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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE: ROUNDUP PRODUCTS  
LIABILITY LITIGATION

)  
) MDL No. 2741  
)  
) Case No. 3:16-md-02741-VC  
)

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*Hardeman v. Monsanto Co., et al.,*  
3:16-cv-0525-VC  
*Stevick v. Monsanto Co., et al.,*  
3:16-cv-2341-VC  
*Gebeyehou v. Monsanto Co., et al.,*  
3:16-cv-5813-VC  
\_\_\_\_\_

) **MONSANTO COMPANY'S MOTION**  
) **TO REVERSE BIFURCATE**  
) **THE GROUP 1 TRIALS**  
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1 Monsanto respectfully requests that the Court reverse bifurcate the Group 1 trials into  
 2 two phases—a first phase focused on medical causation (*i.e.*, did the product at issue cause the  
 3 specific plaintiff’s injury), and, if necessary, a second phase to address Monsanto’s liability  
 4 and the assessment of any damages. Applying Federal Rule of Civil Procedure 42(b) (or  
 5 equivalent state court rules), courts throughout the country have reverse bifurcated trials in  
 6 personal injury litigations where juries have been asked to resolve complex and dispositive  
 7 issues of causation, including in cases involving:

- 8 • **Asbestos**, *see, e.g., Shetterly v. Raymark Indus., Inc.*, 117 F.3d 776, 782 (4th Cir.  
 9 1997); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 152 (3d Cir. 1995); *Angelo v.*  
 10 *Armstrong World Indus., Inc.*, 11 F.3d 957, 964-65 (10th Cir. 1993); *Buttram v.*  
 11 *Owens-Corning Fiberglas Corp.*, 16 Cal. 4th 520, 526 (1997); *Williamson v. Plant*  
 12 *Insulation Co.*, 23 Cal. App. 4th 1406, 1412 (1994); *White v. Owens-Corning*  
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*Corp.*, 22 Phila. Cty. Rptr. 91, 93-94 (C.P. Phila. Cty. 1991).
- 13 • **Bendectin**, *see In re Bendectin Litig.*, 857 F.2d 290, 309 (6th Cir. 1988).
- 14 • **DES**, *see, e.g., In re N.Y. Cty. DES Litig.*, 621 N.Y.S.2d 332, 333 (N.Y. App. Div.  
 15 1995) (affirming DES trial with “reverse-bifurcated proceeding”).
- 16 • **Diet Drugs**, *see, e.g., Order, Stafford v. Wyeth Corp.*, No. CIV-02-1118-L (W.D.  
 17 Okla. Jan. 13, 2006); *Order, Bristley v. Wyeth*, No. H-02-4264 (S.D. Tex. May 27,  
 18 2005); Hr’g Tr. at 3-16, *Hines v. Am. Home Prods. Corp.*, No. DD001645 (Cal.  
 19 Super. Ct. Oct. 12, 2004); Hr’g Tr. at 37:1-11, *Granillo v. Wyeth, Inc.*, No. D-0101-  
 20 CV-200400361 (N.M. Dist. Ct. Oct. 6, 2005); Hr’g Tr. at 42:3-4, *Fazzini v. Wyeth,*  
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 24 *Archer v. Wyeth, Inc.*, No. 2595 (C.P. Phila. Cty. Sept. 20, 2004); *Order, Hansen v.*  
 25 *Am. Home Prods. Corp.*, No. 1063 (C.P. Phila. Cty. Sept. 15, 2004); *Order*  
 26 *Regarding Bifurcation, Danielson v. Wyeth*, No. 3968 (C.P. Phila. Cty. Sept. 15,  
 27 2004); Hr’g Tr. at 13, *Berntson v. Wyeth*, No. 2304 (C.P. Phila. Cty. Aug. 17, 2004);  
 28 Hr’g Tr. at 55:12-14, *Downard v. Wyeth*, No. 170 (C.P. Phila. Cty. Aug. 16, 2004);  
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1 *Haley v. Wyeth*, No. 03-05-19179 (Tex. Dist. Ct. Jan. 3, 2006) (attached hereto  
2 collectively as Exhibit 1).<sup>1</sup>

- 3 • **Hormone Replacement Therapy**, *see, e.g.*, Order Granting Phased Tr., *Buxton v.*  
4 *Wyeth Pharm., Inc.*, No. 202 (C.P. Phila. Cty. July 12, 2010) (attached hereto as  
5 Exhibit 2) (ordering reverse bifurcation in hormone replacement therapy case);  
6 Pretrial Conference Hr'g Tr. at 5, 7-8, *Barton v. Wyeth Pharm., Inc.*, No. 6301 (C.P.  
7 Phila. Cty. Sept. 9, 2009) (attached hereto as Exhibit 3) (same); Pretrial Conference  
8 Hr'g Tr. at 27-33, *Nelson v. Wyeth Pharm., Inc.*, No. 1670 (C.P. Phila. Cty. Sept. 5,  
9 2006) (attached hereto as Exhibit 4) (same).
- 10 • **Other personal injuries**, *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 216 (6th Cir.  
11 1982) (affirming reverse bifurcation in personal injury trial arising from hotel fire),  
12 *cert. denied*, 461 U.S. 929 (1985).

13 That approach is particularly appropriate here because it will allow the jury to evaluate  
14 causation based on the actual scientific studies and evidence, and avoid potential confusion or  
15 distraction created by the assessments of that evidence by regulators and IARC, and by  
16 arguments about the methods and motives of those bodies.

17 As this Court made clear in its *Daubert* opinion, the issue of causation turns on the  
18 underlying scientific studies that have been conducted on glyphosate and glyphosate-based  
19 formulations. It also involves analysis of whether Plaintiffs' experts can reliably use a  
20 "differential diagnosis" to opine that Roundup in fact caused a particular plaintiff's NHL, in  
21 light of the plaintiff's specific medical history and potential alternative risk factors or causes.  
22 While evidence of the longstanding, worldwide regulatory approval of glyphosate (and  
23 IARC's apparent dissent from that consensus) may be relevant not only to causation but also  
24 to Monsanto's good faith in marketing its product, evidence of these regulatory approvals and  
25 IARC's divergent findings raises concerns under Rule 403 because it could confuse and  
26 distract the jury from the central scientific evidence. What the actual regulatory bodies and  
27 IARC have said about the science is not a substitute for the jury's own evaluation of the  
28 science. But the temptation would be great for lay jurors to simply assume that either the

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<sup>1</sup> Reverse bifurcation in the *Diet Drug* litigation occurred following an initial national settlement that barred punitive damages in opt-out cases, but the fundamental principle of trying medical causation before liability was endorsed by the Third Circuit. *See In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 318 (3rd Cir. 2004); *see also In Re Diet Drugs Prods. Liab. Litig.*, 123 F. App'x 465, 470-72 (3d Cir. 2005) (subsequent decision affirming a state court's discretion to utilize reverse bifurcation).

1 expert regulators or IARC are correct and end their analysis there, particularly given that the  
2 regulators and IARC have reached such disparate conclusions.

3 The risk of confusion and distraction regarding the threshold causation issues is all the  
4 greater in light of Plaintiff's counsel's recent assertions about his trial strategy: Plaintiff's  
5 counsel stated at the last hearing that he believes IARC's classification is central to the  
6 causation inquiry, notwithstanding this Court's holding that IARC does *not* answer that  
7 question. *Compare* Dec. 5, 2018 CMC Hr'g Tr. at 59:6-10 (Plaintiffs' counsel: "'Roundup  
8 has been on the market for 40 years. It has a demonstrated record of safety.' And there's so  
9 much untruth about that that we have to unpack. We will do that with evidence, but a lot of it  
10 involves IARC because what IARC did is it's the change in the narrative."): *with* PTO 45, at 2  
11 ("[T]he hazard assessment IARC undertakes is too limited and too abstract to fully serve the  
12 plaintiffs' purposes here. A substance could be cause for concern, such that it can and should  
13 trigger preventive public health measures and further study, even when it is not so clearly  
14 dangerous as to allow a verdict in favor of a plaintiff.").<sup>2</sup> Reverse bifurcation would ensure  
15 that the jury's decision on causation is driven by the scientific evidence regarding causation.

16 Moreover, reverse bifurcation is consistent with the principles of judicial economy that  
17 courts have considered in applying Rule 42. If the jury were to rule in Monsanto's favor on  
18 causation, there would be no need for further trial proceedings. And there is little to no  
19 overlap in the potential witnesses that would testify in each phase of the trial: The experts  
20 who have assessed the epidemiological evidence, animal studies, alleged genotoxicity, and the  
21 Plaintiff's medical history would need to testify only in Phase 1, and corporate and regulatory  
22 witnesses could potentially testify in Phase 2 if needed.

23 Finally, in response to this Court's question about the timing of the two phases of trial,  
24 Monsanto respectfully submits that the safest course would be to try the phases in order before  
25

---

26 <sup>2</sup> *See also* PTO 45 at 12 ("But it's enough at this point to say that IARC's hazard assessment considers the  
27 evidence for a different purpose, and without the attention to the effects of current human exposure the Court  
28 must pay here."); *id.* ("A 'hazard assessment,' as IARC and other public health bodies define that inquiry, is not  
what the jury needs to conduct when deciding whether glyphosate actually causes NHL in people at past or  
current exposure levels.").

1 the same jury. Both phases could be tried in under three weeks total, avoiding undue burden  
 2 on the Court and potential jurors. Trying the phases in succession would allow for a more  
 3 efficient presentation of evidence in Phase 2 (if it is necessary) before a jury already familiar  
 4 with many of the underlying facts. And this approach would avoid any potential constitutional  
 5 issues that could be created if different juries were to make different factual determinations  
 6 about the same issues in the same case.

## 7 ARGUMENT

### 8 **I. Standard of Review**

9 Federal Rule of Civil Procedure 42(b) provides that “[f]or convenience, to avoid  
 10 prejudice, or to expedite and economize, the court may order a separate trial of one or more  
 11 separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a  
 12 separate trial, the court must preserve any federal right to a jury trial.” Fed. R. Civ. P. 42(b).  
 13 *See generally Allstate Ins. Co. v. Breeden*, 410 F. App’x 6, 9 (9th Cir. 2010);<sup>3</sup> *M2 Software,*  
 14 *Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1088 (9th Cir. 2005); *Exxon Co. v. Sofec, Inc.*, 54 F.3d  
 15 570, 575 (9th Cir. 1995), *aff’d*, 517 U.S. 830 (1996).

16 “Under Rule 42(b), the district court has broad discretion to bifurcate a trial to permit  
 17 deferral of costly and possibly unnecessary proceedings pending resolution of potentially  
 18 dispositive preliminary issues.” *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 998 (9th  
 19 Cir. 2001). The Ninth Circuit reviews the district court’s decision to bifurcate a trial for abuse  
 20 of discretion and has routinely affirmed the use of bifurcated trials. *Id.*; *Exxon Co.*, 54 F.3d at  
 21 575-76; *Counts v. Burlington N. R.R. Co.*, 952 F.2d 1136, 1139 (9th Cir. 1991). Recently, in  
 22 *Allstate Insurance Company v. Breeden*, the Ninth Circuit affirmed a district court’s *sua*  
 23 *sponte* bifurcation of liability and damages, holding that “Allstate’s liability under the disputed  
 24 insurance policy was a dispositive issue; the jury’s verdict on Allstate’s misrepresentation  
 25 claim obviated the need for a jury trial on Breeden’s claims for damages, which properly  
 26 served the goals of Rule 42(b).” 410 F. App’x at 9.

27 \_\_\_\_\_  
 28 <sup>3</sup> *Cf.* 9th Cir. R. 36-3(b) (“Unpublished dispositions and orders of [the Ninth Circuit] issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1.”).



1 **II. The Court Should Reverse Bifurcate The Group 1 Trials.**

2 Courts throughout the country have commonly employed reverse bifurcation in cases  
3 involving potentially dispositive issues of medical causation, including toxic torts, asbestos,  
4 pharmaceuticals, and other mass torts. *See, e.g., supra* at 1-2 (collecting cases). The Advisory  
5 Committee Notes to Rule 42 state: “While separation of issues is not to be routinely ordered,  
6 it is important that it be encouraged where experience has demonstrated its worth.”<sup>4</sup> As noted  
7 above, the experiences from mass tort litigations involving asbestos, Bendectin, DES, diet  
8 drugs, and hormone replacement therapy amply demonstrate the worth of reverse bifurcation.

9 Indeed, numerous federal appellate courts applying Rule 42(b) have upheld a trial  
10 procedure like the one Monsanto suggests here, where in the first phase, the jury focused on  
11 “whether the plaintiff [had] a disease that was caused by [the alleged product],” and (if  
12 necessary) in the second phase, the jury considered “what warnings the defendants should  
13 have given . . . and whether the products to which the plaintiff was exposed were the  
14 defendants’.” *Angelo*, 11 F.3d at 965; *see also Shetterly*, 117 F.3d at 782 (affirming reverse  
15 bifurcation in asbestos trial); *In re Bendectin Litig.*, 857 F.2d at 309 (affirming district court  
16 decision to try the issue of causation in a first phase and the issue of liability in a later phase in  
17 action alleging that the anti-nausea drug Bendectin caused plaintiffs’ birth defects); *accord In*  
18 *re Beverly Hills Fire Litig.*, 695 F.2d at 216 (affirming reverse bifurcation in hotel fire case).<sup>5</sup>

19 The Tenth Circuit’s seminal decision in *Angelo* affirmed a similar phased trial  
20 procedure for reasons that well apply here. The plaintiffs in *Angelo*, like here, argued that the  
21 district court abused its discretion by using the reverse bifurcation format because it was  
22 prejudicial to them and because the issues in the trial were inseparable. 11 F.3d at 964-65.

23  
24 <sup>4</sup> The Manual for Complex Litigation, which has been acknowledged by this District “as a resource for managing  
25 complex cases” (<http://www.cand.uscourts.gov/complexlitmanual>), notes that “[i]n pursuing traditional or test  
26 case trials, the judge may conduct a unitary trial, bifurcate liability and damages, or create other helpful trial  
27 structures.” Manual For Complex Litig. (Fourth) at 465, § 22.93 (2004) (footnote omitted). *Cf. In re W. States*  
28 *Wholesale Nat. Gas Antitrust Litig.*, --- F. App’x ---, 2018 WL 3720027, at \*2 (9th Cir. Aug. 6, 2018) (citing  
with approval the Manual for Complex Litigation (Fourth)).

<sup>5</sup> *See also Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 356 (3d Cir. 1999) (noting without disapproval that asbestos  
products trial with a single plaintiff “proceeded in a reverse bifurcated format” with “damages . . . considered in  
Phase I and liability in Phase II”); *Kirk*, 61 F.3d at 152 (same).

1 The Tenth Circuit disagreed, holding that while bifurcation would be “improper if the issues  
2 [were] not separable,” the phase one issues of damages and causation and the phase two issues  
3 of liability and punitive damages were “clearly separable.” *Id.* The court explained:

4 The first phase considers only whether the plaintiff has a disease that was caused  
5 by asbestos, and what damages the plaintiff suffered as a result. The evidence  
6 therefore concentrates on the plaintiff’s health history, the extent of his exposure  
7 to asbestos, the possible causes of his illness, and the losses he has suffered from  
8 his illness. The second phase, on the other hand, concentrates on what warnings  
9 the defendants should have given in light of the “state of the art” and whether the  
10 products to which the plaintiff was exposed were the defendants’. Punitive  
11 damages are also decided in the second phase, because they also focus on the  
12 defendants’ conduct.

13 *Id.* at 965. The Tenth Circuit also held that reverse bifurcation was efficient and economical  
14 because at the time of the district court’s bifurcation order, “[plaintiffs’] claim was one of  
15 more than 600 asbestos cases on” the Northern District of Oklahoma’s docket. Under those  
16 circumstances, reverse bifurcation would “obviously save[] time and money by eliminating  
17 some cases after the first phase, thus avoiding trial of the defendants’ liability.” *Id.* at 964.<sup>6</sup>

#### 18 **1. Reverse Bifurcation Avoids Undue Prejudice And Jury Confusion.**

19 As in *Angelo*, and consistent with Rule 42, Monsanto’s proposal would involve  
20 separating the trial into two phases involving distinct issues. Phase One would focus on the  
21 scientific evidence of causation, and involve testimony from witnesses who have assessed the  
22 epidemiological and other studies, as well as the plaintiff’s medical history. Phase Two, by  
23 contrast, could involve the regulatory history, Monsanto’s responses to that history, the  
24 reasonableness of its decisions to market and sell a product with universal regulatory approval,  
25 and any other issues relevant to damages.

26 This approach would have the benefit of avoiding undue prejudice to the parties and  
27 juror confusion on the issue of causation. As noted above, reverse bifurcation would ensure

28 \_\_\_\_\_  
<sup>6</sup> The administrative decision of the Pennsylvania state court in Philadelphia County to stop the practice of  
reverse bifurcation absent consent of the parties does not change the rationale for or acceptance of the practice by  
federal appellate courts under Rule 42. *Cf.* Gen. Court Regulation No. 2012-01 at 2, *In re: Mass Tort & Asbestos  
Programs* (C.P. Phila. Cty. Feb. 15, 2012), available at <https://www.courts.phila.gov/pdf/regs/2012/cpajgr2012-01.pdf>.

1 that the jury focuses on the central evidence regarding causation, such as the epidemiological  
2 and other studies and the particular plaintiff's medical history. At the same time, bifurcation  
3 would avoid the risk that the jury becomes distracted or misled by extraneous evidence of  
4 corporate conduct or by the complex regulatory record. The jury should conduct its own  
5 assessment of the key causation evidence without the risk of confusion from various third-  
6 party evaluations of that evidence (especially because regulators and IARC apply different  
7 statutory or other criteria in their evaluations), or of distraction by arguments regarding the  
8 reliability and credibility of IARC or the EPA and other worldwide regulatory agencies.

9 Reverse bifurcation also makes good sense in light of Plaintiff's counsel's statements  
10 that he intends to focus on, and improperly bolster, the IARC classification of glyphosate as  
11 central to their "narrative" in the causation case:

12 "Roundup has been on the market for 40 years. It has a demonstrated record of  
13 safety.' And there's so much untruth about that that we have to unpack. We will  
14 do that with evidence, but a lot of it involves IARC because what IARC did is it's  
the change in the narrative."

15 Dec. 5, 2018 CMC Hr'g Tr. at 59:6-10; *see also id.* at 70:25-71:4 ("[F]or what it's worth,  
16 IARC in the realm of academics is like the Blue Blood of scientists, you know. So it's, like,  
17 the fact that our guys have all been on panels and they were there, I mean, that's really an  
18 important part of the gravitas of their opinion."). The Court has already made clear that "[a]  
19 'hazard assessment,' as IARC and other public health bodies define that inquiry, is not what  
20 the jury needs to conduct when deciding whether glyphosate actually causes NHL in people at  
21 past or current exposure levels." PTO 45 at 12. And while IARC and all other regulatory  
22 assessments and approvals may be relevant in the case, the Rule 403 prejudice concerns are  
23 significant on the issue of causation. Allowing all of the regulatory evidence to come in  
24 subject to a limiting instruction does not cure that prejudice—there is a clear risk, exemplified  
25 by the verdict in the *Johnson* case and apparently invited by the Plaintiffs here, that the jury  
26 would be tempted to simply adopt one side of the alleged debate between regulators and IARC  
27 rather than undertaking the necessary job of independently assessing the scientific evidence to  
28

1 determine whether the plaintiff has satisfied his or her legal burden of proving causation.  
 2 Reverse bifurcation eliminates that risk and replaces it with a trial proceeding that properly  
 3 focuses the jury's attention on the scientific evidence.

4 **2. Reverse Bifurcation Promotes Judicial Economy.**

5 Reverse bifurcation also encourages judicial efficiency, one of the bedrocks of Rule  
 6 42(b). If the jury finds in Monsanto's favor on causation, it "obviate[s] the need for a jury trial  
 7 on" liability or punitive damages and saves time and money, "which properly serve[s] the  
 8 goals of Rule 42(b)." *Allstate Ins. Co.*, 410 F App'x at 9. The Court itself has alluded to this  
 9 possibility, observing that general causation is a "close . . . question," and that "plaintiffs  
 10 appear to face a daunting challenge at the next phase" "which will involve an attempt by  
 11 individual plaintiffs to present enough evidence to warrant a jury trial on whether glyphosate  
 12 caused the NHL they developed." PTO 45 at 3. Bifurcation could avoid the presentation of  
 13 days of company conduct and regulatory evidence through multiple witnesses that might prove  
 14 unnecessary if the jury finds for Monsanto on either of the "close" questions of causation.

15 Nor would the proposed bifurcation prolong the overall length of the complete trial—  
 16 as noted above, the issues of causation and compensatory damages are separate and distinct  
 17 from Monsanto's alleged negligence and company conduct and would involve testimony from  
 18 different witnesses. Even accepting Plaintiffs' position that Monsanto's response to IARC,<sup>7</sup>  
 19 the U.S. EPA, and foreign regulators is relevant to liability and punitive damages,<sup>8</sup> that  
 20 evidence would have no relevance to the proposed phase one issue of causation, and thus there  
 21 is no risk of duplicative testimony across the two phases. *See, e.g., Angelo*, 11 F.3d at 964-65  
 22 (holding that evidence relating to causation and damages, which would "concentrate[] on the  
 23

24 <sup>7</sup>*See, e.g.*, Dec. 5, 2018 CMC Hr'g Tr. 59:15-19 (Plaintiffs' counsel: "The simple fact is IARC was a game  
 25 changer; right? It was the first time a group of independent scientists -- this is our viewpoint; you don't have to  
 26 agree -- looked at it with no dog in the fight and made a decision, and that's why -- and the way they responded to  
 27 it and the way they generated junk science."); *see also id.* at 60:22-25 ("And so the context and quality of the  
 28 science and whether or not it is supported by an authority is part of the case, and I don't think looking at it in  
 isolation can possibly work or be fair to us or them.").

<sup>8</sup> *See, e.g., id.* at 58:1-5 ("Monsanto's conduct following the IARC monograph or even before it came out is very  
 clear evidence of punitive intent. It shows a desire to manipulate scientists to orchestrate -- I mean, it's our  
 position. I'm sure they disagree. I'm just giving our pitch.").

1 plaintiff's health history, the extent of his exposure to [the product], the possible causes of his  
2 illness, and the losses he has suffered from his illness," is clearly separable from liability  
3 evidence, which would "concentrate[] on what warnings the defendants should have given,"  
4 punitive damages, and other issues regarding the defendants' conduct).

### 5 **III. Both Phases Should Be Tried To The Same Jury.**

6 Monsanto's motion is premised on the proposal that if Plaintiffs prove the initial  
7 threshold requirement of causation, the Court could then conduct a second phase trial of  
8 liability and damages before the same jury. This approach will avoid undue delay in resolving  
9 this case and will also allow for a more efficient presentation of the evidence in Phase 2 before  
10 an informed jury, should a second phase be necessary. Further, as noted by the Manual of  
11 Complex Litigation (Fourth), "[g]enerally, when issues are severed for separate trials, they  
12 should be tried before the same jury unless they are entirely unrelated." *Id.* at 122, § 11.632.  
13 While the issue of causation is separable and distinct enough that it can be separated from  
14 liability and damages for purposes of reverse bifurcation under Rule 42(b), the issues are not  
15 "entirely unrelated," and so trying the second phase before a different jury could create the risk  
16 of a possible Seventh Amendment violation.

17 The Seventh Amendment does not permit a trial to be structured such that one jury  
18 might reconsider the factual determinations of a prior jury. It guarantees the "right of a litigant  
19 to have only one jury pass on a common issue of fact." *Alabama v. Blue Bird Body Co.*, 573  
20 F.2d 309, 318, 328 (5th Cir. 1978) (reversing certification of antitrust liability class premised  
21 on improperly bifurcated trial where damages would be decided by a second, separate jury).  
22 Moreover, the Seventh Amendment's Reexamination Clause and the Fifth Amendment's Due  
23 Process Clause prohibit courts from having a second jury decide a discrete issue unless that  
24 issue is "so distinct and separable from the others that a trial of it alone may be had without  
25 injustice." *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931).

26 While Monsanto is not seeking a separate trial limited to punitive damages, case law  
27 addressing a partial retrial limited to punitive damages is instructive on how the Seventh  
28

1 Amendment applies to bifurcated trials. In that context, the courts have focused on the  
2 question whether issues of liability and punitive damages are so interwoven as to preclude  
3 submission of those issues to separate juries. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546,  
4 1554 (10th Cir. 1991) (upholding a district court’s decision upon reversal of a punitive  
5 damages award to retry the entire case, including both liability and punitive damages, because  
6 “a punitive damage claim is not an independent cause of action or issue separate from the  
7 balance of a plaintiff’s case”), *cert. denied*, 504 U.S. 910 (1992).<sup>9</sup> The Ninth Circuit, while  
8 declining to adopt a bright-line rule, has likewise held that when determining if damages could  
9 “be tried separately, by separate juries” after a first jury tried liability, “the issues of liability  
10 and damages, exemplary or normal, are not so distinct and separable that a separate trial of the  
11 damage issues may be had without injustice.” *United Air Lines, Inc. v. Wiener*, 286 F.2d 302,  
12 304, 306 (9th Cir. 1961), *cert. denied*, 366 U.S. 924 (1961).<sup>10</sup>

13 As set forth above, the reverse bifurcation proposed here does not present the exact  
14 same concerns because the evidence relevant to causation and compensatory damages is in  
15 fact separate from the evidence relevant to liability and punitive damages. Nonetheless,  
16 because the issues of causation and liability are not “entirely unrelated,” Monsanto believes  
17 the proper course is to try both phase 1 causation and phase 2 liability/damages, if necessary,  
18

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19 <sup>9</sup> *See, e.g., Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 966-67 (10th Cir. 2009)  
20 (reaffirming broad view of the Seventh Amendment’s protections and refusing to remand case for a damages-  
21 only retrial by a second jury); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1177-78  
22 (10th Cir. 1981) (en banc) (holding that, if the plaintiff refused to accept remittitur of a punitive damages award,  
23 “there should be a new trial on all issues since we feel that a new trial on less than all the issues could not be had  
24 without confusion and uncertainty, which would amount to a denial of a fair trial”), *cert. denied*, 464 U.S. 824  
25 (1983).

26 <sup>10</sup> The Ninth Circuit further explained that “[t]he question of damages is so interwoven with that of liability that  
27 the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which  
28 would amount to a denial of a fair trial.” *United Air Lines*, 286 F.2d at 306; *cf. Sears v. S. Pac. Co.*, 313 F.2d  
498, 503 (9th Cir. 1963) (determining that, “because the evidence [on liability and damages] would largely be the  
same, a jury should be permitted to consider and apply it, with the aid of the court’s instructions, to all issues  
rather than the isolated one of damages”); *White v. Ford Motor Co.*, 500 F.3d 963, 974 (9th Cir. 2007) (“In a  
typical case, the same jury would award both compensatory and punitive damages. Here, because of this case’s  
unique procedural history, the jury empaneled to award punitive damages was unfamiliar with the original jury’s  
verdict and the amount of compensatory damages it awarded. Without knowing the amount of those damages,  
the punitive damages jury could not have come to a reasoned conclusion as to the amount of additional damages  
necessary to deter Ford from similar conduct in the future.”).

1 before the same jury. This approach will avoid any potential constitutional issues and will also  
2 allow for a more efficient presentation of the evidence.

3 **CONCLUSION**

4 For the reasons set forth above, the Court should grant Monsanto's Motion to Reverse  
5 Bifurcate the Group 1 trials of the *Hardeman*, *Stevick*, and *Gebeyehou* cases.

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1 DATED: December 10, 2018

Respectfully submitted,

2 /s/ Brian L. Stekloff \_\_\_\_\_

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23 MONSANTO COMPANY



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of December 2018, a copy of the foregoing was filed with the Clerk of the Court through the CM/ECF system which sent notice of the filing to all appearing parties of record.

/s/ Brian L. Stekloff

# **EXHIBIT 1**

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

PATRICIA A. STAFFORD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-02-1118-L
	)	
WYETH CORPORATION,	)	
	)	
Defendant.	)	

**ORDER**

This matter is before the court on Defendant Wyeth's Motion for Reverse Bifurcation of Trial.

A court may order a separate trial of any claim or separate issue "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." Bifurcation is not an abuse of discretion if such interests favor separation of issues and the issues are clearly separable. Regardless of efficiency and separability, however, bifurcation is an abuse of discretion if it is unfair or prejudicial to a party.

Angelo v. Armstrong World Industries, Inc., 11 F.3d 957, 964 (10th Cir. 1993) (citations omitted). Pursuant to this standard, the court has carefully reviewed the parties' briefs and finds reverse bifurcation is warranted in this action. Although plaintiff claims the issues of causation and damages are so interwoven with the issue of liability that they cannot be tried separately, she offers no concrete examples of the interwoven nature of the evidence. It is not enough that the same witnesses may testify in both phases, because the issues and their testimony differ.

See Angelo, 11 F.3d at 965. Likewise, plaintiff has not demonstrated any prejudice she would incur as result of the reverse bifurcation process. Finally, the court finds reverse bifurcation will clearly promote judicial economy and ensure compliance with the National Class Action Settlement Agreement.

Defendant Wyeth's Motion for Reverse Bifurcation (Doc. No. 54) is therefore GRANTED. Trial of this matter will be conducted in two phases. In the first phase, the following issues will be tried to verdict: (1) whether plaintiff's aortic heart valve has been injured; (2) whether that injury was caused in fact by defendant's medicine; and (3) the amount of damages that will compensate plaintiff for that injury. If a verdict is rendered for plaintiff on each of these issues, the same jury will then consider the issue of liability on the claims asserted by plaintiff, including whether defendant's conduct or product defect was the direct cause of the injury found by the jury in phase one.

It is so ordered this 13th day of January, 2006.

A handwritten signature in cursive script that reads "Tim Leonard". The signature is written in black ink and is positioned above a horizontal line.

TIM LEONARD  
United States District Judge

United States Courts  
Southern District of Texas  
ENTERED

MAY 27 2005

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

Michael N. Milby, Clerk of Court

JUDITH B. BRISTLEY,

Plaintiff,

VS.

WYETH f/k/a AMERICAN HOME  
PRODUCTS CORPORATION; WYETH  
PHARMACEUTICALS, et al.,

Defendants.

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CIVIL ACTION NO. H-02-4264

**ORDER**

Upon remand of this case to this Court from the MDL, and understanding the National Class Action Settlement Agreement and its effect on this intermediate opt-out case, the Court finds that the trial of this matter should be conducted in two phases. In the first phase, the following issues will be tried to verdict: 1) whether the Plaintiff's aortic heart valve has been injured; 2) if so, whether that injury was caused in fact by Defendant's medication; and 3) if so, the amount of compensatory damages to which Plaintiff is entitled. If a verdict is rendered for Plaintiff on each of those issues, then in the second phase the same jury will consider the issue of liability on the causes of action asserted, including the issue of whether Defendant's conduct and/or product defect was the proximate and/or producing cause of the injuries found in the first phase.

Signed this 27<sup>th</sup> day of May, 2005.



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Lee H. Rosenthal  
United States District Judge



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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SE D HON. DANIEL SOLIS PRATT, JUDGE

LARRY R. HINES, )  
 )  
 ) PLAINIFF, )  
 )  
 ) VS. ) NO. DD001645  
 )  
 ) AMERICAN HOME PRODUCTS CORPORATION, )  
 )  
 ) DEFENDANT. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
TUESDAY, OCTOBER 12, 2004  
WEDNESDAY, OCTOBER 13, 2004

APPEARANCES:

FOR PLAINTIFFS:

BARON & BUDD, P.C.  
BY: ELLEN A. PRESBY, ESQ.  
AMY M. CARTER, ESQ.

NEMEROFF LAW FIRM  
BY: RICK NEMEROFF, ESQ.

MARY ALEXANDER & ASSOCIATES,  
P.C.  
BY: MARY E. ALEXANDER, ESQ.

HACKARD & HOLT  
BY: PETER T. HOLT, ESQ.  
DAVID E. SMITH, ESQ.

**COPY**

(APPEARANCES CONTINUED ON NEXT PAGE.)

SHARON M. LOPEZ, CSR #5154  
OFFICIAL REPORTER



1 CASE NUMBER: DD001645  
2 CASE NAME: HINES VS. AHPC  
3 NORWALK, CALIFORNIA TUESDAY, OCTOBER 12, 2004  
4 DEPARTMENT SE D HON. DANIEL SOLIS PRATT, JUDGE  
5 APPEARANCES: (AS HERETOFORE NOTED.)  
6 REPORTER: SHARON M. LOPEZ, CSR NO. 5154  
7 TIME: 10:05 A.M.  
8

9 THE COURT: GOOD MORNING, EVERYBODY.  
10 WHY DON'T WE START FROM MY RIGHT AND WORK OUR WAY  
11 AROUND. YOU WANT TO STATE YOUR APPEARANCES, PLEASE.

12 MR. ROSEMOND: ERICK ROSEMOND, WILLIAMS BAILEY, FOR  
13 PLAINTIFFS.

14 MS. ALEXANDER: GOOD MORNING, YOUR HONOR. MARY  
15 ALEXANDER.

16 MR. SMITH: GOOD MORNING, YOUR HONOR. DAVID SMITH FROM  
17 HACKARD AND HOLT.

18 MR. NEMEROFF: GOOD MORNING, YOUR HONOR. RICK NEMEROFF  
19 FOR PLAINTIFFS.

20 MS. PRESBY: ELLEN PRESBY, YOUR HONOR. GOOD MORNING.  
21 FOR THE PLAINTIFFS.

22 MR. KIESEL: GOOD MORNING, YOUR HONOR. PAUL KIESEL.

23 MR. BRADFORD: GOOD MORNING, YOUR HONOR. TIM BRADFORD  
24 FOR WYETH.

25 MR. SPOONER: MARK SPOONER, YOUR HONOR, AND I WOULD LIKE  
26 TO INTRODUCE MY PARTNER, PETER BLEAKLEY. HE IS A PARTNER OF  
27 MINE FROM OUR WASHINGTON D.C. OFFICE, AND PETER HAS BEEN  
28 INVOLVED IN A NUMBER OF CASES RECENTLY TRIED IN PENNSYLVANIA



1 AND GEORGIA AND ELSEWHERE AND WILL BE TRYING THIS CASE WITH  
2 US. WE DIDN'T FILE A FORMAL PRO HAC VICE MOTION BECAUSE  
3 IT'S COVERED BY YOUR GENERAL ORDER NO. 1, BUT I WOULD ASK  
4 YOU TO ADMIT MR. BLEAKLEY FOR PURPOSES OF THIS CASE..

5 THE COURT: SURE. THAT'S FINE. I WOULD BE HAPPY TO.

6 MR. BLEAKLEY: THANK YOU, YOUR HONOR.

7 MS. CUMMINGS: JENNIFER CUMMINGS FOR WYETH.

8 MR. LE BERTHON: GOOD MORNING, YOUR HONOR. ADAM LE  
9 BERTHON FOR WYETH.

10 MR. STANLEY: DAVID STANLEY FOR WYETH.

11 MR. HOLT: GOOD MORNING, YOUR HONOR. PETER HOLT FOR  
12 PLAINTIFFS.

13 THE COURT: OKAY. OBVIOUSLY, I HAVE BEEN THROUGH  
14 EVERYTHING, AND UNLESS ANYBODY FEELINGS DIFFERENTLY, I THINK  
15 THE MOST OBVIOUS PLACE TO START IS ON THE MOTION FOR REVERSE  
16 BIFURCATION UNLESS FOR SOME REASON YOU WANT TO HEAR ALL THE  
17 DECISIONS ON EVERYTHING AND THEN GET TO THAT, BUT I THINK  
18 THAT WOULD BE KIND OF BACKWARDS.

19 MR. KIESEL: ACTUALLY, YESTERDAY WHEN MR. SPOONER AND I  
20 MET, WE HAD DISCUSSED TAKING UP THE REVERSE BIFURCATION  
21 MOTION FIRST, AND WHAT WE ACTUALLY FELT, ALTHOUGH I PROPOSED  
22 DOING IT FIRST, WAS THAT THE COURT TAKE UP THE SECONDARY  
23 ISSUE, WHICH TO WYETH'S MIND HAS SOME BEARING ON THAT ISSUE,  
24 AND THAT RELATES TO THE PPH EVIDENCE. SO DEPENDING UPON THE  
25 COURT'S --

26 THE COURT: SO WHAT ARE YOU SAYING? TAKE UP THE REVERSE  
27 BIFURCATION AND THEN THE PPH EVIDENCE?

28 MR. KIESEL: ACTUALLY, IT WOULD BE THE REVERSE. IF THE





1 COURT WANTS TO GIVE US ITS TENTATIVE ON THE REVERSE  
2 BIFURCATION, WE CAN JUST ARGUE OR NOT ARGUE AND THEN DEAL  
3 WITH THE ISSUE OF PPH AS THE SECOND ISSUE OR REVERSE IT AND  
4 HAVE IT BE THE FIRST ISSUE THE COURT DEALS WITH AND THEN  
5 HAVE THE MOTION TO BIFURCATE AT SOME POINT AFTER THAT.

6 MR. SPOONER: I MEAN THAT WAS OUR FEELING AS WELL, YOUR  
7 HONOR. THESE ISSUES ARE, OBVIOUSLY, INTERCONNECTED, AND  
8 WHETHER YOU FORMERLY TAKE UP BIFURCATION FIRST AND THE PPH  
9 ISSUE SECOND DOESN'T SO MUCH MATTER, BUT OUR PREFERENCE  
10 WOULD BE THAT THEY BE CONSIDERED TOGETHER.

11 THE COURT: WELL, THIS IS OUR FIRST DISAGREEMENT. I  
12 JUST THINK IT MAKES MORE SENSE TO DO THE REVERSE BIFURCATION  
13 FIRST, AND IT MAKES IT A LOT EASIER ON ME.

14 MR. KIESEL: FINE. SO YOU GET TO CONTROL THAT ONE, YOUR  
15 HONOR.

16 THE COURT: WHICH I'M SEEKING TO DO AT THIS POINT IN  
17 TIME.

18 ALL RIGHT. ON THE REVERSE BIFURCATION, DOES  
19 ANYBODY ELSE WANT TO BE FURTHER HEARD? AND FEEL FREE IF YOU  
20 WANT TO.

21 MR. SPOONER: WE STATED ALL OUR ARGUMENTS LAST TIME,  
22 YOUR HONOR, AND, UNLESS YOU HAVE QUESTIONS, WE WILL REST ON  
23 THE PAPERS AND THE ARGUMENT WE MADE BEFORE.

24 MR. KIESEL: I THINK THE ONLY THING I WILL ADD, YOUR  
25 HONOR, BECAUSE I DON'T KNOW IF THIS WAS BROUGHT TO YOUR  
26 ATTENTION, IS THAT LAST WEEK THERE WAS A VERDICT IN  
27 PENNSYLVANIA ON A REVERSE BIFURCATION WHERE THE DEFENDANTS  
28 ARE IN FACT GOING NOW, AFTER THERE'S BEEN A VERDICT, TO THE



1 LIABILITY PHASE, AND SO THEY'RE ACTUALLY -- BEFORE THERE HAD  
2 BEEN A REVERSE BIFURCATION AND THAT APPARENTLY ENDED THE  
3 TRIALS. NOW, THERE WAS A SIGNIFICANT PLAINTIFF'S VERDICT.  
4 THEY ARE GOING TO BE GOING TO THE SECOND ROUND, THE  
5 LIABILITY ROUND.

6 THE COURT: I READ OF ONE THAT I THOUGHT HAD SETTLED.  
7 IS THIS A DIFFERENT ONE?

8 MR. KIESEL: YES, YOUR HONOR. IT HAPPENED LAST WEEK.  
9 THERE WAS A \$2.1 MILLION VERDICT THAT MR. ROSEMOND'S FIRM  
10 GOT IN PENNSYLVANIA, AND THE DEFENDANTS ARE NOW PROCEEDING  
11 TO THE SECOND ROUND, WHICH IS STARTING OCTOBER 25TH FOR  
12 LIABILITY.

13 THE COURT: OKAY. I THINK THAT ACTUALLY HELPS ME WITH  
14 THE DECISION. I WANT YOU TO KNOW I THOUGHT ABOUT --- I  
15 HAVEN'T THOUGHT ABOUT REVERSE BIFURCATION. THAT WAS KIND OF  
16 NEW TO ME, BUT I HAD THOUGHT ABOUT HOW I WAS GOING TO DEAL  
17 WITH ALL THIS EVIDENCE PREVIOUSLY, AND IT IS A 352 SITUATION  
18 AND IT'S NOT EASY, BUT WHAT MADE IT EASIER WAS JUST KNOWING  
19 THAT AT THIS POINT IN TIME WE DON'T HAVE PUNITIVE DAMAGES.  
20 I WAS CONCERNED -- AND I AM MIXING THE TWO MOTIONS AT THIS  
21 TIME, BUT I WANT YOU TO KNOW I WAS CONCERNED ABOUT THE  
22 INFLAMMATORY NATURE OF THAT EVIDENCE. WHEN WE WERE IN PHASE  
23 I, IT WAS A DIFFERENT SITUATION. PUNITIVE DAMAGES WERE  
24 THERE, AND AFTER GOING THROUGH EVERYTHING I FELT THAT IT WAS  
25 RELEVANT, AND THE RELEVANCY, YOU KNOW, CLEARLY OUTWEIGHED  
26 EVERYTHING ELSE AT THAT POINT IN TIME.

27 I HAVE COME TO THE CONCLUSION THAT I THINK, AND  
28 AFTER READING EVERYTHING, I FEEL PRETTY STRONGLY AT THIS



1 POINT IN TIME THAT REVERSE BIFURCATION IS THE WAY TO HANDLE  
2 IT, AND I WANT YOU TO HEAR WHY. I THINK I OWE IT TO  
3 EVERYBODY TO HEAR WHY I CAME TO THAT CONCLUSION. AND I  
4 DIDN'T COME TO THE CONCLUSION UNTIL I FINISHED ALL THE  
5 MOTIONS IN LIMINE, BUT WHEN YOU GO THROUGH THE MOTIONS IN  
6 LIMINE AND SEE ALL THE EVIDENCE, AND IT'S DIFFICULT  
7 EVIDENCE, AND IT'S DIFFICULT EVIDENCE JUST TO SAY NO, I'M  
8 GOING TO KEEP IT OUT ON A 352 BASIS, BECAUSE IT IS VERY  
9 RELEVANT EVIDENCE, AND I THOUGHT -- I MEAN THERE ARE ANY  
10 NUMBER OF MOTIONS THAT I THOUGHT I AM GOING TO BE WALKING A  
11 TIGHTROPE THE WHOLE TIME TRYING TO ALLOW A CERTAIN AMOUNT IN  
12 THAT I THINK IS RELEVANT AND TRYING TO KEEP OUT WHAT I FEEL  
13 MIGHT BE INFLAMMATORY FROM MY POINT OF VIEW, AND IT CLEARLY  
14 WAS, AND I JUST DID NOT FEEL THAT I COULD MANAGE THE  
15 ATTORNEYS BECAUSE I THINK TO THE ATTORNEYS -- WELL, I KNOW  
16 IT'S A VERY, VERY, VERY IMPORTANT CASE AND IT'S AN IMPORTANT  
17 DECISION AND I KNOW WHAT THESE CASES MEAN.

18 SO WHEN I WENT THROUGH EVERYTHING, I FELT THE  
19 BIFURCATION, ESPECIALLY IN LIGHT OF EVERYTHING THAT I READ  
20 NATIONWIDE, WAS THE BEST WAY TO HANDLE IT. AND, IF THERE  
21 WAS A \$2.1 MILLION VERDICT LAST WEEK, THEN I AM EVEN MORE  
22 COMFORTABLE WITH IT AT THIS POINT IN TIME.

23 I THINK IT'S A BETTER WAY FOR ME TO HANDLE  
24 EVERYTHING. IT'S A BETTER WAY FOR ME TO KEEP EVERYTHING  
25 UNDER CONTROL. ANY NUMBER OF REASONS THAT I COULD GO INTO.  
26 THE TRIALS WILL BE CLEANER. I'M NOT SO CONCERNED ABOUT THE  
27 TRIALS BEING SHORTER. I HONESTLY FEEL --- AND I HAVE NOTHING  
28 TO BACK THIS UP. IT'S JUST A FEELING. I HONESTLY FEEL



1 THAT, IF WE TRY FOUR OR FIVE OR TEN -- I AM GUESSING  
2 PROBABLY TEN -- GOOD CASES AND GET GOOD VERDICTS, WE ARE  
3 GOING TO BE ABLE TO RESOLVE THESE CASES, AND THAT'S MY HOPE.

4 IF I DON'T DO A BIFURCATION PROCESS AND I HAVE TO  
5 FIGHT MY WAY THROUGH THE WHOLE CASE, I DON'T THINK THE  
6 VERDICTS WILL BE GOOD, AND WHAT I'M TALKING ABOUT -- I AM  
7 LOOKING AT BOTH SIDES NOW -- AND THE PERCEPTION THAT'S  
8 GIVEN, BECAUSE I THINK THE PERCEPTION IS VERY, VERY  
9 IMPORTANT, AND THAT'S WHAT I'M STRUGGLING FOR.

10 LET ME MAKE SURE I HAVE SAID EVERYTHING THAT I  
11 WANTED TO. I THINK THAT PRETTY MUCH COVERS EVERYTHING. I  
12 WANT EVERYBODY TO KNOW THE REASON I AM MAKING THIS DECISION,  
13 THE BIG PART OF THE REASON IS I FEEL IT'S EASIER TO CONTROL,  
14 AND I THINK IT GIVES ME THE OPPORTUNITY TO HAVE BETTER  
15 VERDICTS.

16 MR. KIESEL: OKAY. SO LET ME RESPOND AND ASK YOU TO  
17 KEEP REALLY AN OPEN MIND WHEN I GO ABOUT THIS BECAUSE I  
18 THINK THAT CONCEPTUALLY REVERSE BIFURCATION WILL NOT PRODUCE  
19 THE RESULTS THAT WE WANT IN TERMS OF A VERDICT THAT GOES  
20 FROM A TO Z AND THAT THE JURY IS GOING TO EVALUATE ALL OF  
21 THE EVIDENCE IN AWARDING THEIR DAMAGES AND DOING A  
22 TRADITIONAL TRIAL, AND THIS REVERSE BIFURCATION CONCEPT  
23 WHERE THE JURY DOESN'T HAVE THE CONTEXT, FOR EXAMPLE, OF  
24 NOTICE, WHICH GOES TO THE FAILURE TO WARN, WHICH IS AN  
25 IMPORTANT COMPONENT OF WHETHER OR NOT THE PLAINTIFF WOULD  
26 HAVE EVEN TAKEN THE DRUG HAD THE WARNINGS BEEN MADE AND  
27 NOTICE BEEN GIVEN, AND THAT'S CRITICAL TO THE FINDING OF  
28 CAUSATION THAT WILL BE A PART OF OUR CASE IN CHIEF. AND



1 IT'S VERY DIFFICULT TO PARSE OUT WHAT'S CAUSATION AND  
2 DAMAGES AND WHAT'S LIABILITY WHEN YOU'RE DEALING WITH STRICT  
3 LIABILITY, FAILURE TO WARN, WHAT THE NOTICES WERE, WHEN THEY  
4 HAD THE NOTICE, AND WHAT THIS PLAINTIFF WOULD HAVE DONE HAD  
5 NOTICE BEEN PROPERLY GIVEN. SO FOR THAT REASON I THINK IT  
6 BECOMES VERY PROBLEMATIC FROM AN EVIDENTIARY STANDPOINT TO  
7 BIFURCATE, BUT I WANT TO ADDRESS THE BIGGER PICTURE.

8 THE COURT: PLEASE, AT LEAST FOR PURPOSES OF YOUR  
9 ARGUMENT, ASSUME THAT I THOUGHT OF ALL THESE THINGS IN  
10 ARRIVING AT THE DECISION.

11 MR. KIESEL: FAIR ENOUGH.

12 THE COURT: AND I MEAN THAT SINCERELY.

13 MR. KIESEL: I KNOW YOU DO.

14 THE COURT: I MEAN I WEIGHED THIS, AND THE LAST WEEK  
15 I'VE READ AND REREAD EVERYTHING AGAIN AND REWEIGHED IT AND  
16 TRIED TO ARRIVE AT THE FAIREST VERDICT OR THE FAIREST  
17 DECISION WITH THE UNDERSTANDING THAT I COULD ARRIVE AT AN  
18 AREA WHERE WE ARE GOING TO HAVE THE BIGGEST IMPACT ON THESE  
19 CASES. SO KEEP THAT IN MIND.

20 AND, BELIEVE ME, I APPRECIATE WHAT YOU ARE TALKING  
21 ABOUT BECAUSE I WENT THROUGH IT IN MY MIND. IF I'M A  
22 PLAINTIFF, WHAT AM I GOING TO HAVE TO DO? AND IT'S SO  
23 FOREIGN TO ALL OF US. I HAVE NEVER DONE THIS BEFORE EITHER.

24 MR. KIESEL: SO THE REASON WHY YOU WANT TO DO IT -- THE  
25 REASON WHY YOU WANT TO DO IT IS BECAUSE YOU WANT TO PREVENT  
26 HAVING TO BE A REFEREE IN SOME MEASURE BETWEEN WHAT EVIDENCE  
27 IS GOING TO BE ADMITTED --



1 THE COURT: THAT IS ONE OF THE REASONS.

2 MR. KIESEL: OKAY. RECOGNIZING THAT FROM THE COURT'S  
3 PERSPECTIVE EACH SIDE IS GOING TO TRY TO PUSH THE ENVELOPE  
4 BECAUSE YOU KNOW WHAT WE ARE TRYING TO DO AND YOU KNOW WHAT  
5 THEY ARE TRYING TO DO ---

6 THE COURT: THAT MAY HAVE OCCURRED TO ME AS WELL.

7 MR. KIESEL: RIGHT. AND I MUST TELL YOU THAT YESTERDAY  
8 WE SPENT A GOOD DEAL OF TIME EVALUATING THIS VERY ISSUE, AND  
9 THE APPROACH THAT WE CAME TO, YOUR HONOR, WAS TO REALLY ---  
10 THIS WAS WHAT WE WERE GOING TO SUGGEST TO YOU. IRRESPECTIVE  
11 OF THE REVERSE BIFURCATION ISSUE THAT YOU ARE NOW RAISING, I  
12 THINK IT SOLVES THE PROBLEM. HERE'S WHAT IT IS. WE WERE  
13 GOING TO PROPOSE THAT THE COURT CAREFULLY LIMIT THE EVIDENCE  
14 AS IT RELATES TO, FOR EXAMPLE, PPH WHERE THE DOCUMENTS THAT  
15 WE WOULD SEEK TO BE ADMITTED YOU'D LOOK AT, WHERE THE  
16 TESTIMONY WE WOULD SEEK TO HAVE ADMITTED YOU WOULD HAVE IN  
17 ADVANCE. THE COURT WOULD SPECIFICALLY SCRIPT AND WE WOULD  
18 NOT GO BEYOND THE BOUNDARY OF WHERE THE COURT SET THE LINE,  
19 AND THAT WAY YOU NEEDN'T BE A REFEREE. WE ARE NOT TRYING TO  
20 INFLAME THE JURY OR CREATE A PUNITIVE DAMAGES ENVIRONMENT.  
21 WE WERE GOING TO PROPOSE THAT YOU DO AN INSTRUCTION AT THE  
22 BEGINNING OF THE TRIAL THAT THERE WILL BE NO PUNITIVE  
23 DAMAGES. THERE WOULD BE AN INSTRUCTION AT THE END OF THE  
24 TRIAL THAT THERE ARE TO BE NO PUNITIVE DAMAGES. THAT WE  
25 CAREFULLY HAVE THE COURT AND RECOGNIZE THAT WE AS GOOD  
26 COUNSEL WILL FOLLOW CAREFULLY THE COURT'S GUIDELINES ON NOT  
27 MAKING YOU BE THE REFEREE BUT DOING THESE HEARINGS PRETRIAL,  
28 402. YOU WILL KNOW PRECISELY WHAT IT IS THE COURT ITSELF



1 HAS ALLOWED US TO INTRODUCE, IF ANYTHING, BUT NOT TRY TO GO  
2 TO A CONTORTED PROCESS OF TRIAL, WHICH REALLY IS A VERY  
3 DIFFICULT TASK TO TRY TO PARSE OUT THE EVIDENCE MERELY FOR  
4 THE SAKE OF THE COURT, AND IT'S AN IMPORTANT CONSIDERATION,  
5 NOT ALLOWING US TO INTRODUCE EVIDENCE THAT WOULD PREJUDICE  
6 THE DEFENDANTS AND VICE VERSA.

7 I THINK THAT WE CAN DO THAT, YOUR HONOR, BY REALLY  
8 WORKING WITH THE COURT TO CAREFULLY MEASURE THE EVIDENCE AND  
9 THE TESTIMONY THAT WOULD BE ADMITTED ON ANY AREAS OF DISPUTE  
10 RATHER THAN -- I MEAN, AND YOU HAVE THOUGHT ABOUT THIS, BUT  
11 FROM OUR STANDPOINT IT'S DEVASTATING. WHAT DOES THE JURY DO  
12 WHEN --

13 THE COURT: I WISH YOU WOULDN'T USE THAT WORD.

14 MR. KIESEL: "DEVASTATING"?

15 THE COURT: YES.

16 MR. KIESEL: OKAY. IT'S DIFFICULT FOR THE JURY WHERE  
17 THE JURY IS IN THE POSITION OF SAYING, WELL, I'M GIVING YOU  
18 TWO TO THREE WEEKS OF MY TIME, BUT IT'S GOING TO BE A TWO-  
19 PHASE TRIAL -- YOU KNOW ALL THAT.

20 THE COURT: I HAVE DONE ALL THAT BEFORE. THAT CAN BE  
21 TAKEN CARE OF.

22 MR. KIESEL: SO IF THE COURT'S PRIMARY CONCERN IS TO  
23 LIMIT THE SCOPE OF THE EVIDENCE THAT WOULD COME IN ON AREAS  
24 WHERE THE COURT FEELS THAT THERE WOULD BE A DISPUTE, WE  
25 WOULD PROPOSE, RATHER THAN DOING A REVERSE BIFURCATION,  
26 WHICH IS NOT AN EFFECTIVE USE OF TIME -- THERE'S A LOT OF  
27 REASONS. YOU KNOW THEM ALL. BUT I THINK THAT WE CAN SOLVE  
28 THAT PROBLEM BY REALLY CAREFULLY WORKING WITH THE COURT IN A



1 COOPERATIVE WAY TO HAVE THE TESTIMONY OR EVIDENCE ADMITTED.  
2 THAT SOLVES THE COURT'S CONCERN ABOUT ANY EVIDENTIARY  
3 ISSUES.

4 THERE MAY BE SOME OTHER FACTORS THE COURT IS  
5 CONSIDERING IN TERMS OF THE TIME OF THE TRIALS.

6 THE COURT: IT WAS A COMBINATION OF THINGS. I DID NOT  
7 ARRIVE AT THIS DECISION LIGHTLY. I DIDN'T START OFF WITH  
8 THIS DECISION IN MIND WHEN I STARTED READING EVERYTHING. I  
9 DIDN'T START OFF THAT WAY, AND I DIDN'T MAKE UP MY MIND  
10 UNTIL I WENT THROUGH ALL THE MOTIONS IN LIMINE.

11 YOU KNOW, I HATE TO USE THE WORD, BUT IT'S THE  
12 TOTALITY OF THE CIRCUMSTANCES. WHEN I LOOKED AT  
13 EVERYTHING -- YOU KNOW, PART OF MY JOB IS TO TRY TO GET THE  
14 CLEANEST VERDICTS THAT WE CAN IN THIS SITUATION; VERDICTS  
15 THAT ARE GOING TO BE EFFECTIVE. I HAVE MENTIONED IT BEFORE,  
16 AND I WILL MENTION IT AGAIN. I AM NOT TRYING THREE OR FOUR  
17 THOUSAND CASES OR WHATEVER WE HAVE. THAT'S NOT MY GOAL  
18 HERE. MY GOAL IS TO GET SOME REPRESENTATIVE VERDICTS, THE  
19 BEST POSSIBLE VERDICTS THAT WE CAN GET WITH THE BEST  
20 POSSIBLE MESSAGE THAT IS SENT, WHATEVER IT MIGHT BE.

21 I WENT THROUGH EVERYTHING. I HAVE WEIGHED  
22 EVERYTHING. I KNEW EXACTLY WHAT I WAS GOING TO CONFRONT,  
23 BUT I TRIED TO MAKE THE FAIREST DECISION THAT I COULD BASED  
24 ON THE EVIDENCE THAT WAS BEFORE ME. I DON'T KNOW HOW ELSE  
25 TO SAY IT. I WENT THROUGH EVERYTHING. I LOOKED AT  
26 EVERYTHING. I WENT BACK AND FORTH ON IT, BUT I WILL TELL  
27 YOU IT WASN'T SO MUCH -- I MEAN THE PART ABOUT BEING A  
28 REFEREE IS IMPORTANT BECAUSE, YOU KNOW, I DON'T WANT TO HAVE





1 A PITCHED BATTLE THROUGH THE WHOLE TRIAL, BUT THE SINGLE  
2 FACTOR THAT CHANGED MY MIND WAS, IF I'M LOOKING AT THESE  
3 CASES FROM ACROSS THE COUNTRY, WHAT KIND OF VERDICTS DO THEY  
4 HAVE? WHAT KIND OF EVIDENCE WAS PRESENTED?

5 AND I READ WHAT JUDGE BARTLE WROTE, AND IT WAS VERY  
6 PERSUASIVE. AND I READ, I THINK IT WAS, THE THIRD CIRCUIT.  
7 I READ THAT OPINION AS WELL. I READ THOSE SEVERAL TIMES  
8 BECAUSE THEIR VIEW OF IT IS A LITTLE LARGER THAN MY VIEW OF  
9 IT, AND I WANTED TO HAVE THAT VIEW WHEN I WAS MAKING THIS  
10 DECISION. IF I WERE TRYING ONE OR TWO CASES --- I WILL TELL  
11 YOU RIGHT NOW, IF I WERE TRYING ONE OR TWO CASES AND THAT  
12 WAS IT, I WOULD BE DOING IT DIFFERENTLY, BUT THAT'S NOT WHY  
13 I ARRIVED AT THAT DECISION. THE BIGGEST SINGLE FACTOR WAS  
14 THE PERCEPTION IN TERMS OF THE VERDICTS.

15 MR. KIESEL: SO TWO QUESTIONS. ONE IS IS THERE ANYTHING  
16 I MIGHT BE ABLE TO SAY OTHER THAN TO PRESERVE A RECORD WHICH  
17 MIGHT ENCOURAGE YOU TO RECONSIDER THIS DECISION?

18 THE COURT: NO. AND I MEAN THAT SINCERELY IN THE NICEST  
19 POSSIBLE WAY, AND I AM SERIOUS ABOUT IT. IF YOU DON'T THINK  
20 THAT I THOUGHT ABOUT THIS AROUND THE CLOCK FOR THE LAST  
21 SEVEN OR EIGHT DAYS, JUST ASK MY WIFE. I THOUGHT ABOUT IT  
22 CONSTANTLY, AND I DIDN'T DECIDE THIS UNTIL ABOUT FOUR OR  
23 FIVE DAYS AGO. AND I HAVE A HABIT OF SLEEPING ON A DECISION  
24 AND SEEING IF I CAN CHANGE MY OWN MIND, AND I DIDN'T. IN  
25 FACT, AS I GOT CLOSER TO IT, I FELT MORE COMFORTABLE WITH  
26 IT, AND THE REASON I FEEL MORE COMFORTABLE IS THE MESSAGE  
27 THAT IT SENDS.

28 I THINK THAT'S WHY I'M HERE. I KNOW THAT'S WHY I'M



1     HERE.  AND I COMPARED IT TO THE LAST TIME -- I CAN'T  
2     REMEMBER WHO'S CITING ME TO MYSELF.  I SAW THAT ON THE  
3     HAROUTOUNIAN DECISION, AND I REMEMBER WHEN I WENT THROUGH  
4     THAT DECISION THAT WAS A VERY DIFFICULT DECISION AT THE  
5     TIME.  I DIDN'T KNOW THE IMPACT IT WOULD HAVE, BUT IT WAS A  
6     TOUGH DECISION BECAUSE I WAS TRYING TO WALK A FINE LINE.  
7     BUT WHAT FINALLY SWAYED ME THERE IS WE HAD PUNITIVES, AND I  
8     WAS REAL CONCERNED WITH THE 352 SITUATION WHERE PUNITIVES  
9     WERE PRESENT.

10            AND I'M NOT SAYING THIS EVIDENCE ISN'T RELEVANT.  
11     WE ALL KNOW IT'S RELEVANT.  IT'S A BALANCING TEST THAT I'M  
12     DOING, AND IT'S A 352 AND THE PERCEPTION THAT WE ARE SENDING  
13     NATIONWIDE, BECAUSE I WANT TO SETTLE THESE CASES.  THAT'S MY  
14     GOAL IS TO SETTLE THESE CASES; NOT TO TRY THREE OR FOUR  
15     THOUSAND CASES.  IT'S AS SIMPLE AS THAT.

16            AND DON'T THINK THAT I DIDN'T THINK WHAT IT MEANS  
17     TO EVERYBODY ON BOTH SIDES.  I WENT THROUGH EVERYTHING.  YOU  
18     CAN TELL.  YOU EDUCATE YOURSELF WHEN YOU GO THROUGH THE  
19     MOTIONS IN LIMINE.  I AM JUST PRESERVING MYSELF NOW.  I WANT  
20     YOU TO KNOW WHAT I WENT THROUGH.  I WENT THROUGH IT VERY,  
21     VERY CAREFULLY; NOT THAT I CAN GO THROUGH IT AND STATE THEM  
22     VERBATIM TO YOU.  I WENT THROUGH IT VERY, VERY CAREFULLY,  
23     AND I CAN SEE WHAT BOTH SIDES ARE TRYING TO DO, AND I KNEW  
24     THAT.  AND I THINK IT'S IMPORTANT FROM MY POINT OF VIEW --  
25     I'M MANAGING THREE OR FOUR THOUSAND CASES.  I THINK IT'S  
26     VERY IMPORTANT FROM MY POINT OF VIEW TO HAVE THE BEST  
27     VERDICTS THAT I CAN POSSIBLY HAVE.

28            NOW, THAT DOESN'T MEAN THAT, IF WE GET TO A PHASE



1 II, THAT THIS EVIDENCE WON'T COME IN. I THINK IT DOES COME  
2 IN. I THINK THERE'S A REAL GOOD CHANCE IT COMES IN IN A  
3 PHASE II, AND THAT WAS PART OF THE REASON FOR MY DECISION.

4 I SEE MR. BRADFORD HOLDING HIS BREATH NOW, BUT, YOU  
5 KNOW, I GAVE IT AS MUCH THOUGHT AS I CAN. I DON'T KNOW WHAT  
6 ELSE TO TELL YOU TO JUSTIFY MYSELF. I GAVE IT AS MUCH  
7 THOUGHT AS I COULD. I FEEL COMFORTABLE WITH THE DECISION.  
8 WHEN I TELL YOU I'M NOT GOING TO CHANGE MY MIND, AT LEAST  
9 RIGHT NOW AS I SIT HERE I MEAN IT. I FEEL GOOD WITH IT, AND  
10 I WEIGHED EVERYTHING, AND I THINK IT'S THE BEST DECISION I  
11 COULD HAVE MADE, AS MR. KERRY SAYS, WITH THE INFORMATION HE  
12 HAD AT THE TIME.

13 MR. KIESEL: MY ONLY FINAL REMARK IS THIS, YOUR HONOR.  
14 THE WHOLE PURPOSE OF OUR EMBARKING ON THIS PROCESS THAT WE  
15 HAVE SET OUT FOR OURSELVES FOR OVER A YEAR, SELECTING RANDOM  
16 CASES, HAVING THOSE CASES SELECTED AND WINNOWNED DOWN AND  
17 THEN TRYING THOSE INDIVIDUAL CASES, WAS THE IDEA THAT BY  
18 HAVING SOME INDIVIDUAL VERDICTS THAT THAT WOULD PROVIDE THE  
19 BASIS FOR A RESOLUTION ON THE ENTIRE CALIFORNIA DOCKET. THE  
20 REVERSE BIFURCATION THAT HAS BEEN ONGOING IN SOME COURTS IN  
21 PHILADELPHIA HAS NOT RESULTED, EVEN THOUGH THERE HAS BEEN  
22 THAT REVERSE BIFURCATION, IN A RESOLUTION OF THOSE CASES.  
23 THEY ARE JUST TEEING THEM UP AND TEEING THEM UP, AND SO MY  
24 POINT BEING, YOUR HONOR --

25 THE COURT: I UNDERSTAND THAT, AND I GAVE IT SOME  
26 THOUGHT AS WELL BECAUSE I SAW THAT PATTERN AS WELL TO THIS  
27 POINT. ALL I CAN TELL YOU IS FROM MY POINT OF VIEW, AT  
28 LEAST HISTORICALLY, CALIFORNIA HAS BEEN BELLWETHER. I CAN'T



1 MAKE ANYBODY DO ANYTHING, BUT CALIFORNIA HAS BEEN BELL-  
2 WETHER, AND I WANT TO HAVE THE BEST VERDICTS POSSIBLE.

3 IF THE COMPANY FOR WHATEVER REASON CHOOSES NOT TO  
4 DO ANYTHING, I CAN'T MAKE THEM DO IT, BUT I CAN TELL YOU  
5 THIS. I AM GOING TO HAVE THE BEST TRIALS THAT I CAN HAVE --  
6 THAT I CAN HUMANLY HAVE SOME INFLUENCE OVER THEM, AND THEN  
7 AFTER THAT -- AND I WILL STATE THIS, AND I AM NOT GOING TO  
8 CHANGE MY MIND. I'M NOT TRYING 3,000 CASES. IF WE HAVE  
9 THAT PROBLEM, THEY WILL BE GOING OUT ALL OVER THE STATE. I  
10 WON'T BE DOING THEM FOR THE NEXT THREE YEARS.

11 MR. KIESEL: WHICH IS WHY WE FELT THAT BY HAVING A  
12 COUPLE OF TRIALS -- AND I THINK IT'S IMPORTANT AT LEAST IN  
13 CALIFORNIA THAT WE GIVE THIS A SHOT BECAUSE THE COURT CAN  
14 ALWAYS CHOOSE AN ALTERNATIVE PATH EITHER WAY, I SUPPOSE, AS  
15 WE GET BEYOND THESE INITIAL --

16 THE COURT: THE ARGUMENT GOES BOTH WAYS.

17 MR. KIESEL: CORRECT. BUT THAT WE GIVE THE INDIVIDUAL  
18 CASE TRIAL AN OPPORTUNITY TO SEE WHAT IMPACT THAT DOES HAVE  
19 IN THE REST OF THE COUNTRY AS WE TRY A COUPLE OF THESE CASES  
20 IN A TRADITIONAL MANNER, AND, OBVIOUSLY, IN OUR VIEW WE  
21 THINK THAT IS THE APPROPRIATE APPROACH.

22 IN LIGHT OF THE COURT'S RULING HERE, I THINK WHAT  
23 MIGHT BE BENEFICIAL IS IF WE AS A PLAINTIFF COMMUNITY MIGHT  
24 USE THE JURY ASSEMBLY ROOM.

25 THE COURT: THAT'S FINE. I THOUGHT THAT WOULD PROBABLY  
26 BE A GOOD IDEA. AND I DON'T KNOW, ONCE YOU DISCUSS IT, ON  
27 THE REMAINING MOTIONS IN LIMINE, I DON'T KNOW HOW MANY OF  
28 THOSE I HAVE TO GO THROUGH OR MAYBE YOU CAN TALK AND LET ME



1 HEAR WHAT YOU WANT ME TO DO ON THOSE AS WELL. I'VE GOT  
2 TENTATIVES ON EVERYTHING, BUT I THINK THIS DOES CHANGE A FEW  
3 THINGS, AND MAYBE AFTER YOU TALK, YOU AND MR. SPOONER AND  
4 MR. BRADFORD CAN GET TOGETHER A LITTLE BIT.

5 MR. KIESEL: RIGHT. THERE ARE A LOT OF ISSUES IF THE  
6 COURT CHOOSES TO GO WITH THE REVERSE BIFURCATION.

7 THE COURT: I DON'T MEAN TO SOUND THE WAY THIS IS GOING  
8 TO SOUND. I HAVE MADE MY DECISION.

9 MR. KIESEL: SO WITH THE COURT'S DECISION IN PLACE,  
10 THERE MAY BE OTHER OPTIONS WE WANT TO EXPLORE WITH WYETH.

11 MS. PRESBY: BEFORE WE BREAK, YOUR HONOR, MAYBE THIS IS  
12 NOT THE APPROPRIATE TIME. MAYBE WE WILL TALK ABOUT IT A  
13 LITTLE BIT LATER. BUT IN LIGHT OF THE COURT'S DECISION --

14 THE COURT: I WON'T KNOW UNTIL YOU TELL ME, SO GO AHEAD.

15 MS. PRESBY: THERE YOU GO, AND THAT'S WHAT I WILL DO.

16 WHAT I AM WONDERING IS HOW WE ARE PLANNING OR HOW  
17 THE COURT, HAVING THOUGHT THROUGH THIS, IS PLANNING TO  
18 HANDLE THE ISSUE WITH THE JURY. OUR CONCERN AND WHAT WE  
19 HAVE SEEN IN THE CASES WE'VE BEEN INVOLVED IN AND THE ONE  
20 THAT WE'VE TRIED IS THAT IN FACT THERE IS A MESSAGE CONVEYED  
21 FROM THE DEFENDANT TO THE JURY THAT THEY DON'T COME BACK IF  
22 THEY JUST SAY NO.

23 THE COURT: WELL, I TYPICALLY IN THE PAST, AND I CAN'T  
24 REMEMBER EVER DOING A CIVIL CASE, BUT, WHEN I TRIED CRIMINAL  
25 CASES, WE BIFURCATED ALL THE TIME, AND I JUST DIDN'T TELL  
26 THEM. I AM GOING TO TIME QUALIFY THEM FOR WHAT I THINK IT  
27 WILL LAST PHASE I AND PHASE II. WHY DO THEY HAVE TO BE TOLD  
28 PERIOD? I MEAN, REALLY, WHY DO THEY HAVE TO BE TOLD? I



1 DON'T THINK THEY HAVE TO BE TOLD, AND THAT'S GOING TO BE THE  
2 ORDER I'M GOING TO MAKE. WE ARE NOT GOING TO TALK PHASE I  
3 AND PHASE II TO THE JURY. IT'S NOT EVEN GOING TO BE  
4 IMPLIED. I CAN TELL YOU THAT RIGHT NOW, AND THAT'S A  
5 DECISION I HAVE MADE AS WELL.

6 MS. PRESBY: THE ONLY ISSUE THAT THAT RAISES, YOUR  
7 HONOR, IS THE ISSUE THAT I AM SURE YOU NOTED IN THE THIRD  
8 CIRCUIT OPINION, WHICH IS THE CONCERN THAT THE PLAINTIFF  
9 ACTUALLY IS NOT PERMITTED IN A REVERSE BIFURCATION CASE TO  
10 SHOW THE FULL CONTEXT OF THE DAMAGES, AND THE JURY MAY BE  
11 DISINCLINED TO AWARD DAMAGES IF THEY HAVE HEARD NOTHING  
12 ABOUT WHAT AN ENTITY HAS DONE WRONG, AND I DON'T KNOW HOW TO  
13 COUNTER THAT.

14 THE COURT: I DON'T KNOW HOW TO RESPOND TO YOU. YES, I  
15 DID THINK ABOUT IT. I'M JUST REPEATING MYSELF AT THIS POINT  
16 IN TIME. I THOUGHT ABOUT IT A GREAT DEAL. I WEIGHED IT.  
17 YOU KNOW.

18 MS. PRESBY: OKAY, AND I APPRECIATE THE COURT'S TIME IN  
19 THIS.

20 THE COURT: I FEEL LIKE I AM DEFENDING MYSELF AT THIS  
21 POINT, AND I DON'T WANT TO. I MADE THE DECISION. I FEEL  
22 GOOD ABOUT IT.

23 MS. PRESBY: RIGHT, AND WE CERTAINLY APPRECIATE THE TIME  
24 YOU PUT INTO IT, CLEARLY.

25 THE COURT: ANYWAY, WHY DON'T YOU TALK, AND TAKE YOUR  
26 TIME. WE ARE IN NO HURRY. AND THEN, WHEN YOU ARE DONE,  
27 MAYBE TALK TO EACH OTHER, AND THEN LET ME KNOW WHEN YOU ARE  
28 READY.

1 STATE OF NEW MEXICO  
2 COUNTY OF SANTA FE  
3 FIRST JUDICIAL DISTRICT COURT

4 No. D-0101-CV-200400361

5 ANNETTE GRANILLO, TAMMY BOWER,  
6 ELIZABETH CREASON, ISABEL ARAGON,  
7 DONALD MOCK, LARRAINE OLIVER,  
8 JEANIE STARKEY, VICTORIA WIECK,  
9 Plaintiffs,

10 vs.

11 WYETH, INC., (formerly known as  
12 American Home Products Corporation,  
13 Wyeth Pharmaceuticals, A.H. Robbins Company,  
14 Inc., and Wyeth-Ayerst Laboratories); and  
15 FRANCISCO M. ANAYA,  
16 Defendants.

17 STATE OF NEW MEXICO  
18 COUNTY OF SANTA FE  
19 FIRST JUDICIAL DISTRICT COURT

20 No. D-0101-CV-200400488

21 DELFINA VEGA, LORILEA BAINTE,  
22 SUZANNE DAWSON, KAREN GALLOWAY,  
23 DONNA GORCZYCA, LINDA KEATING,  
24 AUDREY LEHR, and BARBARA YOUNG,  
25 Plaintiffs,

vs.

WYETH, INC., (formerly known as  
American Home Products Corporation,  
Wyeth Pharmaceuticals, A.H. Robbins Company,  
Inc., and Wyeth-Ayerst Laboratories); and  
FRANCISCO M. ANAYA,  
Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 6th day of October 2005, at approximately 10:30  
a.m., this matter came on for hearing on DEFENSE PENDING

1 MOTIONS, before the HONORABLE JAMES A. HALL, Judge of the First  
2 Judicial District, State of New Mexico, Division II.

3 The Plaintiffs, ANNETTE GRANILLO, et al., and DELFINA  
4 VEGA, et al., appeared by Counsel of Record, E. ARMISTEAD  
5 EASTERBY, The Williams Bailey Law Firm, L.L.P., Attorneys at  
6 Law, 8441 Gulf Freeway, Suite 600, Houston, Texas 77017-5001;  
7 and MARK J. CARUSO, Caruso Law Offices, P.C., Attorneys at Law,  
8 4302 Carlisle Boulevard, Northeast, Albuquerque, New Mexico  
9 87107.

10 The Defendant, WYETH, INC., appeared by Counsel of  
11 Record, WALTER J. MELENDRES, Montgomery & Andrews, P.A.,  
12 Attorneys at Law, Post Office Box 2307, Santa Fe, New Mexico  
13 87504-2307; and ANDREW G. SCHULTZ, Rodey Law Firm, Attorneys at  
14 Law, P.O. Box 1888, Albuquerque, New Mexico 87103; and GEORGE E.  
15 McDAVID and DANIEL K. WINTERS, Reed Smith, L.L.P., Attorneys at  
16 Law, 136 Main Street, Suite 250, Princeton, New Jersey 08540;  
17 and J. SCOTT NABERS, Blizzard, McCarthy & Nabers, L.L.P.,  
18 Attorneys at Law, 440 Louisiana, Ste. 1710, Houston, Texas  
19 77002-1689.

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TR-2



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At which time the following proceedings were had:

\* \* \* \* \*

THE COURT: District Court is in session.  
We're on the record in Granillo vs. Wyeth, Santa Fe 2004-361  
Civil, and Vega vs. Wyeth, Santa Fe 2004-488 Civil. Counsel,  
enter your appearances for the record, please. For the  
Plaintiffs?

MR. EASTERBY: Armistead Easterby with the  
Williams Bailey Law Firm for the Plaintiffs, Your Honor.

MR. NABERS: Scott Nabers with the Law Firm of  
Blizzard, McCarthy & Nabers on behalf of Plaintiffs, Your Honor.

MR. CARUSO: Mark Caruso from Albuquerque also  
for the Plaintiffs, Your Honor.

THE COURT: For the Defendants?

MR. MELENDRES: Walter Melendres for Defendant  
Wyeth.

MR. McDAVID: George McDavid and Daniel  
Winters from ReedSmith for Wyeth, Your Honor.

MR. SCHULTZ: And Andrew Schultz for the  
Defendant, Your Honor.

THE COURT: We're scheduled to hear a number of  
motions pending in both of these actions, and I will say this:  
I did not go back to look at the Court file. I think from  
Mr. Melendres' office I was given a notebook regarding the  
motions pending. I am relying on the idea that notebook

1 bifurcated way. And that's the truth. The cases that I tried  
2 in a reverse bifurcation, the monetary amounts and awards to the  
3 Plaintiffs was far greater. But if Your Honor wants to try Ms.  
4 Oliver in the mitral cases in the first setting, I would agree  
5 to reverse bifurcation for that setting.

6 THE COURT: One last question, since I'm  
7 talking about 13 here. I'll stick with these 13 right now. It  
8 seems to me that if they were tried in a reverse bifurcation  
9 manner, those Plaintiffs that prevailed in the first setting,  
10 the second portion of it seems to me the issues are all common  
11 at that point. Is there any Court who has approached this in  
12 the fashion of addressing reverse bifurcation, trying those in  
13 some sort of manageable number, and then for those that  
14 prevailed, bring them back together for the subsequent trial?

15 MR. NABERS: My experience has been that's  
16 exactly what has happened. I haven't lost one, but all of the  
17 ones that I won came back and were tried together in the second  
18 phase.

19 THE COURT: I am going to hear from the  
20 Defendants, but right now I am looking at the trial groupings,  
21 opt out eligibility and reverse bifurcation.

22 MR. McDAVID: Your Honor, there is a lot of  
23 ground to cover here.

24 THE COURT: And we're running out of time.

25 MR. McDAVID: First of all, with respect to --

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1 I am not sure where the record is on this last colloquy about  
2 phase one and phase two and regrouping. I also have tried cases  
3 in Philadelphia, and I have tried reverse bifurcated cases, and  
4 I have tried cases on all issues. I looked at the -- my firm is  
5 in Philadelphia, and we try many of these cases, and we have  
6 tried many cases against the Williams Bailey firm. They have  
7 tried seven cases, six of them reverse bifurcated. There are  
8 about four Plaintiffs or sometimes two or five in each case.  
9 Phase one takes about four to six trial days. One trial took  
10 eight.

11 THE COURT: For both parties?

12 MR. McDAVID: Yes. Of those six cases, which  
13 were reverse bifurcated, only one case went to a second phase.  
14 That second phase took six days. The first phase of that trial  
15 took six days. Every other time it's been reverse bifurcated,  
16 the case has resolved with these folks without the second phase.  
17 The one case that they tried that was an all-issues case took 11  
18 days. I don't know what Your Honor's evidentiary rulings are,  
19 but I will tell you that in Philadelphia where this universal  
20 case is from, there is no evidence permitted about primary  
21 pulmonary hypertension, and that issue itself can make the trial  
22 even longer. I think that, based on my experience and based on  
23 what I understand their experience is, if we try five cases,  
24 we're talking about somewhere between five and eight days,  
25 depending on Your Honor's evidentiary rulings, that is if

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1 they're reverse bifurcated.

2           The second phase of the trial, and this is the  
3 part I was unclear about, the experience in Philadelphia where  
4 these things are reverse bifurcated is that after the first  
5 phase of the trial, if there is a Plaintiff's verdict and it  
6 doesn't resolve, then the case is then tried, the same group of  
7 Plaintiffs. They don't bring in different Plaintiffs to try it.  
8 I don't know what Your Honor was contemplating, if you were  
9 trying two or three groups in phase one and then bringing the  
10 successful Plaintiffs in phase one for a phase two for trial,  
11 that has not occurred. I don't think that it's contemplated in  
12 Philadelphia that would occur.

13           THE COURT: Why wouldn't I do that, especially  
14 when I have a setting and I have two cases that have seven and  
15 six Plaintiffs, and I think 13 is too many to try at once, and I  
16 decide that reverse bifurcation is appropriate? It seems to me  
17 the second phase the issues are all common.

18           MR. McDAVID: I don't think the issues are at  
19 all common. I think that depending on the theories of liability  
20 they pursue, and I assume they will pursue strict liability on  
21 an evidence case, the evidence is particularized. Is there  
22 negligence on behalf of the Plaintiff? The Plaintiff's  
23 prescriber prescribed the drugs irrespective of what they deemed  
24 to be the appropriate warning. So you will need individualized  
25 testimony. I also think that some of the phase one evidence is

TR-30

1 appropriate to be heard in the phase two case. So you would  
2 want to either try the case before the same Jury, or if you are  
3 going to impanel a new Jury, and in your scenario I think you  
4 would have to impanel a new Jury, and then there would be a  
5 modicum of evidence to this new Jury, which was heard by the  
6 first Jury. I don't think it would be a lot and I think you  
7 could do it, but if you decide that, I think that's the rubric,  
8 and counsel is nodding his head, so he agrees with me.

9 THE COURT: If you tried five Plaintiffs, in  
10 your experience, you're saying to try those five Plaintiffs  
11 under reverse bifurcation theory, it would take five or six  
12 days?

13 MR. McDAVID: At least five days, maybe eight.

14 THE COURT: How long would phase two take if  
15 all the Plaintiffs prevail?

16 MR. McDAVID: I think five to seven days. I  
17 know their experience in the Hansen case, that case was four  
18 Plaintiffs and it took two days on the second phase. I think  
19 the liability issues were similar. I think in Pennsylvania, the  
20 only theory they have is negligence. They don't have a strict  
21 liability to pursue which would add more time, and it would also  
22 depend on Your Honor's evidentiary rulings. I think if we try  
23 five cases, I think we're talking about five to eight first  
24 phase and five to eight second phase. Total ten to 14 maybe,  
25 something like that. On Ms. Oliver, the problem with -- the

TR-31

1 issue with her is that the only difference between Ms. Oliver  
2 and any of the rest of these Plaintiffs, with respect to the  
3 medicine, is that her treating physician says she at some point  
4 in the future is going to need surgery. She's taken blood  
5 pressure medications and many of these Plaintiffs have taken  
6 blood pressure medications. It's not medically that different  
7 except from that perspective, but that little thing, I think, is  
8 something that's potentially prejudicial to my client in this  
9 case.

10           The reason why Mr. Nabers was unable to  
11 identify, at your request, after Oliver the next worse cases is,  
12 is because there aren't. They're all the same. Oliver is the  
13 outlier. He's suggesting that you will resolve these cases by  
14 trying the outlier. I think human experience is to the  
15 contrary, Your Honor. If you want to try cases, try the most  
16 representative cases. That's more likely to resolve these. In  
17 addition, I think if there is a phase two, if you bifurcate it  
18 and you have Oliver in and they prevail on Oliver, the phase two  
19 evidence on that one will be a little different and prolong the  
20 trial on phase two on these other cases.

21           Let me address this issue about the eligibility  
22 challenges, which seems like a long time ago now. Maybe it was.  
23 Judge Garcia, in fact, did review these cases, the eligibility  
24 challenges, and did, in fact, set aside one of the cases because  
25 he thought it did not meet the eligibility challenge.

TR-32

1 THE COURT: What was the record that he did  
2 that on? An affidavit?

3 MR. McDAVID: Yes, Your Honor. To suggest  
4 that no one has ever looked behind at this is not true. It is  
5 true that Judge Walsh in New Jersey does just this in  
6 Philadelphia, and I think the order related to the Philadelphia  
7 procedure is in the paper we submitted, so very clearly that  
8 jurisdiction will hold eligibility challenges, they'll hold  
9 hearings on them, they have made arrangements for the  
10 appointment of a special master. So these issues are being  
11 considered around the country, but to get to the knot of the  
12 issue, Mr. Easterby suggests that all they have to do get a  
13 doctor who says there is regurgitation and they win. That  
14 wasn't the settlement. The parties contemplated they couldn't  
15 bring just any old case, that they had to make a certain showing  
16 on these echocardiograms. It is not true that all they had to  
17 do was produce an echocardiogram timely and produce a  
18 cardiologist. The interpretation of that echocardiogram had to  
19 be done according to certain scientific means. The agreement  
20 between these people and Wyeth specifically cited at least three  
21 text in the same paper, the Flaggboun Cardiology Textbook, and  
22 the Waymen Cardiology Textbook. So it is clearly contemplated  
23 by the parties that Wyeth wasn't going to have to defend cases  
24 which didn't meet scientific standards.

25 All we are asking you to do is apply those

TR-33

1 scientific standards and to function here as a gatekeeper, so if  
2 Your Honor finds that they meet the scientific standards and are  
3 medically reasonable, fine, but if not, Wyeth shouldn't be  
4 required to defend these, they shouldn't go to a Jury, and they  
5 shouldn't suffer the expense and risk of defending them. Your  
6 Honor, Mr. Melendres points out to me that among the group that  
7 you and Mr. Nabers discussed were two people whose eligibility  
8 we challenged, and that would be Ms. Vega and Ms. Young. So  
9 perhaps Your Honor wants to try the four unchallenged mitral  
10 cases initially.

11 THE COURT: That's Aragon, Keating, Bower and  
12 Dawson? Is that the four?

13 MR. McDAVID: Yes, sir. I am not suggesting  
14 that. I realized that two of these four were challenged. It  
15 may affect your thinking. That's all.

16 THE COURT: Anything else on these matters?

17 MR. McDAVID: No, Your Honor.

18 THE COURT: Anything else from the Plaintiff,  
19 talking about the matters related to trial grouping, opt out and  
20 reverse bifurcation?

21 MR. NABERS: Just one with regard to the trial  
22 grouping. I wanted to make sure in the past when I tried these  
23 cases we did have the same Jury for phase one and phase two.  
24 From the Plaintiffs' perspective, we would want to keep that  
25 same Jury, because there is a lot of education that goes into

TR-34



1 phase one that makes it a lot easier and a lot shorter trial for  
2 the same Jury to deal with phase two.

3 THE COURT: I understand that, but I don't know  
4 how I will be able to do that because one of the things you say  
5 is that many of these cases after phase one settle. It's  
6 impossible for me to hold a Jury and hold days open that would  
7 be unusable to the Court. So, in other words, it's impossible  
8 for me to say to a Jury the total trial will take 15 days, and  
9 we get them set up, try the first part, you prevail, and the  
10 case settles. I can't have cases settling during trial. I know  
11 that happens from time to time. My docket is too full for that  
12 to happen. My expectation is if the case starts, that means you  
13 all are taking it to the Jury. I simply don't have time to do  
14 that, and I'm worried that I don't have 15 days. And two, if I  
15 were to set aside 15 days and you tell me, "Good news, Judge,  
16 you've got the next seven days off," the conventional wisdom of  
17 a lawyer is if they come to the Judge right beforehand and say  
18 that it settled, that the Judge will react positively to that.  
19 That's not the case with me. They don't understand why I get  
20 mad. It's because I can't control the remainder of my cases.  
21 I'm worried about that, and I don't know how to address it.

22 MR. NABERS: We would be happy to start phase  
23 two right after phase one, or if the Court needed some time,  
24 because I know you have to bring the Jury back. I unfortunately  
25 can't control whether the cases will settle. I mean, obviously

TR-35

1 we are going to be talking about them and working towards  
2 resolving these cases before we get further down this road, but  
3 I have been in the experience that you are talking about where  
4 the cases have settled in the middle of trial.

5 THE COURT: Don't do that, or carefully select  
6 which one of you will come tell me that.

7 MR. McDAVID: I think the rule is the guy who  
8 gets the money talks to the Judge. Your Honor, on this brief  
9 point about trying the case before the Jury, and the way I  
10 appreciate this is it's your concern that you will try this  
11 case, phase one, before a Jury, and because of your docket that  
12 you will not be able to try phase two immediately?

13 THE COURT: That's my concern.

14 MR. McDAVID: Not in this litigation, but in  
15 other litigations in which I have been involved in which we  
16 reverse bifurcated cases, we have not been able to try -- we got  
17 a verdict in phase one because of various reasons, because of  
18 the Court's problems, because of lapse of time, because of juror  
19 unavailability. We didn't try the case in front of the same  
20 Jury and picked a new jury, which is not optimal, but I think  
21 the amount of evidence which overlaps here is really quite  
22 minimal, and I think if Your Honor were to contemplate trying  
23 two or three groups of these cases phase one, and then if phase  
24 two is necessary, trying all of them before a second phase,  
25 before a new Jury, I think that would be a workable plan.

TR-36

1 THE COURT: We'll find out. Here's what I do:  
2 First, in terms of the reverse bifurcation, I grant the motion.  
3 We'll address the cases that are proceeding to trial in a  
4 reverse bifurcation format. I'll ask counsel to confer. At  
5 this point, I don't see a feasible way logistically to have the  
6 same Jury try phase one and phase two if they become necessary,  
7 but if you can come up with some sort of plan that can do that  
8 in an expeditious way, I'll consider it; but at this point, I  
9 grant the Motion for Reverse Bifurcation. At a minimum, phase  
10 one of the trial will occur as outlined in that particular  
11 motion.

12 I regroup the Plaintiffs in the two cases. The  
13 Plaintiffs that will proceed to trial scheduled in November will  
14 be Ms. Aragon, Ms. Keating, Ms. Vega, Ms. Young and Ms. Oliver.  
15 So those five will be scheduled for trial in the initial setting  
16 in November. The remaining Plaintiffs regretably will have to  
17 be reset in another trial docket.

18 In terms of opt out eligibility, first to the  
19 extent there is a summary judgment motion filed based upon Dr.  
20 Shadoff's affidavit in an attempt to show that on its face  
21 establishes that the Plaintiffs may not bring this claim based  
22 upon the settlement, I conclude that summary judgment is not  
23 appropriate, that there are disputed issues of fact and,  
24 therefore, that's not a basis to conclude that those Plaintiffs  
25 should not be able to proceed. Likewise, I deny the request for

TR-37

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL-TRIAL DIVISION

- - -

CHERYL FAZZINI & THOMAS	)	November Term 2002
RICHARD FAZZINI,	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
WYETH, INC.,	)	
WYETH PHARMACEUTICALS, INC.,	)	
WYETH-AYERST INTERNATIONAL,	)	NO. 001775
INC.	)	

- - -  
February 16, 2005  
- - -

Courtroom 612 - City Hall  
Philadelphia, Pennsylvania

- - -  
BEFORE HONORABLE R.C. JACKSON  
and a Jury  
- - -

REPORTED BY: CATRINA G. MULLER, RPR, CRR

Catrina G. Muller, RPR, CRR 215.683.8035 - fx. 215.683.8005

1 COLLOQUY  
 2 Honor, the plaintiff's fact sheet, which I  
 3 can provide Your Honor, has both of those  
 4 echocardiograms --  
 5 THE COURT: Paragraph 5, in  
 6 connection with this report, I reviewed the  
 7 following records and adhered to as exhibit  
 8 C.  
 9 MR. NAPOLI: Yes, and those  
 10 include Dr. Metkus's --  
 11 THE COURT: Echocardiogram report  
 12 dated 4/25/2002; she doesn't mention '99 and  
 13 '04.  
 14 MR. NAPOLI: '99 and '04 are  
 15 included, and this is the testimony of  
 16 Dr. Norris -- are included in Dr. Norris's  
 17 medical records and Dr. Barr's medical  
 18 records and in the fact sheet. They are  
 19 actually part of Miss Fazzini's file.  
 20 THE COURT: Then why does  
 21 Dr. Landolfo say, I reviewed the  
 22 echocardiogram 4/25/2002?  
 23 MR. NAPOLI: Because the Case  
 24 Management Order requires that you  
 25 specifically spell out in the report the

1 COLLOQUY  
 2 echos that were conducted at the direction  
 3 of an attorney. That's a requirement. So we  
 4 complied with the requirement of the  
 5 echocardiograms on the CMO, and we have told  
 6 them. They have notice because Dr. Norris,  
 7 and I don't think Mr. McConnell will stand  
 8 up and say that Dr. Norris's records did not  
 9 contain Falcone's report and did not contain  
 10 Metkus's report, because you will hear the  
 11 testimony from Dr. Norris and Dr. Barr that  
 12 they were included in the report and they  
 13 commented on them in their reports, in their  
 14 depositions.  
 15 MR. McCONNELL: But if she has  
 16 opinions to render on the '99 and '04 echos,  
 17 which is what I'm hearing, that they're not  
 18 good echos, those opinions belong in the  
 19 report. That's Pennsylvania law, forget  
 20 about the CMO.  
 21 THE COURT: Not only that, she did  
 22 not mention that she reviewed the '99 and  
 23 '04 reports.  
 24 MR. McCONNELL: That's right.  
 25 THE COURT: It says it right in

1 COLLOQUY  
 2 paragraph 5.  
 3 MR. McCONNELL: If you go on,  
 4 underneath the section you've got in front  
 5 of you, there's actually a discussion now  
 6 about the echocardiogram, and she starts  
 7 rendering opinions on it. So she renders  
 8 opinions. She knows how to render opinions,  
 9 and the plaintiff's lawyers know how to  
 10 write them up. There are extensive opinions  
 11 on the echocardiogram. Nothing on '99 and  
 12 '04. She shouldn't be allowed to mention  
 13 them in her testimony.  
 14 THE COURT: That motion is  
 15 granted, Gentlemen.  
 16 MR. NAPOLI: Your Honor, to the  
 17 extent that I pose hypotheticals to the  
 18 witness based on testimony as an expert, I'm  
 19 not precluded --  
 20 THE COURT: I will rule on that at  
 21 the time that it comes up, if it does come  
 22 up.  
 23 MR. NAPOLI: Okay. Thank you.  
 24 THE COURT: Anything further,  
 25 Counsel?

1 COLLOQUY  
 2 MR. McCONNELL: Just one thing, I  
 3 think we have an understanding, but we had  
 4 objected to reference in the opening  
 5 statement, or for that matter throughout the  
 6 case, to mitral regurgitation because that's  
 7 not an issue. I think we want to be clear.  
 8 MR. NAPOLI: We are clear on that.  
 9 THE COURT: No mention of mitral  
 10 regurgitation.  
 11 MR. NAPOLI: Just that we're going  
 12 to talk about showing the four valves but  
 13 not --  
 14 THE COURT: As that being a  
 15 problem in this case.  
 16 MR. NAPOLI: That's right.  
 17 THE COURT: Are we ready to begin?  
 18 I'm advised that one juror is  
 19 missing. How do you wish to handle that?  
 20 MR. NAPOLI: I think we can  
 21 proceed with seven. Your Honor, we have  
 22 Dr. Landolfo here today and she has to go  
 23 back to teach this afternoon -- tonight. So  
 24 we're going to try to get her on today.  
 25 THE COURT: We have to have an

Page 42

1 COLLOQUY  
 2 agreement as to whether we are going to  
 3 proceed with seven, and I understand this is  
 4 a reverse bifurcation. Damages first.  
 5 MR. McCONNELL: Just for  
 6 clarification, Your Honor, my understanding  
 7 is that when we were going with eight  
 8 jurors, that it took six to make a verdict;  
 9 right? Seven. So now if we have seven, we  
 10 need six. I think we would rather wait for  
 11 the 8th juror.  
 12 THE CRIER: You're not going to  
 13 get him.  
 14 THE COURT: If you go with seven,  
 15 you need six. We tried to telephone the  
 16 juror, he was here earlier today, 8 o'clock  
 17 this morning.  
 18 MR. NAPOLI: If they want to wait,  
 19 then I'm ready to pick another juror.  
 20 MR. McCONNELL: Is that Mr.  
 21 Swendon?  
 22 THE CRIER: Robert Patterson.  
 23 THE COURT: What is your pleasure,  
 24 Gentlemen?  
 25 MR. McCONNELL: I don't think we

Page 43

1 COLLOQUY  
 2 can agree to reducing to seven. I think  
 3 it's prejudicial to the client.  
 4 MR. NAPOLI: Because we have a  
 5 witness problem, we're going to have to ask  
 6 for a mistrial unless we can pick another  
 7 juror right now, and we would demand and  
 8 request we bring five jurors up here, we  
 9 each get one challenge, and we pick a juror  
 10 right now and proceed.  
 11 THE COURT: Sounds reasonable.  
 12 MR. McCONNELL: That's preferable  
 13 to dropping a juror. Sure.  
 14 THE COURT: Okay. Now what happens  
 15 if jury selection does not have five over  
 16 there to give us.  
 17 (Whereupon, a discussion was held  
 18 off the record at this time.)  
 19 THE COURT: We're going to take a  
 20 brief recess while we go over and get eight  
 21 more. You requested five.  
 22 MR. NAPOLI: Whatever the court  
 23 clerk thinks is appropriate.  
 24 THE CRIER: I'm going to bring  
 25 eight people. That's all I can get. I will

Page 44

1 COLLOQUY  
 2 bring the eight. Especially when I tell them  
 3 three weeks.  
 4 THE COURT: So will you advise  
 5 counsel which room you're going to go in?  
 6 THE CRIER: Yeah, 636. I will have  
 7 it unlocked for you.  
 8 THE COURT: You can advise Mr.  
 9 Napoli what we're going to do. Because of  
 10 the juror problem, we're going to -- his  
 11 witness, I think he said has to be out by 1  
 12 o'clock, two o'clock?  
 13 You say your witness has to go on  
 14 today?  
 15 MR. NAPOLI: She is here now. She  
 16 is ready to go right after openings.  
 17 THE COURT: Right after openings,  
 18 we will go straight through the day and we  
 19 should be finished by 2 o'clock, no later  
 20 than 3 o'clock.  
 21 MR. McCONNELL: Your Honor, just  
 22 to respond to that, I raised this issue,  
 23 given what Carolyn Landolfo covers, I've got  
 24 a long cross and I'm concerned that I'm not  
 25 going to be able to finish today. I know she

Page 45

1 COLLOQUY  
 2 has got a difficult schedule, but what I  
 3 don't want is a situation where they say,  
 4 oh, yeah, she gets to come back during my  
 5 case. That I don't want. So I don't know how  
 6 we address the scheduling issue, but I hope  
 7 we can work it out.  
 8 THE COURT: Since counsel will not  
 9 agree with going with seven, I'm not going  
 10 to force you to go ahead with seven, we're  
 11 going to have the -- select that one, it  
 12 should be done by 11:30, then we're ready  
 13 for opening statements. I will limit  
 14 opening statements to how many minutes.  
 15 MR. NAPOLI: I will say 30 minutes.  
 16 THE COURT: Thirty minutes is too  
 17 long, we will limit opening statement time  
 18 to, say, 20 minutes. By that time -- we have  
 19 four opening statements.  
 20 MR. NAPOLI: No, there is only  
 21 two.  
 22 THE COURT: So by that time, we  
 23 will start taking testimony around noon, I  
 24 will explain to the jurors that we're going  
 25 to go straight through and take a late

12 (Pages 42 to 45)

CLC

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02/10/05 05:45pm P. 023

\_\_\_\_\_  
MELINDA HOYT,

Plaintiff,

v.

\_\_\_\_\_  
WYETH INC., WYETH  
PHARMACEUTICALS INC.,  
and WYETH-AYERST INTERNATIONAL  
INC.,

\_\_\_\_\_  
Defendants.

COUNTY OF PHILADELPHIA  
COURT OF COMMON PLEAS

December Term, 2002

No. 3781

DOCKETED  
COMPLEX LIT CENTER

FEB 10 2005

J. STEWART

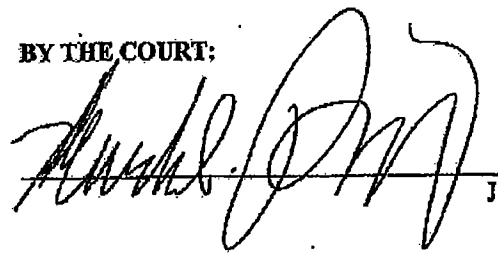
**ORDER REGARDING REVERSE BIFURCATION**

AND NOW, this 10 day of Feb, 2005, it is hereby ORDERED,

ADJUDGED, and DECREED that Wyeth's Motion for Reverse Bifurcation is GRANTED.

Trial shall proceed on a reverse bifurcation basis with Phase I addressing whether Plaintiff has suffered a compensable injury resulting from her use of diet drugs and, if so, the amount of compensatory damages; Phase II, if necessary, will address whether Wyeth was negligent in a manner causally related to Plaintiff's use of the drugs.

BY THE COURT:



COPIES SENT  
PURSUANT TO P.R.C.P. 236(b)

FEB 10 2005

WEST PHILADELPHIA DISTRICT OF PA  
CLERK





IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

-----  
VINESSA ARCHER and : NOVEMBER TERM, 2002  
CARLTON DWIGHT ARCHER :  
vs. :  
WYETH, INC. et al. : NO. 02595

-----  
JUNE KOHLER : DECEMBER TERM, 2002  
vs. :  
WYETH, INC., et al. : NO. 3790

-----  
September 20, 2004  
-----

Room 453 City Hall  
Philadelphia, Pennsylvania  
-----

BEFORE:  
THE HONORABLE NITZA I. QUINONES ALEJANDRO, J.  
And a Jury

-----  
VOLUME ONE  
-----

1 APPEARANCES:  
 2 NEMEROFF FIRM  
 3 BY: RICK NEMEROFF, ESQ.  
 4 295 Madison Avenue, 35th Floor  
 5 New York, NY 10017  
 6 Attorney for Plaintiffs Archer  
 7 BARON & BUDD, P.C.  
 8 BY: AMY M. CARTER, ESQ.  
 9 The Centrum, 3102 Oak Lawn Avenue  
 10 Suite 1100  
 11 Dallas, TX 75219-4281  
 12 Attorney for Plaintiffs Archer  
 13  
 14 FLEMING & ASSOCIATES, L.L.P.  
 15 BY: RAND P. NOLEN, ESQ.  
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 21  
 22 REED SMITH, LLP  
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 26 2500 One Liberty Place  
 27 1650 Market Street  
 28 Philadelphia, PA 19103  
 29 Attorneys for Defendants

1 Archer and Kohler v. Wyeth  
 2 down, at least with regard to Ms. Kohler, I  
 3 think there are only three remaining for the  
 4 plaintiff.  
 5 MR. PEAVY: I believe only one left.  
 6 MR. NOLEN: I think only one left  
 7 from Wyeth, so we went from 60 to four on  
 8 those.  
 9 THE COURT: Okay. What we'll do is  
 10 then, as I go through them, you let me know if  
 11 these are the ones that have been withdrawn or  
 12 these are the ones that have been agreed upon  
 13 or whatever the situation may be.  
 14 With regards to the first Motion In  
 15 Limine, which is the Motion to bifurcate,  
 16 reverse bifurcation, control No. 082550, as  
 17 you know, I have granted that Motion.  
 18 MR. NEMEROFF: And, Your Honor, not  
 19 to be outdone by Fleming lawyers, Rick  
 20 Nemeroff and Amy Carter on behalf of Miss  
 21 Archer and her family.  
 22 We, too, have reduced the amount of  
 23 Motions In Limine significantly. Miss Carter  
 24 met with the Wyeth lawyers yesterday and I  
 25 think we're down -- I can't do as well as they

1 Archer and Kohler v. Wyeth  
 2 THE COURT: Good morning everyone.  
 3 Okay. We're here on the matters of  
 4 Archer v. Wyeth and Kohler vs. Wyeth. Archer  
 5 is November Term 2002, No. 2595, and Kohler is  
 6 December Term 2002, No. 3790.  
 7 I have, I think, 60-some Motions In  
 8 Limine.  
 9 MR. NOLEN: Your Honor, Rand Nolen.  
 10 I represent Miss Kohler. I'm with the firm  
 11 Fleming & Associates and I actually have some  
 12 good news for the Court.  
 13 THE COURT: Okay. I like good news.  
 14 MR. NOLEN: We did confer with  
 15 opposing counsel and we agreed on a number of  
 16 Motions In Limine either to withdraw them  
 17 since the case has already been bifurcated  
 18 because they're just not going to be relevant  
 19 to the Phase 1 of the case.  
 20 THE COURT: Okay.  
 21 MR. NOLEN: And others we've agreed  
 22 on various ones to actually withdraw on both  
 23 sides.  
 24 THE COURT: Okay.  
 25 MR. NOLEN: So I think the Court is

1 Archer and Kohler v. Wyeth  
 2 did. I think we're down to six or so issues  
 3 overall, but I think we're certainly far below  
 4 double digits at this point.  
 5 THE COURT: It's also good news.  
 6 Unfortunately, I have to go through all of  
 7 them since I have to sign them and you have to  
 8 bear with me. I was being stubborn and kept  
 9 both last names, so it takes a while to sign  
 10 them.  
 11 This is Kohler's Motion to bifurcate  
 12 or, rather --  
 13 MR. NEMEROFF: Wyeth.  
 14 THE COURT: -- Wyeth's Motion, but  
 15 it is Kohler's response. It is Control No.  
 16 082551. The Motion has been granted, so I'm  
 17 just making sure I'm signing all the Orders.  
 18 Okay. Plaintiff's Motion In Limine,  
 19 this is Archer's. I think I'm going to be  
 20 doing Archer's first and then Kohler's.  
 21 This is the Motion to -- it's  
 22 control No. 083120 to preclude defendants from  
 23 mentioning any studies performed by any  
 24 experts without first having timely disclosed  
 25 those results to opposing counsel.

29/20/04

cc: Brown Green  
Barb Bini's  
Sarah Bonifant  
Louis Schack

IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY

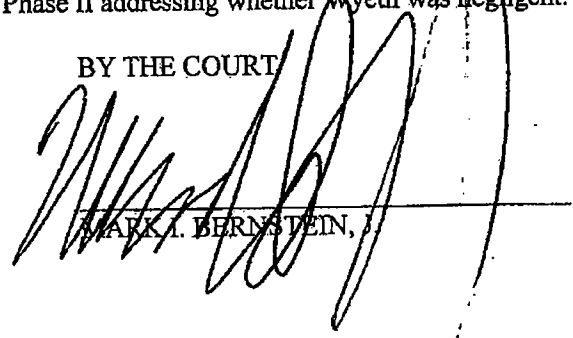
CIVIL TRIAL DIVISION

LUCY HANSEN	:	DECEMBER TERM, 2002
	:	
vs.	:	
	:	
AMERICAN HOME PRODUCTS CORPORATION, ET AL.	:	NO. 1063

ORDER

AND NOW, this 14<sup>th</sup> day of September, 2004, it is hereby ORDERED,  
ADJUDGED, and DECREED that the Wyeth Defendants' Motion for Reverse  
Bifurcation of trial of the above-captioned matter is GRANTED. Trial shall proceed on a  
reverse bifurcation basis with Phase I addressing whether plaintiff has suffered a  
cognizable and compensable injury caused by his use of diet drugs, and, if so, the amount  
of compensatory damages and Phase II addressing whether Wyeth was negligent.

BY THE COURT



MARK L. BERNSTEIN, J.

COPIES SENT  
PURSUANT TO Pa. R.C.P. 236(b)

SEP 15 2004

First Judicial District of Pa.  
User I.D.: RG

DOCKETED

SEP 15 2004

K. GALLAGHER

VICKI DANIELSON,

Plaintiff,

v.

WYETH, et al.,

Defendants.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY

December Term, 2002

No. 3968

**ORDER REGARDING BIFURCATION**

AND NOW, this 14<sup>th</sup> day of September, 2004, it is hereby **ORDERED**,

**ADJUDGED**, and **DECREED** that the Wyeth Defendants' Motion for Reverse Bifurcation of trial of the above-captioned matter is **GRANTED**. Trial shall proceed on a reverse bifurcation basis with Phase I addressing whether plaintiff has suffered a cognizable and compensable injury resulting from their use of diet drugs, and, if so, the amount of compensatory damages and Phase II addressing whether Wyeth was negligent in a manner causally related to plaintiff's use of the drugs.

DOCKETED  
COMPLEX LIT CENTER  
SEP 15 2004  
L. RYANT-DAVIS

BY THE COURT:



ACKERMAN, J.

COPIES SENT  
PURSUANT TO P.A. 2002-100 (b)  
SEP 15 2004  
FIRST JUDICIAL DISTRICT OF PHA  
USER I.D. [Signature]

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

LINDA C. BERNTSON : DECEMBER TERM, 2002

vs.

WYETH f/k/a AMERICAN HOME :  
PRODUCTS CORPORATION, :  
WYETH PHARMACEUTICALS, :  
A Division Of WYETH : NO. 2304

JANICE L. CONNELL, ET VIR : DECEMBER TERM, 2002  
DAVID L. CONNELL :

vs.

WYETH f/k/a AMERICAN HOME :  
PRODUCTS CORPORATION, :  
WYETH PHARMACEUTICALS, :  
A Division Of WYETH : NO. 2454

Tuesday, August 17, 2004

Courtroom 475  
City Hall  
Philadelphia, Pennsylvania

BEFORE: HONORABLE ALFRED J. DiBONA, JR., J.,  
and a Jury

MORNING SESSION

APPEARANCES:

PROVOST UMPRHEY  
 BY: JAMES A. MORRIS, JR., ESQUIRE  
 STEVE FARIES, ESQUIRE  
 COUNSEL FOR THE PLAINTIFFS

PETROFF & ASSOCIATES  
 BY: KIP PETROFF, ESQUIRE  
 COUNSEL FOR THE PLAINTIFFS

DECHERT, LLP  
 BY: ANDREW R. GADDES, ESQUIRE  
 JENNIFER E. DUBAS, ESQUIRE  
 EZRA D. ROSENBERG, ESQUIRE  
 COUNSEL FOR THE DEFENDANT

1           - - -  
 2           (The following occurred in open court  
 3 outside the presence of the jury:)  
 4           - - -  
 5           THE COURT: We're a little late  
 6 getting started. Counsel has been advised that  
 7 I went to a viewing this morning. I was back  
 8 here by 9:40. We have a few problems with our  
 9 jury, and we'll have to resolve those first  
 10 before we talk about any motions that counsel  
 11 may have.  
 12           I want to direct your attention to  
 13 Juror Number 10, Marcella Rhoades. We were  
 14 advised after jury selection that Ms. Rhoades  
 15 had raised an issue in reference to her father  
 16 having Alzheimer's disease and that she would  
 17 be required to leave court every day at 3:30.  
 18           I will not tolerate that. But I did  
 19 call her, and I spoke to her Thursday  
 20 afternoon, and she assured me that sitting from  
 21 4:00 or 4:30 will not be a problem for her.  
 22 So, therefore, she will remain on our jury.  
 23           Well, let me mention her anyway.  
 24 Juror Number 7, Carmen Jaquez, did not show up  
 25 as of, I guess, 9:45 or so. Our court officer

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JUDGES OPENING CHARGE           21

OPENING STATEMENTS

MR. MORRIS                           28

MR. ROSENBERG                       66

1 went to the courtroom where everyone  
 2 participated in jury selection. Bob also went  
 3 to Mary McGovern's office, and we also called  
 4 the jury assembly room trying to locate her. I  
 5 have just been advised that she is now present.  
 6 So that solves that problem with Number 7.  
 7           That leaves us with Juror Number 4,  
 8 Manuel Cordero. He called at 8:20 this morning  
 9 and advised the court officer, Bob Corcoran,  
 10 that he was sick. He didn't feel well. He  
 11 didn't know whether he had a bug or a virus or  
 12 food poisoning. And Bob said, Well, I have no  
 13 authority to excuse you, you'll have to come  
 14 in. He did come in.  
 15           So we're going to have to question him  
 16 to see what his condition is and whether or not  
 17 he can continue as a member of this jury. So  
 18 why don't we start off by bringing in Mr.  
 19 Cordero?  
 20           Good morning, Mr. Cordero. How do you  
 21 feel this morning?  
 22           JUROR NUMBER 4: Not well.  
 23           THE COURT: Tell me what's your  
 24 problem.  
 25           THE WITNESS: Stomach virus or food

Page 6

1 poisoning. I'm not sure.  
 2 THE COURT: I won't ask you what you  
 3 ate in the last couple days. I'll leave that  
 4 up to you. What kind of work do you do?  
 5 JUROR NUMBER 4: I'm a baker.  
 6 THE COURT: Bakers can't get food  
 7 poisoning. You have a lot of people out there  
 8 to take care of.  
 9 When did this illness come on?  
 10 JUROR NUMBER 4: Yesterday.  
 11 THE COURT: Yesterday. Were you able  
 12 to work yesterday?  
 13 JUROR NUMBER 4: No.  
 14 THE COURT: Does counsel have any  
 15 questions?  
 16 MR. MORRIS: No, we don't.  
 17 MR. ROSENBERG: No, we don't.  
 18 THE COURT: Counsel have any objection  
 19 to my excusing him?  
 20 MR. ROSENBERG: No objection, Your  
 21 Honor.  
 22 MR. MORRIS: No.  
 23 THE COURT: Fine. Okay. Hope you  
 24 feel better.  
 25 JUROR NUMBER 4: Thank you.

Page 7

1 THE COURT: What do you bake?  
 2 JUROR NUMBER 4: All kinds of cakes,  
 3 pastries.  
 4 THE COURT: Pastry person. You're the  
 5 guy that has all the calories. We appreciate  
 6 your effort. Thanks a lot.  
 7 Therefore, we will move Juror Number  
 8 9; although, sometimes what I do in a situation  
 9 like this, I leave it up to the juror to  
 10 determine if he or she wants to take seat  
 11 Number 9 or seat Number 4. Of course, we know  
 12 that Number 9 is now Number 4, and that would  
 13 be Marva Smith Hankins.  
 14 All right. I have before me a list of  
 15 witnesses who may testify during this trial. I  
 16 saw a Dr. Cherlo, all right. Deposition, but  
 17 not video deposition?  
 18 MR. MORRIS: Correct.  
 19 THE COURT: Do you have designations  
 20 for me to read?  
 21 MR. MORRIS: Yes, I believe we do.  
 22 THE COURT: Cause I read these  
 23 designations, just like I read transcripts.  
 24 MR. MORRIS: I'm sorry. We have Dr.  
 25 Cherlo by video, Your Honor, I'm sorry.

Page 8

1 THE COURT: Okay. He's a treater.  
 2 What's the length of the video?  
 3 MR. MORRIS: Length of the video,  
 4 maybe 10 minutes. Seven minutes.  
 5 THE COURT: Seven?  
 6 MR. MORRIS: Yes, sir.  
 7 MR. ROSENBERG: Your Honor, I think it  
 8 might be a little longer than that, because  
 9 we're playing both.  
 10 THE COURT: First of all, where's the  
 11 transcript, because I read transcript, because  
 12 I do not watch videos. Let me have the  
 13 transcript from Dr. Cherlo.  
 14 Next, I have Dr. Schaeffer.  
 15 MR. MORRIS: Yes, Dr. Louis Schaeffer,  
 16 that's also by video.  
 17 THE COURT: How long is his video?  
 18 MR. MORRIS: Once again, maybe 10  
 19 minutes.  
 20 THE COURT: All right. Give the  
 21 transcript to our court officer.  
 22 And then we have Dr. Reeves.  
 23 MR. MORRIS: Once again, by video.  
 24 THE COURT: And how long?  
 25 MR. MORRIS: Ten minutes, at most.

Page 9

1 THE COURT: Well, you know, with these  
 2 videos being as short as they are, I may watch  
 3 them. I normally read transcripts, especially  
 4 if there are objections, but because of the  
 5 shortness of these videos, I will watch them.  
 6 Then we go to Mrs. Connell live and  
 7 Mrs. Berntson, and then you have an expert Dr.  
 8 Faulkner, he's live, and then defense has Dr.  
 9 Stoddard, also live.  
 10 Now, let me alert you to another  
 11 problem. I have an assignment tomorrow  
 12 afternoon. Accordingly, we're going to have an  
 13 unusual day tomorrow. I've been doing it in  
 14 other cases also. We will start tomorrow at  
 15 nine o'clock. We will recess at one o'clock.  
 16 We'll take two ten-minute recesses during the  
 17 morning session, but there will be no lunch,  
 18 and everyone is free to do whatever you want to  
 19 do at one o'clock tomorrow.  
 20 I know you will go back to your office  
 21 and work, but there may be some others out  
 22 there that may have an opportunity to enjoy the  
 23 afternoon, at least I hope so. That's the only  
 24 problem I have in relation to scheduling.  
 25 Now, is it my understanding that this

1 jury was told this case would last about a  
2 week?  
3 MR. MORRIS: Yes, Your Honor.  
4 Actually, here's our trial schedule. We  
5 anticipate --  
6 THE COURT: Good, fine.  
7 MR. MORRIS: We anticipate --  
8 THE COURT: Gentlemen, please, do me a  
9 favor, sit down. I'm not as formal as some of  
10 my colleagues, and I do that for a reason. I  
11 want everybody to relax, okay? I'm not saying  
12 we're here to have fun, but I want everybody to  
13 relax. You'll be surprised how much tension it  
14 relieves.  
15 MR. ROSENBERG: That's appreciated.  
16 If we jump up, it's only out of habit, Your  
17 Honor.  
18 THE COURT: You're doing that out of  
19 respect. I have no problem with that either.  
20 MR. MORRIS: Your Honor, James Morris  
21 for the plaintiff. What we intend to do in  
22 terms of our trial schedule is today, we  
23 anticipated opening statements and then putting  
24 on the plaintiffs this afternoon, and we hope  
25 to get both plaintiffs on and off. If that

1 happens, great. If it doesn't, we understand.  
2 Tomorrow morning, we will begin with  
3 Dr. Faulkner, and I anticipate --  
4 THE COURT: Dr. Faulkner, Wednesday  
5 a.m.  
6 MR. MORRIS: Dr. Faulkner, Wednesday  
7 a.m. We anticipate finishing Dr. Faulkner  
8 tomorrow morning. Even with Your Honor's  
9 limitation at one o'clock, I believe we'll be  
10 able to get him on and off.  
11 THE COURT: Okay.  
12 MR. MORRIS: I anticipate the defense  
13 will call Dr. Stoddard on Thursday. And, once  
14 again, we may be able to get him on and off in  
15 the morning, maybe early afternoon. When we  
16 get him off, and then I anticipate the case  
17 will be closed then, and we can either do final  
18 arguments on Thursday afternoon or Friday  
19 morning, as the Court pleases.  
20 THE COURT: Well, if we have time  
21 Thursday afternoon, I would like to do  
22 closings. But let's hold that off. We don't  
23 know, for example, how long Dr. Stoddard may be  
24 on the stand. We have to play that by ear.  
25 What about Phase 2? Is this jury

1 advised of Phase 2?  
2 MR. ROSENBERG: They've just been told  
3 there's a trial. They have not been advised  
4 that it's a phase trial. Our hopes, of course,  
5 is that Phase 1, one way or the other, takes  
6 care of it. Of course, one doesn't know for  
7 sure. Even if it doesn't, we're still going to  
8 be finished with Phase 1 by Thursday, or  
9 Friday.  
10 MR. MORRIS: Your Honor, may I speak  
11 to that, also?  
12 THE COURT: Sure.  
13 MR. MORRIS: I recently tried a case  
14 in front of Judge Glazer over in criminal  
15 courts building, a reverse bifurcated fen-phen  
16 case last month. What Judge Glazer did at the  
17 initiation of the trial is explain to the jury  
18 that this is going to be reverse bifurcated.  
19 That means that we're not going to be concerned  
20 about liability right now. That's later.  
21 That's after this first phase.  
22 He gave them an instruction, so they  
23 wouldn't be in the dark wondering why they're  
24 not hearing about the conduct of the company or  
25 the conduct of the plaintiffs.

1 THE COURT: I will explain that in my  
2 preliminary remarks to the jury.  
3 What I did in the first fen-phen  
4 trial, I chose to go straight through. That  
5 was my decision. I have now realized that my  
6 colleagues are correct. So, hereafter, any  
7 cases in this courtroom will be by reverse  
8 bifurcation.  
9 I don't know, for example, if Judge  
10 Ackerman is going to issue a global ruling to  
11 that effect, but I will be one of the judges  
12 who will do reverse bifurcation. So we're  
13 talking about damages.  
14 In fact, if you would be kind enough,  
15 Mr. Morris, to share Judge Glazer's verdict  
16 sheet with counsel. And if it's not available,  
17 I have it. My verdict sheet will be very  
18 simple. It will be very simple.  
19 MR. MORRIS: All right.  
20 THE COURT: In fact, what I'll do,  
21 I'll show you. Even though, even though I went  
22 straight through, I did announce towards the  
23 end of the trial that we were going to be  
24 talking about whether or not these people had  
25 the valvular heart disease. So, therefore, I



2 IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
3 CIVIL TRIAL DIVISION

4 - - -

5  
6

BECKY DOWNARD : DECEMBER TERM, 2002

7

VS :

8

WYETH, WYETH-AYERST, :

9 PHARMACEUTICALS, INC., :

WYETH AYERST INTERNATIONAL, :

10 INC., AND WYETH :

PHARMACEUTICALS, DIVISION OF :

11 WYETH : NO. 00170

12 - - -

13 JOYCE C. DRAGE : DECEMBER TERM, 2002

14

VS :

15

WYETH, WYETH-AYERST, :

16 PHARMACEUTICALS, INC., :

WYETH AYERST INTERNATIONAL, :

17 INC., AND WYETH :

PHARMACEUTICALS, DIVISION OF :

18 WYETH : NO. 001068

19 - - -

20 BONNIE J. FINSTER : DECEMBER TERM, 2002

21

VS :

22

WYETH, WYETH-AYERST, :

23 PHARMACEUTICALS, INC., :

WYETH AYERST INTERNATIONAL, :

24 INC., AND WYETH :

PHARMACEUTICALS, DIVISION OF :

25 WYETH : NO. 001602

3 JUDY K. GRIEVE : DECEMBER TERM, 2002  
 4 VS :  
 5 WYETH, WYETH-AYERST, :  
 6 PHARMACEUTICALS, INC., :  
 7 WYETH AYERST INTERNATIONAL, :  
 8 INC., AND WYETH :  
 9 PHARMACEUTICALS, DIVISION OF :  
 10 WYETH : NO. 001067  
 11 JODI STOFFERS : DECEMBER TERM, 2002  
 12 VS :  
 13 WYETH, WYETH-AYERST, :  
 14 PHARMACEUTICALS, INC., :  
 15 WYETH AYERST INTERNATIONAL, :  
 16 INC., AND WYETH :  
 17 PHARMACEUTICALS, DIVISION OF :  
 18 WYETH : NO. 000998  
 19 AUGUST 16, 2004  
 20 COURTROOM 453, CITY HALL  
 21 PHILADELPHIA, PENNSYLVANIA  
 22  
 23 BEFORE: HONORABLE N.I. QUINONES ALEJANDRO, J.  
 24  
 25  
 JODI PITTA - R.P.R. (215)683-8013

1 (DOWNARD, ET AL VS. WYETH)  
 2 THE COURT: ARE WE READY TO  
 3 START?  
 4 WELL, SINCE THE DEFENSE WASN'T  
 5 HERE WITH ME LAST TIME, IT'S SORT OF YOUR  
 6 OBLIGATION TO TURN THE AIR CONDITIONERS  
 7 OFF BECAUSE YOU'RE CLOSEST TO THEM, BUT  
 8 WE'LL LET THE GENTLEMAN DO THAT.  
 9 WE'RE GOING TO DO OUR MOTIONS,  
 10 AND LET ME JUST GET MYSELF SITUATED HERE.  
 11 I'M NOT QUITE SURE WHICH ORDER THEY ARE SO  
 12 I'LL JUST PICK UP A BATCH.  
 13 MR. BLIZZARD: YOUR HONOR,  
 14 BEFORE WE GET STARTED WITH THE MOTIONS,  
 15 CAN I JUST RAISE A CONCERN THAT I HAVE  
 16 ABOUT TODAY'S NEWSPAPER STORY.  
 17 THE COURT: TODAY'S NEWSPAPER  
 18 STORY?  
 19 MR. BLIZZARD: YES.  
 20 THE COURT: I HAVEN'T READ THE  
 21 PAPER.  
 22 MR. BLIZZARD: IN TODAY'S  
 23 PHILADELPHIA INQUIRER, THE HEADLINE  
 24 STORY -- AND I'LL PASS IT UP TO THE  
 25 COURT -- THE HEADLINE STORY IN THE LOCAL

2 APPEARANCES:  
 3  
 4 BLIZZARD, MCCARTHY & NABERS, LLP  
 5 BY: EDWARD F. BLIZZARD, ESQUIRE  
 6 FOR THE PLAINTIFFS  
 7 CURRAN & BYRNE, P.C.  
 8 BY: ROBERT E.J. CURRAN, ESQUIRE  
 9 FOR THE PLAINTIFFS  
 10 WILLIAMS & BAILEY  
 11 BY JOHN T. BOUNDAS, ESQUIRE  
 12 E. ERICK ROSEMOND, ESQUIRE  
 13 FOR THE PLAINTIFFS  
 14 MILLER & ASSOCIATES  
 15 BY: MICHAEL MILLER, ESQUIRE  
 16 FOR THE PLAINTIFF STOFFERS  
 17 DECHERT, LLP  
 18 BY: DIANE P. SULLIVAN, ESQUIRE  
 19 PHILIP N. YANNELLA, ESQUIRE  
 20 FOR THE DEFENDANTS  
 21  
 22  
 23  
 24  
 25  
 JODI PITTA - R.P.R. (215)683-8013

1 (DOWNARD, ET AL VS. WYETH)  
 2 NEWS SECTION IS ABOUT THE RESULTS FROM THE  
 3 TRIALS A COUPLE WEEKS AGO.  
 4 THIS APPEARS TO ME TO BE  
 5 STRAIGHT OUT OF WYETH'S PUBLIC RELATIONS  
 6 MACHINE. IT HAS ALL OF THEIR THEMES IN  
 7 IT, THIS THEME OF OUT OF STATE PEOPLE COME  
 8 HERE WITHOUT DOCUMENTED INJURIES TO TRY TO  
 9 MAKE RECOVERY FOR SOMETHING THAT IS COMMON  
 10 IN THE GENERAL POPULATION.  
 11 THEY ALSO TALK ABOUT THEY COULD  
 12 HAVE STAYED IN THE SETTLEMENT AND RECEIVED  
 13 \$6,000 AND A GUARANTEE OF MEDICAL CARE.  
 14 ESSENTIALLY EVERYONE OF THEIR THEMES IS IN  
 15 THIS NEWS STORY. IT WOULD BE DIFFICULT  
 16 FOR US TO IMAGINE A SITUATION WHERE NO  
 17 JUROR HAS SEEN THIS. BUT IT CERTAINLY IS  
 18 POSSIBLE.  
 19 AND SO I'M NOT REALLY ASKING FOR  
 20 ANY REMEDY AT THIS POINT IN TIME. I  
 21 WANTED TO BRING IT TO THE COURT'S  
 22 ATTENTION AND THEN PERHAPS AFTER THE COURT  
 23 HAS AN OPPORTUNITY TO READ IT, LET --  
 24 MAYBE CONSIDER WHAT REMEDIES, IF ANY, ARE  
 25 IN ORDER.

1 (DOWNARD, ET AL VS. WYETH)  
 2 THE COURT: IT'S WITHIN THE FOUR  
 3 CORNERS OF HIS FIRST REPORT THOUGH. I  
 4 MEAN IT'S WITHIN THE FOUR CORNERS, IS IT  
 5 NOT?  
 6 MS. SULLIVAN: NO, YOUR HONOR.  
 7 IT WOULD BE OUR POSITION THE FIRST REPORT  
 8 HAS NO MENTION OF SYMPTOMS WHATSOEVER.  
 9 AND IT WAS ONLY IN RESPONSE TO THE GIFFEAR  
 10 MOTION THAT BELATEDLY ON THE TRIAL DR.  
 11 DEVAUGHN OPINES ABOUT SYMPTOMS.  
 12 THE COURT: WHEN DID YOU GET  
 13 THIS SUPPLEMENTAL REPORT?  
 14 MS. SULLIVAN: IT WAS IN  
 15 RESPONSE TO OUR GIFFEAR MOTION, SO IT  
 16 WOULD HAVE BEEN APPROXIMATELY THREE WEEKS  
 17 AGO.  
 18 THE COURT: WHAT PREJUDICE HAVE  
 19 YOU SUFFERED?  
 20 MS. SULLIVAN: OUR EXPERT HAS  
 21 BEEN ON VACATION. HE'S NOT YET HAD A  
 22 CHANCE TO REVIEW THE NEW REPORT. IT  
 23 CHANGES TRIAL PREPARATION, IT CHANGES  
 24 CROSS-EXAMINATION PREPARATION.  
 25 THE COURT: HAVING HEARD THE

1 (DOWNARD, ET AL VS. WYETH)  
 2 ARGUMENTS ON THIS MOTION, THE MOTION IS  
 3 DENIED.  
 4 I THINK I'M COMING DOWN TO THE  
 5 MORE DIFFICULT ONES.  
 6 THIS IS DEFENDANT'S MOTION IN  
 7 LIMINE TO PRECLUDE THE EXPERT TESTIMONY OF  
 8 PAUL GENECIN, G-E-N-E-C-I-N.  
 9 MR. MILLER: WE'RE NOT GOING TO  
 10 CALL DR. GENECIN SO THAT IS MOOT.  
 11 THE COURT: OKAY.  
 12 I THINK THE NEXT ONE IS WYETH  
 13 MOTION REQUESTING REVERSE BIFURCATION  
 14 WHICH THE COURT HAS ALREADY GRANTED.  
 15 DO WE NEED A BREAK, FIVE MINUTE  
 16 BREAK?  
 17 MS. SULLIVAN: I'M FINE.  
 18 THE COURT: WELL, I DO. LET'S  
 19 TAKE A FIVE MINUTE BREAK.  
 20 MR. ROSEMOND: I JUST WANT TO  
 21 MAKE SURE, I KNOW I ASKED THIS BEFORE BUT  
 22 DO YOU HAVE A COPY OF OUR WILLIAMS  
 23 BAILEY'S MOTION IN LIMINE BECAUSE WE DID  
 24 IT LIKE LAST TIME. WE HAD ABOUT 60 SOME  
 25 ODD ONES. THEY'RE SEPARATE MOTIONS BUT

1 (DOWNARD, ET AL VS. WYETH)  
 2 THEY'RE WITHIN A VERY LARGE DOCUMENT.  
 3 THE COURT: I THINK IT'S THIS  
 4 ONE.  
 5 - - -  
 6 (SHORT RECESS WAS TAKEN.)  
 7 - - -  
 8 THE COURT: I THINK I AM NOW ON  
 9 PLAINTIFFS' MOTIONS. I THINK.  
 10 MR. YANNELLA: WE HAD --  
 11 MR. ROSEMOND: WAS THAT FILED  
 12 THROUGH CURRAN AND BYRNE? BECAUSE THEN IT  
 13 WOULD BE OURS.  
 14 MR. YANNELLA: YOUR HONOR,  
 15 THERE'S ACTUALLY A COUPLE MORE WYETH  
 16 MOTIONS.  
 17 THE COURT: I KNOW THERE ARE. I  
 18 JUST SEE THEM RIGHT HERE.  
 19 MR. YANNELLA: OKAY.  
 20 THE COURT: WE'LL GET THEM ALL.  
 21 WYETH MOTION FOR SEPARATE TRIAL.  
 22 I THOUGHT I JUST DID ALL THESE.  
 23 MR. YANNELLA: THAT ONE WE DID.  
 24 MR. ROSEMOND: THOSE WERE THE  
 25 FIRST ONES.

1 (DOWNARD, ET AL VS. WYETH)  
 2 THE COURT: WE TRIED TO PUT THEM  
 3 ALTOGETHER, AND THIS MAY HAVE JUST ENDED  
 4 UP BY ITSELF.  
 5 I'VE ALREADY DENIED THE  
 6 PROGRESSION ONES; IS THAT CORRECT?  
 7 MS. SULLIVAN: YES, YOUR HONOR.  
 8 THE COURT: I'M SORRY.  
 9 MS. SULLIVAN: YES.  
 10 MR. YANNELLA: THAT IS CORRECT,  
 11 YOUR HONOR.  
 12 MR. ROSEMOND: YES.  
 13 THE COURT: THE MOTIONS FOR  
 14 SUMMARY JUDGMENT, PLAINTIFFS' RESPONSES.  
 15 THOSE ARE JURY INSTRUCTIONS.  
 16 DEFENDANT'S MOTION TO EXCLUDE  
 17 INFLAMMATORY EVIDENCE.  
 18 MR. YANNELLA: YES, YOUR HONOR.  
 19 WE HAVE AN AGREEMENT TO ALL BUT ONE OF THE  
 20 DOCUMENTS. AND THE DOCUMENT IN DISPUTE IS  
 21 THE 1998 CONSIDINE MEMO WHICH ACTUALLY  
 22 YOUR HONOR RULED ON THIS LAST MONTH AND AT  
 23 THE TRANSCRIPT IT'S PAGES 23 TO 27. YOU  
 24 PRECLUDED THE DOCUMENT, BUT I UNDERSTAND  
 25 THE PLAINTIFFS WANT TO REVISIT THE ISSUE.

MASTER FILE NO. M-00-001-A

<b>IN RE:</b>	§	<b>IN THE DISTRICT COURT OF</b>
	§	
<b>SEVENTH ADMINISTRATIVE</b>	§	<b>TOM GREEN COUNTY, TEXAS</b>
<b>JUDICIAL REGION CONSOLIDATED</b>	§	
<b>DIET DRUG LITIGATION</b>	§	<b>51<sup>ST</sup> JUDICIAL DISTRICT</b>

CAUSE NO. 18,463

<b>ROSA CASTERENO, et al.</b>	§	<b>IN THE DISTRICT COURT OF</b>
<b>Plaintiffs,<sup>1</sup></b>	§	
	§	
<b>v.</b>	§	<b>NOLAN COUNTY, TEXAS</b>
	§	
<b>WYETH, et al.</b>	§	
<b>Defendants.</b>	§	<b>32ND JUDICIAL DISTRICT</b>

**ORDER GRANTING WYETH'S MOTION FOR REVERSE BIFURCATION OF TRIAL**

Came on to be heard on this 12 day of January 2006, Wyeth's Motion for Reverse Bifurcation of Trial. After considering the arguments of counsel and evidence presented, the Court, based upon the National Class Action Settlement Agreement and its effect on this intermediate opt-out case, finds that the trial of this matter should be conducted in two phases before the same jury and GRANTS the motion. In the first phase, the following issues will be tried to verdict: 1) whether the Plaintiff's heart valve has been injured; 2) if so, whether that injury was caused in fact by Defendant's medication; and 3) if so, the amount of compensatory damages to which Plaintiff is entitled. If a verdict is rendered for Plaintiff on each of those issues, then in the second phase the same jury will consider the issues of liability on the causes of action asserted, including the issues of whether Defendant's conduct and/or product

SIGNED this 12 day of Jan

  
 \_\_\_\_\_  
 HONORABLE BARBARA L. WALTHER

Plaintiffs Castereno and Calzada have dismissed their cases; only Plaintiff Ortiz remains.

**MASTER FILE NO. M-00-001-A**

<b>IN RE:</b>	§	<b>IN THE DISTRICT COURT OF</b>
	§	
<b>SEVENTH ADMINISTRATIVE</b>	§	<b>TOM GREEN COUNTY, TEXAS</b>
<b>JUDICIAL REGION CONSOLIDATED</b>	§	
<b>DIET DRUG LITIGATION</b>	§	<b>51<sup>ST</sup> JUDICIAL DISTRICT</b>

**CAUSE NO. 18028**

<b>DIANNE PENCE,</b> Plaintiff	§	<b>IN THE DISTRICT COURT OF</b>
	§	
	§	
v.	§	<b>CALLAHAN COUNTY, TEXAS</b>
	§	
<b>WYETH, and RAUL N. CALVO, Jr.,</b> Defendants	§	<b>42<sup>ND</sup> JUDICIAL DISTRICT</b>

**ORDER GRANTING WYETH'S MOTION FOR REVERSE BIFURCATION OF TRIAL**

Came on to be heard on this 12 day of January, 2006, Wyeth's Motion for Reverse Bifurcation of Trial. After considering the arguments of counsel and evidence presented, the Court, based upon the National Class Action Settlement Agreement and its effect on this intermediate opt-out case, finds that the trial of this matter should be conducted in two phases before the same jury and GRANTS the motion. In the first phase, the following issues will be tried to verdict: 1) whether the Plaintiff's heart valve has been injured; 2) if so, whether that injury was caused in fact by Defendant's medication; and 3) if so, the amount of compensatory damages to which Plaintiff is entitled. If a verdict is rendered for Plaintiff on each of those issues, then in the second phase the same jury will consider the issues of liability on the causes of action asserted, including the issues of whether Defendant's conduct and/or product defect was the proximate and/or producing cause of the injuries found in the first phase.

SIGNED this 12 day of January, 2006.

  
 \_\_\_\_\_  
 HONORABLE BARBARA L. WALTHER

# 121<sup>ST</sup> DISTRICT COURT

500 W. Main, Rm. 302W  
Brownfield, Texas 79316-4335

**Kelly G. Moore**  
Presiding Judge

Phone (806)637-7742  
Fax (806)637-8011

Email Ninthregion@aol.com



Terry\*Yoakum

Court Coordinator  
Claudette Buske  
(806)637-7742

Court Reporter  
Jamie Jackson  
(806)637-6958

January 10, 2006

James L. Wharton  
Jones, Flygare, Brown & Wharton  
P.O. Box 2426  
Lubbock, Texas 79408-2426

Kenneth J. Ferguson  
Clark, Thomas & Winters  
P.O. Box 1148  
Austin, Texas 78767

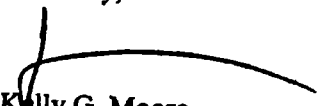
Adam Peavy  
Fleming & Associates, L.L.P.  
1330 Post Oak Blvd., Suite 3030  
Houston, Texas 77056

Re: Cause No. 8154 in the 121<sup>st</sup> District Court of Yoakum County, Texas; Sally H. Bradford vs. Wyeth

Counsel:

The court, after considering DEFENDANT'S MOTION FOR REVERSE BIFURCATION OF TRIAL is of the opinion that the granting of the Motion is appropriate in this case. Defendant is directed to prepare and submit an order to the court.

Sincerely,

  
Kelly G. Moore  
KGM/cb

cc: District Clerk

received  
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CAUSE NO. 03-05-19169

MARGARET ROGERS,

Plaintiff,

v.

WYETH AND CRAIG SCOTT  
BRADLEY, M.D.

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§

IN THE DISTRICT COURT

286<sup>TH</sup> JUDICIAL DISTRICT

HOCKLEY COUNTY, TEXAS

ORDER GRANTING WYETH'S MOTION  
FOR REVERSE BIFURCATION OF TRIAL

Come to be heard on this 21<sup>st</sup> day of December 2005, Wyeth's Motion for Reverse Bifurcation of Trial. After considering the arguments of counsel and evidence presented, the Court, based upon the National Class Action Settlement Agreement and its effect on this intermediate opt-out case, finds that the trial of this matter should be conducted in two phases before the same jury and GRANTS the motion. In the first phase, the following issues will be tried to verdict: 1) whether the Plaintiff's heart valve has been injured; 2) if so, whether that injury was caused in fact by Defendant's medication; and 3) if so, the amount of compensatory damages to which Plaintiff is entitled. If a verdict is rendered for Plaintiff on each of those issues, then in the second phase the same jury will consider the issues of liability on the causes of action asserted, including the issues of whether Defendant's conduct and/or product defect was the proximate and/or producing cause of the injuries found in the first phase.

SIGNED this 3rd day of Jan., 2006

Original Signed By  
Judge Harold Phelan

HONORABLE HAROLD PHELAN  
Judge, 286<sup>th</sup> Judicial District Court of  
Hockley County, Texas

1 FILED at 4:05 o'clock P  
3-06 DENNIS PRICE  
District Court Clerk, Hockley Co., TX  
By [Signature] Deputy

NO. 03-05-19179

**CHERYL A. HALEY AND  
RHONDA C. ROGERS-TUE,**

**Plaintiffs,**

v.

**WYETH, DR. MICHAEL G. BAILEY  
AND DR. CRAIG BRADLEY,**

**Defendants.**

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**IN THE DISTRICT COURT OF**

**HOCKLEY COUNTY, TEXAS**

**286TH JUDICIAL DISTRICT**

**ORDER GRANTING WYETH'S MOTION  
FOR REVERSE BIFURCATION OF TRIAL**

Come to be heard on this 21<sup>st</sup> day of December 2005, Wyeth's Motion for Reverse Bifurcation of Trial. After considering the arguments of counsel and evidence presented, the Court, based upon the National Class Action Settlement Agreement and its effect on this intermediate opt-out case, finds that the trial of this matter should be conducted in two phases before the same jury and GRANTS the motion. In the first phase, the following issues will be tried to verdict: 1) whether the Plaintiff's heart valve has been injured; 2) if so, whether that injury was caused in fact by Defendant's medication; and 3) if so, the amount of compensatory damages to which Plaintiff is entitled. If a verdict is rendered for Plaintiff on each of those issues, then in the second phase the same jury will consider the issues of liability on the causes of action asserted, including the issues of whether Defendant's conduct and/or product defect was the proximate and/or producing cause of the injuries found in the first phase.

SIGNED this 3rd day of Jan., 2006.

Original Signed By  
Judge Harold Phelan

HONORABLE HAROLD PHELAN  
Judge, 286<sup>th</sup> Judicial District Court of  
Hockley County, Texas

FILED at 4:08 o'clock PM  
1-3-06 DENNIS PRICE  
District Court Clerk, Hockley Co., TX  
By [Signature] Deputy



# **EXHIBIT 2**

Buxton Vs Wyeth Pharmac-ORDER



SHARON BUXTON  
 Plaintiff,  
 v.  
 WYETH PHARMACEUTICALS, et al.,  
 Defendants.

COURT OF COMMON PLEAS  
 PHILADELPHIA COUNTY  
 JULY TERM 2004  
 No. 000202  
 HORMONE THERAPY CASE

FRANCES HENRY, and  
 DANIEL HENRY, w/h  
 Plaintiff,  
 v.  
 WYETH PHARMACEUTICALS, et al.,  
 Defendants.

COURT OF COMMON PLEAS  
 PHILADELPHIA COUNTY  
 JULY TERM 2004  
 No. 000875  
 HORMONE THERAPY CASE

PAULINE LESCINSKI  
 Plaintiff,  
 v.  
 WYETH PHARMACEUTICALS, et al.,  
 Defendants.

COURT OF COMMON PLEAS  
 PHILADELPHIA COUNTY  
 JULY TERM 2004  
 No. 000390  
 HORMONE THERAPY CASE

**ORDER**

AND NOW, this 12th day of July, 2010, upon consideration of Wyeth Defendants' Motion for Phased Trial, and any response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and that:

(i) trial in these cases will be tried in three phases:

- Phase I: Medical causation and compensatory damages
- Phase II: Liability for compensatory and punitive damages

**DOCKETED**  
**COMPLEX L.F. CENTER**

JUL 14 2010

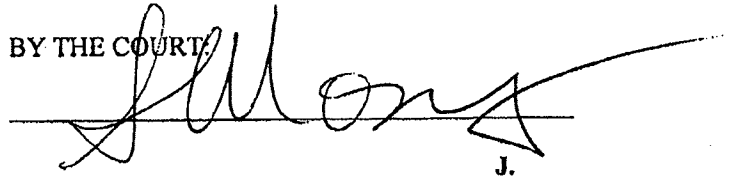
**L. RYANT-DAVIS**

Case ID: 040700202  
Control No.: 10060732

Phase III: Amount of punitive damages; and

(ii) Plaintiffs are precluded from introducing any evidence in a given Phase that is not relevant to the issue or issues being tried in that Phase.

BY THE COURT:

A handwritten signature in black ink, written over a horizontal line. The signature is stylized and appears to be "Sullivan". Below the signature, the letter "J." is printed.

# **EXHIBIT 3**

2 IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
3 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
4 CIVIL TRIAL DIVISION

5 - - -  
6 CONNIE BARTON : APRIL TERM 2004

7 VS :

8 WYETH PHARMACEUTICALS, INC., :  
ET AL. : NO. 006301

9 - - -  
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11 PRETRIAL CONFERENCE

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13 SEPTEMBER 9, 2009

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15 ROOM 633, CITY HALL  
16 PHILADELPHIA, PENNSYLVANIA

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19 BEFORE: THE HONORABLE NORMAN ACKERMAN, J. and a  
20 Jury

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23  
24 Judith Ann Romano, RPR, CM, CRR  
25 Official Court Reporter

1 (Barton v Wyeth, et al.)  
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4 APPEARANCES:

5 LITTLEPAGE BOOTH

6 BY: ZOE LITTLEPAGE, ESQUIRE and

7 RAINEY C. BOOTH, ESQUIRE

8 2043A West Main Street

9 Houston, TX 77098

10 and

11 WILLIAMS CUKER BEREZOFSKY

12 BY: ESTHER BEREZOFSKY, ESQUIRE and

13 SAMUEL ABLOESER, ESQUIRE and

14 KEVIN HAVERTY, ESQUIRE

15 1617 JFK Blvd., Suite 800

16 Philadelphia, PA 19103

17 For Plaintiff

18 REED SMITH, LLP

19 BY: GEORGE E. MCDAVID, ESQUIRE and

20 SHANA E. RUSSO, ESQUIRE

21 136 Main Street, Suite 250

22 Princeton, NJ 08540

23 and

24 PORZIO, BROMBERG & NEWMAN, PC

25 BY: LAUREN HANDLER, ESQUIRE and

SPRING POTOCZAK, ESQUIRE

100 Southgate Building

Morristown, NJ 07960

For the Defendants

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1 (Barton v Wyeth, et al.)

2 MS. HANDLER: Right.

3 THE COURT: Since it appears that there  
4 is going to be more than one trial attorney  
5 who will participate in the trial of this  
6 litigation, pursuant to my pretrial order --  
7 who is local counsel?

8 MR. ABLOESER: I am, Your Honor, for  
9 plaintiff, Sam Abloeser.

10 THE COURT: Defense?

11 MR. MCDAVID: George McDavid, Your,  
12 Honor.

13 THE COURT: Do each of you have on your  
14 letterhead a statement of the involvement of  
15 various counsel in this litigation?

16 MR. MCDAVID: Yes, Your Honor.

17 MR. ABLOESER: Yes, Your Honor.

18 THE COURT: Hand it up to my law clerk.

19 Please note that notwithstanding the  
20 number of counsel on each side, there will  
21 only be counsel, one attorney cross-examining  
22 witnesses. There may be only one attorney who  
23 is going to open, and one attorney who will  
24 close. You may have different attorneys to  
25 question different witnesses, that's fine, but

1 (Barton v Wyeth, et al.)

2 there will be only one attorney who will open,  
3 one attorney who will close, and one lawyer  
4 who will involve themselves in cross  
5 examination on either side of various  
6 witnesses. Is that understood.

7 MS. LITTLEPAGE: Yes, Your Honor.

8 MR. MCDAVID: Yes, Your Honor.

9 THE COURT: This case, pursuant to this  
10 Court's discretion, will proceed on a reverse  
11 bifurcation basis. We will take in the first  
12 phase of this litigation medical causation and  
13 damages. The second phase will be liability.  
14 Jury selection will commence tomorrow at 9:30.

15 What's the estimated length of trial of  
16 phase one, counsel?

17 MS. LITTLEPAGE: Probably a week, just  
18 on the science issue.

19 THE COURT: On phase one?

20 MS. LITTLEPAGE: Yes, sir.

21 THE COURT: Defense agree?

22 MR. MCDAVID: I don't know if she is  
23 referring to her case or the whole case.

24 THE COURT: I assume she is referring  
25 to the whole case.



1 (Barton v Wyeth, et al.)

2 MS. LITTLEPAGE: I was. I think five,  
3 maybe six days, I was thinking us three and a  
4 half, three and a half. I haven't really  
5 thought of it because I just got hit with  
6 bifurcation.

7 THE COURT: Well, it's important that I  
8 ask you these questions because the jury is  
9 going to want to know how long.

10 MR. MCDAVID: I am sort of in the same  
11 boat that she is. I haven't thought about it.

12 THE COURT: Think about it, counsel.

13 MR. MCDAVID: Right now?

14 THE COURT: Yes, as I am looking at it.

15 MR. MCDAVID: As I am looking, too, I  
16 would say five to eight trial days.

17 THE COURT: Let's figure a week and a  
18 half for phase one?

19 MR. MCDAVID: Your Honor, this issue is  
20 unanticipated by both of us and I had not  
21 planned to call my science witnesses on that  
22 sort of notice that quickly, so I have to go  
23 and make sure that they are available. If  
24 that raises issues I will raise them with the  
25 Court. I am not saying it does, I am not

1 (Barton v Wyeth, et al.)

2 sure.

3 THE COURT: Well, your firm should  
4 understand because I held reverse bifurcation  
5 in the Nelson case, and I also held reverse  
6 bifurcation in other Mass Tort programs which  
7 I tried. So your office certainly should have  
8 been aware of it. So let's hope that you have  
9 witnesses because I don't wait for witnesses.

10 MR. MCDAVID: Very well, Your Honor, I  
11 understand that, and I am just pointing out  
12 that that may be an issue.

13 In those matters, Your Honor, I think  
14 there was a motion for reverse bifurcation, so  
15 it was somewhat more anticipated, so I  
16 understand --

17 THE COURT: I didn't see any motion for  
18 reverse bifurcation.

19 MR. MCDAVID: In other cases.

20 THE COURT: Oh, yes, there was. But  
21 that's up to the Court.

22 MR. MCDAVID: Absolutely.

23 THE COURT: I don't need a motion, I am  
24 doing it *sue sponte*. And I am doing it  
25 because I feel the jury should make a

1 (Barton v Wyeth, et al.)  
2 determination of medical issues without any  
3 testimony as to conduct. So that consequently  
4 their determination will be based solely on  
5 medical issues and will not be influenced by  
6 any testimony dealing with conduct of the  
7 defendant.

8 Now phase two, if we get to that, how  
9 long will phase two take?

10 MS. LITTLEPAGE: I would anticipate for  
11 the plaintiffs, four trial days.

12 MR. MCDAVID: I would say about three  
13 for us, Your Honor.

14 THE COURT: So we are talking about a  
15 week and a half. So we are talking about a  
16 case that could last three to four weeks. Is  
17 that fair?

18 MR. MCDAVID: Yes, sir.

19 MS. LITTLEPAGE: Yes.

20 THE COURT: This will proceed as a jury  
21 of eight, is that satisfactory to both sides?

22 MR. MCDAVID: Yes, Your Honor.

23 MS. LITTLEPAGE: Yes, sir.

24 MR. MCDAVID: Your Honor, may I suggest  
25 that we obtain two alternates?

1 (Barton v Wyeth, et al.)

2 THE COURT: Well, under our local rules  
3 if you proceed with a jury of eight it can be  
4 reduced to six for purposes of verdict. Is  
5 that satisfactory?

6 MS. LITTLEPAGE: Yes, sir.

7 MR. MCDAVID: Yes, but I would still  
8 request two alternates, Your Honor.

9 MS. LITTLEPAGE: Plaintiffs don't  
10 object if the Court is inclined to do that.

11 THE COURT: What you are asking for,  
12 you might as well ask the Court for a jury of  
13 ten rather than a jury of eight. All right,  
14 we will proceed with eight. Frank will get  
15 two alternates just in the event that there is  
16 a problem. We did have it in the Nelson One.

17 This means that if we utilize the two  
18 alternates during the trial and there is other  
19 defections, a jury verdict of six would be  
20 appropriate. Do both sides agree?

21 MR. MCDAVID: Yes, sir.

22 MS. LITTLEPAGE: Yes, sir.

23 MR. MCDAVID: Your Honor, based on past  
24 experience, I would also suggest that we, if  
25 possible, secure a panel of 60.

# **EXHIBIT 4**

THE COURT OF COMMON PLEAS OF PHILADELPHIA  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

- - -

JENNIE B. NELSON and : JANUARY TERM, 2004  
LAWRENCE NELSON, w/h, :  
Plaintiffs, :  
vs. :  
WYETH PHARMACEUTICALS, INC., :  
et al., :  
Defendants. : NO. 1670

Pretrial Conference

- - -

Tuesday, September 5, 2006  
Commencing at 1:30 p.m.

- - -

Courtroom 646, City Hall  
Philadelphia, Pennsylvania

- - -

BEFORE: THE HONORABLE NORMAN ACKERMAN, JUDGE

- - -

REPORTED BY: Bernadette Black Berardinelli, RMR, CRR

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APPEARANCES:

TOBIAS MILLROOD, ESQUIRE  
Schiffrin & Barroway, LLP  
Three Bala Plaza East, Suite 400  
Bala Cynwyd, PA 19004

- and -

KENNETH M. SUGGS, ESQUIRE  
Janet, Jenner & Suggs, LLC  
500 Taylor Street  
Columbia, SC 29201

- and -

ROBERT K. JENNER, ESQUIRE  
Janet, Jenner & Suggs, LLC  
1829 Reisterstown Road, Suite 320  
Baltimore, MD 21208

- and -

ERIK B. WALKER, ESQUIRE  
Hissey, Kientz & Herron, P.L.L.C.  
16800 Imperial Valley Drive, Suite 130  
Houston, TX 77060

For the Plaintiffs;

MICHAEL T. SCOTT, ESQUIRE  
ANDREW J. TREVELISE, ESQUIRE  
TRACY G. WEISS, ESQUIRE  
AMY M. VANNI, ESQUIRE  
Reed Smith, LLP  
2500 One Liberty Place  
1650 Market Street  
Philadelphia, Pennsylvania 19103  
Counsel for the Defendants.

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Walker of Hissey, Kientz & Herron prepared to address this issue on reversion bifurcation, if I may.

MR. WALKER: Actually, you stated most of our positions. I will probably be a little repetitive.

THE COURT: I didn't mean to do that. I have been in this position before in the mass tort program. How long did I do that? Four years as mass tort judge?

MR. WALKER: I am glad you did. I am afraid you stated it better than I will right now.

Our ultimate feeling is that reverse bifurcations goals would not be achieved in a tort that has not even had its first lawsuit yet.

THE COURT: Why not?

MR. WALKER: Because the goals of reverse bifurcation, at least two principal goals from the case law I've seen are to promote efficiencies in the trial of cases and to facilitate settlement. And neither of those goals would be realized in a litigation that



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has not yet had any liability evidence presented to any jury.

THE COURT: They are our goals in every type of case, whether they're mass tort cases or other cases that I've had some experience handling, mostly medical mal cases. When I was one of the team leaders before I became coordinating Judge for the mass tort program, their goals each and every time is to sit here in front of a jury or if you sit here in front of Judge Ackerman and we're getting ready for trial -- in many instances during my pretrial conference, I would talk to counsel about the ultimate -- which is the settlement of the case.

But you might have missed what I said: Sympathy is also a reason. To avoid sympathy -- and you will hear the judge, in my remarks to the jury, tell them what their duties and responsibilities are once they are sworn as jurors in this litigation. And they'll have to find the facts in this case, find the true facts from the evidence that is being submitted just here in this courtroom.

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And those facts must be determined without sympathy for, prejudice against any of the litigants.

So when I talk about sympathy, I am talking about a jury making a determination on a very important issue of causation, medical causation, without having heard any testimony concerning the conduct of the defendant.

Am I afraid of that? Well it is not a question of being afraid. Maybe I used the wrong term. But I'm suspicious to the point that if the jury determines conduct the member of Plaintiffs Bar feel that there is, conduct which would justify the imposition of damages in excess of compensatory damages in this litigation, then I'm concerned about the jury rendering a determination on the issue of medical causation by taking into consideration the conduct for which the testimony has already been introduced.

And this Court wants to make certain that all of the issues are determined without any recourse, sympathy, or prejudice, and consequently would not, in my judgment -- in

1  
2 the past one of the reasons, main reasons, was  
3 to allow the jury to determine the issue of  
4 medical causation without hearing anything that  
5 could cause them to determine it other than on  
6 the bases of the facts in this case. You may  
7 not like the conduct, but that should have no  
8 basis in the determination of whether or not  
9 the taking of this hormone therapy drug was a  
10 factual cause in the injuries sustained by  
11 Plaintiff.

12 How do you respond to that, Counsel?

13 MR. WALKER: Well, certainly, Judge,  
14 there always is an interest in reducing  
15 prejudice. That is an interest that exists in  
16 any case, even cases that do not involve toxic  
17 torts, cases that don't involve any kind of  
18 scientific causation issues. That issue is  
19 always prevalent in any case where liability is  
20 to be decided. But it did not result in  
21 reverse bifurcation in every case because we do  
22 have confidence in the ability of juries to  
23 follow court's instructions and obey the  
24 Court's instructions.

25 In addition, in this case, the

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Defendants' attempt to kind of break the evidence down into causation evidence and liability evidence is destined to fail, just by way of example.

One of the big issues will be epidemiological evidence, of the relationship between hormone therapy and breast cancer. That evidence is undeniably relevant to prove causation. But it is also relevant to prove the defendants' duty to warn and duty to test to obtain an adequate warning.

So we will present evidence in both phases of the trial if it is bifurcated. But certainly to prove both liability and causation, we will introduce evidence of what the science showed at various points in time --

THE COURT: Well, you certainly have a right to do so. And you certainly would have a right to do so even if I bifurcated that without requiring you to know duplicity of testimony. Because in the second phase, you could testify what you're talking about, which is relevant to the issue of medical causation, which very well might also be necessary for you

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to argue about a duty on the part of the defendant in the second phase of litigation.

The jury won't take a blind ear to that.

But you also have to understand and realize what success we have had here in Philadelphia County. I am not saying you should -- my son-in-law practices in Baltimore. And I respect the attorneys in Baltimore and the Judges in Baltimore. But I have no idea as to whether or not they had a mass tort program in that part of Maryland, and I have no idea what those judges' personal histories as to whether or not it has been successful as far as reverse bifurcation is concerned.

While you indicate that reverse bifurcation shouldn't be necessary in this type of case, it also has helped in reducing the amount of time that a trial will occur. Because if counsel is correct for Defendants, and the jury finds no damage, then this would be the end of the trial. There wouldn't be any reason to go ahead and have a second phase of litigation. And in my judgment, the first

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phase probably, if it is similar to the cases in our other mass tort program, we'll finish the first phase in no longer than ten days or two weeks. So we can save trial time for three weeks if the jury makes a determination in favor of defense.

I've been through all of these arguments. And I want to you say sympathy is not the only reason. I think it has been justified in our system. I think our system has been successful with handling reverse bifurcation. And while I did not make it global, because I felt it is the responsibility of the trial judge to make that decision, I at no time during my stay as coordinating judge wanted to influence any of my colleagues or state that they should do it because Judge Ackerman is doing it. I think that all of them, after their first handling in the traditional fashion, agreed with this Court and held that reverse bifurcation was the appropriate way to go.

And I am going to enter an Order granting the motion for reverse bifurcation

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this 5th day of September, trial shall proceed on a reverse bifurcated basis with Phase I addressing whether Plaintiff suffered a compensable injury resulting from her use of hormone replacement therapy; Phase II, if necessary, will address the issues of statute of limitations, liability and punitive damages.

And let me make a note, Counselor, if we get to Phase II, if we get to Phase II, the last question would be for the jury to determine whether the conduct of Defendant is outrageous before we get into the wealth of reasons of why.

MR. SCOTT: That is agreed with us certainly, Your Honor.

THE COURT: That is what this Court has done in many of our cases, even prior to my being coordinated judge of Complex Litigation Center.

With that, the Court will enter the order dated 9/5/2006.

MR. MILLROOD: Your Honor, will you, of course, just note plaintiffs' exceptions.

THE COURT: You get automatic

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exceptions in Pennsylvania, unless that has changed, Counsel.

Sally, will you, at the end of the day, take this to Jan, have it docketed, and copies sent to counsel?

All right. That being said, let's go over your list. First of all, I am going to ask you which ones are being pressed and which ones haven't been. And then I want you to tell me which are necessary for Phase I. Because I am not going to go into 47 motions if some of them are not necessary for Phase I, which we're going to start.

MR. SCOTT: Just a second, Your Honor. I am scrolling down this list. If you could give us a minute.

THE COURT: Let me just say, which ones are unopposed? And I received a letter from Wyeth indicating -- I count four. They said five.

Plaintiffs' Motion in Limine No. 5 is granted as unopposed. If I am wrong, you tell me I am wrong.

MR. SCOTT: You're right, Your Honor.