

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

FRANCES E. KEMNER, et al.)
)
Plaintiff,)
)
vs.) No. 80-L-970
)
MONSANTO COMPANY,)
)
Defendant.)

Before the HON. RICHARD P. GOLDENHERSH, Judge

REPORT OF PROCEEDINGS

JURY TRIAL

April 8, 1986

APPEARANCES:

MR. REX CARR & MR. JERRY SEIGFREID, Attorneys at Law
Appeared on Behalf of the Plaintiff.

MR. KENNETH R. HEINEMAN, MR. JOSEPH NASSIF, & MR. JAMES
CRAVEN Attorneys at Law
Appeared on Behalf of the Defendant.

MARSHA SCHNIPPER
Official Court Reporter

1 BE IT REMEMBERED AND CERTIFIED that heretofore, on
2 to-wit: April 8, 1986, being one of the regular judicial days
3 of this Court, the matter as hereinbefore set forth came on
4 for hearing before the Honorable Richard P. Goldenhersh, a
5 Judge in and for the Twentieth Judicial Circuit of the State
6 of Illinois, Belleville, St. Clair County, Illinois, and the
7 following was had of record, to-wit:

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9 * * * * *

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11 (The following proceedings were had in open Court.)

12 THE COURT: Give me just a minute and I'll read what
13 you just filed. (Pause) Okay. I've read the report and
14 response to order that defendants have filed. Mr. Carr, it's
15 your motion. Do you have anything that you would like to
16 say?

17 MR. CARR: Mr. Craven is standing, your Honor. I
18 defer to him if he has something to say.

19 THE COURT: All right. Fine.

20 MR. CRAVEN: May I just in conjunction with the
21 report ask leave to schedule an evidence deposition in
22 Cincinnati, Ohio at the earliest possible date of Dr. Richard
23 Vilter, taking his deposition to supplement the matters in
24 the report.

1 THE COURT: I will consider that after I hear the
2 rest of the argument today. Thank you.

3 MR. CARR: Your Honor, the response that has been
4 given us suggests that Dr. Suskind is in apparently worse
5 condition than had been reported earlier. It would indicate
6 that his recuperative powers that he's unable to recover, at
7 least that's what it says -- indicated that the -- Page 2 and
8 3 it says Dr. Suskind indicated that circumstances of his
9 present health make his return at this time impossible.

10 If that is true, it is apparent that his real
11 physical and health condition belies his appearance, his
12 physical appearance. It also appears to me where the Dr.
13 Vilter says he should be able to return absent a worsening in
14 a matter of a few weeks or a month, it appears to me that
15 this Court is being held hostage by Dr. Suskind's
16 deteriorating health condition. It would further appear to
17 me if he has achieved this state of ill health since February
18 the 10th when he was tendered as a witness here and brought
19 forward as a witness -- I calculated the actual -- we have
20 had 42 actual days when there could have been Court,
21 including Court holidays, 42 weekdays, I should say, and up
22 to the present time we have had 22 of those days of actual
23 testimony in Court with Dr. Suskind.

24 It would appear to me that if his condition is so

1 badly and adversely affected by being in Court less than half
2 time the past two months that we have no prospect of ever
3 finishing his testimony without inordinate delays and without
4 risk of killing the man. The statement from his counsel that
5 his life is in jeopardy, the sworn statements here of the
6 doctors that he's in this kind of bad situation, it would
7 appear to me that the only thing this Court can do in view of
8 the documents that have been presented to this Court and with
9 the -- to take it at the -- in the present context, that we
10 move on in this case without Dr. Suskind's presence
11 hereafter.

12 We acknowledge that we will be damaged by not being
13 able to cross-examination Dr. Suskind on all the points that
14 we yet have to consider, but if my cross-examination of this
15 man and his responses to my cross-examination is going to be
16 responsible for endangering his life, as apparently they say
17 it is, I don't want to be a party to any possible risk of
18 this man's life. I had believed that were Dr. Vilter here
19 with his medical records I could demonstrate that the man's
20 outward appearance is in fact what his health condition is,
21 but since counsel brings neither the records nor Dr. Vilter
22 here I have no option except to conclude that Dr. Suskind's
23 health is in jeopardy with any continued appearance in this
24 Court no matter what the circumstances may be.

1 He is 72 years of age, his health will not better
2 itself, his health will only worsen, and if it takes him a
3 month or a week to recoup from the relatively part time
4 examination in Court that's taken place, I would suggest that
5 if he does come back a month from now and testifies for three
6 or four days, that we may have to again lay off another week
7 or a month or two months and then he'll come back and testify
8 for three or four or five days and then again the Court will
9 have to be laid off.

10 I believe, Your Honor, that it is appropriate at
11 this time that we -- the plaintiffs sacrifice what right we
12 have to cross-examination and that this Court find that in
13 view of the certificates that have been presented to it and
14 the reports that have been presented to it, that Dr.
15 Suskind's health condition will prevent any further
16 examination, that any recuperation that might take place
17 would be only a temporary recuperation and not permanent and
18 that this Court would if the past is prelude to the future
19 and tells us anything, that we'll have to again recess in the
20 future for this purpose, and unless some doctors can assure
21 us that Dr. Suskind will not deteriorate again and that his
22 cross-examination does not put him under severe stress as it
23 has in the past and that court testimony will not be
24 dangerous to his health and that we get such certificates

1 within the next few days or the doctor appear and so testify
2 under examination, that I don't see any option that this
3 Court has except to proceed without Dr. Suskind, and we're
4 certainly not willing to stand by and let the doctor come and
5 go from time to time in the future as they now suggest that
6 he might be available to return. Even if he is able to
7 return, there is no guarantee that he will be able to remain
8 as a witness, and I certainly don't want to be a party to
9 jeopardizing his health. While we'll be damaged thereby, I
10 move that we go forward without Dr. Suskind.

11 THE COURT: Mr. Craven?

12 MR. CRAVEN: Your Honor, Mr. Carr indicated
13 yesterday that the cross-examination of Dr. Suskind might
14 take a couple of days. He said he thought might finish in
15 two more days.

16 THE COURT: If I remember correctly, he said he
17 would if he were responsive to the questions.

18 MR. CRAVEN: That's right, if he testifies the way
19 Mr. Carr wants him to.

20 THE COURT: No, if he testifies the way the Court
21 has ordered him to. Let me correct you.

22 MR. CRAVEN: Mr. Heineman has indicated to me that
23 the redirect might take a couple of days. We are in no
24 position to advise this court of Dr. Suskind's health other

1 than the information that we have given the Court. It is for
2 that reason that we want to take the evidence deposition of
3 Dr. Vilter, who is as you can read by the report would be
4 available for a deposition in Ohio at a date to be arranged,
5 and it would seem to me that if the question is one of Dr.
6 Suskind's health, the place to get that information would be
7 from his doctor in Ohio, and the decision as to what to do
8 should await some information from a medical practitioner.
9 Mr. Carr nor I, neither of us are qualified to give an
10 opinion with reference to the future. Dr. Vilter, I think,
11 can. He already has indicated that absent a worsening of the
12 condition Dr. Suskind could return in a matter of a few weeks
13 or a month. Now, I would remind the Court that this Court
14 took a three and a half, I guess it was, week recess waiting
15 for Mrs. Melton.

16 THE COURT: Right.

17 MR. CRAVEN: The testimony of Mr. Wilson was
18 interrupted, the Court continued. I don't -- I don't see why
19 this question has to even be resolved until we have the
20 information upon which to make an informed judgment, and
21 accordingly, we again request leave to schedule an evidence
22 deposition of Dr. Vilter in his office in Cincinnati at the
23 earliest practicable date that we can arrange, and we ask
24 that any questions with reference to Dr. Suskind be deferred

1 until such time as this Court has an adequate evidentiary
2 basis to make an informed judgment.

3 MR. CARR: Your Honor, we would oppose any taking
4 of any evidence deposition of Dr. Vilter. Obviously it would
5 require us to take time from this Court or take time from the
6 weekends in which we're preparing for other witnesses. Dr.
7 Vilter has stated in this response that he himself is
8 concerned for his own health if he were to undergo stress
9 similar to what Dr. Suskind has undergone. I'm the same
10 person that cross-examined Dr. Suskind, it's the same person
11 that will be cross-examining Dr. Vilter. I don't want to be
12 in a position of being responsible for the death of two
13 people here, Dr. Vilter -- or to damage the health of Dr.
14 Vilter and Dr. Suskind together.

15 I see nothing -- the only thing Dr. Vilter can
16 possibly say is that with -- that this man's heart condition
17 is permanent because a man that age, the Court will take
18 judicial notice, that his heart condition is not going to get
19 better with the passage of time. His heart condition will
20 only worsen, cannot possibly improve and taking notice of
21 that, the Court can deduce that all Dr. Vilter can possibly
22 say is that Dr. Suskind's heart can deteriorate if given the
23 similar stress that he has been given in the past week or
24 two.

1 There is no doubt but what Dr. Suskind will be
2 subjected to that kind of stress, that is, if the plaintiff
3 has the right to cross-examine, and, that is, if the Court
4 has the right to demand of this witness responsive answers.
5 The witness' excitement, if you would, came invariably when
6 he learned that he was required to obey the Court's orders.
7 This is stress that does exist in a courtroom. There is no
8 way that we can avoid that stress. We cannot represent our
9 clients, and this Court cannot do its duty without that
10 stress being present. There is absolutely nothing that Dr.
11 Vilter's evidence deposition can say other than what he's
12 already said, this man has a permanent dangerous heart
13 condition, that stress can exacerbate and make it worsen, and
14 that stress of cross-examination can cause Dr. Suskind to be
15 at risk for his life as they have already said.

16 Your Honor, I don't think that in view of what they
17 have said about Dr. Suskind's health, I don't think that this
18 Court nor the plaintiff should be obligated to have a witness
19 here and then have his future in our hands. If the man is
20 not capable of withstanding the kind of Court orders and
21 cross-examination that has taken place in the past, and the
22 doctors say that he's not capable of it, noone can guarantee
23 that it won't happen in the future-- matter of fact, we can
24 guarantee that it will happen in the future. The leopard has

1 not changed his stripes.

2 Dr. Suskind -- yes, I would have my
3 cross-examination finished within two days of an ordinary
4 witness that would respond to the Court's orders. There's
5 certainly nothing about this witness to suggest that he's
6 going to start obeying the Court's orders now. Counsel for
7 the defendant has admonished and admonished, instructed and
8 instructed time and time again. This Court has instructed
9 counsel to admonish the witness time and time again, and it
10 has done no good. The witness got worse with responsiveness
11 rather than better. There's absolutely nothing to suggest
12 that he's changed his stripes and that my two days of
13 cross-examination will not be two weeks or three weeks. I
14 can't guarantee a limit, it might a month in view of this
15 witness' actions. It should be two days. When they
16 redirect, if on redirect the witness takes back what he said
17 under cross-examination, then we might be a month or two
18 months cross-examining the witness on the recross-examination
19 aspect of this case.

20 Your Honor, with that kind of stress in the offing
21 I would suggest that there's no conceivable thing in an
22 evidence deposition that could change those facts. I would
23 oppose taking an evidence deposition at this point in time,
24 because it would add nothing to this Court's order, and it

1 would take us away from this case where we should be trying
2 it, and this Court should not be held hostage to the health
3 of this witness.

4 THE COURT: Okay. Excuse me. I will consider the
5 report and the response that's been made here and the
6 arguments and give you the ruling in a short time. Obviously
7 Dr. Suskind will not be here tomorrow. Dr. Cugell will be on
8 the stand. Before we go into that, Mr. Carr, I'll grant you
9 time to respond to this Motion to Reconsider, if you would
10 --.

11 MR. CARR: On the matter of in limine?

12 THE COURT: No, on the matter of the striking the
13 juror that was filed also.

14 MR. CARR: Oh, right. Well, I won't be able to -- I
15 want to file some pleadings to that, Your Honor.

16 THE COURT: Right. That's what I mean. I'll grant
17 you leave to do that.

18 MR. CARR: All right. Fine, Your Honor.

19 THE COURT: We'll have Dr. Cugell tomorrow. That's
20 obvious, so we understand that. Are there any -- I believe
21 that you were bringing up a matter concerning Dr. Cugell, one
22 of you were yesterday, and since obviously Dr. Cugell will be
23 on the stand tomorrow rather than Dr. Suskind, this is an
24 appropriate time to bring that up, I would think.

1 MR. CRAVEN: Yesterday, Your Honor, we moved to
2 vacate the order of this Court entered on February 3, 1986
3 that relates both to Dr. Cugell and the Northwestern doctors
4 generally, and the Court is aware of its order in limine.

5 THE COURT: Sure.

6 MR. CRAVEN: The Court is also aware of the fact
7 that we went up on an effort to get a supervisory order and
8 that the Supreme Court was, upon the recusal of Judge
9 Goldenhersh, the Supreme Court was evenly divided. In view
10 of the fact that three judges of the Supreme Court clearly
11 manifest a conclusion that this kind of limitation upon these
12 witnesses testifying would be error, and, of course,
13 obviously if it's error, it's reversible error, we would move
14 that the Court vacate its order of February 3, 1986 and that
15 the -- Dr. Cugell and all of the Northwestern doctors be
16 permitted to testify without limitation of the order in
17 limine.

18 THE COURT: Mr. Carr.

19 MR. CARR: Your Honor, the plaintiffs, of course,
20 have the greatest respect for the Supreme Court. They have
21 affirmed by their action this trial court's order in limine,
22 but in view of the fact that three justices believe that the
23 plaintiffs' motion was not appropriate under these
24 circumstances, we have absolutely no opinion from the Court,

1 we don't know what it was that persuaded these three. It
2 might have been a technicality, and we have no way of knowing
3 that, and since we have no way of knowing that and since we
4 do have the greatest respect for the Supreme Court, we will
5 agree that the motion to vacate the order in limine should be
6 granted.

7 THE COURT: Okay. Well, gentlemen, I agree with
8 you. I think that in view of the indication that the Supreme
9 Court has made, that that would be the appropriate thing to
10 do, and under those circumstances, my order in limine -- and
11 I am familiar with it, I don't remember the date.

12 MR. CRAVEN: February 3, 1986.

13 THE COURT: February 3 is vacated.

14 MR. CRAVEN: Thank you, your Honor.

15 MR. CARR: Your Honor, there's another order in
16 limine that was affirmed on the same basis. I see no
17 reasoning that would different there, and if counsel wants to
18 move -- well, I'll move its vacation -- there's no reason to
19 keep that order in effect when this one is being vacated
20 unless counsel don't desire its vacation.

21 MR. CRAVEN: Judge, at this point that issue isn't
22 before us. There is no witness going to be tendered in the
23 immediate future, so we would defer any decision or any
24 position on that until such time as the issue is a ripe one.

1 MR. CARR: Well, we'll take it ahead of that, your
2 Honor, and plaintiffs will move to vacate the order in limine
3 restricting the opinions of the Missouri doctors in view --

4 THE COURT: You want to wait for your response is
5 what I understand?

6 MR. CRAVEN: We would like an opportunity to
7 consider the motion and to come to a conclusion as to the
8 appropriate response, and we will file an appropriate
9 response prior to tendering any witness that's affected by
10 that order.

11 THE COURT: Fine. I'll be happy to defer on that.
12 Okay, gentlemen, I will consider these other matters and I
13 will let you know. Are there any other matters that ought to
14 be taken up before Dr. Cugell gets on the stand, back on the
15 stand rather?

16 MR. CRAVEN: Judge we have -- we have the question I
17 think ought to be taken up. I'm not sure that there's any
18 agreement with me, and that is the question of Mrs. Melton.

19 THE COURT: Now, wait--

20 MR. CRAVEN: I understand --

21 THE COURT: You filed-- now, wait a second, wait a
22 second. I don't agree that it should be taken up. You filed a
23 motion to reconsider. I've granted plaintiff leave to file
24 something, whatever plaintiff feels appropriate in response

1 to that. At the time that that's filed, and I've had a
2 chance to read and you've had a chance to read it would be
3 the appropriate time to take that up, and it's not
4 appropriate now.

5 MR. CRAVEN: I'm responding to the Court's question
6 are there other things that should be taken up before Dr.
7 Cugell resumes the stand, and my response is I think that it
8 should be.

9 THE COURT: Okay.

10 MR. CRAVEN: I also would respectfully suggest that
11 we should also voir dire the jury, and that should happen
12 before there's any resumption of testimony.

13 THE COURT: I'm working on orders, on deciding and
14 on orders on both of the motions that were argued together at
15 that time, and when they are ready, I will file them and you
16 will be advised as to the Court's position. In the meantime
17 we will proceed with trial, as I've stated before. That's my
18 position. And when these orders are appropriate or finished
19 to my satisfaction, they will be filed. Okay. Thank you,
20 gentlemen.

21 MR. CRAVEN: Judge, just as a question, when you say
22 in a short time, are we talking today or a few minutes or --

23 THE COURT: What?

24 MR. CRAVEN: The decision on this response. I'm

1 simply trying to figure out my own schedule.

2 THE COURT: Oh, well, I have to look at this. I'm
3 not sure at this point in time. It may be a short time. If
4 it's not, I'll come back and let you know and we can take it
5 up tomorrow morning.

6 MR. CRAVEN: I'm not trying to hurry the Court. I
7 didn't understand whether you were talking about a few days
8 or a few minutes or a few hours.

9 THE COURT: I'm talking about either a few minutes
10 or tomorrow morning probably.

11 MR. CRAVEN: That's fine. I just wanted to know.

12 THE COURT: I'll let you know. Okay.

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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)
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5 I, MARSHA SCHNIPPER, certify the foregoing to be a
6 true and accurate transcript of the testimony and proceedings
7 in the above-entitled cause.

8 Dated this ____ day of April, 1986.
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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)
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5 I, RICHARD P. GOLDENHERSH, one of the Judges in and
6 for the Twentieth Judicial Circuit, do hereby certify that
7 the foregoing transcript is a true and correct transcript of
8 the proceedings had in said cause.

9 Dated this ____ day of April, 1986.

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12 _____
13 RICHARD P. GOLDENHERSH, JUDGE
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