

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

MARILYN ADAMS,	:	Civil Action No. 17-621
	:	
Plaintiff,	:	
v.	:	The Honorable Judge Edward G. Smith
	:	
ZIMMER US, INC., ZIMMER	:	
HOLDINGS, INC., ZIMMER INC., AND	:	
ZIMMER SURGICAL, INC.	:	
	:	
Defendants.		

ZIMMER’S MOTION FOR BIFURCATION AND SEPARATE JURIES

The defendants, Zimmer US, Inc., Zimmer Biomet Holdings, Inc. (formerly known as Zimmer Holdings, Inc.), Zimmer, Inc., and Zimmer Surgical, Inc. (collectively, “Zimmer”), respectively move for an Order bifurcating the trial of this case so that the issue of the statute of limitations is tried to a separate jury prior to trial on the substantive issues of liability and damages.¹ A bifurcated trial is required and makes sense for several reasons.

First, the Court has broad discretion to order separate trials of discrete issues under Federal Rule of Civil Procedure 42(b). Here, bifurcation of the statute of limitations issue could shorten a two-week trial to a mere two days or less, conserving substantial judicial resources and jury time.

Second, bifurcation with a separate jury to hear the merits of Plaintiff’s product liability claims eliminates the potential evidentiary problem and prejudice caused by her doctor’s unsubstantiated and prejudicial opinion that the Zimmer prosthetic hip device was the cause of her

¹ Counsel for Zimmer reached out to Plaintiff’s counsel prior to the filing of this motion to determine whether counsel could reach an agreement on the issue of bifurcation, which they unfortunately could not. Accordingly, Zimmer’s motion is contested.

pain. Though the testimony directly relates to her notice of a potential claim against Zimmer and is therefore not only relevant but critical to the triggering of the statute of limitations period, some of that same testimony is prejudicial and potentially inadmissible as to the merits of Plaintiff's product liability claims.

Third, this proposal will not prejudice Plaintiff. Instead, she will enjoy similar economic advantages, particularly the potential to avoid the expense of paying for the time and arrangements for witnesses, in particular her three expert witnesses. If Plaintiff somehow establishes that her claim was timely filed (which it was not), then the merits of her product liability claims could be tried without any further reference to or discussion of the statute of limitations. A second jury would be immune from any lingering doubt on that issue.

Because the issues proposed to be tried separately are unrelated—with the statute of limitations issue being strictly procedural and the product liability claim being substantive—this case presents an ideal scenario for bifurcation and separate juries. Such an order would constitute an exercise of prudent case management.

WHEREFORE, in the event that the Court does not grant Zimmer's motion for summary judgment, Zimmer respectfully requests that the Court bifurcate Zimmer's statute of limitations defense for a trial separate from issues of liability and damages, and empanel a second jury if it remains necessary to try the remainder of the case, or for any other relief the Court deems appropriate.

Dated: June 22, 2018

Respectfully submitted,

/s/ Sean J. Powell

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CERTIFICATE OF SERVICE

On June 22, 2018, I electronically filed this pleading using the Court's CM/ECF system, which will provide notice of electronic filing to all counsel of record.

/s/Sean J. Powell

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ZIMMER US, INC., ZIMMER	:	
HOLDINGS, INC., ZIMMER INC., AND	:	
ZIMMER SURGICAL, INC.	:	
	:	
Defendants.	:	

**MEMORANDUM IN SUPPORT OF ZIMMER’S MOTION
FOR BIFURCATION AND SEPARATE JURIES**

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the defendants, Zimmer US, Inc., Zimmer Biomet Holdings, Inc. (formerly known as Zimmer Holdings, Inc.), Zimmer, Inc., and Zimmer Surgical, Inc. (collectively, “Zimmer”), respectively move the Court to bifurcate the trial of this case so that the issue of the statute of limitations is tried to a jury prior to trial on the substantive issues of liability and damages. In support, Zimmer states as follows:

I. Introduction

It is undisputed that Plaintiff Marilyn Adam’s (“Plaintiff”) claim is subject to a two-year statute of limitations under Pennsylvania law. Zimmer has shown through the factual record that Plaintiff had actual or constructive knowledge of her injury and its potential relationship to her Zimmer components outside of the two-year limitations period, and Zimmer is entitled to summary judgment on that basis. *See* Zimmer’s Motion for Summary Judgment [ECF No. 75]; Zimmer’s Statement of Undisputed Facts [ECF No. 76]; Brief in Support of Zimmer’s Motion for Summary Judgment [ECF No. 77] (collectively referred to as “Zimmer’s Motion”).

As outlined in Zimmer's Motion, the undisputed evidence shows that Plaintiff knew or reasonably should have known of her potential claim against Zimmer by January 30, 2015, at the latest. On January 30, 2015, Plaintiff was diagnosed with metallosis for the second time and had the last of many discussions with her doctor about the cause of her pain. Plaintiff, after she should have known of the potential connection between her pain and the Zimmer prosthetic hip device, then waited until eleven days after the two-year statute of limitations expired to file her claim. *See* Zimmer's Motion [ECF Nos. 75-77.] If the Court denies summary judgment by finding a question of fact exists as to Plaintiff's actual or constructive knowledge, Zimmer respectfully requests that the Court bifurcate the trial scheduled to begin on July 31, 2018, and try first the statute of limitations question to a separate jury.

A bifurcated trial is required and makes sense for several reasons. First, the Court has broad discretion to bifurcate issues in the interest of efficient case management. Bifurcation of the statute of limitations issue could shorten a two-week trial to a mere two days or less, conserving substantial judicial resources and jury time.

Second, bifurcation with a separate jury to hear the merits of the product liability claims eliminates the potential evidentiary problem and prejudice caused by Plaintiff's doctor's unsubstantiated and prejudicial opinion that the Zimmer prosthetic hip device was the cause of Plaintiff's pain. *See e.g.*, Deposition of Dr. Prodromos Ververeli, attached as Exhibit B to Zimmer's Statement of Undisputed Facts [ECF No. 76], at pp. 128-129, 105:12-106:20. Though the testimony directly relates to her notice of a potential claim against Zimmer and is therefore not only relevant but critical to the triggering of the statute of limitations period, some of that same testimony is prejudicial and potentially inadmissible as to the merits of Plaintiff's product liability claims.

Third, this proposal will not prejudice Plaintiff. Instead, she will enjoy similar economic advantages, particularly the potential to avoid the expense of paying for the time and arrangements for witnesses, in particular her three expert witnesses. If Plaintiff somehow establishes that her claim was timely filed (which it was not), then the merits of her product liability claims could be tried without any further reference to or discussion of the statute of limitations. A second jury would be immune from any lingering doubt on that issue.

Because the issues proposed to be tried separately are unrelated—with the statute of limitations issue being strictly procedural and the product liability claim being substantive—this case presents an ideal scenario for bifurcation and separate juries. Such an order would constitute an exercise of prudent case management.

II. Bifurcation Of The Statute of Limitations Issue Is Warranted

A. The Court Has Broad Discretion To Bifurcate, Which Will Serve Judicial Economy.

District courts have broad discretion to order separate trials of discrete issues under Federal Rule of Civil Procedure 42(b). *See Idzajt v. Pennsylvania R.R. Co.*, 456 F.2d 1228, 1230 (3d Cir. 1972 (per curiam)); *see also Lis v. Robert Packer Hosp.*, 579 F.2d 819, 824 (3d Cir. 1978) (“[T]he rule in this circuit since 1972 has been that the decision to bifurcate *Vel non* is a matter to be decided on a case-by-case basis and must be subject to an informed discretion by the trial judge”). In determining whether to bifurcate, district courts must “weigh the various considerations of convenience, prejudice to the parties, expedition, and economy of resources.” *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984).

The Third Circuit and district courts within the Third Circuit affirm bifurcation when it is calculated to reduce the length of a trial and otherwise promote judicial economy. *See In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 452 n.5 (3d Cir.1997) (“[B]ifurcation preserved

judicial resources and reduced the expense of the parties, and the district court did not abuse its discretion in ordering such a process”).¹ Courts in this district have also recognized the benefits of bifurcation in carving out discrete issues for individual consideration. *See White v. SMI of Pattison Ave., L.P.*, No. C.A. 92-1724, 1998 WL 633697, at *5 (E.D. Pa. Aug. 11, 1998) (bifurcating liability and damages phases of trial because “[i]t would be a waste of everyone’s time and the jury’s time to hear evidence on damages if the jury found the defendants were not liable for the injuries in the first place”); *Tabas v. Tabas*, No. CIV.A. 91-1355, 1996 WL 107848, at *2 (E.D. Pa. Mar. 12, 1996) (bifurcating liability and damages to potentially “spare both sides the expense of presenting the minute accounting evidence that both sides recognize this case will entail”). Other courts have also bifurcated statute of limitations issues under Rule 42(b) for precisely the reasons Zimmer advances. *See, e.g., Gomez v. City of Torrance*, 438 Fed. Appx. 626, 628 (9th Cir. 2011) (“[D]istrict court did not abuse its discretion in bifurcating the trial into a statute of limitations phase and a liability phase because the statute of limitations issue was dispositive”); *Burgess-Lester v. Ford Motor Co.*, No. 1:06CV43, 2007 WL 3088082, at *1 (N.D. W.Va. Oct. 22, 2007) (“[B]ifurcating the trial on the . . . statute of limitations defense would promote convenience, avoid prejudice and be conducive to expedition and judicial economy”). Additionally, a district court in New Jersey granted a similar motion with similar arguments in a case about a different Zimmer product. *See Brady v. Zimmer, Inc.*, No. 10-3043, *verdict returned* (D.N.J. May 12, 2015).

¹ *See also Emerick*, 750 F.2d at 22 (affirming bifurcation of trial into liability and damages phases); *Franklin Music Co. v. American Broad. Co.*, 616 F.2d 528, 538 (3d Cir. 1980) (same); *Plaza-Bonilla v. Cortazzo*, CIV.A. No. 07-2045, 2009 U.S. Dist. LEXIS 30672 at *11-12 (E.D. Pa. Aug. 9, 2009) (same); *Miller v. New Jersey Transit Auth. Rail Operations*, 160 F.R.D. 37, 41 (D.N.J. 1995) (“Trifurcation may actually shorten the trial”); *Smith v. Alyeska Pipeline Serv. Co.*, 538 F. Supp. 977, 984 (D. Del. 1982) (bifurcating liability and damages to potentially spare lengthy trial), *aff’d*, 758 F.2d 668 (Fed. Cir. 1984).

Finally, bifurcation is proper when the opposing party fails to show prejudice from bifurcation. *See Bandai Am. Inc. v. Bally Midway Mfg. Co.*, 775 F.2d 70, 74 (3d Cir. 1985) (affirming district court's exercise of discretion to bifurcate fraud issue, noting that party opposing bifurcation failed to show prejudice); *see also U.S. Gypsum Co. v. Schiavo Bros., Inc.*, 668 F.2d 172, 181 (3d Cir. 1981) ("The touchstone, in reviewing bifurcated proceedings, is whether the party bearing the burden of proof was unfairly prejudiced by the procedures employed").

Bifurcation of the statute of limitations issue is appropriate here because it may save the Court substantial time and resources. The statute of limitations issue undoubtedly involves fewer and less complex factual questions than Plaintiff's product liability claims. Trial of the statute of limitations will consume far less of this Court's (and a jury's) time than the remaining portion of the case, which involves complex matters of product liability dependent on the testimony of numerous expert and fact witnesses. If Zimmer prevails on its statute of limitations defense, trial of the remainder of the case will be unnecessary.

B. Bifurcation Sidesteps Significant Evidentiary Problems.

This case presents prejudicial evidentiary problems that bifurcation would avoid. As set forth in Zimmer's Motion, Dr. Ververeli's discussions with Plaintiff in February of 2013 and January of 2015 that the Zimmer prosthetic hip device was causing her pain, as well as the explanation of why it would need to be replaced, are critical to the determination of Plaintiff's state of mind and the triggering of the statute of limitations period. *See Zimmer's Motion* [ECF Nos. 75-77.] If the Court finds a factual issue preventing summary judgment, then Zimmer must introduce evidence of what Plaintiff was told and understood in 2013 and 2015 so that a jury can resolve Zimmer's statute of limitations defense. But that same evidence, specifically Dr.

Ververeli's speculative and unsupported opinions as to what was causing Plaintiff's pain, is potentially inadmissible with respect to the merits of Plaintiff's negligent design claim. Furthermore, the harm on the merits caused by this type of potentially inadmissible evidence could not be cured by a confusing limiting instruction to the jury with respect to how and when this evidence could be considered. Bifurcation is the only way to avoid the almost certain prejudice that would arise from being required to introduce evidence that should be excluded in its entirety on the merits of Plaintiff's claim.

Moreover, bifurcation will allow the parties to avoid confusing the jury on liability with the evidence presented on statute of limitations. For example, on the statute of limitations issue, Zimmer will need to present evidence showing that Dr. Ververeli and Plaintiff subjectively **believed** that the prosthetic hip device was a cause of her injuries, though Zimmer's ultimate position is that this belief was incorrect, unfounded, and inadmissible. Given that position, the jury may be confused as to why Zimmer is presenting this evidence or its significance. Similarly, for her case on liability, Plaintiff will want to present all of the testimony from Dr. Ververeli and Plaintiff and her medical records that created their subjective belief that the prosthetic hip device may have caused her injuries, but the jury may be confused as to why Plaintiff is offering that evidence, given that it necessarily results in her losing the case under the statute of limitations argument. To avoid this jury confusion, the wholly separate issues of statute of limitations and liability should be tried before separate juries.

C. Preliminary Resolution Of The Statute Of Limitations Issue Would Not Prejudice Plaintiff.

Plaintiff cannot legitimately claim undue prejudice from an early, separate determination of the statute of limitations issue. Instead, both sides benefit economically if the end result obviates the need for a much lengthier, more expensive trial. Plaintiff has listed three expert

witnesses and presumably plans to have numerous other witnesses testify live at trial. If these costs can be spared through preliminary adjudication of Zimmer's statute of limitations defense, that is to Plaintiff's economic benefit. Simply put, preliminary resolution of the statute of limitations defense makes her case less expensive and less difficult to try.²

Bifurcation also presents logistical advantages. In a preliminary bifurcated trial of the statute of limitations issue, Zimmer will seek to establish Plaintiff's knowledge through deposition designations of Dr. Ververeli and live testimony of Plaintiff. There would be no inconvenience to any of Plaintiff's witnesses, and presumably only Plaintiff herself would be subject to being recalled as a witness. If Plaintiff prevailed and defeated Zimmer's statute of limitations defense, then the second bifurcated portion of the trial would resume in a traditional fashion. Plaintiff would open her case on the merits of the product liability claims unburdened by Zimmer's statute of limitations defense. This is the feasible and logical approach designed to streamline proceedings.

III. The Court Should Empanel A Second Jury If It Is Necessary To Try The Remainder Of The Case

If Plaintiff convinces a jury that she timely filed her claim (which she did not) then the Court should empanel a second jury to hear the merits of her claim. This is necessary because of the evidentiary problem discussed above. Although Plaintiff's knowledge of her doctor's comments regarding whether the Zimmer prosthetic hip device was the cause of her pain is relevant to the running of the statute of limitations, those same comments are inadmissible as to

² To the extent Plaintiff claims that the jury is entitled to weigh all issues together and that she is prejudiced by the fact of separate trials, such an argument reflects nothing more than hope that either the jury would ignore valid proof of Zimmer's statute of limitations defense or improperly consider such evidence on the merits of her claim. Zimmer's statute of limitations defense is strictly procedural and unrelated to the merits of whether the Zimmer prosthetic hip device was negligently designed, whether it caused Plaintiff's injuries, and the extent of any such injury; all issues that Plaintiff seeks to present and prove. Because the statute of limitations does not overlap with the merits, there is no logical or equitable reason that requires the evidence to be heard together.

the merits of her negligent design claim, and Zimmer is entitled to their exclusion. Calling a separate second jury solves this problem.

A separate jury presents no constitutional problem either. As the Third Circuit has explained, “[t]he Seventh Amendment requires that, when a court bifurcates a case, it must divide issues between separate trials in such a way that the same issue is not reexamined by different juries.” *Paoli*, 113 F.2d at 452 n. 5 (internal quotations omitted) (indicating that the court could have called a second jury without a constitutional problem); *see also Paine Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 587 F. Supp. 1112 (D. Del. 1984) (ordering second jury for an unrelated issue in bifurcated case and noting, “[t]he prohibition is not against having two juries review the same evidence, but rather having two juries decide the same essential issues”). Because the statute of limitations issue does not overlap with the merits of Plaintiff’s product liability claims, the same issues will not be reexamined by different juries, and no constitutional issue arises.³

IV. Conclusion

In the event that the Court does not grant summary judgment, Zimmer respectfully requests that it bifurcate Zimmer’s statute of limitations defense for a trial separate from issues of liability and damages, and empanel a second jury if it remains necessary to try the remainder of the case, or for any other relief the Court deems appropriate.

³ Zimmer acknowledges that calling a second jury requires additional effort for the Court and staff. However, the potential time and cost savings of a two-day trial versus a two-week trial outweigh the time and resources required to empanel and *voir dire* a second jury.

Dated: June 22, 2018

Respectfully submitted,

/s/ Sean J. Powell

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and Zimmer Surgical, Inc. (f/k/a Zimmer
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/s/Sean J. Powell

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SURGICAL, INC.	:	
	:	
Defendants.	:	

ORDER

This matter having come before the Court on ZIMMER’S MOTION FOR BIFURCATION AND SEPARATE TRIALS, it is hereby ORDERED that the Motion is GRANTED.

Done this ____ day of _____, 2018.

By the Court:

EDWARD G. SMITH, J.