IN THE SUPREME COURT OF FLORIDA

Case No. SC2024-1537
L.T. Case No. 3D2023-0834

JOHNSON & JOHNSON AND ETHICON, INC.,

Petitioners,

v.

MSP RECOVERY CLAIMS, SERIES LLC; MSPA CLAIMS 1, LLC; SERIES PMPI, a designated series of MAO-MSO RECOVERY II, LLC,

Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

Pursuant to Fla. R. App. P. 9.210(f), Respondents do not intend to raise any issues independent of those on which jurisdiction is invoked nor independent of those raised by Petitioners in their statement of the issues on cross-review.

STATEMENT OF THE CASE AND FACTS

On December 17, 2018, Plaintiffs MSP Recovery Claims, Series LLC; MSPA Claims 1, LLC; Series PMPI, a designated series of MAO-MSO Recovery II, LLC (collectively, "Plaintiffs") filed the underlying action seeking a pure bill of discovery against Defendants Ethicon, Inc. and its parent company, Johnson & Johnson (collectively, "Defendants") related to Defendants' surgical pelvic mesh products.

On March 1, 2019, Defendants moved to dismiss the complaint for lack of standing and for failure to state a claim. Defendants did not raise or otherwise challenge personal jurisdiction. On June 21, 2019, Defendants filed a second motion to dismiss Plaintiffs' amended complaint, again arguing lack of standing and failure to state a claim. Again, Defendants did not raise or otherwise challenge personal jurisdiction or the sufficiency of the allegations regarding same. On March 4, 2020, Defendants filed a third motion to dismiss related to the Second Amended Complaint. Once more, Defendants did not raise or otherwise challenge personal jurisdiction or the sufficiency of the allegations regarding same. After the motion was denied, Defendants filed their Answer and Affirmative Defenses to the

Second Amended Complaint and for the very first time raised the affirmative defense of lack of personal jurisdiction. And it was not until February 3, 2023, more than four years after the filing of the initial complaint, that Defendants affirmatively sought to enforce their defense of personal jurisdiction by way of a motion for judgment on the pleadings.

The lower court held a hearing on Defendants' motion on April 23, 2023. In preparation for that hearing, Plaintiffs, in their written papers, highlighted to the lower court that Defendants had never raised the personal jurisdiction argument before. Accordingly, the very first line of questioning by the lower court to Defendants was whether personal jurisdiction could be waived. Defendants' counsel invited the court to commit reversible error when it argued it had not been waived:

> THE COURT: Let me -- And before -- I want to hear the story you're about to tell. But before you tell me that story, why hadn't I heard personal jurisdiction in this case before? I understand that it's not something that is waived. Right? Or is it? Jurisdiction is never waived. Right? **But - but is personal jurisdiction waived?**
>
> COUNSEL FOR DEFENDANTS: **It's not waived, Your Honor.** It wasn't argued on the last motion to dismiss which was raised before this *Coloplast* case was decided… But personal jurisdiction is asserted and set forth in the

> answer in this case and there's no waiver of argument of the opposition to this motion of the issue… So we believe its preserved and properly before the Court.

App. 1493-94 (emphasis added).

The lower court granted the motion in part and denied it in part. Defendants appealed, and the issue of waiver, among other things, was, again, raised. On August 14, 2024, the District Court issued a per curiam affirmance. After a motion for the issuance of a written opinion, the District Court, with the benefit of the entire record before it (including all motions and oral argument transcripts), issued a written opinion (the "Opinion") holding that they need not address the substantive issues because Defendants had "filed three motions to dismiss before challenging personal jurisdiction," and had therefore "consented to jurisdiction in Florida." Opinion, p. 2.

On October 25, 2024, Defendants filed a notice invoking this Court's discretionary jurisdiction claiming that Plaintiffs "waived the waiver argument" because the issue was raised for the very first time on appeal, despite what was discussed below.

ARGUMENT

Pertinent to this appeal, the jurisdiction of this Court is limited to "review any decision of a district court of appeal that … expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3, Fla. Const. As this Court has explained, this requires either (1) "the announcement of a conflicting rule of law," or (2) "the application of a rule of law in a manner that results in a conflicting outcome despite 'substantially the same controlling facts,'" keeping in mind that even the misapplication of precedent in cases presenting new or different facts does not support jurisdiction. *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021) (quoting *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)); *Askew v. Fla. Dept. of Children & Families*, 385 So. 3d 1034 (Fla. 2024).

Here, the Defendants do not and cannot allege the announcement of a conflicting rule of law and instead claim that the Third District applied the rule of waiver in a manner that results in a conflicting outcome on substantially the same controlling facts. However, the Defendants' argument fails because the Third District's

decision does not conflict with any existing precedent on any facts, much less on substantially the same controlling facts. In the supposedly conflicting authority relied upon by Defendants, the unpreserved issue was never raised in the lower court; whereas here, it was. Simply stated, there is no conflict.

I. The Panel's Decision Does Not Conflict with this Court's Precedent on Waiver nor conflict with the Fifth District Court of Appeal's Decision in Parlier v. Eagle-Picher Industries, Inc.

Defendants' argument that the decision below misapplies this Court's precedent on waiver blatantly mischaracterizes the Third District's decision and the record on appeal. As the Third District correctly explained, "[a] defendant's objection to personal jurisdiction must be raised 'in the first step the defendant takes in the case' or it is waived." *See* Op. p. 1 (*citing Allstate Mortg. Sols. Transfer, Inc. v. Bank of Am., N.A.*, 338 So. 3d 985, 988 (Fla. 3d DCA 2022); *see also McKelvey v. McKelvey*, 323 So. 2d 651, 653 (Fla. 3d DCA 1976) (recognizing that a motion to dismiss for failure to state a claim is a motion involving the merits of plaintiff's claim and holding that filing such a motion constitutes a general appearance sufficient to confer

in personal jurisdiction over that defendant) . The Third District then applied well-established precedent to the facts at hand, noting that the Defendants had filed three motions to dismiss before challenging personal jurisdiction. *See Allstate*, 338 So. 3d at 987-988 (Fla. 3d DCA 2022; *Inter Am. Coal, S.A. v. SHE DDF2-FL2, LLC*, 255 So. 3d 432, 433 (Fla. 3d DCA 2018) ("[A] defendant may waive a timely objection to personal jurisdiction by seeking affirmative relief . . . inconsistent with an initial defense of a lack of personal jurisdiction." (quoting *Alvarado v. Cisneros*, 919 So. 2d 585, 587 (Fla. 3d DCA 2006)); *Chestnut v. Nationstar Mortgage LLC*, 255 So. 3d 397, 399 (Fla. 3d DCA 2018) (holding that where a defendant first filed a pre-answer motion to dismiss solely contesting the plaintiff's standing and did not raise lack of jurisdiction until a subsequently filed answer to the complaint, submitted himself to the trial court's jurisdiction and thus waived this defense. The Panel's decision is consistent with this Court's precedent and well-established Florida law.

To distract from their waiver, Defendants now claim that Plaintiffs committed their own waiver because the issue was never

argued below and was only ever raised on appeal. This simply is not true.

In both the briefing and during oral argument, Plaintiffs apprised the Court that Defendants had not raised this objection in their first three motions to dismiss. In fact, the very first line of questioning by the lower court of Defendants on their motion for judgment on the pleadings was whether the objections to personal jurisdiction could be, and had been, waived. Not only did Defendants argue their position, they invited the lower court to commit reversible error by misrepresenting Florida law and claiming that objections to personal jurisdiction cannot be waived. The Third District correctly saw through this argument and held, consistent with Florida law, that Defendants had consented to personal jurisdiction by failing to properly object at the "first step." The Third District also implicitly rejected Defendants' waiver of waiver argument, and tacitly held, based on the record before it, that Plaintiffs timely preserved Defendants' waiver of lack of personal jurisdiction below. That approach is wholly consistent with this Court's precedent

Defendants also claim conflict where there is none, pointing to the Fifth District's opinion in *Parlier v. Eagle-Picher Indus.*, 622 So.

2d 479 (5th DCA 1993). However, despite Defendants' best efforts, no conflict exists because *Parlier* is entirely distinct from the facts here.

Parlier dealt with the 120-day service of process requirement and plaintiffs' failure to provide timely service of process under, at the time, newly enacted Fla. R. Civ. P. 1.070(j). In the initial appeal, the Fifth District ruled that Fla. R. Civ. P. 1.070(j) did not apply to plaintiff's actions. On remand from this Court, the Fifth District ruled that the service provision did apply. The Fifth also ruled that plaintiffs waived the issue of defendants' failure to object because, unlike here, the issue had never been raised in the circuit court. Because the issue was only raised on appeal, the Fifth District, consistent with Florida case law, held that the issue had not been properly preserved below and had thus been waived.

As explained above, that is not what happened here. Here, the issue of waiver *was* addressed below and Defendants argued (erroneously) that their objections to personal jurisdiction had not been waived. The issue was thus preserved. With the benefit of the full record on appeal, the Third District applied Florida law and determined that Defendants' objection to personal jurisdiction had

been waived. Defendants have attempted (unsuccessfully) to create "conflict" where none exists.

II. This Case Would Not Warrant Review Even If Jurisdiction Existed

As explained above, there is no express and direct conflict to support jurisdiction in this Court. Even if there were, however, the Court should not exercise its discretion to hear this case because, as discussed above, the Third District's decision is entirely correct. The court properly ruled that Defendants waived their objections to personal jurisdiction by failing to make the argument at the "first step." The Third District's holding is entirely consistent with Florida law and this Court's precedent.

CONCLUSION

For the reasons explained above, there is no basis for jurisdiction in this case, and even if there were, there is no reason for the Court to exercise its discretion to hear this case.

Date: December 4, 2024

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CERTIFICATE OF SERVICE

I certify that a copy of this brief on jurisdiction was filed and served via email on all counsel of record on December 4, 2024.

By: /s/ *Eduardo E. Bertran*
Eduardo E. Bertran

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210(a)(2)(A) and consists of 1,725 words.

By: */s/ Eduardo E. Bertran*
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