

1 IN THE CIRCUIT COURT
2 TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

3 FRANCES E. KEMNER, et. al.)
4 Plaintiffs,)
5 VS.) NO: 80-L-970
6 MONSANTO COMPANY,)
7 Defendant.)

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10 REPORT OF PROCEEDINGS

11 Before the HON. RICHARD P. GOLDENHERSH

12 MOTION HEARD AFTER DISCHARGE OF JURY

13 April 3, 1986
14

15 APPEARANCES:

16 Mr. Rex Carr
17 Mr. Jerome Seigfreid
On Behalf of the Plaintiffs;

18 Mr. Kenneth Heineman
19 Mr. Joseph Nassif
Mr. James Craven
On Behalf of the Defendant.

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23 Debra M. Musielak, CSR, CM
24 Official Court Reporter

1 BE IT REMEMBERED, that on the 3rd day of April,
2 1986, the same being one of the regular judicial days of said
3 court, the above-styled cause came on regularly for hearing
4 before the HONORABLE RICHARD P. GOLDENHERSH, one of the
5 Judges at the St. Clair County Building, 10 Public Square, in
6 the City of Belleville, County of St. Clair, State of
7 Illinois. Whereupon the following proceedings were had:
8 (The following proceedings were had outside the presence of
9 the jury)

10 THE COURT: Gentlemen, we are here for the argument
11 on these motions. Before we start on the argument, if any of
12 you have any documents that you wish filed or anything else
13 that you wish filed, could you please do so at this time,
14 because I want to release my clerk, if possible. Any of you
15 have anything to be filed?

16 MR. CARR: No, Your Honor.

17 MR. HEINEMAN: Not right now.

18 THE COURT: Well, now is the time. That's what I'm
19 saying, now is the time.

20 MR. HEINEMAN: We don't have anything to be filed
21 today.

22 THE COURT: Okay, that's what I meant. Fine.
23 Second of all, the two motions that are up for argument this
24 afternoon, excuse me, are Monsanto's Motion to Voir Dire Jury

1 and Monsanto's Motion for Mistrial. We were scheduled to
2 argue the Motion to Voir Dire the Jury last Wednesday, and we
3 had to cancel that, so, I suppose the order in which to go is
4 to argue the Motion to Voir Dire the Jury first, and then to
5 argue the motion on the mistrial. I've read both the
6 motions. I've read everything that you gentlemen have filed
7 as of yesterday, so I would appreciate it if in any arguments
8 that you make, if you have anything to add to it, or response
9 to the other side, but please don't repeat what you've
10 already written, because I have read what you've written. I
11 think the argument will go a lot faster and better for
12 everybody concerned.

13 So with that, with those stipulations, we will
14 start first with the Motion to Voir Dire the Jury.

15 MR. HEINEMAN: Your Honor, if the Court please,
16 before we get started on that motion, there are a couple of
17 things I'd like to raise now about what happened in court
18 today. The Court has always asked us to raise these things
19 after --

20 THE COURT: I have indeed.

21 MR. HEINEMAN: -- after court. First of all, Your
22 Honor, we would move for a mistrial in this case with respect
23 to the conduct of Mr. Carr with respect to Dr. Suskind and
24 the baiting of Dr. Suskind in connection with what a

1 registered nurse was intelligent enough to do or not
2 intelligent enough to do, or what a six year old could do,
3 knowing, of course, that juror number 1 Clair Moy is a nurse,
4 and the efforts of Mr. Carr were clearly directed to anger
5 that juror, and to get some sort of a statement out of Dr.
6 Suskind with respect to registered nurses which would anger
7 Mrs. Moy. I know she has got a married, another married name
8 now but that's the name by which I remember her when we chose
9 her over two years ago. And, he was clearly baiting the
10 witness with respect to that. He was trying to get some sort
11 of response which would anger Mrs. Moy, and he would -- he
12 was very likely successful. Secondly, Your Honor, we would
13 object to the occasion when the Court pounded on the desk, on
14 the bench, and shouted at the witness with respect to an
15 answer that the witness gave, and particularly in light of
16 the fact that it occurred at a time when no request had been
17 made by counsel for assistance from the Court, and it was
18 clearly an intimidation of the witness and we object to it,
19 and to that end we would request that today's tape be
20 impounded by the Court, that that tape made of the
21 proceedings be impounded by the Court. We'd like to have a
22 copy of it right away.

23 MR. CARR: If I might respond to the remarks, Your
24 Honor. The reference to the statement that somehow or

1 another I asked questions designed to bait the witness into
2 saying bad things about registered nurses, the baiting has
3 been the other way. The witness constantly does things which
4 he knows are improper in order to bait me. The incident that
5 he's talking about was the witness had said a registered
6 nurse is not competent to read charts, that they are not
7 trained to do it, and that they are unable to read this to a
8 substantial degree and to accurately reflect it. I didn't
9 ask for nor want nor expect that answer. The witness is
10 simply relating what he believes apparently and what he
11 thinks is the case. My cross examination was designed to get
12 him to agree that a registered nurse is competent to read
13 these records, and he resisted. Obviously my questioning was
14 appropriate in view of his responses.

15 Insofar as the Court's reaction to this witness'
16 statement, quite frankly, I am surprised that the Court has
17 been able to restrain itself as long as it has. This witness
18 has now literally for weeks been engaged in an apparent
19 attempt to goad the Court and to goad counsel into actions to
20 the detriment of the trial. I have not seen a witness so
21 transparently obviously taking such an action. The Court has
22 time and time and time again instructed the witness to obey
23 the orders of the Court, to obey the requests of the Court,
24 to respond appropriately. The witness responds each time

1 that he will -- there is no question but what the man
2 understands exactly what he's doing and has done. If the man
3 were uneducated or inexperienced, or not wise, or felt
4 somehow or another upset in this courtroom, it might be
5 different, but this man is flaunting the rules of this Court,
6 openly flaunting proper procedure, openly daring the Court
7 and counsel to do something, and doing it I might say to date
8 with impunity. I believe that if I had been the Judge and
9 had to endure this kind of conduct -- the Court will recall
10 you started out instructing -- we had the witness back in the
11 Chambers. You said time and time again, you've instructed
12 counsel to tell the witness the proper way to respond. Now,
13 it's certainly possible, Your Honor, that your rules are the
14 worse rules on earth. It may be that you're just
15 overreaching, senseless overreaching and deliberately
16 designed to corrupt the ends of justice. I know that it's
17 not so, but the point that I'm making, even were it so,
18 counsel are constrained to obey your orders. The witnesses
19 are constrained to obey your orders. This witness
20 deliberately is taking the opposite and it can't be
21 considered by anything or anybody except deliberate. The man
22 is deliberately disobeying the orders of Court, and has done
23 so for a long period of time. And quite frankly, I thought
24 the Court was restrained in its action. I would have taken

1 that gavel, I think, and probably walked off the bench and
2 done a little more enforcement. And I might say, Your Honor,
3 I've been in a number of cases where judges confronted with
4 only a tenth of what has gone on with this witness have
5 reacted much more vociferously and with much more direct
6 action against the recalcitrant witness than you. I am,
7 quite frankly, am just amazed at your ability to continue to
8 be -- to treat this man with gentleness and kindness and for
9 one comment today in the fashion I think you deserve a medal
10 in, not criticism, not criticism, because this witness is
11 openly, flagrantly engaged in contumacious conduct, and I
12 think there is no question about it. So I think the Court
13 should deny both motions of counsel.

14 THE COURT: It's your motion, do you have any
15 response that you'd like to make?

16 MR. HEINEMAN: I have no response, Your Honor.

17 THE COURT: Fine. Okay. I'm denying the Motion
18 for Mistrial on both grounds. First of all, I made numerous
19 rulings throughout the examination of this witness this
20 afternoon, my rulings stand, and I would reaffirm that I do
21 not think that there was any improper questioning of this
22 witness.

23 As far as this registered nurse matter was
24 concerned it is unfortunately an example again of one of

1 these matters that the witness brought on himself. If there
2 was any adverse effect to it, I think it was handled properly
3 by Mr. Carr. There is no grounds for mistrial. There was no
4 prejudice to any party by it.

5 As far as my remarks and what I did, it was done at
6 a point in time when the witness was trying to assert himself
7 as the power that determines what can be asked of him, and
8 whether or not a certain subject can be raised with him,
9 whether or not he can be allowed to continue a question,
10 matters of that ilk, and I have told this witness a number of
11 times that those are decisions that I make, that he is not
12 allowed to make. Both of you gentlemen are professionals,
13 both of you have responsibilities to your clients that you
14 discharge by what you consider in your professional judgment
15 to be proper interrogation, whether direct or cross
16 examination, and it's not his problem to determine that for
17 himself. The -- there was nothing done by the Court at this
18 time that was in any way improper or that prejudiced either
19 party. It was a proper exercise of the discharge of this
20 Court's duties to see the witnesses follow the rules of this
21 Court. And it is in no way a basis for a mistrial.

22 The pounding on the desk was because my gavel was a
23 little farther away than it should have been, other than that
24 it would have been with the gavel. But I think it had the

1 same effect, which was basically to get the witness'
2 attention and to stop the proceedings so that I could
3 reassert what are the proper rules of this Court in the
4 discharge of my duties, and that is exactly why this gavel,
5 or anything else that is useful as an implement like that, is
6 available to us. That also is not a basis for a Motion for
7 Mistrial in this cause.

8 On both grounds your motion is denied.

9 MR. HEINEMAN: Your Honor, may we have today's tape
10 impounded? Can we get a copy of it?

11 THE COURT: My understanding is that all these
12 tapes exist. I thought I understood the last time that we
13 discussed this that there was going to be something submitted
14 to me as far as authority or requests or whatever, as far as
15 the use of the tape. I thought by both of you. I haven't
16 had anything so far. Perhaps we should clarify that. You --
17 I believe that I asked you to, both parties, to submit to me
18 matters about these tapes and what would be a proper use of
19 them or what we should do with them, and I have checked with
20 the person who keeps these, and more likely than not all of
21 the tapes of the trial up to this date still exist. They
22 have not been recycled. So, I don't think that that is a
23 problem. I have not done anything past that, because I'm
24 waiting for basically a formal motion and some citations and

1 argument to me as to what would be a proper use of these
2 tapes, if any, as far as making a record in this matter. So,
3 if you gentlemen would do so, it was your motion. If you
4 would do that first, and Mr. Carr, if you respond to that.

5 MR. CARR: I've been waiting for something from
6 them.

7 THE COURT: Then we can take this matter up. So
8 far, I've been given to understand, the audio tapes of the
9 trial exist. There have been no video.

10 MR. HEINEMAN: Your Honor, the last time we
11 discussed this there was no objection from counsel.

12 MR. CARR: Oh, yes, there was.

13 THE COURT: I think there was, and whether there
14 was an objection or not, I made it clear on the record that
15 in my mind I was not sure what the proper approach would be
16 as to the use of these tapes and I wanted some direction and
17 some suggestions from counsel as to that, and so if you would
18 supply me with these, and Mr. Carr if you would respond to
19 theirs, whether or not agreeing or disagreeing, or a mixture
20 thereto, then I think that we can resolve that matter also,
21 but if you would please do so, then I can take care of that
22 matter. But so far as I know all these tapes still exist.

23 MR. CRAVEN: Judge, is it permissible to ask, I
24 don't understand what you are asking us to do. We thought we

1 had an order whereby the tapes would be preserved and we
2 could get copies of the tapes.

3 THE COURT: No. You don't have such order. I want
4 a formal motion to that effect and your citations or
5 arguments or whatever as to the proper approach to this, and
6 your authority for making that a formal part of the record,
7 and whatever else you wish to include in your motion. Your
8 backing for that, and to have Mr. Carr's response to that
9 before I enter any such order.

10 Now, in the normal course of things, I told you at
11 the -- also I would see whether any of these tapes still
12 exist, and I've been given to understand by the gentleman who
13 handles our audio system that they do. So they still exist.
14 Now, I want some suggestions from you gentlemen as to what's
15 to be done with them, and I thought I made that clear when we
16 were in Chambers before. If I didn't, I think I'm making
17 them clear now.

18 MR. CARR: The Court did, Your Honor, and my memory
19 of the event is that the Plaintiffs were not yet ready to
20 take a position on it. We asked an opportunity to consider
21 it, and respond at some later time as to what our position
22 would be on the subject. I don't think -- I know we didn't
23 agree, and I don't think there is -- I certainly had no
24 objection to impounding and keeping the tape in vial until

1 such time as the Court decided, but I know the Plaintiffs
2 were not in a position to agree that that tape would be part
3 of the record at that time. It's my understanding that this
4 matter be put on hold, the tapes would be preserved, matter's
5 been put on hold for the Court to make a decision.

6 THE COURT: They are being preserved. They are
7 just reusing tapes from 1978 at this point in time. They
8 weren't even close to starting with ours. So the tapes still
9 exist. That's no problem. Okay. Let's get to the motions
10 that we have got.

11 First of all, the Motion to Voir Dire the jury.

12 MR. CRAVEN: We have two motions, and I understand
13 the Court's suggestion that we take the Motion to Voir Dire
14 the Jury first. I guess maybe it's best to start with our
15 Catch 22 situation Mr. Carr is sharing with us again. On
16 Page 12 of his objections he says a voir dire is not
17 appropriate unless there is some indication that the jury has
18 read the article and has been improperly influenced thereby.

19 THE COURT: That was Page 12?

20 MR. CRAVEN: That's Page 12. The Court has before
21 it all of the articles that we appended to our motion, and
22 Mr. Carr comes back with some other articles that he says had
23 their origin with us or were somehow or another were inspired
24 by us, but the bottom line is that both parties seem to be

1 suggesting that the jury has at least had the possible
2 exposure to substantially prejudicial articles. We allege,
3 and I think the record would establish, that Mr. Carr's
4 engaged in a deliberate course of conduct of getting things
5 in the press both in the St. Louis and in the Belleville
6 press, and in the St. Louis Magazine and various and sundry
7 other places where he appears in living color talking about
8 this trial and his mission in life to pin the label of bad
9 guy on Monsanto. And, it's simply beyond belief that that
10 kind of publicity on the front pages of the local paper, or
11 in the St. Louis paper, or in the Post Dispatch Sunday
12 Magazine, or wherever it is, doesn't come across to these
13 jurors. But Mr. Carr says, okay, no, you know -- first place
14 he said if you are going to voir dire the jury, voir dire
15 them about everything, and we have no objection to that.
16 But, how does he expect that we are supposed to prove without
17 voir dire that which we are asking this Court to do? So I
18 think the really fundamental fairness that we are asking for
19 is does Mr. Carr say we have to prove that the jury read it
20 in order to get relief, and at the same time objects to us
21 finding out if the jury read it. That's silly. That's just
22 impossible.

23 We are saying that there is an evidentiary basis on
24 the basis of this circulation of newspapers, of which this

1 Court has been aware, and the appearance in the Belleville
2 paper of this story, and the settlement, and all of the
3 prejudicial material that has been available for this jury to
4 read. It's there. It's there on a repetitive basis and we
5 say in our motion it's been there on the basis of Mr. Carr
6 electing affirmatively to permit himself to be interviewed,
7 to be photographed on his sail boat, to show the story about
8 what's a broken neck work worth, etcetera. A deliberate
9 effort to get matters before the jury.

10 How can we prove it? If we were to go and talk to
11 the jurors and ask them Mr. Carr would be screaming, and
12 properly so, because we are not entitled to do that. So then
13 how does he suggest we meet the burden that he casts upon us
14 by saying there has to be an indication that the jury has
15 read the articles and been improperly influenced? And that's
16 a condition precedent to voir diring the jury to find out
17 what he tells us we have got to prove in the first place.
18 Now that's simply asking this Court, leading this Court again
19 into error, and we think with malice of forethought in that
20 sense.

21 Judge, this trial is now historic, and I don't
22 necessarily think that that's good. But it is. It's been
23 going on for 388 something trial days. This jury has been
24 exposed to all of this publicity backwards and forwards. And

1 if they have heard this, we need to know it. The parties are
2 entitled to know it. The record is entitled to reflect it.
3 And then once we see what they have read, what they have been
4 exposed to, what they have heard, listened, seen, read, then
5 we argue the next question of was it prejudicial. Now, the
6 one time that we argued in this court the question of the --
7 Mr. Carr's very well publicized interview in the New York
8 times, the Court incredulously, I thought, suggested to us
9 that we had no reason to object because it was derogatory to
10 Mr. Carr. Well, I don't think it was derogatory to Mr. Carr,
11 but that's irrelevant. The question was did the material get
12 to the jury, and if it did, what impact did it have on the
13 jury. We are entitled to have -- assert whether or not this
14 jury has any information towards this record about this trial
15 from publicity. We do not object to Mr. Carr's suggestion
16 that the voir dire include the articles that he appended. We
17 agree that if you are going to voir dire the jury you are
18 going to voir dire the jury about the sum total of the
19 extraneous matters that have gone on. And then we have to
20 determine whether that matter was prejudicial to the
21 Plaintiff or to the Defendant, and to what extent and what
22 the remedy is, but, Judge, it's inappropriate to go forward
23 with this trial, with this jury, with this burden on this
24 account when this record is incomplete as to this exposure of

1 these jurors to this kind of deliberately inflicted
2 publicity.

3 He comes back and says, well, the Monsanto PR man
4 said this and so forth. We dispute that. But we agree there
5 should be inquiry as to what the jury has read, seen, heard,
6 talked about. And then we will talk about the prejudice to
7 whom and under what circumstances and when and where. So we
8 request that the jury be voir dired. We filed this motion as
9 soon as we reasonably could after the Belleville story
10 appeared. We have been persistent in our request that the
11 jury be voir dired. I think that was February 16th or 18th,
12 some such date, and here we are now in early April. And I
13 suggest that there is some urgency to doing this, like
14 tomorrow. Like tomorrow, or Monday, or Saturday. We have to
15 know whether we are trying a case before a jury that has been
16 made less than impartial by this kind of publicity. What's
17 it to try cases where juries hear about million dollar
18 settlements, and it's my -- it's my life to pin the label of
19 bad guy on Monsanto, and it will be the great contribution to
20 the society to do this, and the evil chemical companies, and
21 this kind of material that's in this literature that has its
22 origin with Mr. Carr. And it's published in the Belleville
23 newspaper.

24 Now, we don't give you cases with reference to what

1 is prejudicial because we don't know whether they have read
2 it. But we are entitled to know, and as soon as we do get
3 that, and we are entitled to know that, I don't think there
4 is any question but what we are entitled to know whether this
5 jury has read it. Then we will make the judgment of whether
6 it is or is not prejudicial. I see no reason for further
7 amplification of the material in the motion unless the Court
8 has some questions.

9 THE COURT: No, I don't believe I do. Mr. Carr?

10 MR. CARR: Your Honor, it's not unusual for cases
11 in this country where we have a free press to receive
12 publicity. It is not unusual that cases like Agent Orange
13 that go to trial receive publicity. It's not unusual that
14 the Westmoreland case received publicity. Simply stated,
15 it's not at all unusual for reporters to write about
16 newsworthy lawsuits and trials. It's expected. It's part of
17 a free society. It's something to be looked at with
18 approval. The Courts in preservation of the sanctity of the
19 jury has said that newspapers may write about ongoing
20 publicity, about ongoing cases, may editorialize about it, if
21 you will, in part of the exercise, but jurors are going to be
22 instructed not to read the newspaper, and if they should
23 happen to come across an article or something on TV that they
24 cannot turn their eyes away from, they are further instructed

1 not to be influenced by it, to listen to only the
2 instructions of the Court, and pay attention only to the
3 facts in this case.

4 Now, if counsel properly has asked to voir dire the
5 jury, then in every occasion that has any publicity, the
6 Court should then assume that the jurors have disobeyed its
7 orders, and will again disobey its orders in the future with
8 reference to instruction and base their decision upon the
9 facts in this case.

10 Your Honor, I think that is an insult to the jury.
11 To automatically -- by questioning them you are automatically
12 assuming that they have read these articles and by further
13 questioning them you are automatically assuming they are
14 going to be prejudiced by it. This Court should not make
15 that assumption, and if it does make that assumption then the
16 Courts in cases like Westmoreland or Agent Orange or any
17 other case that receives publicity of every sort, every
18 morning you should start out the jury by asking have you read
19 anything about this case; have you obeyed my instructions;
20 have you been influenced by anything that you may have
21 inadvertently seen. Your Honor, that isn't -- that would
22 mean then that this case, and it's not -- this case and other
23 cases like it would go on forever, if you have to inquire.
24 Because there are stories about dioxin in the newspaper

1 probably on a weekly basis, and not necessarily connected
2 with this case, but this Court didn't limit its instruction
3 not to read about this case. Ordered the jury to not read
4 about dioxin. Period. And be influenced here. So that
5 would require this Court to appropriately see whether the
6 jury is following out its order every day. That's what they
7 do. It would be silly for the Court to give instructions if
8 it's going to ask the jury these questions every day. I've
9 been in cases in which reporters sat in the courtroom and
10 reported, often a daily basis, a case that lasted four weeks,
11 nearly on a daily basis, in Granite City, and every day there
12 was a story, and if the Court had wanted to, every day -- the
13 reporter didn't get it accurate all the time, many times and
14 got comments from people in the hallway, as well. What do
15 you think of the case? How it's going. Things of that
16 sort. And the Court, if counsel is to be believed, should
17 have inquired of the jury. No. The requirement is, Your
18 Honor, here, is that you must assume that they have obeyed
19 your orders because otherwise it's insulting to them, and
20 it's incumbent upon the defendant or whoever else wants the
21 jury to be voir dired to make a prima facie case before this
22 Court has the right to assume that the jury is disobeying its
23 orders.

24 And I think this Court should assume to the

1 contrary, that the jury will obey its orders, and if there
2 should have been some inadvertent publicity that we expend,
3 that it will adequately instruct the jury at the end of this
4 case that they are to disregard anything that they might have
5 seen, and they're to make their decision, as the Court will
6 do and has done in many other cases, in all other cases, make
7 the decision upon the evidence in this case.

8 I don't think it's proper for this Court or any
9 Court to assume the jury is not going to obey its
10 instructions, and that is what the Court would have to do if
11 it granted Defendant's motion, and we do not join in the
12 motion, and we state that this trial should not boil down to
13 an every day question of the jury, and more specifically that
14 there has been absolutely no showing that Monsanto has been
15 prejudiced in any way.

16 The major thing they have quarreled about is
17 reported in our brief, and I'm not going to go into it, is
18 the amount of money that we have received and the initial
19 publicity that came from Monsanto and from from us. And
20 that's about all we want to say, Your Honor.

21 THE COURT: Do you have any reply?

22 MR. CRAVEN: I want to make just this observation
23 in response to some material that Mr. Carr put in a Supreme
24 Court brief. We put into a responsive and germane and

1 relevant to his material, we put into it the settlement which
2 this Court ordered disclosed to us, and we filed that in a
3 Supreme Court pleading and the press picked it up.
4 Therefore, Mr. Carr is saying somehow or another we caused
5 the publicity on that by filing it in the Supreme Court.
6 What should we do? What should we do? Not file it, hide it,
7 get a gag order? He seems to be fond of those. If the
8 answer is that, I've never heard of filing a gag order to
9 keep someone from knowing what was disclosed in a pleading in
10 the Supreme Court. But implicit in what he says, is that the
11 information that may well be in the heads of the jury is
12 prejudicial. Implicit in what he says is that's prejudicial
13 but you did it, so stew in your own juice. Well, that's not
14 the rule. But I am -- I at least welcome his notion that he
15 recognizes that it could be prejudicial. We are entitled to
16 a fair trial, before a fair and impartial juror, jury,
17 without that jury having been tainted by publicity.
18 Everybody real or corporeal is entitled to a fair trial under
19 those circumstances, and I'm surprised that Mr. Carr persists
20 in his notion that we should prove what we are asking this
21 Court to have a hearing to find out, as a condition preceding
22 to having a hearing. How do we come along and show
23 prejudice? How do we come along and show that the jury read
24 the front page of their hometown newspaper? How do we do

1 that? Well, it's like all of the other burdens he gives us.
2 He wouldn't give us the burden if he thought we could abide
3 by it. He gives it to us when he knows it's impossible. Or
4 to find out would be an impropriety, and we won't do that.
5 We think we are entitled to a voir dire of this jury to find
6 out if they read this material and then determine what is the
7 proper course of action.

8 THE COURT: Okay, gentlemen. Next we will argue
9 the Motion for Mistrial.

10 MR. CRAVEN: Thank you, Judge. I'll start this one
11 as I started the other one, and as a matter of fact on Page
12 15 this time instead of Page 12. On Page 15 of Mr. Carr's
13 Objections to the Motion for Mistrial, he says he thinks it's
14 incumbent that he remind the Court that the Court inquire of
15 Monsanto as to whether or not Monsanto would be willing to be
16 bound by the result of a test case and thus avoid
17 multiplicity of trials on the issue of liability at the very
18 time the Court was considering whether or not the cases
19 should be consolidated. Well, implicit in that I suppose is
20 that we should have accepted a test trial as an -- as the
21 basis for an objection of consolidation, and if we wouldn't
22 accept the test trial then the appropriate punishment is to
23 consolidate the cases and end up with this kind of a
24 proceeding. But it might be helpful to look at the record

1 and see that on the 10th of February, 1983, that Mr. Carr
2 said to this Court as follows: They, the Defendants, suggest
3 that some time savings could occur if we picked out one case
4 and try it. And the outcome of that case would have a
5 bearing upon what happens in the other cases. I can't see
6 that at all, said Mr. Carr. "I see no possible bearing that
7 would have. There would be no estoppel, no verdict, no res
8 judicata. There would be no privity that would bind anybody,
9 and even if there could be, privity could operate in favor of
10 the Plaintiff. Plaintiff would want to adduce all the
11 evidence that they believe would require some sort of
12 punitive damages and to render in here," etcetera, etcetera,
13 etcetera. He says no. He says, no, he wants to produce all
14 the relevant facts in all of the cases because he wants to
15 try his punitive damage case, and then he says this on Page
16 18 of the same transcripts. "As I say, no counsel has
17 suggested that a consolidated case would take longer than a
18 year to try. All counsel have agreed that it could take from
19 six months to a year to try. If we took the average, say
20 nine months. All of counsel have agreed that an individual
21 case would take four months to try." And he justifies the
22 consolidation by those observations.

23 Now, I'm not suggesting that he should have been
24 able to have a crystal ball and talk in terms of how long

1 these cases would take, but I can say that on the basis of
2 his representation to this Court that the consolidation,
3 consolidated case wouldn't take more than nine months to a
4 year, he proceeded to take 19 months to put on his own case
5 and -- inordinately long trial. It can be examined -- and an
6 illustration of it is Dr. Suskind. His direct testimony took
7 a little over two days, actually part of three days, but
8 under three total trial days. Under three total trial days.
9 And Mr. Carr in pursuit of this, what I consider to be abuse
10 of this witness, has had him on the witness stand in cross
11 examination for 18 days, and it's because of that kind of
12 conduct, and then he turns and and says it's a deliberate
13 stalling, and he does this in his PR, deliberate stalling.
14 It takes a certain amount of something to accuse one side --

15 MR. CARR: Hutzpah.

16 MR. CRAVEN: No, I wouldn't accuse you of having
17 hutzpah, I know what that is. We have got a case here,
18 Judge, 64 Plaintiffs, a mixed bag of evidence as we set forth
19 in Page 2 of our motion. Take the chart with reference to
20 Frances Kemner. The evidence with reference to that
21 plaintiff is spread over a year, scattered all through the
22 transcript, and during that same twelve-month period,
23 evidence as to 63 other plaintiffs was heard. Compensatory
24 damages, punitive damages, exposure, causation. Now, I am a

1 great admirer of the human mind, but I don't know of any
2 human mind that can sit around here and endure three years of
3 a trial like this and concern itself with 64 plaintiffs,
4 punitive damages, compensatory damages, and keep it straight,
5 sorted out, and for Mr. Carr to suggest that that's okay, the
6 jurors are taking copious notes indicates to me two things.
7 One, he doesn't understand the difference between copious and
8 not copious, and number two, I've watched that jury, and I
9 don't think any of them are going to get writers cramps from
10 taking notes. But it doesn't matter. Those of us that work
11 with this trial and have a verbatim transcript are lost in a
12 myriad. I've heard Your Honor talk in terms of things that
13 happened and then be under a misapprehension as to what did
14 or didn't happen. I know that I have that same thing and
15 even Mr. Carr has been in error several times as to what has
16 transpired in this case, and the fact of the matter is this
17 case is beyond human endurance. And the reason there has
18 never been another case like it is that no twelve people can
19 sit down and assimilate all of the material that's come
20 through this courtroom and then report a verdict. And it's
21 for that very reason that the Appellate Court in Lowe said
22 consolidation was reversible error, was an abusive
23 discretion, and that is the law of this district. It is
24 indistinguishable from this case, except in some minor,

1 minor, minor irrelevant ways. That case didn't involve
2 punitive damages. This one does. That case involved 47
3 plaintiffs. This involved originally 72, now 64. That case
4 took 142 trial days. We are already at 385 or 390. 390
5 trial days. And the error started when this Court
6 consolidated these cases. This case is completely out of
7 hand. It is -- it's time for something called judicial
8 euthanasia. It's time to terminate this kind of a proceeding
9 because it's an aberration. There isn't a person in this
10 room or in the jury box that is capable of telling what this
11 case is about with any detail, or capable of taking and
12 recalling and reacting to and following any kind of
13 instructions with reference to damages, causation, punitive
14 damages. This case is out of hand. This case is an
15 embarrassment. This case should be mistried at this stage
16 because it is, I think, riddled with reversible error. The
17 most prominent being -- one of the most prominent being the
18 order for consolidation which we have consistently opposed.
19 Consistently opposed.

20 We have -- in the Lowe case they had 14,500 pages
21 of transcript. We have well in excess of that. We have more
22 plaintiffs. We have everything, and Judge, the express,
23 express holding in Lowe, and I know it's the Fourth District
24 sitting in the Fifth District, but they are not devoid of

1 judicial power when they are assigned to hear the case. It's
2 the Fifth District opinion. And that is the law of the State
3 of Illinois on consolidation of cases. That opinion is
4 binding on on this Court, and we filed this motion for the
5 mistrial on the basis of the consolidation on this second
6 anniversary of this trial, having consistently opposed it,
7 and I don't believe there is any fair reading of the Lowe
8 case that doesn't say Your Honor is supposed to mistry this
9 case, because to continue the trial will cause a reviewing
10 Court to say that this consolidation was reversible error,
11 that this trial was horrendous mistake. That jury cannot
12 sort out these plaintiffs and that this thing ought to stop.
13 It shouldn't ever have started the way it is.

14 Now, I want to say one thing that there are a whole
15 bunch of cases over in St. Louis, same identical
16 circumstances, and Mr. Carr filed his supplement and in that
17 he suggested that --

18 THE COURT: I read it.

19 MR. CRAVEN: And that I find very provocative.
20 That was drawn with great care and it was a suggestion to the
21 Court in St. Louis that that Court as a matter of law
22 determine the matter set forth in that motion, and it was a
23 legal determination for the Court, and we expressly said that
24 we wanted the consolidated hearing for the narrow purpose of

1 determining this and for no other purpose, and we were not
2 thereby waiving any objections to subsequent consolidations
3 and so forth and then for him to come along and take that and
4 assert that that was a waiver of consolidation is simply not
5 presenting the full import of that St. Louis motion to this
6 Court. The trial of a lawsuit is designed to assert truth
7 and give parties a fair trial. I don't believe that anybody
8 will contend that this jury with this massive material can in
9 any way arrive at a judgment as to any plaintiff. Right now
10 you could ask the jury, you know, pick out the name of a
11 plaintiff and ask the jury something about that person and I
12 would venture to say that few, if any of them, would know.
13 If the law is to have any stability, we have traveled in the
14 footsteps of those who have gone before, somebody said, and
15 this Court has to do that, and Judge, the Lowe case and not
16 the class action cases that Mr. Carr has cited to the Court,
17 class action cases are not relevant to the question of
18 consolidation. The Lowe case is a barrier to any further
19 proceeding in this court under this Court's order of
20 consolidation. And, we already know that three judges of the
21 Supreme Court are persuaded that the order in limine, both of
22 them, should be reversed. I think that's what the order
23 says. We know that the Lowe Court would say this
24 consolidation is reversible error. We know that this jury

1 can't fairly decide this case.

2 I see jurors who are not always awake. As a matter
3 of fact, sometimes I find it difficult after lunch to be
4 really alert. But to ask these people to come into this
5 courtroom and to hear this material, day after day after day
6 after day for 385 days tells the public that there is
7 something wrong with a judicial process, and to inflict that
8 on 12 citizens, 14 now, and pay them \$5 a day for these
9 number of days, any time you talk about this case, anyplace,
10 under any circumstances, to any group, it is an
11 embarrassment, because they say what do you do to people?
12 What do you do to jurors? Why have you done this? Why do
13 you mix this all up? And the base for the error was this
14 Court's order consolidating the cases. And now it's engraved
15 in stone, and this should be undone and terminated, judicial
16 euthanasia is the kindest thing that we can do, because it is
17 economic burden on anybody, the plaintiffs, the defendant,
18 the county, the jurors, everybody.

19 And under the Lowe case, that which this Court has
20 done is an abusive discretion, reversible error, and the time
21 to correct it is now. We think the motion for mistrial
22 should be granted and granted instanter.

23 THE COURT: Okay. Mr. Carr? You were finished,
24 weren't you?

1 MR. CRAVEN: Yes, I was.

2 MR. CARR: Your Honor, I'd like to correct a few
3 comments of Mr. Craven about the jury. The jury has been
4 from the beginning the most attentive jury that I'm familiar
5 with yet, the jury is obviously happy. You can hear the
6 laughter in their recesses. They're happy with one another.
7 They are happy with the case. And they recognize that they
8 are on a case that will be monumental in its effect upon our
9 American community and hopefully more than America with its
10 final decision.

11 I might point out, as the Court is aware, on
12 occasion there have been an opportunity for the possibility
13 of proceeding without other jurors, without jurors here, and
14 they have let the Court know as the Court has advised in the
15 past that they don't want to be excused. The Court will
16 recall when we had Juror, I forget her name, Melton, had her
17 appendectomy, that the Court was in the process of having the
18 bailiff line up the jurors to go on and she let it be known
19 that she was unhappy that the case might go on without her.
20 And, if you recall one juror that had a problem with over
21 heating or hyperventilation was being taken from the
22 courtroom about a year ago, she raised up from her stretcher
23 and said, I'll be back, I'll be back. Now this jury is a
24 happy jury. They express absolutely no dissatisfaction with

1 the case nor with the length of the case. They express no
2 dissatisfaction with the Court and counsel. I might say they
3 are unfailingly attentive to both sides, and they yet
4 continue to take notes when it's appropriate so to do.

5 I feel that the jury is one to be proud of and they
6 recognize that they are doing something important and will do
7 something important in the final analysis.

8 With reference to the comments counsel has made
9 about the motion in St. Louis, what counsel has failed to
10 acknowledge is that Monsanto took the position in St. Louis
11 that the dictates of judicial committee would require the
12 hearing that they want over there be a consolidated hearing
13 in order not to have 55 separate trials. Monsanto, out of
14 the corner of its mouth that resides in Missouri, says we
15 need this case, this hearing on their petition in Missouri
16 consolidated and not heard 55 separate times. They
17 acknowledge that. They also acknowledge that to have the
18 Court understand the issues involved in their 55 petitions it
19 would be best to hear it at one time, because they want to
20 put all the evidence in because it all bears upon -- all the
21 evidence in the 54 bears upon the result in the 55th case, as
22 they have acknowledged. And, Your Honor, both of those
23 points apply here, that Monsanto is not saying that here.
24 And Monsanto is taking the position here simply because this