

2007

Margaret Kilpatrick v. ACandS, INC : Brief of Appellant

Utah Court of Appeals

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JUN 06 2007

IN THE UTAH COURT OF APPEALS

MARGARET KILPATRICK, Individually,
and as Personal Representative on behalf of
the Legal Heirs of JAMES KILPATRICK,
Deceased,

Plaintiff and Appellant,

v.

ACandS, INC., et al,

Defendant and Appellee.

BRIEF OF THE APPELLANT

Case No. ~~20040991-CA~~

20060887-CA

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

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JURISDICTION

This court has jurisdiction over this appeal pursuant to section 78-2a-3(2)(j) UTAH CODE ANN.(1996).

ISSUES AND STANDARDS OF REVIEW

A. Issues.

Appellant Margaret Kilpatrick and her now deceased husband, James Kilpatrick, filed a claim for personal injury and loss of consortium based on Mr. Kilpatrick's asbestos-related disease. After Mr. Kilpatrick died, Mrs. Kilpatrick was substituted as named plaintiff and amended her complaint to add actions for survival and wrongful death in her capacity as representative of the legal heirs of James Kilpatrick. Defendants moved to dismiss all plaintiffs' claims for failure to comply with the court's Case Management Order No. 1. which requires an autopsy be conducted upon the death of any plaintiff in an asbestos case. The court's decision to dismiss the plaintiff's entire action based on failure to conduct an autopsy on the body of James Kilpatrick raises the following issues:

1. Did the court abuse its discretion and commit reversible error when it granted the defendants' Motion to Dismiss as a discovery sanction without evidence of fault on the part of the Plaintiffs?

2. Did the court commit reversible error in granting Defendant's Motion to Dismiss for failure to perform an autopsy when Appellants had other medical evidence to support their claims?

B. Standards of Review.

3. Did the court commit reversible error when it denied the decedent's legal heirs their right to a trial based on an alleged violation of a discovery order to which they were not subject?

Whether the court properly granted the motion to dismiss is a question of law, which the Court of Appeals reviews for correctness, giving no deference to the decision of the court. *Peterson v. Delta Air Lines, Inc.*, 2002 UT App 56, ¶ 7, 42 P.3d 1253. Imposition of discovery sanctions is reviewed for an abuse of discretion. *Tuck v. Godfrey*, 1999 UT App 127, ¶ 15, 981 P.2d 407. The striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party. Because of the severity of this type of sanction, "the Trial Court's range of discretion is more narrow than when the court is imposing less severe sanctions." *Marshall v. Marshall* 915 P.2d 508, 515 (Utah App.,1996). 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." *First Federal Sav. & Loan Ass'n of Salt Lake City v. Schamanek*, 684 P.2d 1257 (Utah 1984) (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 -962 (Utah App.,1989).

These issues were raised by the defendants in their motions to dismiss (R. 1497-1500; 1764-1769), the memoranda and other papers filed by the parties in support of and in opposition to defendants’ motions (R. 1501-1602;1607-1615; 1770-1787; 1788-1792), and at the hearing on the motion. (R.1812).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES OR RULES

1. The Utah Constitution, Article I, section 11 is determinative of this issue and provides as follows:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

U.C.A. 1953, Const. Art. 1, § 11

2. Utah Rule of Civil Procedure 37 is determinative of this issue and provides as follows:

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY;
SANCTIONS

* * *

(b) Failure to comply with order.

* * *

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 16(b), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney or both of them to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This case began as a claim for personal injury and loss of consortium resulting from exposure to asbestos and asbestos-containing products. After the plaintiff died, his spouse was substituted as the named plaintiff. She amended her complaint to include causes of action for survival and wrongful death on behalf of the heirs. The defendants moved to dismiss the case based on violation of the court's Case Management Order No. 1 which requires that in all asbestos cases, upon a plaintiff's death, his spouse or other representative is required to produce the body for a full autopsy. At the time the

defendant's motion was filed, the plaintiff had been dead for over two years, no autopsy had been conducted, and his body had been cremated.

The court determined that the failure to have an autopsy conducted was a violation of the discovery provisions of its case management order and required dismissal of plaintiff's claims. The court entered an order dismissing the plaintiffs' claims against the moving defendant. A subsequent motion put forth by additional defendants on the same grounds was decided based on the court's prior memorandum decision, and the plaintiffs' claims against those defendants were also dismissed.

B. Statement of Facts

Plaintiffs James and Margaret Kilpatrick filed their complaint for personal injury and loss of consortium on February 9, 2001. (R. 1). They alleged injuries to James resulting from exposure to asbestos and asbestos-containing products, and loss of consortium. (R. 1-55). On May 7, 2001, the court adopted its Case Management Order No.1, which applies to all cases alleging injury due to exposure to asbestos. (Addendum). In compliance with the court's order, James Kilpatrick signed an authorization for his counsel to procure a full and complete autopsy upon his death (R. 1532). That authorization was not signed by Mrs. Kilpatrick and she had no knowledge of it. (*Id.*) James Kilpatrick died on July 5, 2003. (R. 1534). No autopsy was conducted, and Mr. Kilpatrick's body was cremated. (*Id.*)

On April 1, 2004, Margaret Kilpatrick filed a motion to substitute her as the named plaintiff. (R. 1378 – 1380). The court entered an order to this end on May 27, 2004. (R. 1426 – 1428). Mrs. Kilpatrick filed her second amended complaint for survival, loss of consortium, and wrongful death on June 23, 2004. (R. 1437 – 1446). Defendant Burlington Northern & Santa Fe Railway Company's ("BNRR") answer to the second amended complaint was filed on August 12, 2004 (R1447 – 1452). On October 13, 2005, more than two years after James Kilpatrick's death, defendant BNRR filed a motion to dismiss all of plaintiffs' claims for failure to comply with Case Management Order No. 1. (R1497 – 1500). Specifically, defendant claimed plaintiffs' case must be dismissed for failure to provide the body of James Kilpatrick for autopsy as required by Case Management Order No. 1, section III, paragraph 5.a. (R. 1502) That paragraph provides as follows:

"Plaintiff's spouse or another of plaintiff's representatives shall produce the body of the deceased for one full and complete autopsy, including the thoracic and abdominal cavities, to be performed by the State medical examiner or a competent pathologist designated by plaintiff's counsel unless otherwise ordered by the court upon good cause shown."

This case management order was adopted by the court on May 7, 2001 and was amended September 30, 2003. (Addendum). It is routinely applicable to all asbestos cases filed in Salt Lake County by the Brayton ❖ Purcell, LLP firm.

Plaintiffs opposed the motion noting that there was no evidence of fault in Mrs. Kilpatrick's failure to procure an autopsy. (R. 1518-1604). Mrs. Kilpatrick provided a

sworn and notarized affidavit that she had been unaware that her husband had agreed to have an autopsy conducted. (R. 1605-1606). She further noted that by the time she notified her attorneys of her husband's death, he had already been cremated. (*Id.*).

On March 3, 2006, the court issued a memorandum decision in which it determined that the failure to obtain an autopsy of Mr. Kilpatrick was prejudicial to the defendants and their ability to defend against the claims that Mr. Kilpatrick suffered from an asbestos-related disease. (R. 1633-1637; Addendum). On March 21, 2006, the court entered an order dismissing defendant BNRR. (R. 1638-1641).

On August 4, 2006 defendant Bullough Abatement, Inc. filed its motion to dismiss all claims for failure to perform an autopsy. (R.1764-1769). Plaintiffs again opposed the motion to dismiss and the court again granted the dismissal. On September 21, 2006 the court filed a minute entry granting the motion to dismiss on the basis of the memorandum of decision previously filed in response to the motion by BNRR. (R.1797-1798). Plaintiffs filed their Notice of Appeal on September 26, 2006. (R. 1799-1801).

SUMMARY OF ARGUMENT

The court abused its discretion in granting the dismissal of the plaintiffs' claims for failure to comply with Case Management Order No. 1. While Utah law extends the court great discretion in imposition of discovery sanctions, that discretion is not absolute. "As an initial matter, before imposing sanctions . . . , 'the court must find on the part of the noncomplying party willfulness, bad faith, or fault, or persistent dilatory tactics

frustrating the judicial process.”” *Hales v. Oldroyd* 999 P.2d 588, 592 (Utah 2000).

Nothing in the evidentiary record supports any finding that there was willfulness, bad faith, or fault, or persistent dilatory tactics on the part of Mrs. Kilpatrick or any other plaintiff.

Even if the court finds there is no abuse of discretion in applying the order, the court must reverse the decision of the court because the case management order itself exceeds the court’s authority. Utah Rule of Civil Procedure 35, which authorizes physical examination of the person of the plaintiff, requires the party seeking the examination to demonstrate good cause for the examination U.R.C.P. 37 (2006). The court’s order requiring an autopsy, a much more intrusive and abusive examination, reverses that burden and places on the nonmoving party the burden to demonstrate good cause **not** to conduct an autopsy. The State of Utah maintains a preference in its law against requiring an autopsy because of the intrusive nature of that procedure. Further, the court’s order is not specific to the facts of any individual case but applies without limitation to all asbestos cases. Without evidence of the necessity for an autopsy in an individual case, imposition of a blanket order imposing an autopsy requirement in all cases is an abuse of the court’s authority.

If this court finds that the court’s order is permissible under Utah law, application of that order to the plaintiffs in this case is inappropriate. The action in which this order was enforced, and in which dismissal was ordered, is a wrongful death action. The

plaintiffs in this action, Mrs. Kilpatrick and the legal heirs of James Kilpatrick, were unaware of the existence of the court's case management order, and the requirement that an autopsy be conducted. By the time they informed their counsel of the death of James Kilpatrick, his body had already been cremated. The legal heirs of James Kilpatrick were not parties to the personal injury case in which the case management order was imposed. It was in that case, prior to the amendment for wrongful death, in which the order was allegedly violated.

No plaintiff in the wrongful death case violated the court's order to conduct an autopsy of James Kilpatrick. Those plaintiffs did not have a cause of action until James Kilpatrick died, they had not asserted their cause of action until well after his body had been cremated, and they had no ability to comply with any order to conduct an autopsy of his body. Imposition of that order to dismiss their cause of action exceeds the court's authority, is an abuse of discretion, and violates the plaintiffs' Constitutional right to have their claims heard in court.

Further, even if the court's case management order was appropriate, its imposition in this case was inappropriate. There is no harm to the defendants by the failure to obtain an autopsy. This case stands today in the exact posture it would have been had there been no personal injury case. Had James Kilpatrick simply died from the effects of his exposure to asbestos, and had his heirs asserted their rights to damages under the law of Utah based on that death, these defendants would have been in the same

circumstances that they are in today. The simple fact that James Kilpatrick asserted a claim in his own right before he died does not deprive the defendants of any relevant wrongful death evidence in this case. Plaintiffs in this case still have the burden to demonstrate by a preponderance of the evidence that the decedent suffered from asbestos-related disease for which the defendants are responsible and which caused his death. That burden is not changed in the absence of an autopsy in this case. There is other substantial evidence of causation on which to proceed. If, as the Defense claims, there is substantial evidence calling into question the existence of an asbestos related disease, that evidence is not adversely affected by the lack of autopsy results. Because neither side is prejudiced by the absence of an autopsy, because the burden on the plaintiffs to prove their case remains the same, it was an abuse of discretion in excess of the courts authority to order dismissal of the plaintiffs' claim in this case.

Finally, the court's reliance on the Federal Employers' Liability Act ("FELA") as an additional ground for dismissing plaintiffs' survival and wrongful death claims is in error because James Kilpatrick did not violate any discovery order which would have effected his rights under the FELA. Moreover, Mr. Kilpatrick had viable and ongoing FELA claims at the time of his death, when the case management order was allegedly violated, an action he was incapable of causing. Accordingly, this court should reverse the decision of the court and remand the case for discovery and trial.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIMS FOR FAILING TO PRODUCE THE BODY OF JAMES KILPATRICK FOR AN AUTOPSY

A. The Court's Action Was Improper Because the Record Fails to Demonstrate Any Fault on the Part of the Plaintiffs Which Would Support a Sanction of Dismissal.

The court dismissed the plaintiff's claim as a sanction for failure to comply with the court's case management order which requires that when a personal injury plaintiff in an asbestos-related lawsuit dies, his spouse or other representative must produce the body for an autopsy. This requirement is contained in the section of the court's Case Management Order No. 1 which is entitled "Additional Discovery." (Addendum). It is intended to be a discovery order. *See, Preston & Chambers, P.C. v. Koller*, 1997, 943 P.2d 260 [while ruling was not designated as an order compelling discovery, that was inarguably the substance of the order.] Accordingly, the dismissal for failure to comply with that portion of the order is a discovery sanction. Under Utah law, however, to impose a discovery sanction of dismissal, there must be a showing that the party being sanctioned is at fault. No such showing was made in this case.

Utah Rule of Civil Procedure 37 permits imposition of dismissal as a sanction in discovery. (Utah R. Civ.P. 37(b)(2)(C)) (2006). Utah courts have long held that courts have wide discretion in imposing the appropriate sanctions for violation of discovery rules. *Tuck v. Godfrey*, 1999 UT App 127, ¶ 15, 981 P.2d 407; *see also Utah Dep't of*

Transp. v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995). But, the discretion of the court in imposing sanctions for violations of discovery orders is not unbridled.

The striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a nonresponding party. Because of the severity of this type of sanction, “the trial court's range of discretion is more narrow than when the court is imposing less severe sanctions.”

Marshall v. Marshall, 915 P.2d 508, 515 (Utah App.1996). As the United States Supreme Court (as well as Utah Courts) has pointed out:

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 -962 (Utah App.,1989).

The court’s action dismissing the claims of the plaintiffs in this case is an abuse of discretion because the record is totally devoid of any willfulness, bad faith, or fault on the part of any of the plaintiffs. Neither the moving party’s motion, nor the argument in the court on the motions, nor the courts memorandum of decision point to any willfulness, bad faith, or fault. The only point raised by the defendants, and the only support relied upon by the court was the simple absence of an autopsy. The defendants did not attempt to demonstrate, nor did the court find any fault on the part of the plaintiffs.

The court's failure to find willfulness, bad faith, or fault is due to the simple fact that there was none. The unchallenged facts show that Mrs. Kilpatrick was unaware that her husband had signed an autopsy authorization. (R. 1605-1606). Mrs. Kilpatrick was unaware that the court expected an autopsy to be conducted. By the time Mrs. Kilpatrick informed her attorneys that her husband had died, he had already been cremated. (*Id.*) At that point, there was nothing any plaintiff could do, there was nothing that counsel could do, to comply with an order to produce the body for autopsy. There is no evidence that this failure was anything but unconscious, unknowing, and without fault. Because the court failed to find the predicate elements necessary to support a sanction of dismissal, that sanction was an abuse of discretion and must be reversed.

The inappropriateness of the sanction of dismissal in this case is further demonstrated by the frequently stated purpose behind the imposition of discovery sanctions. "[S]anctions are intended to deter misconduct in connection with discovery. *First Federal Sav. & Loan Ass'n of Salt Lake City v. Schamanek*, 684 P.2d 1257, 1266 (Utah, 1984) (Citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 1976). See also, *Utah Dep't of Transp. v. Osguthorpe*, 892 P.2d 4, 8 (Utah 1995). Surely there is no misconduct to deter in this case. No sanction the court could impose will enable this widow to turn back the clock and order an autopsy, nor is it likely to make her more compliant on the next such occasion. The sanction is unwarranted under the law of this state. As such, it is an abuse of discretion and must be overturned.

B. The Trial Court's Case Management Order, Requiring an Autopsy in Every Asbestos Case in Which the Plaintiff Dies, Exceeds the Trial Court's Legal Authority and Must Be Stricken.

Plaintiffs have demonstrated that the court inappropriately struck their claims as a discovery sanction. If this court somehow concludes that imposition of a discovery sanction was appropriate under the facts of this case, it must nonetheless reverse the judgment of the court because the case management order itself exceeds the court's authority.

The Utah Supreme Court has long recognized that "since the most ancient of times people have had a reverent regard for the remains of their loved ones..., and this naturally includes an ardent desire that their remains be treated with respect and allowed to remain in undisturbed peace." *Smart v. Moyer*, 577 P.2d 108 (Utah 1978). For this reason, the authority to order an autopsy is limited in statute, and infrequently exercised.¹ Even in

¹Cases in which an autopsy is either required or permitted are set out in statute as follows:

(1) The medical examiner shall perform an autopsy to:

- (a) aid in the discovery and prosecution of a crime;
- (b) protect an innocent person accused of a crime; and
- (c) disclose hazards to public health.

(2) The medical examiner may perform an autopsy:

- (a) to aid in the administration of civil justice in life and accident insurance problems in accordance with Title 34A, Chapter 2, Workers' Compensation Act;
- (b) in other cases involving questions of civil liability.

U.C.A. § 26-4-13 (1953)

those cases in which statute provides authority to direct an autopsy, the Supreme Court has recognized that such provisions do not provide an “absolute right” to litigants to have an autopsy performed. Rather, the authority must be exercised with discretion. *Silver King Coalition Mines Co. V. Industrial Commission*, 204 P.2d 811, (Utah 1949).

A similar limitation exists in Utah rule of Civil Procedure 35 which provides for physical examination of the person of the plaintiff in appropriate situations U.R.C.P. 35 (2006). Rule 35 provides that an order for such an examination may be entered only after a motion and “upon good, cause shown.”² In this case, the court’s order for an autopsy is an order for a physical examination of the body. But, in an ironic twist, that order does not require the party seeking the autopsy to show good cause that it be ordered. Rather, the court’s order reverses the burden and imposes upon the party being examined a requirement that it demonstrate good cause why no such examination should be conducted. Because this court’s order reverses the burden imposed by Utah Rule of Civil Procedure 35, it exceeds the authority of the court and must therefore be stricken as inappropriate.

²**Utah Rules of Civil Procedure 35(a) Order for Examination.** When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party or person to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. *The order may be made only on motion for good cause shown* and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. (Emphasis added)

Finally, the court's order exceeded its authority because it is not specific to the facts of each individual case. While the law recognizes, and plaintiffs freely admit, that an order to conduct an autopsy may be appropriate in certain cases, it is certainly not a requirement, nor is it appropriate, in every asbestos case. Nothing in the court's order clarifies or explains or defines those factors which will or will not make an autopsy appropriate. The right to order an autopsy requires a sound exercise of discretion. *Silver King Coalition Mines, supra*, 204 P.2d at 815-16. The order in question here eliminates all exercise of discretion by the court. It directs an autopsy in each and every case. Because the order eliminates that exercise of discretion, it violates the underlying statutory authority and it is invalid. Accordingly the court's order exceeds its authority and must be invalidated by this court.

C. The Trial Court Erred in Dismissing Plaintiffs' Claims Because the Wrongful Death Plaintiffs Had No Ability to Comply with the Court's Order.

At the time Margaret Kilpatrick was substituted as the named plaintiff in this case, and the complaint was amended to add causes of action for survival and wrongful death, it was too late to conduct an autopsy on the body of James Kilpatrick. Mr. Kilpatrick's body had already been cremated. (R. 1518-1604, R. 1605-1606) Despite this fact and despite the fact that the wrongful death plaintiffs, the heirs of Mr. Kilpatrick, had never had a chance to be subject to the court's jurisdiction, the court's order nonetheless struck their claim without any recourse. This decision was a violation of the wrongful death

plaintiff's right under the Utah Constitution to have their claims heard in the court.

Accordingly, the court's order must be reversed.

The Utah Constitution, article 11, section 3, provides each individual the right to have his or her claim heard in the court (935). The legal heirs of Mr. Kilpatrick were denied that right by the court's decision dismissing the action. They had no ability to comply with the court's order. It was not an order to which they were ever subject prior to the cremation of Mr. Kilpatrick. In an, analogous situation the Court held:

a person who puts forth every reasonable effort to comply with a court order and still is unable to do so, is not guilty of contempt on account of such failure.

Limb v. Limb, 113 Utah 385, 389, 195 P.2d 263, 265 (1948); *See, also Jeppson v. Jeppson*, 597 P.2d 1345 (1975).

An order which is incapable of being obeyed cannot be a valid order. The application of this fact is incorporated in Utah Rule of Civil Procedure 37. As noted above, Rule 37 authorizes imposition of sanctions for failure to cooperate in discovery. In addressing the sanctions available for failing to permit a physical examination of the plaintiff ordered under Rule 35, the rule provides:

(E) where a party has failed to comply with an order under Rule 35(a), such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, *unless the party failing to comply is unable to produce such person for examination.* (2006)

The circumstance contemplated by this rule is exactly the circumstance which pertains here. The legal heirs of Mr. Kilpatrick had no ability to produce his body for

examination. By the time their claim was filed the body was already cremated. Yet, despite the plain language of the rule that in such circumstance an order dismissing the complaint is not appropriate, the court dismissed their claims. In so doing, the court deprived them of their Constitutional right to have their claims heard in the court. Because the court's order was without support in the law, and because the effect of that order was to deprive plaintiffs of their Constitutional right, the court's order must be stricken and the judgment reversed.

D. The Trial Court Erred in Striking Plaintiffs' Complaint Because it Erroneously Concluded That Defendants Were Prejudiced by the Lack of an Autopsy.

In its memorandum decision granting the motion to dismiss the plaintiffs' claims, the court explained that the lack of an autopsy was prejudicial to the defendants in this matter. That conclusion, which forms the support for the court's decision, is factually in error. The lack of an autopsy in this case has not in any way prejudiced the defendants.

The defendants, and indeed the court, seem to believe that an autopsy would provide conclusive proof of causation in this case. However, the law does not require conclusive proof of causation. Rather it requires proof by a preponderance of the evidence. There is significant other evidence in the case to meet this burden.

Other courts have recognized that autopsy results are not necessary to prove causation. In *Hess v Norfolk S. Ry. Co.*, 795 N.E.2d 91 (Ohio Ct. App 2003), the plaintiffs were exposed to asbestos while working for the defendant railroad. The

defendant requested that the family of each plaintiff conduct a limited autopsy of the lungs and pleura. On appeal the defendant argued that because counsel for the plaintiffs failed to notify it of the autopsies, it missed its chance to conduct a full autopsy to determine the cause of death and moved to exclude any testimony relevant to the cause of death due to spoliation of the evidence. Rejecting the defendant's motion and argument that they were prejudiced, the court stated that "independent evidence pertaining to the cause of death of each of the [plaintiffs] was established by their individual death certificates, through testimony from expert witnesses, and through their medical records. It would have been improper for the court to exclude all evidence as to the cause of death simply because a full autopsy had not been completed." (*Id.* at 100).

As in the *Hess* case, other independent evidence relating to Mr. Kilpatrick's cause of death is available to the parties here. In opposition to defendants' motion to dismiss, plaintiffs provided copies of reports from expert witnesses who would be expected to testify as to the nature of Mr. Kilpatrick's illness and the cause of death. Medical records from the University of Utah Medical Center, Lakeview Hospital and Mr. Kilpatrick's treating physicians exist, as well as the tissue from the biopsies. (R. 1600-1601). There was an examination and resulting death certificate for Mr. Kilpatrick. Equally importantly, the defendants had more than two years to conduct their own Rule 35 examination of Mr. Kilpatrick and they chose not to request the exam.

Moreover, the conduct of, or failure to conduct an autopsy does not alter the burden of proof standards for civil injury and wrongful death claim. Plaintiffs must prove by a preponderance of the evidence that the injury or death is caused by the exposure to asbestos. In *Alder v. Bayer Corporation*, 61 P.3d 1068, 1085 (Utah, 2002), the Utah Supreme court gave insightful instruction on how Utah courts should address causation issues in toxic tort claims. The Court said:

Individuals routinely feel the effects of a wide array of common phenomena whose mechanisms remain unexplained by science, including, for example, the law of gravity, the nature of light, the source of personality, and the process of cell differentiation. *If a bicyclist falls and breaks his arm, causation is assumed without argument because of the temporal relationship between the accident and the injury. The law does not object that no one measured the exact magnitude and angle of the forces applied to the bone. . . Legally, an observable sequence of condition > event > altered condition, has been found sufficient to establish causation even when the exact mechanism is unknown.*

The Court ended its discussion by advising Utah courts that plaintiffs with toxic exposures “enjoy the opportunity to prove that which they can, as do those of more prosaic injuries.” *Id* Plaintiffs have sufficient evidence to prove that asbestos exposure caused Mr. Kilpatrick’s death. The burden of proof is a preponderance of the evidence and plaintiffs are to “enjoy the opportunity to prove that which they can.” Here, plaintiffs should be granted the same opportunity as the plaintiffs in *Alder*, to put forth the evidence that exists to a finder of fact to determine whether the evidence establishes that Mr Kilpatrick’s death was more likely than not caused by his exposure to asbestos for which the defendants are responsible.

E. The Trial Court's Reliance on the FELA as a Basis for Dismissing the Plaintiffs' Claims was Error Because James Kilpatrick Did Not Violate the Case Management Order

By stipulation, plaintiffs' claims against defendant BNRR were limited to those under the Federal Employers' Liability Act (FELA). (R. 1469-1472). The court focused on this limitation in its memorandum decision as an additional basis for dismissing the claims of the legal heirs. In a somewhat curious comment, the court noted:

Because this action is governed by the FELA, under which the rights and obligations of the heirs are derived from those of the decedent, the spouse and children of the decedent are subject to the regulations, orders and statutes governing the decedent's personal injury as if they were the decedent.

(R. 1634; Addendum) The meaning of, or reason for this statement is unclear. It is apparently the court's response to the plaintiffs' argument, cited earlier in the memorandum decision, that:

[N]one of [the] legal heirs were parties to the matter, and as such, the CMO would not apply to their separate and distinct claims for the wrongful death of their father. At most, argue Plaintiffs, Mrs. Kilpatrick's claims for personal injury damages that survived following the death may be at risk for failing to procure the autopsy. However, note Plaintiffs, her separate and distinct claims for wrongful death should not.

The court is correct that the statutes governing the decedent's case affect the heirs as if they were the decedent. *See Mellon v. Goodyear*, 277 U.S. 335, 345 (1928)

[wrongful death action under FELA impermissible where injured employee had entered into a settlement with his employer for his injuries during his lifetime]; *Frese v. Chicago, B. & Q. R. Co.*, 263 U.S. 1, 4 (1923) [holding that wrongful death action under FELA

could not be brought where injured employee would have been precluded by his negligence from recovering in a personal injury suit]; *Walrod v. Southern Pac. Co.*, 447 F.2d 930, 932 (9th Cir. 1971) [injured employee obtained judgment against employer in FELA action; court held that wrongful death action could not be brought after the employee's death because, under *Flynn*, a wrongful death action requires that the employee had a personal injury cause of action at the time of death]. The court is mistaken, however, in finding that anything in James Kilpatrick's personal injury case barred the legal heirs from pursuing their wrongful death action.

As noted above, at the time he died, James Kilpatrick had valid, active, and on going claims for personal injury. He had complied with the court's order by signing an authorization for an autopsy. He was in total compliance with all the "regulations, orders, and statutes" governing the FELA case. The legal heirs had no cause of action until James Kilpatrick died. At that time, when the cause of action arose, nothing in the personal injury case limited their wrongful death action under FELA. Thus, the court's conclusion to the contrary is an error of law and must be reversed.

CONCLUSION

The plaintiffs in this matter have been wrongly deprived of their right under the Utah Constitution to have their day in court. The court's orders dismissing the plaintiffs' claims because of their failure to produce the body of James Kilpatrick for autopsy were without legal authority. There was no showing of any willfulness, bad faith or fault on

the part of any of the plaintiffs. Such findings are essential predicates to the imposition of a sanction of dismissal. The absence of any such evidence makes the court's orders invalid. Moreover, the court's case management order itself conflicts with, and reverses the burden established by the Supreme Court when it adopted Rule of Civil Procedure 35 and its procedure for ordering a physical examination of the plaintiff. Because application of these invalid orders deprived the plaintiffs of their right to have their claims heard, and because there was no prejudice to the defendants due to the lack of an autopsy, the dismissal of the plaintiffs' claims was in error.

Accordingly, plaintiffs respectfully request that this court reverse the judgment of the court and remand for further proceedings.

DATED this 6th day of June, 2007.

EISENBERG GILCHRIST & MORTON

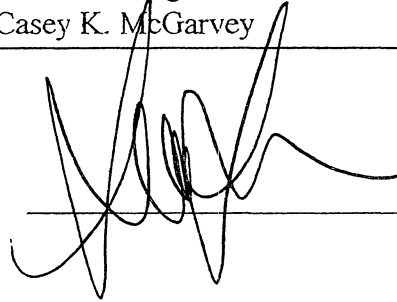
A handwritten signature in black ink, appearing to read "S. Brook Millard", is written over a horizontal line.

S. BROOK MILLARD
COURTNEY G. BROADEN
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 6 day of June, 2007, a true and correct copy of the foregoing document was mailed, postage pre-paid and first class to the following:

BULLOUGH ABATEMENT INC.;	KIPP AND CHRISTIAN 10 Exchange Place, 4 th Floor Salt Lake City, UT 84111 Fax: (801) 359-9004 Shawn McGarry Michael F. Skolnick J. Kevin Murphy
BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY	BERMAN & SAVAGE 170 South Main Street E. Scott Savage Casey K. McGarvey



ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MARGARET KILPATRICK,
Individually, and as Personal
Representative on behalf of
Legal Heirs of JAMES
KILPATRICK, deceased,

Plaintiffs,

vs.

ASBESTOS DEFENDANTS.

MEMORANDUM DECISION

Case No. 010901285

Honorable GLENN K. IWASAKI

Court Clerk, ~~James Beck~~
FILED DISTRICT COURT
Third Judicial District

March 2, 2006

MAR - 3 2006

By 

SALT LAKE COUNTY

Deputy Clerk

The above-entitled matter comes before the Court pursuant to Defendant Burlington Northern & Santa Fe Railway Company's Motion to Dismiss All Claims of Plaintiff for Failure to Comply with Case Management Order No. 1. The Court heard oral argument with respect to the motion on February, 27, 2006. Following the hearing, the matter was taken under advisement.

The Court having considered the motion and memoranda and for the good cause shown, hereby enters the following ruling.

With this motion, Defendants seek dismissal of the wrongful death claims brought by Margaret Kilpatrick, individually, and as Personal Representative on behalf of the legal heirs of James Kilpatrick based upon a violation of the Case Management Order ("CMO") requiring autopsy.

Plaintiffs oppose the motion arguing Defendants had an

opportunity to perform a Rule 35 exam during Mr. Kilpatrick's life and did, in fact, do so. Additionally, contend Plaintiffs, adequate tissue samples were available to Defendants to evaluate the same evidence as Plaintiff, to wit; the cause of Decedent's cancer. Moreover, assert Plaintiffs, although upon his death his wife, Margaret Kilpatrick, was a party to the personal injury case, none of his remaining legal heirs were parties to the matter, and as such, the CMO would not apply to their separate and distinct claims for the wrongful death of their father. At most, argue Plaintiffs, Mrs. Kilpatrick's claims for personal injury damages that survived following the death may be at risk for failing to procure the autopsy. However, note Plaintiffs, her separate and distinct claims for wrongful death should not. It is Plaintiffs' position the evidence which is present for the Plaintiffs in this wrongful death case is the same as that which is available to the Defendants and the medical evidence that exists, and that will be forthcoming through expert opinion, is sufficient to prove a prima facie case as it relates to asbestos being the cause of Mr. Kilpatrick's death. Indeed, argue Plaintiffs, even an autopsy which may or may not have revealed asbestos fibers or asbestos bodies would not prove with certainty the cause of death.

Pursuant to the Case Management Order entered in this matter:

Plaintiff's spouse or another of plaintiff's representatives shall produce the body of the deceased for one full and complete autopsy, including thoracic and abdominal cavities, to be performed by the state medical examiner or a competent pathologist designated by plaintiff's counsel unless otherwise ordered by the Court upon good cause shown.

CMO §111, ¶ 5(a).

Because this action is governed by the FELA, under which the rights and obligations of the heirs are derived from those of the decedent, the spouse and children of the decedent are subject to the regulations, orders and statutes governing the decedent's personal injury as if they were the decedent.


Moreover, the CMO (a product of much negotiation and debate among the parties) provides that, "Plaintiff's spouse or another of plaintiff's representatives shall produce the body. . . ." In addition, Plaintiffs have admitted that Mr. Kilpatrick signed an authorization for their counsel to produce a full and complete autopsy after his death.

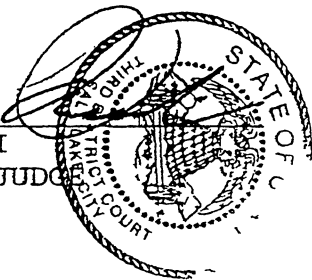
Finally, Plaintiffs' destruction of the body prejudices Defendant because it completely eliminates the Defendant's ability to find out if Mr. Kilpatrick's lungs would have

evidenced any exposure to asbestos over and above the usual background levels.

Based upon the forgoing, Defendant Burlington Northern & Santa Fe Railway Company's Motion to Dismiss All Claims of Plaintiff for Failure to Comply with Case Management Order No. 1 is granted.

DATED this 3 day of March, 2006.


GLENN K. IWASAKI
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 010901285 by the method and on the date specified.

METHOD NAME

Mail	STEVEN BROOK MILLARD ATTORNEY 215 S STATE ST STE 900 SALT LAKE CITY, UT 84111
Mail	E SCOTT SAVAGE ATTORNEY DEF 170 S MAIN ST STE 500 SALT LAKE CITY UT 84101

Dated this 3 day of March, 2006.


Deputy Court Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

SEP 30 2003

SALT LAKE COUNTY

By

Deputy Clerk

IN RE ASBESTOS LITIGATION

JU/U3 Second Amended Case Management Order



010900863 VD13227166 O
ASBESTOS, MASTE

)
) SECOND AMENDED CASE
) MANAGEMENT ORDER NO. 1
)
)
) Case No. 010900863 AS
)
) Honorable Glenn K. Iwasaki

Based upon representations by various potential plaintiffs' counsel to the judges of the Third Judicial District Court of Salt Lake County, Utah, this Order is entered in anticipation of a substantial increase in asbestos litigation in Utah courts.

This order is intended to facilitate the administration of those cases involving allegations of asbestos exposure by reducing multiple filings and hearings and by setting out orders for the orderly disposition of such cases. This order shall apply to all cases filed by Brayton Purcell and by Ness, Motley, Loadholt, Richardson & Poole in which a claim for money damages is based upon allegations of exposure to products containing asbestos and/or machinery calling for the use of asbestos ("asbestos cases").

I.

GENERAL PROCEDURES

1. Cover Sheet: A cover sheet shall be filed with each pleading. The cover sheet shall list the party filing the pleading and its counsel; it shall also list in a vertical column all other parties.
2. Master Service List: Plaintiffs' counsel shall maintain a master service list of all counsel representing parties in any asbestos cases governed by this Order. Defense counsel shall

e-mail their addresses to plaintiffs' counsel at the time they enter their appearances. An updated copy of this master service list will also be filed in the offices of Judge Iwasaki. It is the responsibility of all parties to ensure that the current master service list, as updated, is used for the service of all master pleadings.

3. Service of Pleadings and Documents: Any party required to serve any notice in an asbestos case shall serve one copy of the document on counsel for each party as they appear on the service list for that individual case, and file it with the Court as appropriate.

a. The parties may stipulate to service of any pleading, discovery document, or other written material by e-mail ("e-service") in lieu of standard service by mail or hand delivery, and are encouraged to do so. Such e-service shall be deemed the same as service by hand delivery for computing time to file a response.

b. No party will be deemed bound by e-service unless it has affirmatively stated that it will agree to such service in writing, but if such an election is made by a party in one case, it will be deemed effective in all cases until expressly rejected in writing. Also, if an attorney stipulates to e-service on behalf of one client s/he will be expected to accept e-service for all his/her clients. Parties may reject a prior e-service agreement if such an election is not made.

4. Status of Service of Process: At the time Initial Disclosures by plaintiff are due, plaintiffs' counsel shall provide a list of all parties who have been served to date and their attorneys. The Certificate of Service on the Initial Disclosures is sufficient to satisfy this requirement. Defendants shall have forty-five (45) days from the date of proper service in which to file an Answer or otherwise plead.

5. Rules of Civil Procedure: The Utah Rules of Civil Procedure shall govern all asbestos cases except to the extent that those rules are modified by this Second Amended Case Management Order.

6. Master Pleadings: It is hereby ordered that an action entitled In re: Asbestos Litigation, Master Case No. 010900863 AS, shall become the Master case for all cases involving exposure to asbestos-containing products. This Master Asbestos Case shall serve as a depository for all asbestos liability actions. Pleadings, discovery matters, motions, orders, exhibit and witness lists, pre-trial statements and other documents common to all cases shall be filed only in the Master Asbestos Case and not in any individual case. When counsel enters an appearance for the first time for a particular defendant, s/he should file his/her notice of appearance in the Master Asbestos Case. Counsel are thereafter required to notify the Clerk of Court of all changes in their address, telephone numbers, and fax numbers.

a. In each case, the parties may, if they wish, incorporate by reference any specifically described master pleading, whether that master pleading is filed by that party or by any other party;

b. Plaintiff's counsel should file a Master Complaint and then incorporate it by reference in a brief complaint filed on behalf of each individual plaintiff;

c. Defendants are encouraged to file Master Answers and to incorporate their Master Answers by reference in answering the individual Complaints filed on behalf of each plaintiff.

d. Any party shall have the right to move against or contest any master pleading as though that master pleading were filed in an individual case.

7. Attribution of Fault: In each case in which a railroad is included as a defendant and alleged to be liable under the provisions of the Federal Employers' Liability Act, that railroad defendant is presumed to have properly pled cross-claims for contribution and indemnity against all other defendants, and all other defendants likewise are deemed to have pled a general denial to the railroad defendant's contribution and indemnity cross-claims. Until further order of the Court, all non-railroad defendants are presumed to have no cross-claims against one another for contribution, indemnity or allocation of fault. However, consistent with § 78-27-41, Utah Code Ann., those defendants will notify plaintiffs' counsel, by the date set in the attorneys' planning meeting or upon further order of the Court, of the identity of those non-party defendants it intends to place on the jury verdict form for purposes of the allocation of fault. Nothing herein precludes any railroad defendant from bringing third-party claims for contribution or indemnity.

8. Pro Hac Vice Admissions:

a. Motion for admission: When local counsel seek a first time association and admission of an out-of-state attorney, local counsel shall present Judge Iwasaki with an ex-parte motion and related paperwork that shall fully comply with all requirements of Utah law. The motion shall be filed in the master case file, bearing the case number noted on this Case Management Order.

b. Scope of order: An order admitting counsel *pro hac vice* in a Salt Lake County asbestos exposure case shall provide that it is effective in all then pending actions and shall be effective in any future actions filed in Salt Lake County alleging damages from asbestos exposure. Once an out-of-state attorney has been admitted in any case pursuant to this Case

Management Order, local counsel need only file a copy of the order admitting that counsel in any other asbestos-related case in which the out-of-state attorney wishes to appear.

c. Notice of changes: Local counsel and an out-of-state attorney admitted *pro hac vice* shall promptly notify the Court of any changes in the out-of-state attorney's bar admission status.

d. Timing of Filings Orders for admission *pro hac vice* may be filed at any time prior to the last judicial day before trial. Motions for admission *pro hac vice* or related orders made subsequent to that time will be granted only for good cause shown.

9. Non-waiver of Rights: By entry of this Case Management Order, the parties have not waived any of their rights including, but not limited to, the right to contest joinder, jurisdiction, or venue, or the right to seek removal to federal court. Moreover, the parties have not waived their rights to assert or contest the manner in which these cases should be tried nor have the parties waived their rights to seek modifications of this order in individual cases upon motion and for good cause shown.

10. Preservation of Privileges: The joint defense privilege and the common interest privilege are preserved to the extent allowed under the law of Utah and, by conferring or meeting or exchanging documents, defendants have not waived any attorney/client or work product privilege.

11. Amendment of Case Management Order: For good cause shown, any party may move, or the court may act on its own motion, to amend this Case Management Order.

12. Severance of Punitive Damages: The Court has taken the issue of whether to sever any claims for punitive damages from the compensatory damages under advisement.

13. Amendment of Complaints: Plaintiffs may amend their complaint in any case, prior to the completion of discovery, without stipulation of the parties or leave of court, provided that the only purpose for the amendment is to add additional defendants to the case, and no substantive changes are made to the allegations against any existing defendant.

14. Dismissal of Complaints: Plaintiffs may unilaterally dismiss a case without prejudice at any time prior to the close of discovery in the case based upon a determination that the case cannot be successfully pursued. The procedure for unilateral dismissal may not be employed, however, if the plaintiff or plaintiff's counsel reasonably believes that the case may be refiled in this or another jurisdiction at any time in the future. When Plaintiffs unilaterally dismiss a case without prejudice based upon a determination that the case cannot be successfully pursued, the presumed cross-claims for contribution and indemnity of the railroad defendants, as established by section I.7 of this order, are deemed dismissed without prejudice.

II.

DISCOVERY: INITIAL PHASE

1. Initial Disclosures: No later than 30 days after the filing of the first answer to a complaint plaintiff shall serve his/her Initial Disclosures, which shall include all of the information required by Rule 26(a)(1) plus:

- a. The exposed person's Social Security Number;
- b. The exposed person's date of birth;
- c. A complete list of the exposed person's employers, with last known addresses and phone numbers, to the extent reasonably available;

- d. The exposed person's medical history; and
- e. A complete list of all of the exposed persons' health insurance carriers for the last 10 years.

2. Authorization for Obtaining Records: Simultaneous with the filing and service of the initial disclosures, plaintiff will provide to an attorney designated by defense counsel signed original authorizations (current within 120 days) to enable defendants to obtain medical records, VA records, union records, income tax records, Social Security earnings records, Social Security disability records, Social Security Printouts, military records, worker's compensation records, and past or present employers' personnel records.

a. These authorizations are for documents, pathology material, and original radiological films and are not to be construed to authorize verbal communications that are not otherwise allowable.

b. These records described in this paragraph 2 of Section II, which are produced by any party pursuant to these authorizations, are determined by the court to be authentic under the Utah Rules of Civil Procedure, unless specific objection is made thereto at least thirty (30) days prior to trial.

c. These records are not to be filed with the Court.

d. The attorney designated by defendants to receive the authorizations shall make a complete copy of all records obtained pursuant to these authorizations available to plaintiff's counsel.

3. Defendants' Master Interrogatories and Requests for Production of Documents:
No later than one-hundred twenty (120) days after the filing of a complaint, plaintiff shall serve a

copy of the plaintiff's responses to Defendants' Master Interrogatories and Requests for Production of Documents, together with a copy of the requested documents. The Master Interrogatories and Requests for Production are deemed served at the time plaintiff files his/her complaint.

4. Defendants' Initial Disclosures: No later than thirty (30) days after filing its answer, each defendant shall serve its initial disclosures.

5. Plaintiffs' Master Interrogatories and Requests for Production of Documents: Each defendant shall serve responses to Plaintiffs' Master Interrogatories and Requests for Production within thirty (30) days after service of Plaintiff's responses to Defendants' Master Interrogatories and Requests for Production. The Plaintiff's Master Interrogatories and Requests for Production are deemed served at the time the defendant is properly served with process.

6. Attorneys' Planning Conference: As soon as practicable after filing plaintiff's Initial Disclosures and after service has been perfected on all named defendants which are subject to service and are not engaged in private settlement negotiations with the plaintiff, plaintiffs counsel shall convene an attorneys' planning conference with all defense counsel. The conference may be held by telephone.

a. At this planning conference all counsel shall agree on the following:

1. The date by which plaintiff shall identify;

(a) the asbestos-containing products, or types of products manufactured or distributed by a particular defendant, to which he/she was allegedly exposed;

- (b) the period of time during which plaintiff alleges that the exposure occurred;
- (c) the location at which plaintiff alleges that the exposure occurred;
- (d) the manner in which plaintiff alleges he/she was exposed to each identified product, and whether plaintiff alleges that the exposure was direct or indirect;
- (e) any documents plaintiff contends will support the identification of each product specified; and
- (f) the names, addresses and telephone numbers of any and all witnesses who will testify to plaintiff's exposure to each identified product; provided, however, that witnesses who are asbestos plaintiffs themselves shall be contacted, if at all, through their asbestos counsel; and provided further that, to the extent reasonably possible, defendants will coordinate their contacts with plaintiff's product identification witnesses in an effort to protect them from an inordinate number of interview requests.

- 2. The deadline for completing factual discovery;
- 3. The date, following the close of fact discovery, by which defendants shall identify those non-parties to whom they shall seek to allocate fault;

4. The date by which plaintiff's counsel shall designate plaintiff's case-specific expert witnesses and serve Rule 26(a)(3)(B) expert witness reports as follows:
 - (a) Injury and Damage Experts: Plaintiff's counsel shall serve case-specific expert witness reports with respect to Plaintiff's injury and damage claims;
 - (b) Industrial Hygienists: Plaintiff's counsel may serve a single work-site specific expert witness report for all cases involving the same work-site if the expert is not expected to present case-specific testimony at trial; and
 - (c) General Experts: Defendant's counsel may serve a Master Expert Report for any experts who will testify generally, and not based upon a review of case-specific or work-site specific information.
5. The date (typically 60 to 120 days after the plaintiff's designation of expert witnesses and service of Rule 26(a)(3)(B) expert witness reports) by which defendants' counsel shall designate defendants' case-specific expert witnesses and serve Rule 26(a)(3)(B) expert witness reports as follows:
 - (a) Injury and Damage Experts: Defendants' counsel shall serve case-specific expert witness reports with respect to

any expert witnesses expected to testify with respect to plaintiff's injury and damage claims;

- (b) Industrial Hygienists: Defendants' counsel may serve a single work-site specific expert witness report for all cases involving the same work-site if the witness is not expected to give case-specific testimony at trial; and
- (c) General Experts: Defendants' counsel may serve a Master Expert Report for any experts who will testify generally, and not based upon a review of case-specific or work-site specific information.

6. The deadline for completing expert witness discovery; and

7. The deadline for filing dispositive motions.

- b. If counsel are unable to reach an agreement regarding these matters, any party may file a motion for a scheduling conference with the court pursuant to Rule 16, Utah Rules of Civil Procedure.
- c. If at any time after the Attorneys' Planning Meeting has been held and/or a scheduling order has been entered in a particular case, a plaintiff amends his/her complaint to add additional defendants in the case, a new Attorneys' Planning Meeting will be convened, including counsel for the new parties, to consider whether changes to the scheduling order are appropriate under the circumstances.

III.

ADDITIONAL DISCOVERY

1. Supplementing Answers to Interrogatories and Responses to Requests for Production: If plaintiffs or defendants have previously answered Interrogatories or Requests for Production, they need only supplement their answers to those Interrogatories or Requests pursuant to the Utah Rules of Civil Procedure, but required supplementation shall occur no later than thirty (30) days before trial, absent special circumstances.
2. Rule 35 Examinations of Plaintiff: Defendants are entitled to arrange for the Rule 35 examination(s) of the plaintiff, if living, to be conducted by a physician(s) of defendants' choice and at defendants' expense.
 - a. Defendants shall agree among themselves on the identity of the specialist who will conduct the Rule 35 examination. Under ordinary circumstances, plaintiff shall be examined by only one physician.
 - b. In those cases where plaintiff alleges physical and/or mental conditions that require assessment by more than one specialist, plaintiff may be required to submit to an additional physical or mental examination for each condition. The need for these additional Rule 35 examinations shall be determined on a case-by-case basis.
 - c. The Rule 35 examination will be conducted in Salt Lake County to the extent possible. In those cases where the plaintiff is unable to travel, the Rule 35 examination will be conducted in the community where plaintiff resides.
 - d. The parties recognize that there may be circumstances under which a Rule 35 examination may need to be conducted by a physician located outside the State of Utah. The

need for and arrangements pertaining to such an examination shall be resolved on a case-by-case basis.

3. Pathology Materials; Plaintiff agrees to provide to one defendant's attorney all of the plaintiff's pathology materials and those original chest images in his/her possession, as soon as practicable, but no later than one-hundred twenty (120) days after the filing of the complaint absent special circumstances.

a. The Defense Counsel to whom these materials are delivered shall be the custodian of the plaintiff's pathology materials, chest x-rays and related medical materials when they are provided for examination and all parties shall work together to allow all parties to use these materials as needed in preparing their medical work up in these cases. Each defendant has the absolute right to examine the pathology materials, chest images, and related medical materials independently of the other defendants.

b. All pathology materials, chest images and related medical materials received directly from plaintiff shall be returned to plaintiff's counsel upon completion of the defendants' examination thereof. The parties may make agreements to share the costs and acquisition of medical records, pathology materials, chest x-rays and related materials.

c. No destructive testing will be done without giving thirty (30) days' prior notice to all parties. Those parties objecting to the destructive testing shall file their objections with the Court prior to the expiration of the 30-day notice period. If an objection is filed, no destructive testing shall occur until the objection has been resolved.

d. The results of any destructive testing shall be made available to all parties upon order of the court.

e. Pathology materials and original radiological studies received pursuant to plaintiff's authorization shall be returned to plaintiff's counsel no later than thirty (30) days prior to trial.

4. Written Report of Rule 35 Examination: The defendants shall serve a written report of any Rule 35 examination described in paragraph 2 of this Section III, as soon as practicable after the examination but no later than forty-five (45) days prior to the deadline for completing expert discovery unless otherwise agreed by counsel.

5. Notice of Death and Autopsy: Plaintiff's attorney, upon learning of the death of Plaintiff shall immediately notify counsel for Defendants of Plaintiff's death.

a. Plaintiff's spouse or another of plaintiff's representatives shall produce the body of the deceased for one full and complete autopsy, including the thoracic and abdominal cavities, to be performed by the state medical examiner or a competent pathologist designated by plaintiff's counsel unless otherwise ordered by the court upon good cause shown.

b. A showing of "good cause" may include religious beliefs and family preferences regarding autopsies, although these factors are not necessarily determinative of the issue.

c. Appropriate and adequate quantities of tissue shall be obtained and preserved for inspection and review by pathologists selected by the parties and all tissue samples selected and preserved at the autopsy shall be made available to all parties for appropriate medical and pathological testing.

IV.

NO EVIDENCE DISMISSAL

1. No Evidence Letter: At the close of fact discovery pertinent to a specific defendant, that defendant may, in good faith, serve a "No Evidence Letter" upon plaintiff.
 - a. The defendant must certify in the No Evidence Letter as follows:
 - (1) that the attorney has reviewed, or caused to be reviewed by another attorney or a legal assistant working under the direction of the attorney, all of the exchanged discovery;
 - (2) that the defendant has provided the plaintiff with all information in its possession, custody, or control, other than expert witness reports, which are required by the Case Management Order, or pursuant to any discovery request or court order; and
 - (3) that the plaintiff's discovery responses have not identified any evidence tending to show plaintiff or plaintiff's decedent was exposed to asbestos for which the defendant was responsible.
 - b. Plaintiff must respond to a No Evidence Letter agreeing to dismiss the defendant with prejudice and a mutual waiver of costs, or rejecting the letter, no later than 10 days after service of the letter. Failure to respond shall be deemed an agreement to dismissal. If plaintiff agrees to a no evidence dismissal of a defendant under this provision, the presumed cross-claims for contribution and indemnity of the railroad defendants

against that defendant, as established by section I.7 of this order, are deemed dismissed with prejudice. This dismissal occurs only if the railroad defendants were also served with the No Evidence Letter and did not object within 10 days of service.

- c. If plaintiff rejects the No Evidence Letter, plaintiff must state the factual and legal basis for rejecting it.
- d. If Plaintiff rejects the No Evidence Letter and/or refuses to agree to dismissal with prejudice and a mutual waiver of costs, Defendant may file a motion for summary judgment without the necessity of awaiting completion of expert discovery. If such a motion is granted in Defendant's favor, it will also be effective as to the presumed cross-claims for contribution and indemnity of the railroad defendants, as established by section I.7 of this order. The railroad defendants shall have the right to oppose any such motion for summary judgment.
- e. In the event a defendant files a motion for summary judgment pursuant to this paragraph, plaintiff shall have 45 days within which to respond.

V.

TRIAL SETTING

1. Timing and Effect of Dispositive Motions: Except as set forth in Section IV, dealing with No Evidence Dismissals, motions for summary judgment shall not be filed until after the close of discovery. Motions to dismiss may be filed at any time after the completion of discovery pertaining to the particular issue on which the motion to dismiss is based. Dispositive

motions granted in a defendant's favor shall be effective as to the presumed cross-claims for contribution and indemnity of the railroad defendants. The railroad defendants shall have the right to oppose any defendant's dispositive motion. If plaintiff's claims against a railroad defendant are dismissed on any basis, including No Evidence Letter, dispositive motion or settlement, then that dismissal shall also be effective as to the presumed cross-claims for contribution and indemnity of the railroad defendants, as established by section I.7 of this order.

2. Trial Setting: Once dispositive motions have been decided and the remaining parties have attempted to settle through mediation, an individual case may be set for trial.

3. Exigent Cases: A case may be set for an exigent trial setting, which will occur, to the extent possible, no later than seven months after the court declares the matter as an exigent case.

a. An exigent case is defined as follows:

(i) *Mesothelioma*: any living plaintiff who has been diagnosed in writing by a Board Certified Pulmonologist with Malignant Mesothelioma, shall be presumed exigent.

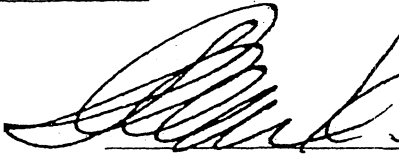
(ii) *Lung Cancer, other Cancer and other Asbestos-Related Diseases*: any living plaintiff who has been diagnosed in writing by a Board Certified Pulmonologist with an asbestos related disease, and for whom the Board Certified Pulmonologist will sign an affidavit stating that s/he has personally examined the plaintiff and that there is a substantial medical doubt that the plaintiff will survive beyond six months.

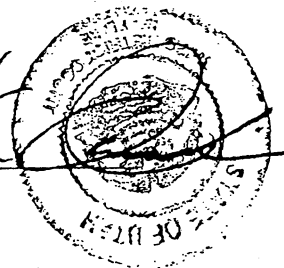
b. Plaintiff's counsel shall file a motion seeking that a case be designated as exigent. Defendants shall have 14 days thereafter to object on the basis that the scheduled case does not meet the definition of an exigent case.

c. Each exigent case will have a separate six-month pre-trial scheduling order entered, using the same basic format as the attorneys' planning conference format used in all non-exigent cases. Plaintiff may request a trial setting upon completion of its obligation to prove complete medical records, pathological materials, autopsy reports (where applicable) and product identification evidence.

d. The subsequent death of the plaintiff will be considered just cause for returning the case to a non-exigent status unless the court rules otherwise. Issues resulting from the death of the plaintiff (*e.g.*, failure to comply with formalities in regard to proper substitution of plaintiff, medical and autopsy issues, impact on the jury if one has already been impaneled, etc.) may be considered by the court in regard to a request for maintaining the case on an exigent trial setting.

DATED this 30 day of Sept., 2003.


Glenn K. Iwasaki
District Court Judge



CERTIFICATE OF SERVICE

Defendant Union Pacific Railroad Company, by and through counsel, hereby certifies that a true and correct copy of the foregoing proposed SECOND AMENDED CASE MANAGEMENT ORDER NO. 1 was served by mailing, postage prepaid, and/or by electronic transmission, this 12th day of September, 2003 to the following parties:

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