 2018, the *Hammons* panel issued an 82-page published decision affirming the judgment in plaintiff's favor and addressing in detailed fashion the many issues raised on appeal, including personal jurisdiction. *Hammons* having been decided, on June 27, 2018, the Prothonotary placed *Carlino* on the next available argument panel and set the case for argument on August 8, 2018.

Defendants now have filed a motion for continuance of the August 8 oral argument in *Carlino* (the second continuance sought). In parallel, they filed a motion for reargument in *Hammons* raising two issues—(1) the trial court's allowance of testimony concerning Ethicon's spoliation of evidence; and (2) personal jurisdiction. Plaintiff's answer to the reargument petition is currently due on July 17, 2018. The undersigned has filed a motion seeking an additional ten days in which to file the answer, such that the due date become July 27, 2018. That extension motion is pending before in *Hammons*. Based on I.O.P. 65.36, it appears unlikely that the Superior Court will have completed voting on the *Hammons* petition before *Carlino* ripens for oral argument on August 8.

Defendants have filed a third appeal involving personal jurisdiction, raising again the issue decided in *Hammons*. The additional appeal arises because Judge New vacated the March 2015 order during the pendency of the *Hammons* and *Carlino* appeals, and ordered the parties to re-brief the jurisdiction issue in light of the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co v. Superior Court*, 137 S. Ct. 1773 (2017). The parties provided Judge New with briefing and oral argument. On December 4, 2017, Judge

New again denied Defendants' global motion to dismiss for lack of jurisdiction (impacting about 70 cases with out-of-state plaintiffs). In February 2018, Judge New amended the December 4 Order to state that the Order concerned a "substantial issue" of jurisdiction under Pa.R.A.P. 311(b)(2). This permitted Defendants to file an interlocutory appeal as of right. The appeal is docketed as *In re Pelvic Mesh Litigation*, 652 EDA 2018. Defendants have filed an opening brief. Plaintiffs' responsive brief is currently due on July 27, 2018. As with *Hammons*, the undersigned expects to seek an extension of time because of other responsibilities. Briefing will not conclude until September. It is unknown when the matter might be set for argument.

Significantly, in parallel with the reargument petition in *Hammons* and the instant continuance motion in *Hammons*, Defendants filed a motion in *In re Pelvic Mesh* asking for oral argument to be heard by an *en banc* panel, which would decide the case in the first instance. In Defendants' conception, an *en banc* panel would decide all issues in *Hammons* (trial and jurisdiction), all issues in *Carlino* (trial and jurisdiction) and *In re Pelvic mesh* (jurisdiction)—all at the same time.

## **II. Argument**

Against that backdrop, the Panel should deny the continuance motion for seven reasons. *First*, this Court already postponed oral argument once. It should not do so again. The *sua sponte* January 25 Order provided for rescheduling promptly after *Hammons* was decided. That is exactly what the Prothonotary did. By now, Mrs. and Mr. Carlino have been waiting over two years since Ethicon filed its appeal for this case

to reach argument. More than five years have passed since they filed suit. Their case should not be indefinitely postponed because of the theoretical possibility that the Court will agree to decide *Hammons*, *Carlino*, and *In re Pelvic Mesh* by an en banc panel (deciding two of the cases in the first instance). Ethicon never sought to change the January 25 Order to state that oral argument in *Carlino* would wait until disposition of post-decision proceedings in *Hammons*. They should live with the Order as it reads.

*Second*, the *Carlino* appeal involves far more than personal jurisdiction. Defendants have raised seven issues on appeal. These make fact-intensive arguments concerning jnov, new trial, and remittitur. Their argument concerning the preclusion of evidence relating to the FDA also involves multiple sub-arguments. Defendants' jnov, new trial, and remittitur arguments are not only factually-intensive but arise from the *Carlino* trial, which Plaintiffs must discuss and defend in detail. Especially given the number and complexity of the issues raised, *Carlino* deserves the same treatment as any other appeal—an individual oral argument. Perhaps Defendants assume that a postponed *en banc* argument in *Carlino* would address jurisdiction only. If that happens, and if the Court again finds that Ethicon has subjected itself to personal jurisdiction in Pennsylvania, the Carlinos will still be waiting for oral argument and decision on Ethicon's jnov, new trial, and remittitur issues. When would those be decided? This appeal could be pending for many years more. The Court does not address appeals in piece-meal fashion. It should not do that here given the fact-intensive and trial-specific nature of Defendants' appellate arguments.

*Third*, Defendants presume too much in supposing that reargument in *Hammons* will be allowed. In *Hammons*, the Panel measured the record evidence concerning Defendants' mesh-related activities against the U.S. Supreme Court's decision in *Bristol-Myers Squibb*. The resulting decision on jurisdiction was straightforward, correct, and well-grounded in the facts and law. The same is true regarding Defendants' other reargument issue—the trial court's allowance of testimony concerning Ethicon's spoliation of evidence. The Carlinos should not have final resolution of their case further postponed for the sake of a reargument in a different case that may not occur.

*Fourth*, Defendants are pursuing an identical issue through three different appeals in three different procedural postures. *Hammons* has been decided and is the subject of a reargument petition. *Carlino* has oral argument pending on August 8. *In re Pelvic Mesh* is in the early stages of briefing. Given this diversity of postures, the Panel should appreciate that Defendants seek to have *Carlino* continued for an extraordinary amount of time not only to allow for the reargument petition to be decided and (they presume) granted, but also to allow for briefing to be finished in *In re Pelvic Mesh*. Briefing in *In re Pelvic Mesh* may not be complete until the fall. The significant delay proposed by Defendants compounds the unfairness to Mrs. and Mr. Carlino, who have been waiting over two years for Defendants' appeal to reach a panel.

*Fifth*, Defendants want both *Carlino* and *In re Pelvic Mesh* to be decided in the first instance by an *en banc* panel of this Court. This oral argument would require an *en banc* Court to consider—at one shot—the following issues: (a) all trial issues in *Hammons*

plus jurisdiction and (c) all trial issues in *Carlino* plus jurisdiction; and (c) the stand-alone jurisdiction issue appearing in *In re Pelvic Mesh*. But reargument is a procedure for evaluating decided cases. There is no procedure in the appellate rules for skipping panel argument. The Court should not create a procedure now, especially not to cram appeals involving different trials into one argument. Further, this approach is inefficient to the Court, which has a well-established method for handling cases one at a time. It is also prejudicial to Ms. Hammons and the Carlinos, who must contend with word limits on briefs, time limits on oral argument, and the necessity to respond to fact-intensive jnov, new trial, and remittitur arguments in multiple cases. As noted above, perhaps Defendants assume that the *en banc* panel only would address jurisdiction and would dispose of all appeals on this basis alone. Such assumption is premature against the background of the *Hammons* decision, which unanimously rejected Defendants' jurisdictional argument.

*Sixth*, judicial efficiency is served by having a *Carlino* panel that includes judges familiar with pelvic mesh litigation. Two of the judges currently assigned to *Carlino* also sat on *Hammons*—Judge Stabile and Judge Stevens. That familiarity will facilitate argument and decision on the fact-intensive trial issues that Defendants have advanced. The panel by now has begun its preparation for oral argument, heightening the judicial efficiency of keeping *Carlino* on track. Preserving the August 8 oral argument will enable the Court to decide *Carlino* efficiently, promptly, and completely as to all issues presented.





## CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

\_\_\_\_\_/s/ Charles L. Becker  
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Dated: July 12, 2018

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, a true and correct copy of the foregoing was served upon the following persons by email:

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Dated: July 12, 2018