

2006

# Margaret Kilpatrick v. Garlock Sealing Technologies, LLC, et al., : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARGARET KILPATRICK,  
individually,  
and as personal representative on behalf of  
the legal heirs of JAMES KILPATRICK,  
deceased,

Plaintiffs and Appellants,

vs.

GARLOCK SEALING  
TECHNOLOGIES, LLC, et al.,

Defendants and Appellees.

**REPLY BRIEF OF APPELLANT**

Consolidated Case No.: 20060887-CA

MARVIN KIRKHAM and  
CAROLYN KIRKHAM,

Plaintiffs and Appellants,

vs.

AC and S,

Defendants and Appellees.

APPEAL FROM A FINAL JUDGMENT OF THE THIRD DISTRICT COURT,  
SALT LAKE COUNTY, STATE OF UTAH,  
THE HONORABLE GLENN K. IWASAKI PRESIDING

FILED  
UTAH APPELLATE COURT  
DEC 05 2007

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## **TABLE OF AUTHORITIES**

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## **I. INTRODUCTION**

In their brief the Appellees continue their quest to punish the Appellants for failing to do the impossible. Their motions, and the District Court's orders, punished the Kilpatrick Plaintiffs for not complying with an order that they were unaware of and which, in the case of the wrongful death heirs, did not even apply to them. Not satisfied with those impossibilities, the defendants now claim the punishment for Plaintiffs in both cases is appropriate because Plaintiffs' counsel was aware of the order and can be responsible for failing to comply with it. Of course, this position ignores the undisputed fact that Plaintiffs' counsel did not become aware of either client's death until after Mr. Kilpatrick was already cremated and after Mr. Kirkham was already buried, making it impossible for counsel to insure compliance with the order. Seeking even more impossibility, appellees claim Plaintiffs are barred from challenging the Case Management Order on appeal because they did not challenge it in the trial court. Defendants totally ignore the impossibility of challenging a case management order which had been in full force and effect for over two years before the death of Mr. Kilpatrick, and over four years before the Defendants filed their first motion to dismiss.

Not satisfied with impossibility, the Defendant appellees also seek to have this court apply fiction to uphold the trial court's order. In the Kilpatrick case, they claim the Plaintiff heirs are bound by the actions of their personal representative. But the acts that they claim resulted in the heir's loss of any right to pursue their case all occurred before

there was a personal representative. They also seek to create the fiction that Plaintiffs' counsel supported the autopsy requirement of the case management order. They rely on Plaintiffs' counsel's arguments against defense efforts to make the autopsy requirement even more burdensome as some sort of supposed evidence that Plaintiffs supported the autopsy requirement. But even in those efforts they cannot bring themselves to argue directly that Plaintiffs' counsel supported the autopsy requirement because they know such an assertion would be false.

Finally, appellees seek to rely on so called evidence submitted in their replies to Plaintiffs' opposition to their motions for dismissal to demonstrate that the autopsy requirement of the case management order is correct. The problem with this reliance is that the so called evidence was submitted in the reply when Plaintiffs had no opportunity to respond to it. Further, the so called evidence itself is hearsay without authentication. Finally, the so called evidence is all supposed "science" that is twenty years or more old and which by its own terms defeats the claim that autopsy is "necessary" in every asbestos death case.

Because the orders of the District Court dismissing these cases for lack of autopsy are without authority and an abuse of discretion, this court should reverse the orders and remand the cases to the District Court for further proceedings.



## II. ARGUMENT

### A.     **This Court Has Jurisdiction Over The Kilpatrick Appeal Which Is Timely as to Both Defendants and Both Orders of The Court**

Defendant Burlington Northern and Santa Fe (“BNSF”) argues that this court does not have jurisdiction over the Plaintiffs’ appeal of the order dismissing BNSF. The rather unique basis for this position is Defendant’s argument that Plaintiffs did not timely appeal the order of dismissal. At the time the order was entered, Plaintiffs sought certification of the order for interlocutory appeal under Utah R.Civ.P. 54(b). The court entered a minute order authorizing appeal and directing that a formal order be filed. No such order was ever completed. Defendant recognizes that a minute order which directs further action is NOT a final order for purposes of appeal. *See* Brief of Appellees, page 20, footnote 2 (citing *State v. Leatherbury*, 2003 UT 2 ¶ 9, 65 P.3d 1180, 1182-83). Yet, Defendant then claims, without any rationale or support, that the rule does not apply here. But the rule does apply here, and the minute order certifying interlocutory appeal did not start the time running for Plaintiffs to appeal.

Defendant then claims that even if the interlocutory appeal was not approved, the court still has no jurisdiction to hear the appeal against BNSF because Plaintiffs’ notice of appeal did not include the Order of Dismissal of BNSF. Once again BNSF demonstrates that it understands the law: that an appeal of a final disposition of a case does not require that every interlocutory order in the action be listed in the notice of appeal in order to be

appealable. *See* Brief of Appellees, pages 20-21, footnote 3 (citing *Scudder v. Kennecott Copper Corp.*, 886 P.2d. 48, 50 (Utah 1994)). Yet, once again BNSF claims the law does not apply to it. The trial court’s order dismissing every cause of action against Bullough, the final defendant in the case, recited by its own terms that it constituted “the order regarding the matters addressed herein. No further order is required.” This final order made all other interlocutory orders in the case appealable, including the order dismissing BNSF.

But even if the defendant is correct and this is not a final judgment subsuming all interlocutory orders, on its face it includes the order dismissing BNSF. The order recites it is **the Order** regarding the matters addressed herein. One of those matters, plainly set out in the order, is “the Court’s Decision pertaining to the issue with respect to Defendant Burlington Northern and Santa Fe Railway Company.” By its own terms both dismissals are included in this final order. There is no question that the Plaintiffs’ notice of appeal of this order was timely. Because it was, and because the court’s final order made both orders appealable, both are properly before this court.

**B. Plaintiffs Did Not Have the Opportunity to Challenge The Autopsy Requirement of the Case Management Order. Counsel’s Objection to Its Inclusion in That Order Preserves the Issue on Appeal**

Seeking to add additional impossibilities to the Plaintiffs’ burden, appellees ask this court to rule that the challenge to the trial court’s autopsy requirement in the case management order may not be raised on appeal because it was not raised in opposition to

the motions to dismiss. As Appellants pointed out in their opening briefs, they had no ability to comply with the order much less an ability to challenge it.

Defendants attempt to treat this “discovery order” as a typical request for discovery from one party to another which is pursued unsuccessfully and then reinforced by an order of the court. But that is clearly not the nature of the order in this case. The court’s case management order applies to all asbestos cases filed by Plaintiffs’ counsel. Individual plaintiffs are not subject to individual discovery orders. The order applies as soon as they file their action, whether they are aware of it or not. In the case of Mrs. Kilpatrick, the record is clear. She was not even aware of the order until after her husband was cremated. Yet, Defendants claim her appeal is barred because she did not oppose the order in the trial court. They fail, however, to explain just how she should have accomplished this impossibility.

Plaintiffs had no opportunity to oppose the court’s autopsy order in the trial court. The only opportunity they had was to oppose the proposed sanction for violating that order. This they did with vigor. But the Defendants are not assisted by the Plaintiffs’ alleged failure, because there was no failure. In their brief, appellees identify the fact that Plaintiffs’ counsel and the court both discussed and agreed that Plaintiffs’ counsel had opposed inclusion of the autopsy requirement in the court’s case management order. Having opposed inclusion of the requirement in the order, counsel has preserved that challenge to the order on appeal. Defendants cannot have it both ways. They cannot

claim that Plaintiffs' counsel's objection to the order did not preserve the issue on appeal while claiming later, as they do, that Plaintiffs are bound by their failure to follow the order because their Counsel knew of its terms.

The motion before the court was a motion to dismiss for violating the case management order. It was not a motion to determine whether an order for an autopsy should be issued. That had already happened. The law does not require a party to object to a request for a discovery order and then to object to it again when the other party seeks to enforce it. Having unsuccessfully objected to the imposition of the order, counsel is not expected to, nor would it be properly respectful of the court to again challenge the court's decision to impose the order. At the hearing in this matter counsel was opposing a request for sanctions. The challenge to the order itself was preserved earlier, and the challenge to the sanction was properly preserved at the hearing.

Appellees are similarly inaccurate in their argument that Plaintiffs waived any challenge to the autopsy requirement when their counsel opposed modifications to the case management order. In their statement of facts, Defendants quote comments from various papers submitted by Plaintiffs' counsel in opposition to defense efforts to change the case management order. Those innocuous comments point out that the order was the product of extensive negotiations, that Plaintiffs did not prevail in all their positions, and that the autopsy requirement should not be made more onerous than it already was Brief of Appellees at 11. These statements are far from either admissions of support for,

adoption of, or waiver of the Plaintiffs' objections to the court's autopsy requirement. For appellees to suggest that they are is totally disingenuous. There has been neither a failure to challenge the order nor a waiver of any such challenge. The issue is properly before this court.

**C. Appellees Inappropriately Rely On So Called "Evidence" of the Need for Autopsies in Asbestos Cases.**

In another attempt to misdirect the issues in this court, appellees rely on supposed "evidence" supplied in their reply to Plaintiffs' opposition to their motion to dismiss. They claim this scientific evidence of the need for an autopsy in asbestos cases supports the court's case management order autopsy requirement and demonstrates the appropriateness of that order. There are several problems with appellees position.

First, the so called evidence provided by the appellees was provided in support of their motion to dismiss the Plaintiffs' claims for violation of the court's case management order autopsy requirement. Their motion was not addressed to the appropriateness of the autopsy requirement. The issue, as noted above, was the appropriateness of applying a sanction for violation of the order. Because the scientific basis for the order was not raised in the defendant's motion, there was no reason for Plaintiffs to submit scientific evidence in their opposition. The court had already entered its order years before, and the only question was whether to issue a sanction, and if so, what that sanction should be. Because the so called "evidence" was submitted in the reply, Plaintiffs had no opportunity to rebut it.

Second, the so called evidence is hearsay. All of the submission consists of excerpts from articles apparently taken from various publications. But each of the presentations stands as the classic definition of hearsay — an out of court statement presented in court to prove the truth of the matter asserted. As such, the information is inadmissible under Rule 802 of the UTAH RULES OF EVIDENCE. Appellents suspect the appellees will argue that the supposed evidence is admissible under one of two exceptions two the hearsay rule set out in Rule 803 of the UTAH RULES OF EVIDENCE, but that is not the case.

Because of the age of the documents presented – all over 20 years – defendants will likely argue that the documents are admissible under Rule 803 (16) which provides an exemption for “statements in a document in existence twenty years or more the authenticity of which is established.” The problem with that position would be that nothing in the defendant’s submission establishes the authenticity of the documents. And nothing in the documents themselves meets the standards of Rule 902 of the UTAH RULES OF EVIDENCE authentication.

Defendants might also argue that the documents are admissible as learned treatises under Rule 803(18) of the UTAH RULES OF EVIDENCE. This exception clearly does not apply because Rule 803(18) requires that the statements in learned treatises be adopted by the testimony of an expert witness before they may be admitted in evidence. And even then, the statements may only be read into evidence. The documents themselves may not

be presented into evidence.

Third, and most significantly, the documents presented by the defendants in their reply do not support the underlying rationale of the Case Management Order that an autopsy is required for diagnosis in every asbestos case. A few samples of the statements contained in the articles demonstrate that the Defendant's own so called evidence disputes their position that autopsy is required in all cases. Defendants relied on and cited to Andrew Churg M.D. & Francis H.Y. Green M.D., Pathology of Occupational Lung Disease, 224 (1988). But that document makes it clear that autopsy is not only not required in every case, it is not even the primary method of diagnosis:

#### IDENTIFICATION OF ASBESTOS IN HUMAN LUNG

*It should be remembered that routine gross and microscopic examination, coupled with appropriate clinical and radiographic data, are the primary methods of diagnosis in asbestos-related disease. Analysis of asbestos bodies or fibers are adjunctive methods to be used when necessary, but they are by no means necessary in every case. (Emphasis in original)*

In the Kirkham case, defendants, in their reply brief, relied on "Tumors and Pseudotumors of the Serous Membranes," McCaughey, et al., *Atlas of Tumor Pathology*, Second Series, 1985. But, at page 70 of that document, the authors note:

#### Role of Autopsy

Although an autopsy has been regarded in the past as essential for sure diagnosis of diffuse mesothelioma, increasing experience has made it clear that the tumor can often be accurately identified at an earlier stage on the basis of its gross distribution as defined radiologically or at operation and its cytologic and histologic characteristics.

Defendant's appendix at 6. Of further significance is the age of all the supposed scientific evidence presented by the Defendants in their replies to the motions and recycled in their Brief of Appellees. Though dealing with scientific inquiry and medical evidence and research, defendants cite to only articles which are twenty years or more old. The only appropriate conclusion from that fact is that more recent publications do not support the dated conclusions advanced by the Defendants.

**D. Mr. Kilpatrick's Heirs Cannot be Denied the Benefit of Their Claims by Actions Which Occurred Prior to the Appointment of Their Personal Representative**

Appellees seek to impose further impossibility in this case by claiming that Mr. Kilpatrick's wrongful death heirs have no claim in this matter because they are bound by the actions of their personal representative. They correctly point out that under Utah law the personal representative acts for the benefit of the heirs. And they further correctly note that the heirs are bound by the actions and decisions of the personal representative. What they mistakenly or disingenuously ignore, is that Mrs. Kilpatrick took no action as the personal representative in this case that is the basis for the trial court's decision. At the time Mr. Kilpatrick died on July 5, 2003 and was cremated, there was no personal representative in this case. Mrs. Kilpatrick was not appointed the personal representative until May 27, 2004. Mrs. Kilpatrick did nothing as the personal representative that violated any order imposed upon her by the court. Therefore, the claims of the heirs cannot be barred by the actions of their personal representative.



In the same way, BNSF cannot benefit by its reliance on the fact that all the Kilpatrick's claims against it were based on the Federal Employers Liability Act ("FELA"). As Appellants pointed out in their opening brief, and appellees did not dispute in their brief, Mr. Kilpatrick did nothing to impair his claims against BNSF. The only claim permissible under FELA, that of the employee, was unimpaired at the time of his death. When Mrs. Kilpatrick was appointed the personal representative months later, she gained the entitlement to continue that case for the benefit of herself and the heirs. Nothing she has done in her role as the personal representative has impaired her claims or those of the heirs she represents. Consequently, the court's order dismissing those claims is legally incorrect.

**E. The Court Abused Its Discretion by Dismissing the Plaintiffs' Cases Where There Was No Evidence of Fault**

Appellants made clear in their opening briefs that the court had abused its discretion by dismissing their cases when there was no evidence of fault to support the dismissal. The standards imposed by Utah courts for imposition of a discovery sanction are clear:

Imposing sanctions for a party's refusal to respond to a court order compelling discovery is a harsh sanction and therefore, requires "a showing of 'willfulness, bad faith, or fault' on the part of the non-complying party." *Fed. Sav. & Loan Ass'n*, 684 P.2d at 1266 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)). "Willful failure" has been defined as " 'any intentional failure as distinguished from involuntary noncompliance.' "

*Amica Mut. Ins. Co. v. Schettler* 768 P.2d 950, 961-62 (Utah App.,1989). Defendants

recognize the requirement for a finding of “willfulness, bad faith, or fault” in order to impose a sanction of dismissal, but fail to demonstrate in any way how any of the Plaintiffs in either of these cases is guilty of any of those things. Rather, they simply say “mere fault is sufficient.” Brief of Appellees at 37. True as it may be that fault is sufficient reason to impose a dismissal sanction, there must be some showing of fault. None has been shown here. The appellees have not demonstrated how a plaintiff who was unaware of the order, or her counsel who was unaware of the client’s death could have complied with the court’s autopsy order or how their failure to perform that impossibility turned into “fault.”

The simple fact is that there was no fault on the part of the Plaintiffs. The trial court never sought any fault and did not impose the sanction based upon fault. The court simply imposed the dismissal sanction because no autopsy was conducted. Because the mandatory prerequisites for imposition of the dismissal sanction – willfulness, bad faith, or fault – were not present, the court abused its discretion in imposing the sanction. This court must reverse that decision.

### **III CONCLUSION**

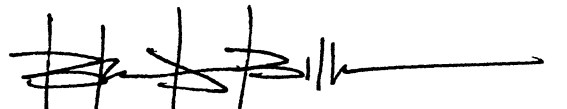
The Brief of Appellees has presented no substantial reason for this court to uphold the trial court’s rulings. In addition to expecting the impossible by expecting compliance with an order the Plaintiffs were unaware of, they seek support in the hearsay,

unauthenticated, so-called evidence that Plaintiffs had no chance to rebut and which was not relevant to their motion which sought not to impose an autopsy requirement, but to impose a sanction for violating it. They also incorrectly seek to deprive Plaintiffs of a wrongful death action because of the actions of their personal representative when the actions they rely on occurred long before a personal representative was appointed.

The record here is clear. The court imposed the very extreme sanction of dismissal without making the required prerequisite findings of wilfulness, bad faith, or fault. Without such a finding, the sanction was an abuse of discretion and cannot stand. Accordingly, the Plaintiffs in both of these actions respectfully request that this court reverse the orders of dismissal and remand these cases for discovery and trial.

DATED this 5<sup>th</sup> day of December, 2007.

**EISENBERG & GILCHRIST**

A handwritten signature in black ink, appearing to be 'R. Gilchrist', written over a horizontal line.

Robert G. Gilchrist  
Bronson D. Bills

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, or electronically on this 5<sup>th</sup> day of December, 2007, to the following:

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