

03cv17000zbn-ord(MedicalDiscovery).wpd

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE: WELDING FUME PRODUCTS :
LIABILITY LITIGATION : **Case No. 1:03-CV-17000**
: **(MDL Docket No. 1535)**
:
: **JUDGE O'MALLEY**
:
: **ORDER**

The Court conferred with the parties recently to discuss various matters related to case management. During this conference, the parties reached certain agreements. This Order documents those agreements.

1. Medical Records Discovery.

This Court earlier entered a number of Orders identifying batches of cases for medical records discovery.¹ The Court ordered counsel for the plaintiffs in these cases to review the medical records discovery, meet with their clients, and determine whether the case was one which counsel and client fully believed should go to trial. Counsel for each plaintiff then had to either: (1) certify he believes in good faith that he and his client will pursue the matter to trial; or (2) move to dismiss his case, or to withdraw his representation. This process has worked to winnow substantially the number of cases pending in this MDL, and to advance certified cases into a more-trial-ready status.

¹ See master docket no. 1888 (“*First 100-Case Order*”); master docket nos. 1978, 2031 (amending the *First 100-Case Order*); master docket no. 2124 (“*Second 100-Case Order*”); master docket no. 2140 (amending the *Second 100-Case Order*); master docket no. 2178 (*Third 100-Case Order*) see also master docket no. 2107 (“*Second Case Administration Order*”) (discussing the designation process).

The parties agree this process has been salutary.

Accordingly, the parties further agree and the Court now Orders that **all** cases pending in this MDL – except those in which a motion to remand to state court is pending – are designated for medical records discovery. Counsel estimates there are about 1,700 such cases. As before, the parties will work to reach a joint agreement on the records discovery process and will adhere to directives discussed in the earlier Orders of case designation.

The parties shall make all reasonable efforts to conduct this medical records discovery expeditiously, so that counsel for plaintiffs can reach certification decisions on all cases as soon as possible. To further expedite the process, counsel for plaintiffs shall undertake efforts to: (1) determine whether there is reason to move to dismiss a case, or to withdraw representation, even *before* the case is put into the process for medical records discovery; and (2) determine whether it is possible to reach a certification decision before the entirety of the medical records discovery process is complete.²

2. Motions to Withdraw following Medical Records Discovery.

As noted above, following medical records discovery, plaintiffs' counsel may choose to move to withdraw from representation in a given case, having decided that pursuit of the case to trial is not appropriate. Pursuant to agreement of the parties, the Court now outlines the following procedure applicable in these circumstances.

² As noted in the Court's *Second Case Administration Order*, the medical discovery process often involves several rounds of records retrieval. *See* master docket no. 2107 at 2-3. It may be that plaintiffs' counsel can formulate criteria to decisively rule out trial certification – or rule it in – before the medical records discovery process is complete, and possibly even before the process begins.

In any case where counsel for plaintiff moves to withdraw after initiation of the medical records discovery process, the plaintiff shall have 60 days from the date of the filing of the motion to withdraw to obtain replacement counsel. If no replacement counsel files a timely notice of appearance, defendants may file a motion to dismiss. If replacement counsel does file a timely notice of appearance, then replacement counsel shall have 60 days to certify he believes in good faith that he and his client will pursue the matter to trial. If replacement counsel does not so certify, defendants may file a motion to dismiss. Finally, withdrawing counsel will ensure his client is aware of all of these procedures.

3. Additional Cases Designated for Trial.

Earlier, this Court designated five cases for full case-specific discovery – two cases to be tried by this Court, and three cases to be remanded to transferor courts.³ Plaintiffs' counsel has indicated that, despite prior certification of one of these cases – *Richmond*, case no. 05-CV-19212 – additional discovery has given them reason to withdraw their certification and move for dismissal.

The Court now intends to designate nine additional cases for full case-specific discovery – six more cases to be tried in this Court (by the undersigned and also possibly other Judges), and three more cases to be remanded to transferor courts. The Court will confer with Lead Counsel at **2:00 p.m. E.S.T. on Monday, June 8, 2009**, at which time the Court will choose these nine cases,

³ See master docket no. 2170 (designating these cases).

with input from counsel.⁴ The nine cases will be chosen from those cases that have, as of that date, been certified by plaintiffs. Counsel shall provide the Court with a list of all such cases, including identification in each case of: (1) plaintiff's counsel; (2) where the case was filed; (3) apparently applicable state law;⁵ and (4) diagnosing doctor(s). Further, before this date, counsel for plaintiffs will re-examine all of the earlier-certified cases and determine whether, as with *Richmond*, any change in certification status is appropriate.

4. Trial Hours.

The trial of *Cooley*, case no. 05-CV-17734, is scheduled to begin on September 14, 2009. The Court now orders that plaintiffs and defendants will have a time limit of 30 hours each to present their case in *Cooley*, not including voir dire, opening statement, or closing argument.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: May 4, 2009

⁴ Counsel may appear in person or via teleconference. The Court expects that counsel for plaintiffs and defendants will each suggest certain cases, taking into account the Court's desire for a variety of applicable state law, transferor court locations, plaintiff's counsel, and so on. Of course, if the parties can agree on the designation of certain cases, the Court will probably defer to this agreement.

⁵ The Court understands that choice-of-law issues may remain unsettled in any given case until shortly before trial; at this juncture, the Court asks only for counsel's best guess as to applicable state law, which may be simply a matter of where plaintiff now resides.