UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	**SECTION "L"**
	:	
	:	**JUDGE FALLON**
.. ..	:	

THIS DOCUMENT RELATES TO THE FOLLOWING CASES:
Civil Action No. 00-2577, and only on behalf of
Plaintiff Patricia L. Deiz, wife of and on behalf of
Richard Diez, Richard Diez, Jr., and Marc J. Diez

ORDER & REASONS

Before the Court is the Plaintiff's Motion for Expedited Hearing of this Court's March 11, 2003 Order and Reasons Severing Plaintiff's Theories of Recovery; or, in the Alternative, Motion for Federal Rule of Procedure 54(B) Entry of Final Judgment Regarding the Severance of Plaintiffs' Theories of Recovery and for a Stay of These Proceedings Pending Decision by the Appellate Court; or in the Second Alternative, Motion for Decision on the Issue of Design Defect, for Federal Rule of Procedure 54(B) Entry of Final Judgment on the Issue of Design Defect, and for a Stay of These Proceedings Pending Decision by the Appellate Court. The Motion for Expedited Hearing is GRANTED, and the Court will consider the matter on the briefs at this time. For the following reasons, the Plaintiffs' request for reconsideration and for alternative forms of relief are DENIED.

I. BACKGROUND

The genesis of this case began on August 21, 2000 when the Judicial Panel on Multidistrict Litigation transferred all federal court actions concerning the use of the drug Propulsid, manufactured by the defendants, to this Court for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. After nearly three years of pretrial discovery, this MDL consists of approximately 28 class actions from 30 states and several thousand individual cases. Some of these cases were originally filed in this Court. To date, more than 7 million pages of documents have been produced in discovery, which is nearing conclusion.

As the discovery began winding down, this Court expressed its desire to begin trials of individual actions that were originally filed in this Court since it still maintained original jurisdiction over those actions. The Court further noted that it wished to proceed to trial on three types of cases involving Propulsid: wrongful death cases, personal injury cases, and the sustained prolonged QT cases seeking medical monitoring. The Court permitted counsel representing the Louisiana plaintiffs to designate which cases would be scheduled for trial. Representative cases reflecting the three categories were selected for trial, which were scheduled to be held consecutively beginning in January, 2003.[1] The case of the plaintiffs in the above-captioned action, Patricia L. Diez, Richard Diez, Jr., and Marc J. Diez, was one of those cases selected for trial. Upon the motion of plaintiffs' counsel, the trial date of the three cases was continued until March, 2003, with the Diez's case scheduled to begin March 17, 2003.

It is undisputed that the plaintiffs' only theory of relief is the Louisiana Products Liability Act

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[1]One of the other two cases scheduled for trial was dismissed on defendants' motion for summary judgment. The defendants also have a motion for summary judgment pending before the Court in the third case scheduled for trial. These Order and Reasons will not affect that case.

("LPLA"), which is the exclusive theory of recovery against a manufacturer for injuries caused by a defective product that is determined to be "unreasonably dangerous." The LPLA provides that a product may be unreasonably dangerous in one of four ways: (1) defective composition or construction; (2) inadequate warnings; (3) defective design; and (4) breach of express warranty. The parties agree that there is an issue of fact, which will require a trial, on the inadequate warnings theory. On March 7, 2003, the defendants brought for oral argument before this Court a motion for partial summary judgment on the other three theories of recovery. The defendants argued that the plaintiffs had failed to show a genuine issue of material fact that Propulsid was unreasonably dangerous by virtue of a defect in design, a defect in construction or composition, or breach of an express warranty. The plaintiffs did not contest summary judgment on the construction or composition or express warranty issues. They do contest summary judgment on the defective design theory. Under this theory, the plaintiffs are required to prove that, at the time of manufacture, there was an alternative design in existence which was in effect safer than the product at issue. A potentially dispositive question is whether the LPLA permits evidence of other drugs to be introduced to show an alternative design to Propulsid.

During oral arguments, the Court and counsel noted that this issue was res nova under Louisiana law. Further, the Court noted that the issue, despite the Court's and the parties' exhaustive research, has not been specifically addressed by any other cases, state or federal. Further, the plaintiffs argued that the only Fifth Circuit case to seemingly address the issue, *Theriot v. Danek Medical, Inc.*, 168 F.3d 253 (5th Cir. 1999), was distinguishable, and the Court find that this argument may have merit. Following oral arguments, the Court took the matter under advisement. Still wrestling with this issue, the Court conducted a telephone status conference with the attorneys in the case on March 10, 2003 to discuss the

status of the case. The Court noted that it was inclined to sever the issues of warning defect from the design defect issue and proceed to trial on the former the following week. Plaintiffs' counsel indicated its objections to such a ruling at that time. The following day, March 11, the Court issued an order severing the issues for trial.

That order granted in part the defendants' motion for partial summary judgment on the construction/ composition and warranty claims. The court further reserved ruling on the design defects issue. The plaintiffs do not dispute that part of the order as part of their motion for reconsideration. What the plaintiffs do dispute, however, was the severance of the design and warnings claims, with the warnings claims to be tried beginning on March 17. The Court's authority for such action is found in Rule 42(b) of the Federal Rules of Civil Procedure, which provides:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED. R. CIV. P. 42(b).

Plaintiffs now move the Court to reconsider that ruling. As one alternative to that ruling, plaintiffs ask this Court to certify the order of severance as a final judgment under Rule 54(b) and stay this matter pending resolution of a the validity of this Court's order of severance by the Fifth Circuit. As a second alternative, plaintiffs request that this court decide the issue of design defect, and enter a final judgment on that issue pursuant to Rule 54(b) and stay matters pending decision of the design defect issue by the Fifth Circuit. The Court now writes to explain further its reasons for severance and denial of plaintiffs' alternate

requests for relief.

II. ANALYSIS

A. RULE 42(B)

The decision to sever issues for trial rests within the sound discretion of this Court. *See Conkling v. Turner*, 18 F.3d 1285, 1294 (5th Cir. 1994) (quoting *First Texas Sav. Ass'n v. Reliance Ins. Co.*, 950 F.2d 1171, 1174 n.2 (5th Cir. 1992)). As the language of Rule 42(b) indicates, a trial court has four main considerations in severing a case: (1) whether the issues are separate issues; (2) whether the issues could be tried separately without prejudice; (3) whether a separate trial would be conducive to judicial economy; and (4) whether severance interferes with a party's rights to a jury trial under the Seventh Amendment. *See In re Bendectin Litigation*, 857 F.2d 290, 320 (6th Cir. 1988) (summarizing a Rule 42(b) analysis). The fourth issue, a party's right to a jury trial, is concerned mainly with the court's ability to separate the issues for trial. Accordingly, the Court will not discuss that issue apart from the first issue, but will consider the two together.

B. SEPARATION OF ISSUES

The Court notes at the outset of its analysis that the plaintiffs do not argue that the issues could not be separated. Rather, the plaintiffs rely on prejudice and judicial economy to support their arguments. However, the Court will discuss this issue to provide a complete explanation of its reasons in this case.

The Fifth Circuit in *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978), echoed the concerns of the Supreme Court in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), and held that bifurcation of trials should not be routine and should be done only if the issues are "so distinct and separable from the others that a trial of it alone may be had without injustice." *Blue Bird*, 573

F.2d at 318. The court noted that such a rule existed "for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent." *Id.* The court, however, did not foreclose the idea of a trying claims to multiple juries. Rather it noted that bifurcation and the use of two juries "'must be grounded upon a clear understanding betwen the court and counsel of the issue or issues involved in each phase and what proof will be required to pass from one phase to the next.'" *Id.* at 318-19 (quoting *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1324 (5th Cir. 1976).

Appellate courts have previously permitted separate juries to consider issues arising out of the same set of facts. In *Houseman v. United States Aviation Underwriters*, 171 F.3d 1117 (7th Cir. 1999), the plaintiff was injured when the plane, in which he was a passenger crashed. His initial suit alleged the pilot's negligence as the cause of the accident. He thereafter sought to amend his petition to name the manufacturer of a defective air filter aboard the plane as an additional tortfeasor. The district court refused to stay the case against the pilot to permit additional discovery as to the manufacturer. Instead, the court bifurcated the trials of the two defendants and elected to proceed first against the pilot. At trial, the jury found the pilot negligent but determined that his negligence was not the cause of the crash. The plaintiff appealed the district court's bifurcation order contending that two juries would be trying the same issue, in violation of his Seventh Amendment rights.

The Seventh Circuit rejected that view and affirmed the district court. The court held that the plaintiff's Seventh Amendment concerns would be alleviated because the second jury would not be able to re-determine factual issues common to both trials that were necessary for the outcome. *Id.* at 1126. The court further noted that the theories of liability against the two defendatns were different and distinct.

The *Houseman* court distinguished its previous decision in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), wherein the Seventh Circuit denied class certification of a nation-wide class action against manufacturers of blood products. *Id.* at 1304. The district court in *Rhone-Poulenc* had certified a class and determined that one jury would hear the issue of the defendants' negligence, while subsequent juries would determine issues of comparative negligence, proximate cause, and damages. The Seventh Circuit reversed, finding that the issues of negligence, comparative negligence, and proximate cause were too intertwined to be separated. *Id.* at 1303. Specifically, the court found that decisions on comparative negligence and proximate cause would necessarily require a second jury to consider the first jury's determination of negligence because of the interrelationship between the three legal issues. *Id.* In contrast, the *Houseman* court found that the issues to be tried were separate enough to warrant two juries. *Id.* at 1127.

In the instant case, the LPLA creates four exclusive theories of liability, as noted above. *See* LA. REV. STAT. ANN. § 2800.54. However, a plaintiff need not prevail on all four theories to be successful; it is sufficient if the plaintiff prevails on one theory. *See id.*; *Green v. BDI Pharmaceuticals*, 803 So. 2d 68, 72 (La. App. 2d Cir. 2001). Thus, the design defects and inadequate warnings claims are separable. A finding of liability on one theory does not guarantee or preclude a finding of liability on the other. The required elements of proof are also different and distinct. A warnings claim in a prescription drug case such as this one focuses on whether the defendant adequately warned the plaintiff's doctor of the dangers of the product, while the defective design claim focuses on the actions of the defendant in manufacturing the drug despite alternative designs. Further, the Court does note that a design defect claim references the adequacy of warnings. However, it is merely an element of proof in that case. A finding of an adequate warning

specifying all of the potential risks will actually help the plaintiffs by showing the likelihood of the risks involved in using Propulsid. Thus, the Court finds that these issues are separate and that it will not cause an injustice to try them separately.

B. PREJUDICE TO THE PARTIES

Plaintiffs argue that the defendants will not be prejudiced by a continuance and stay of the proceedings, but the plaintiffs will be prejudiced. Plaintiffs contend that they will be prejudiced because they will have to endure two lengthy trials regarding the death of a loved one. The Court recognizes the plaintiffs' situation, but it does not agree that the defendants' will not be prejudiced. Further, a stay of this matter pending decisions by the Fifth Circuit will prejudice everyone, the plaintiffs included.

Staying this trial will potentially delay matters for six months to a year awaiting decision by the Fifth Circuit. This is particularly so if the Court adopts one of the plaintiffs' proposed alternatives and makes the issue of severance an appealable issue under Rule 54(b). Under that scneario, the Court would have to await the Fifth Circuit's ruling on severance before proceeding with the issue of design defect. Further, Plaintiffs' Liaison Counsel argued to the Court during oral arguments on the design defect issue that certification of the question of design defect to the Louisiana Supreme Court would be appropriate. While this Court lacks such authority, the Fifth Circuit may do so, and it is probable that the parties will request that such action be taken. Doing so before trial on the matter would necessarily add further delay and expense to the case.

Plaintiffs will unquestionably be prejudiced by the delays they seek. They filed suit in this action almost three years ago, and have yet to see any resolution of claims for the death of their loved one. The Court finds it simply is not in their best interests to have to wait more than another year before any results

are seen. Further, such action is not in the best interests of this MDL. This Court and counsel have worked diligently to bring the matters to this point, and the Court has repeatedly expressed its desire to avoid the "black hole effect" that MDLs have become criticized for. Delaying trials in this matter, will delay action in this Court.

The Court further finds that it is in the best interests of the parties, as well as the MDL, to package their claims and allow the warnings issue to be tried separately. Following a verdict, the parties in the present litigation, as well as the MDL litigants, will have a clear indication of how these claims are likely to proceed in future MDL cases. If the Court were to permit both actions to be tried together, and this Court were reversed on appeal on the design defect, it would necessitate another trial more than a year from now on the same issues. This also would harm the MDL because any verdict resulting from a trial of both issues would eliminate the opportunity to see how a jury responds to each theory or issue. Furthermore, as the defendants suggest, evidence admissible to prove an inadequate warning may not be relevant to prove design defect or vice versa. In short, the Court finds that it is in everyone's best interests to proceed to trial immediately on the warnings issue and subsequently focus on the design theory. The Court finds that severance of these theories will not be prejudicial to either plaintiffs or defendants.

Also, the Court does not feel that piecemeal appeals of this case would be appropriate because they would delay the ultimate outcome of this case and retard the progress of both the instant case and the MDL. The Court finally notes that the plaintiffs have already requested a continuance in this matter, four weeks before trial was expected to begin. Now, on the eve of trial, plaintiffs seek to further delay the matter. The Court concludes that any delay would prejudice the defendants. They have expended considerable time preparing this case for trial, as have the plaintiffs. To simply stop matters now, without

any clear indication as to when the case would resume, is simply not appropriate.

C. JUDICIAL ECONOMY

Plaintiffs also contend that two trials would not be expedient or economically feasible for this Court or the parties. They contend that they will have to bear the expense of experts coming to town twice to testify. Such costs include lodging, meals, and expert fees. Plaintiffs fail to mention that the defendants are likely to incur such costs themselves, but have no objection to such severance. Plaintiffs fail to point out that these experts in this case are the same experts testifying in the vast majority of MDL cases involving Propulsid before this Court as well as other state courts. It is not as though this were an isolated case where the experts would have to come to town twice. These experts have already appeared before this Court on at least one occasion in connection with the MDL, advancing the same opinions they are likely to advance in the upcoming trials. Additional appearances are more than likely. Looking at the facts of this case, the Court simply does not find that it would be a lack of judicial economy to proceed to trial on the warnings issue.

Finally, the Court is mindful that its primary duty in this case is owed to the litigants in this case, but the Court cannot ignore its responsibilities as an MDL transferee court. The Court must balance the two interests. In doing so, the Court re-iterates its previous statements that trial of the issue of adequate warnings will be helpful to all litigants, including the Diez family, in an attempt to move this litigation forward toward an ultimate conclusion.

III. PLAINTIFFS' ALTERNATIVE REQUESTS

Plaintiff first requests that if the Court denies reconsideration of its severance order that it issue a final judgment on the issue of severance pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

The Court finds that Rule 54(b) is inapplicable in this case. That rule permits entry of a final judgment only upon adjudication as to "fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." FED. R. CIV. P. 54(b). In this case, the issue of severance does not dispose of one of the issues or parties in the case; thus, the rule does not apply. The plaintiff's first alternative request for relief is DENIED.

Second, plaintiff requests this Court to decide the issue of design defect, make it a final judgment pursuant to Rule 54(b), and stay these proceedings, pending the disposition of the case by the Fifth Circuit. As noted above, the Court does not feel that it is appropriate to stay these proceedings. Rather, trial should proceed on the issue of alternative warnings. This request is likewise DENIED.

IV. CONCLUSION

In conclusion, the plaintiffs' motion for reconsideration of this Court's March 11, 2003 Order and Reasons is DENIED. The Court further DENIES the plaintiffs' alternative requests for relief, for the reasons stated above.

New Orleans, Louisiana this 13th day of March, 2003

/S/ ELDON E. FALLON
UNITED STATES DISTRICT JUDGE