

1 IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

2 ST. CLAIR COUNTY, ILLINOIS

3 FRANCES E. KEMNER, ET AL.,)

4 Plaintiffs,)

5 vs.)

Case No. 80-L-970

6 MONSANTO COMPANY,)

7 Defendant.)

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9
10 REPORT OF PROCEEDINGS

11 August 21, 1985

12
13 Before the HONORABLE RICHARD P. GOLDENHERSH, Circuit Judge

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15 APPEARANCES:

16 MR. REX CARR and MR. JEROME SEIGFREID, Attorneys at
17 Law, on Behalf of the Plaintiffs; and

18 MR. K. HEINEMAN and MR. JOSEPH MASSIF, Attorneys at
19 Law, on Behalf of the Defendant Monsanto.

20
21 Kathleen Watson Brunsmann, RPR, CSR
22 Official Court Reporter

23
24 EXHIBIT J

1 to do. I'm not going to rule now. All right. Okay.

2 MR. CRAVEN: Now may I go to the protective order?

3 THE COURT: Sure. Sure. Okay.

4 MR. CRAVEN: As I read the transcript of August 6
5 hearing with reference to the protective order, I think it
6 can be fairly summarized to say this, that there was conver-
7 sation about the protective order, and this was soon after you
8 turned over some of the documents you had examined in camera.

9 THE COURT: I ordered that they be turned over.

10 MR. CRAVEN: You ordered that they be turned over.
11 Then there was an order for the protective order. There was
12 some discussion. You indicated on the record that you were
13 going to deny the motion for the protective order.

14 THE COURT: I did.

15 MR. CRAVEN: Later in the transcript Mr. Carr --
16 there was a lot of discussion, and then Mr. Carr indicated
17 that he would impose upon himself voluntarily a protective
18 order for a period of 30 days where upon you indicated in
19 view of that there was no necessity for you to rule.

20 THE COURT: No, no, no, no, no. That's not right.
21 I ruled that I was denying the protective order. If I said
22 anything about ruling, it was about further requests above
23 and beyond the particular protective order that had been
24 submitted to me, because I definitely ruled and did not vacate

1 my ruling that I was not going to sign that protective order.
2 If there was an indication from me that I wasn't ruling on
3 something, it was on something else.

4 MR. CRAVEN: I may be misreading the transcript.
5 But at page 150 of the transcript, and I think it relates
6 to the protective order, preceding it was the discussion of
7 the voluntary non-distribution. There's some business going
8 on about whether it would be applicable to Jerry, and Mr.
9 Carr told him he should have kept quiet, it was only going
10 to be Mr. Carr. I don't know whether you remember that
11 colloquy or not. Jerry was feeling left out and Rex was
12 mad at him for getting -- moving in.

13 MR. CARR: That will be the day.

14 MR. CRAVEN: And then Mr. Nassif said the protective
15 order, you wanted to extend it to both counsel, and the volun-
16 tary agreement, and the court says this, this is where --
17 if there's any ambiguity, it's in this language. I think the
18 agreement gives you what you want. I am not inclined to rule
19 on this issue.

20 THE COURT: Okay. I think there is some ambiguity
21 there, and what I was referring to was they wanted in effect
22 an order for 30 days or some period of time until they could
23 decide what to do about it.

24 MR. CARR: That was my understanding.

1 THE COURT: I was denying the protective order
2 per se. Orally they asked for some emergency or temporary
3 type of protective order. It was basically agreed to.

4 MR. NASSIF: I asked the judge if he would issue
5 a temporary order until we could go forward and seek protection
6 and the Judge--

7 THE COURT: That's what it was.

8 MR. NASSIF: That's when Rex piped up and said
9 "you don't have to do that, I'll give that to you." What
10 the Judge did not rule on was my request for a temporary
11 restriction, Jim.

12 MR. CARR: That's correct.

13 THE COURT: Thank you. I remember that now.that
14 you said it. Thank you.

15 MR. CRAVEN: There's no question that earlier on
16 in the transcript you deny the motion for protective order.

17 THE COURT: Yes, sir, I did.

18 MR. CRAVEN: But just a person reading this,
19 I couldn't say that it had been allowed or denied.

20 THE COURT: Sure. I can see where that ambiguity
21 came about.

22 MR. CRAVEN: Assuming now that it is a denial of
23 the protective order. We are now here again on a Motion
24 again to reconsider that. Also in reading this, and I guess

1 reading a record is, you don't get the body language, and
2 everything that goes on, but I think there's a misapprehension
3 here, maybe, maybe not. What we want, and what we think we're
4 entitled to, we have litigation going in the federal courts
5 in other jurisdictions, and whether the material that the
6 Court has turned over to Mr. Carr is or is not discoverable
7 in that litigation by counsel in that case, those cases,
8 should be a matter to be determined by the law of the forum,
9 and the Courts there. Clearly, we're entitled to that.
10 If it's privileged in New York, it should be not usable against
11 us in New York, and Mr. Carr should not be able to give it
12 to counsel in New York, because that would effectively be
13 this Court making a decision for the New York Court, which
14 I'm sure the Court doesn't want to do. Now this Court has
15 decided that Mr. Carr can have the material for this case, and
16 we complied. But the only other -- the only thing to do was
17 to stand in contempt or comply. That's the Illinois system.
18 So we've turned it over. Now it shouldn't be a judgment as
19 to whether it goes to counsel in West Virginia and New York
20 in federal courts there, and Mr. Carr has with commendable
21 candor indicated he's willing to use it and give it to those
22 people, but he has given us a 30 day period. We're saying
23 he's not entitled to do that. We are saying that this Court
24 shouldn't make a decision for the federal courts of New York

1 and West Virginia. Judge, we had this kind of a question in
2 reverse in the Clark v. Monsanto thing where there were
3 protective orders running around and so forth. Each court
4 and each question of privilege, unfortunately the law is
5 different, and Illinois is really very peculiar --

6 THE COURT: Let me interrupt for a minute. What
7 did you have in Clark?

8 MR. CRAVEN: Well, in Clark there was protective
9 orders in West Virginia and some turn over orders in Madison
10 County, who was supposed to do what and where, and which
11 set of lawyers could get it. It was the same kind of issue.
12 It never got to a resolution because there was so many other --

13 THE COURT: Okay. I wasn't exactly clear what you
14 were referring to.

15 MR. CRAVEN: It was running around there. In this
16 case Mr. Carr has this material. We will debate on appeal
17 the question of whether it was or was not properly turned
18 over. It's a debatable issue. But we're entitled also
19 to debate in the federal court whether it is or is not
20 discoverable, and Mr. Carr is not entitled to moot that issue
21 by going up there and bartering this material with other
22 counsel. We are asking this Court for a protective order,
23 enjoining Mr. Carr from making that kind of use of it. Now
24 we are not asking that you exercise extra-territorial jurisdic-

1 tion. We can't get an order from the federal court in New
2 York enjoining Mr. Carr from breaching a protective order
3 there if there is one. We shouldn't be put on that burden.

4 THE COURT: Well, can't you get an order in New
5 York barring counsel there from getting it from Carr?

6 MR. CRAVEN: No, sir.

7 THE COURT: You can't?

8 MR. CRAVEN: We go in there and find that the
9 material is protected there and that court would have
10 jurisdiction only to not require us to turn it over to
11 counsel. If counsel goes out and gets it someplace else,
12 that doesn't offend the protective order of the New York
13 Court. Mr. Carr has got it now, and if he said he wanted it
14 for this litigation, he's got it. He can use it in this
15 litigation. Now let New York and West Virginia decide it
16 on the basis of the New York and West Virginia law, or the
17 federal rules, and we have an additional problem, Judge.
18 Some of the material that you ordered turned over was for all
19 practical purposes in our view the same with reference to the
20 scope of privilege as some of the material you denied a
21 turn over. We see no discernible difference in the material.
22 We think the rulings are inconsistent. I'm not trying to
23 open up and suggest that you now change your mind and give
24 them something that you didn't give them. I'm just saying

1 what motive does Mr. Carr want to use this material to moot
2 questions that are going to be in courts in New York and
3 West Virginia? Now, I don't believe that's cricket. We're
4 not playing cricket. But we're using discovery not for cat
5 and mouse games. I believe that we're entitled to that kind
6 of protection, and we are adamant that we are entitled to
7 that kind of protection. I suppose had we known, I don't
8 know what we would have done. Hind sight isn't even getting
9 very good anymore. But nevertheless, we want the protective
10 order, and in the absense -- I mean Mr. Carr has already
11 said 30 days. I don't question that he's abided by his own
12 30 day limitation.

13 THE COURT: Sure.

14 MR. CRAVEN: I suppose the Supreme Court is getting
15 tired of hearing about this case, or reading about the case,
16 as I understand it the Law Bulletin is getting ready to do
17 whatever they do. But anyway, we need time to get a super-
18 visory order because we think just very clearly in the
19 absense of a further agreement by Mr. Carr or protective
20 order here that the Illinois Supreme Court will say that the
21 New York and the West Virginia courts can decide their own
22 scope of discovery and we won't do it for them and moot the
23 issue.

24 THE COURT: You're telling me that a New York or

1 West Virginia or federal court cannot tell one of the counsel
2 that appears in front of it in a case at issue that they are
3 not allowed to get by other means what that court has said
4 they are not entitled to have in their particular litigation?

5 MR. CRAVEN: I don't know. I know this, I know
6 that this Court has jurisdiction to tell Mr. Carr that you
7 gave it to him to use in this litigation, and you didn't give
8 it to him to barter with other counsel in other cases, and
9 that that was an improper use of discovery. We don't have
10 to worry about what New York might or might not do. We're
11 here, we have Mr. Carr here, and I don't doubt that he would
12 abide by this Court's decision and this Court's order, and
13 I don't believe that this court said -- that if this court
14 said give it to Mr. Carr to barter -- I don't believe that
15 this court gave it to Mr. Carr to barter with. You gave it
16 to Mr. Carr to give him a chance in what he said was a fair
17 trial. He wanted to see it. Judge, we have, on this
18 question of discovery, I've been digging and looking and I've
19 got stacks of material as to what the scope of discovery in
20 this case is, over 700,000 documents, hundreds of thousands
21 of dollars of just divulging material, under precedent as far
22 as I can tell, with maybe MCIATT exception. If we have to
23 go through all of this kind of stuff, and then he takes it
24 and barterers and makes whatever kind of use, when it's given
for a limited purpose and then when the Court recognizes that

1 there is a debatable issue as to whether or not it's privileged.
2 As I said, I think there's some inconsistency in the rulings.
3 In some instances it was turned over, others it wasn't.
4 There's a difference in format and so forth. But we think
5 work product was offended by the ruling. But where are we in
6 protecting ourselves in other litigation if work product is
7 in fact turned over? Where are we if under federal law it's
8 not discoverable, under Illinois law it is, and Mr. Carr has
9 given it to New York counsel? That's like telling the
10 jury to disregard something. If counsel has it and the
11 Court says you can't use it, how do you determine whether
12 they used it or not? The instruction to tell -- to admonish
13 the jury to disregard the fact that Counsel hit somebody in
14 the nose, you know it's just something that's there, everybody
15 saw it, and you tell them to move it out of their mind.
16 That's unfair to give us that burden. We would like the
17 Court to issue a protective order, and in the absence of
18 that protective -- permanent protective order, or at least
19 until the final conclusion of this litigation, to give us
20 time to go in for a supervisory order.

21 THE COURT: So in other words, you're asking me
22 to extend what was agreed upon the other day?

23 MR. CRAVEN: I'm perfectly content if Mr. Carr will
24 extend it. Judge, we're asking you to reconsider the whole

1 thing.

2 THE COURT: I understand that.

3 MR. CRAVEN: To give us a protective order.

4 THE COURT: I understand that.

5 MR. CRAVEN: But in the absence of a protective
6 order, then we will go to the court and try to get a protec-
7 tive order.

8 MR. CARR: Are you through?

9 MR. CRAVEN: Yes.

10 MR. CARR: Your Honor, this Court has interpreted
11 Illinois rules and case law relating to discovery, and it has
12 held that material A is not privileged as work product under
13 Illinois law, that it is not work product. Now Counsel
14 is asking the Court to say, to interpret the federal court
15 rules and say that this same material under federal court
16 rules is privileged by federal rules called work product.
17 This Court and the attorneys in this case have a difficult
18 enough time knowing what the law is in Illinois that applies
19 to discovery, without the same time going in and researching
20 and arguing point whether this is or is not work product
21 under federal court rules. I could quarrel and debate whether
22 or not this is work product under any number of federal court
23 cases. The work product rule is not simply apply when
24 Counsel for the other side says this is work product. The

1 Court goes in on an ad hoc basis and looks at document by
2 document as this Court has done, to determine whether it is
3 or is not work product under federal court rules. To require
4 this Court then to say that everything that they're calling
5 work product is, in fact, work product under federal court
6 rules is actually putting a burden on this Court that this
7 Court is not -- should not accept. As an officer of this
8 court, and as attorney of my clients, I have the right to use
9 the material that is given to me in any way permissible under
10 Illinois law. I don't have the right to divulge knowledge,
11 trade secrets and work secrets insofar as the process is
12 concerned, and the Court has issued an order that protects
13 them for things that are truly trade secrets. But I know of
14 no precedent, I know of no case, and Counsel doesn't cite
15 any case, that suggests this Court can prevent me from the
16 free exchange of information with other counsel in other
17 jurisdictions about the material that I've been given. I'm
18 not representing to this court, that I'm going to run out
19 tomorrow and give out what they call work product. But I
20 certainly don't believe that this Court has the right at
21 Counsel's request to put a burden on me, if I want to give
22 a piece of material to counsel some place, to put a burden
23 on me to say I've got to go into that federal court and
24 dispute whether or not this is or is not work product, or if

1 I give up some material that I'm going to be in contempt of
2 this Court, when in fact it's freely discoverable under
3 Illinois law, then what we would do then, if the Court could
4 then say well, we've got a lawsuit going on in West Virginia,
5 or we've got a lawsuit going on in Iowa, or we've got a law-
6 suit going on in Missouri, is this material useable in Missouri?
7 Either in the federal or the state court, or in Iowa, This
8 Court would be called upon to interpret the laws of 48 states
9 and of the 9 circuits to decide what is work product and
10 protection in those particular cases. No, I think it's a
11 burden that they're trying to put on this court by saying
12 everything that is -- they've assigned the label work product
13 is privileged from discovery in all the 50 states, in all
14 the federal jurisdictions. I insist this Court should not
15 put that burden on me. If they want to go to the Supreme
16 Court of Illinois to define my obligation, if I am obligated
17 to not give up this work product to some other lawyer some
18 other place, then I'm obligated to do it on my own as an
19 officer of this court, and because the ethics of the profession
20 so say that I should not do it. I certainly -- this Court
21 should not say that I'm engaging in unethical conduct or
22 attempting to prelimit what I can or cannot do. I know what
23 my obligations are and I don't know of any law anywhere that
24 says because one court may call something work product that

1 I may not use that in any way that I see fit in some other
2 jurisdiction. I think the Court is exactly right. If you
3 learn in this case that I was attempting to avoid an order
4 that you put on me as far as getting information was concerned,
5 I'm under the jurisdiction of this court, and if I tried to
6 avoid it. If you told me that I could not get X material,
7 that it is privileged and that I may not discover it, then if
8 I violate that order, or if they bring up information that
9 I'm violating the order, I'm subject to your jurisdiction.
10 To me it's ludicrous for Counsel to suggest that those
11 lawyers that are subject to the power and the jurisdiction
12 of the federal courts in New York, or West Virginia, or
13 Timbuktu cannot apply to those courts for protection orders
14 upon counsel of record, just as I am subject to the orders
15 of this court, those lawyers are subject there. And if they
16 want to prevent this material from falling into certain
17 hands, and if they can prevent it that way, they have the
18 right to do so. But they certainly should not be allowed
19 to circumscribe or limit my rights. I don't intent to use
20 this as counsel says, to barter. But I intend to use this
21 for the purpose of arriving at the truth wherever, and to help
22 others arrive at the truth. I know that in -- I have a case
23 pending in this court right now, the Ramiere case, the product
24 was manufactured in Iowa. Under the discovery rules of Iowa

1 I could not get certain material in Iowa. It's privileged
2 up in Iowa. But it's clearly discoverable in Illinois. They
3 tried to argue here that they didn't have to produce that
4 material because it's not discoverable in Iowa. It was
5 discoverable here. I got it here. Counsel in Iowa had given
6 me information, and I was told in advance -- and I told in
7 advance that I'm going to give information to Counsel in Iowa.
8 If you can go to Iowa courts and prevent me from giving that
9 information to Iowa attorney, I'll certainly oblige. I'm
10 not going to do that without order of court. Neither the
11 Iowa court or this court entered any order upon me not to
12 give this information to Iowa counsel. That's the only
13 practical experience I've had with jurisdictions that had
14 different rules relating to discovery and privilege. Based
15 upon that experience I would say if you can get the federal
16 court in New York, which has jurisdiction of those parties
17 and counsel to order them not to get it from me, then they'd
18 never have -- I am not going to broadcast it. I'm not going
19 to announce to the world, although I have a right to do so.
20 I see nothing in the material that the court gave me that
21 could even be remotely called something that could prejudice
22 Monsanto if it's sent elsewhere. I see nothing in it that
23 is not discoverable. I see nothing in it that could be called
24 work product and labeled, and thusly prevented from discovery

1 either here or elsewhere.

2 MR. CRAVEN: If I may.

3 THE COURT: Sure.

4 MR. CARR: I will, if counsel advises me that they
5 want to present this to the Supreme Court, I'm more than
6 willing to not divulge it to anybody else, to give you a
7 chance to file pleadings.

8 MR. CRAVEN: We shouldn't have to go to the
9 Supreme Court.

10 MR. CARR: What I'm saying is if you want to go
11 for the supervisory order, I'm certainly willing to wait --
12 I'll wait 30 more days and give you another chance to file in
13 the Supreme Court. If you want that time.

14 MR. CRAVEN: Let me address the question. We
15 shouldn't have to go to the Supreme Court. Rex misapprehends
16 the issue.

17 MR. CARR: One of the two of us.

18 MR. CRAVEN: And is mixing it up. Protective
19 orders are not strangers to the law. They're entered all the
20 time.

21 THE COURT: Sure.

22 MR. CRAVEN: We are not talking about materials
23 that are discovered, and that there's no debate about. I
24 know there are pools of information in product's liability

1 cases, Pento cases, these kinds of things. Everybody gets into
2 the thing that they contribute. I know that. I'm talking
3 about information that he has, and we're not talking about
4 all things that he discovered, we're talking about those
5 things that were submitted for in camera inspection that we
6 debate as to whether they are or are not discoverable. That's
7 why they were in camera. That's all we want is a protective
8 order there. Rex knows very well that we can't go out to
9 New York and get an order that all New York lawyers can't go
10 down and get this little secret cash from Rex Carr. That's
11 just not -- that's just unreal.

12 MR. CARR: Hold it. Let me interrupt. You're
13 talking about cases pending in New York in a federal court.
14 You're saying you can't go to that court and get an order?

15 MR. CRAVEN: No, we can't go to that court and
16 say that New York lawyers generally couldn't -

17 MR. CARR: Not generally. You're talking about a
18 case in court.

19 MR. CRAVEN: He's really saying for some reason he's
20 trying to switch the whole forum. New York will decide itself
21 the question of what's privileged. He is not entitled to moot
22 it by giving the stuff away. He's entitled to use it in
23 this litigation, but that's all. That's why this court gave
24 it to him. Now West Virginia will decide, and I know that you

1 can have diverse rulings by diverse courts on the same subject
2 matter and so forth. But, Judge, not the general discovery --

3 THE COURT: I realize you're limiting it to the
4 in camera, the incamera stuff.

5 MR. CRAVEN: What happens if the Supreme Court when
6 this case, and if it ever concludes and gets there, and they
7 look at it and say Judge Goldenherish was in error when he
8 ordered this turned over? It's clearly work product. It's
9 clearly protected. It's clearly privileged. Well, the genie
10 is out of the bottle because Mr. Carr has traded it off for
11 some purpose. It precludes us from having a fair examination
12 of that question. It moots the issue on appeal. That's not
13 fair. We're entitled to some reasonable protection. That's
14 all we're asking.

15 THE COURT: Okay. After hearing all this argument,
16 I think that my original decision was correct, in effect
17 you're telling me you are suggesting that I decide what is
18 proper in New York and or a Missouri court, or a United
19 States District Court, wherever that's operating under the
20 federal rules. You are ineffect, and you're also telling
21 me now in this argument for reconsideration, not only that,
22 but that those particular courts, either state or federal,
23 do not have the power over their own attorneys representing
24 the litigants in front of those courts to prevent them from

1 *either seeking* r receiving what that court in its wisdom
2 has decided under its own applicable rules is privileged
3 for whatever privilege basis. That's not for me to decide.
4 Now the parties in this case are under restrictions as far
5 as trade secrets and proprietary matters like that, and I
6 think that is a reasonable, contemplateable type of restric-
7 tion, as far as dissemination of information. But I don't
8 think with the kind of restriction that you're asking for is.
9 I think that my original ruling was correct. I understand --
10 I understood then that it wasn't explicitly noted in the
11 record, it is explicitly now that we're talking about the
12 in camera materials. But that protective order as far as
13 trace secrets and whatever applies to that as well as to the
14 other, of course. But I think my ruling was correct. I
15 don't think that this court has any business doing what
16 you're asking it to do. I also note that we end on another
17 agreement to wait a few days, which this court, that's fine
18 with me. But as far as entering the protective order that
19 was suggested to this court earlier in the month, August 6
20 I suppose, I think my decision at that time was correct. I
21 think it was appropriate as to what this court should do.
22 It's done with the realization, having done a substantial
23 amount of research in order to determine what was discoverable
24 and not discoverable here, that there are differences at least

1 between Illinois and the federal courts, that it's not
2 appropriate for this court to take on this function of decid-
3 ing what's appropriate there or delegating it to either of
4 the parties. And under the circumstances, your Motion to
5 Reconsider the Motion for Protective Order is denied.

6 MR. CRAVEN: For the record, Rex, you said 30 days.
7 Now what kind of time limit are we talking about now? Thirty
8 days from when?

9 MR. CARR: Whenever you want, Jim. There is nothing
10 pressing me to pass this out to anybody. Nobody has asked
11 for it. There's no on going cases of which I'm aware that
12 are being tried or anybody has asked me for it. If you want
13 to go to the Illinois Supreme Court, you tell me how much
14 time you need and I'll agree to it.

15 MR. CRAVEN: 45 days.

16 MR. CARR: Sure.

17 MR. CRAVEN: So for 45 days you're under a voluntary
18 so called --

19 MR. CARR: Absolutely.

20 MR. CRAVEN: Fine.

21 THE COURT: I have no objection to any arrangement
22 you gentlemen want to make among yourselves like that.

23 MR. SEIGFREID: I'll be under it too, Jim, just in
24 case.