

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>IN RE: ZIMMER NEXGEN KNEE</b>	)	<b>MDL NO. 2272</b>
<b>IMPLANT PRODUCTS LIABILITY</b>	)	
<b>LITIGATION</b>	)	<b>Master Docket Case No. 11 C 5468</b>
	)	
<b>This Document Applies to All Cases</b>	)	<b>Judge Rebecca R. Pallmeyer</b>

**TRIAL SELECTION ORDER**

In October 2017, the court randomly selected 36 cases in this MDL to constitute the initial pool of cases eligible for trial. Pursuant to the procedures outlined in Case Management Order No. 12 ("CMO-12") [2341], Plaintiffs and Defendant have narrowed that initial pool to twelve cases: four cases involving allegedly defective 5950 MIS tibial component products, four cases involving allegedly defective NexGen Flex femoral component products, and four cases involving allegedly defective NexGen Flex tibial component products. Both sides have provided brief statements addressing whether each of the remaining cases is appropriate for bellwether treatment.

CMO-12 provides that the court will select two cases from the 5950 MIS tibial component category of cases to be worked up for trial, and that Defendant will then select a case from either the Flex femoral category or the Flex tibial category. The court then selects the remaining trial cases. In their submissions, the parties agree that Plaintiff Larry Effler's case (11 C 5489) is an appropriate case for trial in the 5950 MIS tibial category. The court also agrees that Mr. Effler's case appears to be an appropriate one for trial and selects it as a bellwether case. The parties are also in agreement that Plaintiff Beverly Nicholson's case (15 C 3438) would not be an appropriate bellwether trial case. The court agrees that Ms. Nicholson's participation in a Zimmer clinical trial and the lack of clarity about whether she has experienced loosening in both knees limits the case's representativeness and its value as a bellwether case.

The parties disagree about the remaining cases in the 5950 MIS tibial category:

*Johnston* (15 C 3031) and *Suber* (13 C 6806) Plaintiff Bobby Suber suffered a stroke approximately six years after his revision surgery and has since suffered multiple additional strokes. Plaintiffs urge that Mr. Suber's case should not be selected for trial because he is incapacitated and would be unable to attend the trial or offer any testimony, including by deposition. A case with an incapacitated plaintiff is not representative, the Plaintiffs Steering Committee contends, and any damages awarded in the event of a verdict for Mr. Suber would provide only limited information because he became incapacitated soon after suffering the injury alleged in this case.

Defendant argues that the paucity of medical records available in Plaintiff Barbara Johnston's case makes it impossible even to assess whether her case is representative. According to Defendant, Ms. Johnston has produced just 25 pages of medical records—a 16-page chart from her implant surgery and a 9-page chart from her revision surgery. That is, Ms. Johnston has produced no x-ray reports and no documentary record of the implant technique used, her post-operative care, follow-up visits with her surgeon, or the exact products used during her revision surgery. In addition, Defendant notes that Ms. Johnston's limited medical records suggest that she has a complex and unique medical history that would make her case unrepresentative.

In the court's view, other than Mr. Effler's case, Mr. Suber's case is the most appropriate of the remaining cases for trial. The lack of medical records in Ms. Johnston's case makes it difficult to determine whether her case would be representative and informative as a bellwether case. With respect to Mr. Suber, as Defendant notes, Plaintiffs did not dismiss his case, strike his case from the pool, or waive *Lexecon*. If Mr. Suber intends to continue to prosecute his case, his case should remain eligible for bellwether selection. The court is also not certain that the impact of Mr. Suber's absence at trial would be so significant that it would affect the representativeness of his case. In addition, any damages awarded in this case would presumably be based on the alleged harm Mr. Suber suffered in the period between the alleged

injury to his knee and the stroke that incapacitated him. The court is confident that such an award would provide *some* information and that the parties could attempt to extrapolate from that award to assess the value of cases in which parties have allegedly suffered harm for longer periods.

For the reasons discussed above, the court selects the following two cases from the 5950 MIS tibial component category for bellwether trials:

*Larry Effler, et al. v. Zimmer, Inc.*, 11 C 5489

*Bobby Suber v. Zimmer, Inc.*, 13 C 6806.

ENTER:

A handwritten signature in black ink, appearing to read "Rebecca R. Pallmeyer", with a long horizontal flourish extending to the right.

Dated: January 16, 2018

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REBECCA R. PALLMEYER  
United States District Judge