

FRANCES E. KEMNER, ET AL.,
Plaintiffs,
vs.
MONSANTO COMPANY,
Defendant.

February 28, 1986

Before the HONORABLE RICHARD P. GOLDENHERSH, CIRCUIT JUDGE

MR. REX CARR and MR. JEROME SEIGFREID, Attorneys at Law
on Behalf of the Plaintiffs; and
MR. KENNETH H. HEINEMAN and MR. JOSEPH NASSIF,
Attorneys at Law, on behalf of the Defendant,
Monsanto Company.

Official Court Reporter

1 BE IT REMEMBERED AND CERTIFIED, that heretofore on
2 to-wit: Friday, February 28, 1986 the matter as hereinbefore
3 set forth came on for hearing before the Honorable Richard
4 P. Goldenhersh, Circuit Judge, in and for the Twentieth
5 Judicial Circuit, and the following was had of record, to-
6 wit:

7
8 (The following proceedings were had in chambers
9 out of the presence of the jury:)

10
11 MR. HEINEMAN: Okay. Judge, we're appearing
12 before you in chambers this morning. I don't know if the
13 Court has had an opportunity yet to see during the time that
14 we've been off the motions which have been filed by the
15 Defendant Monsanto Company.

16 THE COURT: I haven't seen a thing. I just walked
17 in.

18 MR. HEINEMAN: Okay. On February 25th there was a
19 Motion for Mistrial filed in connection with the second
20 anniversary of the trial, which has been filed, as I say, on
21 February 25. And/or about the same day we filed a Motion to
22 Voir Dire the Jury with respect to certain articles that
23 have appeared in newspapers and magazines in the St. Louis
24 area recently --

1 THE COURT: Is that why you're back here on those
2 motions?

3 MR. HEINEMAN: I just wanted to tell the Court
4 that I'm sure, or I felt sure that the Court had not yet had
5 a chance to see them.

6 THE COURT: I've been out with the flu for three
7 days. I just got in and I haven't looked at anything,
8 frankly.

9 MR. HEINEMAN: All right. And I wanted to say
10 that we really don't have anything further to say in terms
11 of oral argument in support of these motions. We believe
12 everything is contained therein, but I've been asked to
13 request the Court to rule on these as quickly as possible in
14 light of the continuation of the testimony.

15 THE COURT: Do you want to file a response?

16 MR. CARR: Yes, your Honor. I want to file a
17 response. If they don't want to argue, that's fine with me.

18 MR. HEINEMAN: We may need argument when we see
19 Mr. Carr's response, but at this point I have no further --

20 THE COURT: Yes, I understand. After you file
21 your response, then we'll see what you want to do. I will
22 read it -- I'll catch up and read this, and I'll read yours
23 as it comes in.

24

1 (Short recess.)

2

3 (The following proceedings were had in chambers
4 out of the presence of the jury:)

5

6 THE COURT: Okay. While we're waiting for this
7 juror, you've got this response and objections to the Notice
8 to Produce. Do you have anything you want to add to your
9 response and objections?

10 MR. HEINEMAN: Your Honor, clearly the documents
11 that we know about at this point have been produced. There
12 has been a production as reflected in paragraphs one and
13 two. This same request was made --

14 THE COURT: Well, I have a question about that.
15 What is constructively produced supposed to mean?

16 MR. HEINEMAN: Well, that was the situation where
17 Rex said he got them from the Nitro --

18 MR. CARR: Let me interrupt there. They produced
19 them, you recall, Judge, they produced this material in the
20 Nitro case and at that time there was a restriction that
21 they could not release then because of the federal court
22 order, and you ordered them released in our case.

23 THE COURT: Right.

24 MR. CARR: And Dr. Carnow was then given

1 permission to give those documents to us as we requested
2 them.

3 THE COURT: Okay.

4 MR. CARR: And while they have not been produced
5 to us, what Counsel says is true, we haven't yet been denied
6 although we get charged for copies left and right all the
7 time, we have not yet been denied access to those records.
8 So to that extent he's certainly correct.

9 THE COURT: Okay. I didn't quite understand what
10 constructively produced meant. Now I understand because I
11 remember the arguments on that. Okay. Go ahead.

12 MR. HEINEMAN: All right. We don't know at this
13 point what else may have been generated or what else we
14 might have there, but in any event if there are any records
15 with respect to non-plaintiffs, we have the same privacy
16 problem that we've had in the past, in which we're obligated
17 to assert on their behalf. Anybody who is not a plaintiff
18 and who has not, therefore, waived the right to the privacy
19 of those documents certainly has that right and we don't
20 have the right to turn them over to violate that privacy.

21 THE COURT: This is the same argument you made
22 before on those other documents.

23 MR. HEINEMAN: I think it is.

24 THE COURT: Okay. So that would -- that's the

1 substance and the reasoning behind your objection in
2 paragraph three?

3 MR. HEINEMAN: Yes. And in addition to that, as I
4 sit here, I don't know what other records may have been
5 generated in connection with those people, but we have given
6 the documents that were generated in connection with the
7 Nitro situation. I think Mr. Carr has all those. You know,
8 whatever was produced in connection with paragraphs one and
9 two I think is all there is, but I'm not sure. I really
10 don't know.

11 THE COURT: So basically what you're saying is you
12 think you've given them everything there is, and if there is
13 anymore you think you still have a privilege and privacy
14 problem?

15 MR. HEINEMAN: Right. And I can't imagine that
16 anything else is going to be relevant.

17 THE COURT: Okay. Mr. Carr, what do you have to
18 say?

19 MR. CARR: Our position, Judge, anything obviously
20 that has been produced and that we have access to, we're not
21 asking for a reproduction of those documents. But if there
22 is material that has been generated relative to these 36, we
23 think we're entitled to it because it is pertinent to the
24 cross examination that's taking place right now and

1 pertinent to the direct examination that Counsel has made
2 with this witness. We want it. The privacy rule obviously
3 would not apply.

4 Monsanto -- neither Monsanto nor Suskind came into
5 possession of these records in any kind of privileged
6 situation. They were not treating physicians and they were
7 doing a study, and the appropriate permissions were given to
8 Monsanto at that time and the views and results of this
9 study and the papers they've published, those arguments I
10 don't think would hold any water. We don't know that
11 there's any additional material, apparently Counsel doesn't
12 either. If there is, we believe we're entitled to it.

13 THE COURT: Well, basically we're back to arguing
14 what was done before. I ruled at that time that there
15 wasn't any privilege or privacy problem, and I would adopt
16 the arguments that were made on both sides as to that
17 question and adopt my prior ruling, and the rationale that
18 was stated for it at that time. I think that would be
19 relevant.

20 I think that as I've been doing throughout this in
21 trying to establish as the operating rule, Illinois
22 discovery is broad discovery, its relevant material, or
23 anything leading to relevant material. I think that these
24 records in the posture of the cross examination as it has

1 gone up to this point, in my opinion, would obviously be
2 relevant to the cross examination at hand right now, and
3 would clearly fall under proper discovery under Illinois
4 discovery rules. I'm going to deny your objections.

5 Since we seem to be in limbo right now as far as
6 this juror, why don't you get on the phone and see if there
7 is anything else existent. Obviously, you don't have to
8 reproduce what was produced before, and I understand what
9 you're saying on those now that I understand what you meant
10 by constructive production. So why don't you get on the
11 phone and find out if there's anything else, and either
12 produce it over the weekend or produce an affidavit that
13 there isn't anything else. Find out whether there is
14 anything else, because no one in this room seems to know.

15 MR. NASSIF: Your Honor, we're telling you that we
16 don't have anything else here in St. Louis. If there are
17 other things, they're outside of St. Louis, and it may take
18 a little while to find out what's out there and to get them
19 copied. I don't know if we can do that over the weekend.

20 THE COURT: Well, try, because we're in the middle
21 of cross examination, so they're relevant now.

22 MR. CARR: We served this on counsel a week ago,
23 so they've had time --

24 MR. HEINEMAN: Well, there's a problem with that.

1 I never saw this thing, and it didn't appear in our
2 Belleville office, trial office until the 25th. I didn't
3 see it until the 26th. That's why our response was filed
4 when it was. I never saw the thing until after the 25th.

5 THE COURT: Well, I saw it -- I was here on
6 Monday --

7 MR. CARR: We served it personally on your
8 Belleville office.

9 MR. HEINEMAN: Where? Which Belleville office?

10 MR. CARR: I don't know. We gave it to the man
11 and said serve it on Coburn and Croft.

12 THE COURT: I had to have gotten it by Monday at
13 the latest because I've been -- I've had the flu since
14 Monday night, and I got my copy out of a stack of things
15 that were served on me by Carr's office.

16 MR. HEINEMAN: Okay.

17 THE COURT: It had to have been at least since
18 Monday.

19 MR. HEINEMAN: Well, there may be a problem -- you
20 know, we have an office across the street from our trial
21 office here in Belleville. In other words, when Mr. Carr
22 has come to look at records, it has been in our trial office
23 for this case there at 219 South Illinois. We have an
24 office across the street. The girl that is there all the

1 time I think was out sick or something. Was it put over
2 there, do you think?

3 MR. CARR: I don't know. I gave it to a man that
4 delivers papers for us and said serve this on Coburn and
5 Croft, they've got an office down on Illinois Avenue. I
6 told him where to go. I don't know which office he served
7 it upon. But he served it upon a Coburn Croft office.

8 MR. HEINEMAN: It might have ended up in Ralph
9 Stenger's mail or something.

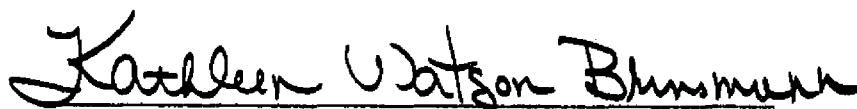
10 THE COURT: I don't know. But I know I had it at
11 least by Monday because I haven't been here since Monday.
12 But anyway, since we still don't know where that juror is,
13 why don't you get on the phone and see about this
14 information because it is relevant to cross examination.
15 Okay.

16
17 (Adjourned.)
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT)
3 COUNTY OF ST. CLAIR)
4

5 I, KATHLEEN WATSON BRUNSMANN, one of the Official
6 Court Reporters, do hereby certify that the foregoing
7 transcript is a true and correct copy of said transcript.
8

9 DATED: March 4, 1986.
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13 KATHLEEN WATSON BRUNSMANN, RPR, CSR
14 Official Court Reporter
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT)
3 COUNTY OF ST. CLAIR)
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5 I, RICHARD P. GOLDENHERSH, CIRCUIT JUDGE, do
6 hereby certify that the foregoing transcript is a true and
7 correct copy of said transcript.
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9 DATED: March 4, 1986

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12 RICHARD P. GOLDENHERSH, CIRCUIT JUDGE
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1 IN THE CIRCUIT COURT
2 TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
3 ST. CLAIR COUNTY

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1 all together that were dead at the time of the 1979
2 examination, and we have earlier discussed eleven you did
3 examine in 1979, correct, sir? That accounts for a total of
4 26 of those people, does it not, sir?

5 A Which--

6 Q Twenty-six of the original thirty-six? Do you
7 understand what I am asking you?

8 A No, I do not, sir.

9 Q Exhibit 1734 accounts for a group of--maybe you
10 don't have it. Doctor, 1734 is the list of the eleven
11 workers who had been examined in 1953 that you examined in
12 1979, isn't that correct, sir?

13 A It is.

14 Q And those eleven, when added to the thirteen
15 deaths which we--fifteen deaths, rather, that we described in
16 these two exhibits in 1748, would make a total of 26 persons
17 from the original 36, isn't that correct, sir?

18 A I would assume that that's so, sir. I haven't
19 figured out, but I assume that that's so.

20 Q Well, to help you, Doctor, McClanahan died of--
21 hit by a train at a crossing, and Steele killed himself. And
22 we have thirteen here on Exhibit 1748, that's fifteen people,
23 isn't it, sir, accounted for that were dead that we can
24 account for in 1979, correct, sir?

25 A Yes.

1 Q And 1734 lists eleven people that you examined,
2 correct, sir?

3 A Yes.

4 Q Eleven and fifteen and twenty-six, is it not,
5 sir?

6 A I believe so.

7 Q So twenty-six we can account for, twenty-six of
8 the thirty-six, can we not, sir, or have accounted for at
9 least, isn't that correct, sir?

10 A If you are saying that there are twenty-six
11 included in these two exhibits, yes, there are.

12 Q Plus the two that died, Mr. McClanahan and
13 Steele, who died of the accident and the suicide, isn't that
14 correct, sir?

15 A That's true.

16 Q Now, that leaves ten who were not accounted for
17 by these exhibits and by your testimony, isn't that correct,
18 sir, of the original thirty-six?

19 A I would assume so, sir.

20 Q And of those ten, do you have any knowledge as to
21 their disposition?

22 A I do not, sir, not off-hand.

23 Q Now, they may be all dead, they may be all alive,
24 but they were not re-examined by you, is that correct, sir,
25 or by your group in 1979?

1 A They were not.

2 Q So the only evidence we have as to the health
3 status of the thirty-six is that which is described in 1734
4 and 1748, isn't that correct, sir?

5 A No, sir.

6 Q What other evidence do we have of their health
7 status as--

8 A I don't have any evidence, but there must be
9 evidence in medical records, sir.

10 Q Doctor, my question is, if you listen to my
11 question, my question is the only evidence that we have that
12 you are aware of that you know of, what's been shown in
13 Exhibit 1734 and 1748, plus the two death certificates of
14 McClanahan and Steele, isn't that correct, sir?

15 A That's not so, sir.

16 Q What other information do you have as to their
17 health status?

18 A There is information.

19 Q I'm sure somewhere in this world there may be,
20 Doctor. But my question is--

21 A --And it might be--

22 Q What other information do you have, sir?

23 A I haven't sought out any information, sir.

24 Q Then is the answer to my question is that you
25 have no other information?

1 A I don't, but there is information, sir.

2 Q Doctor, I'm sure, if they're dead, there are
3 death certificates somewhere. If they are alive, they are at
4 their homes or they are in Florida or wherever. I'm sure
5 there is some information. But that isn't what I asked you,
6 is it, Dr. Suskind? I asked you whether or not--Doctor, I
7 asked you whether or not you have any information about these
8 other ten workers, and you do not have any such information.

9 A I personally do not.

10 Q All right. And, Doctor, do you know where this
11 information, if it exists, is on these other ten workers?

12 A I would assume.

13 Q Now, Doctor, my question is do you know where it
14 is? Do you know whether or not anybody has collected that
15 information, has amassed that information, has put it in a
16 file or in a report or in any other form, do you have any
17 knowledge about that?

18 A I don't know, sir.

19 Q Then the answer is you have no knowledge as to
20 that point, is that correct, sir?

21 A That is true, sir.

22 Q All right. And, Doctor, of the twenty-six that
23 we do know of, we know that eleven--I'm sorry, ten of those
24 twenty-six are having the same problems or worsened in some
25 instances as we established yesterday that they had in 1953

1 upon that examination, isn't that correct, sir?

2 A Yes, according to your coding, sir.

3 Q And we know that--Doctor, do we have to go
4 through this again? According to the way the records have
5 been interpreted by you and by your colleagues over a period
6 of time, and that's shown on these exhibits.

7 A No, sir.

8 Q Dr. Suskind, do you not recall that we went
9 through that very same question yesterday a half a dozen
10 times?

11 A I do indeed remember the discussion.

12 Q Fine, Doctor. Then we pass on to that. The
13 information that you have for 1979 is reflected in the
14 reports that we went through, is it not, sir? The reports on
15 these eleven individuals, the '79 reports are all in front of
16 you right there, that stack sitting in front of you, isn't
17 that correct, sir? Remember, we went through those
18 yesterday?

19 A We did.

20 Q You do remember that?

21 A Oh, I sure do.

22 Q All right. Now, Doctor, you also recall that we
23 discussed your report about the workers in '53 that you said
24 complained of in your report to the National Institute for
25 Environmental Health Sciences in '78 that you reported that a

1 few cases had continued to complain of mild pains,
2 nervousness, and fatigue, do you recall that, sir?

3 A Yes, I do.

4 Q And do you also recall--and you did categorize
5 those as mild pains, didn't you, sir, in your report?

6 A I would have to look at the report to remind
7 myself, sir. What exhibit is it?

8 Q For the benefit, you can look at the summary--it
9 is the report, it is 1727, Plaintiff's Exhibit 1727, but the
10 pages passed to the Jury is, I'm not sure, I think 1731.

11 A I have 1727 before me, sir. What page is it on?

12 Q It is on Page 4. You have this other sheet,
13 Doctor, in front of you, this one where they're--I don't have
14 the number handy on that one. Mr. Seigfreid tells me that
15 the pages passed to the Jury with the excerpt from
16 Defendant's Exhibit 62 and Plaintiff's Exhibit 1727 and 1728
17 was never given a number.

18 THE COURT: I don't think it was.

19 (Plaintiff's Exhibit 1751 was
20 marked for identification.)

21 MR. CARR: Mr. Nassif, does this conform to your
22 records that this exhibit was never given a number?

23 MR. NASSIF: Yes, it does.

24 MR. CARR: Your Honor, I'd like to offer
25 Plaintiff's Exhibit 1751, which is the page we passed to the

1 Jury yesterday morning which contains the excerpt from
2 Monsanto Exhibit 62, Plaintiff's Exhibit 1727, and
3 Plaintiff's Exhibit 1728.

4 (Plaintiff's Exhibit 1751 was
5 offered into evidence.)

6 THE COURT: Mr. Heineman?

7 MR. HEINEMAN: I think it contains part of
8 documents that have already been admitted, Judge.

9 THE COURT: It does.

10 MR. HEINEMAN: We don't have any objection.

11 THE COURT: Fine. Admitted without objection.

12 (Plaintiff's Exhibit 1751 was
13 admitted into evidence.)

14 BY MR. CARR:

15 Q Now, Doctor, the point that I was getting to is
16 that your report in 1953, I'm sorry, your report in 1978 said
17 that in a very few cases these workers continue to complain
18 of mild pains, nervousness, and fatigue, is that correct,
19 sir?

20 A That is correct.

21 Q And, of course, we have already been through the
22 fact that twenty-seven, what twenty-seven out of thirty-six
23 means, but we haven't really gone through the statement as to
24 whether or not there were mild pains involved, have we, sir?

25 A We went through pains, I believe.