I.

PRELIMINARY STATEMENT

This is one of 170 cases brought against Monsanto by current and former employees. Plaintiffs allege that Monsanto deliberately exposed them to toxic substances over a 30 year period at the Company's Nitro, West Virginia chemical plant. Over the years, many of the plaintiffs developed cancer, heart conditions, brain damage and other serious and permanent diseases. They allege that Monsanto, by various means, concealed and otherwise obstructed plaintiffs' discovery of not only the identity of the toxic substances, but the connection between them and the diseases plaintiffs now complain about.

The defendant has filed a motion for summary judgment, contending that the statute of limitations has run. This position is based on the assertion that the plaintiff complained of certain symptoms during the course of his employment with Monsanto. As support for this proposition the defendant relies on records of a Workmen's Compensation claim filed on behalf of the plaintiff following a 1949 autoclave explosion. Because the plaintiff, during the course of those proceedings complained of "chemical rash", "aches and pains", "being tired", and "insomnia", defendant contends that plaintiff had reasonable notice in 1950 of the cause of action presently pending before this Court.

Thus, Monsanto has focused attention only on the 1949 autoclave explosion, contending that plaintiff's claims in 1981 are really for that exposure. The 1949 explosion was an important event, but only one in a long and complex chain of events. To rebut Monsanto's argument, plaintiff will spend a considerable amount of time on the circumstances of the 1949 explosion

and the subsequent Workmen's Compensation proceedings. These circumstances, however, are not dispositive of the Statute of Limitations issue in this case. Subsequent events, such as new exposures, exposures to other chemicals, development of new diseases, and Monsanto's later conduct, are what the Court must consider in deciding this issue.

Defendant's motion is part of an ongoing effort by Monsanto to focus attention away from the central issues of what was known by the defendant and plaintiff of the general health and safety of the plant over a 30 year period and the issue of what the defendant and plaintiff knew during that period of the dangerous conditions in which plaintiff worked. Monsanto ignores the issue of the complex medical pathology of toxic substance exposure and what the plaintiff could reasonably have appreciated about such exposure.

In responding to Monsanto's motion plaintiff contends that he could not have reasonably known the true nature of his illnesses and their causes, and, that even if he could have he reasonably relied to his detriment on Monsanto's misrepresentations and bad faith conduct regarding those illnesses and their causes.

At the outset, the Court must understand the nature of the toxic substances complained of and the mechanism of disease that follows exposure to them. Before going any further the Court is requested to read the affidavit of Bertram Carnow, M.D. There the Court will find an explanation of the nature of "Dioxin Poisoning", "Carbon Disulfide (CD_2) Poisoning", "Hydrogen Sulfide (H_2S) Poisoning" and an explanation of the "synergistic effect" of being exposed to numerous toxic substances. Without this understanding an appreciation of the intricate issues this case presents is impossible.

After having read Dr. Carnow's affidavit, the Court should now be aware that exposure to "dioxin" (and its synergistic effect with other chemicals) causes a complete derangement of the body's systems. It reduces the body's ability to fight infection, to resist carcinogens, and damages virtually every major organ system. The effect is cumulative. Subsequent exposures intensify the damage and may result in new diseases or conditions. The diagnosis is complicated by the appearance of seemingly unrelated symptoms that commonly occur in persons not exposed. The disease process in part is latent many times requiring 10, 15, 20 years before readily identifiable diseases begin to appear. Even then unknowledgeable persons often fail to appreciate the symptom complex that relates the seeming disparate complaints and diseases to "dioxin." An understanding of this disease process is essential to determining the statute of limitations issue.

Plaintiff's brief will first present a statement of facts necessarily limited to the 1949 Workmen's Compensation episode. Then, a discussion of the applicable law will follow. These legal issues have been divided into five chapters. Following that, plaintiff will argue the issues raised by defendant's motion. Finally, in Chapter IX the Court's attention will be directed to Senate Bill 585 which amends West Virginia Code 16-28-10 effective June 11, 1983, and provides a special period of limitations for those exposed to "phenoxy herbicides."

STATEMENT OF FACTS

Chester Jeffers was hired by Monsanto Chemical Company in 1937, when he was 22 years old. He was hired as a yard laborer. Over the years he worked his way from a pipefitter-helper to a pipefitter. Pipefitters worked in all parts of the plant. They were exposed to chemicals in the air and on the

ground, and they were exposed to the residue of chemicals in the machinery, equipment and buildings. Jeffers, affidavit, Exhibit 1.

Monsanto first began manufacturing the herbicide 2,4,5-Trichlorophenoxyacetic acid in late 1948. About six months after production began, an autoclave, a large steel vessel about the size of an 8 by 10 foot room, unexpectedly vented its contents through a relief valve. The autoclave was engaged in production of trichlorophenol, a chemical used in the production of 2,4,5-T. The exact details of the accident are not clear. The pressure became such, however, that a safety valve blew open with explosive force. The reaction, in fact, had "run away." After the release, a black powder or tarry substance coated the surrounding area. The force of the release was such that the piping around the autoclave was severely damaged and the internal agitators were destroyed. Workmen were exposed to the residue when they went back to clean up the area, repair the machinery and piping, and haul away debris. The exposure extended over several months, and occurred in many ways other than being in the vicinity at the time of the "explosion." A number of the men involved including the plaintiff began to develop chemical rashes and a number of general non-specific complaints.

In response, Monsanto prepared and filed Workmen's Compensation claims for the men. The claims were identified by Monsanto as involving "chemical rashes.

An application, signed in blank by C. A. Jeffers, was filed on his behalf by Monsanto. The company completed the form. His complaint was described as a "chemical rash on face." Exhibit 3. The employer's report described the occupational hazard which caused the injury as an "unexpected chemical reaction liberating unknown products of decompositions. . ." Exhibit

4. Monsanto would maintain throughout the Workmen's Compensation proceedings that it could not identify the chemicals produced when the autoclave "exploded."

Soon after the "explosion" and the onset of symptoms in a number of the men, Monsanto began consulting a number of sources to, ostensibly, determine the extent of the problem. Four of the "exposed" men were sent to the Kettering Institute in Cincinnati for study and tests. Confidential reports were prepared on these men by Kettering physicians, Drs. Ashe and Suskind, dated 1949 and 1950. Exhibits 28 and 35.

At the same time, certain public agencies became involved. Dr. Swartz of the Public Health Service examined some of the men, although not the plaintiff. In addition, the West Virginia Department of Health also looked at the situation. Reports and recommendations were made by these agencies and physicians to Monsanto. The Mellon Institute in Pittsburg was likewise consulted.

In the meantime, Monsanto continued its production of 2,4,5-T. Basically it involved heating certain chemicals in an autoclave, piping them to another building and ultimately depositing "fresh" or "green" 2,4,5-T product in fiber drums. At this point the material looked like wet cornmeal. The drums were open topped and essentially filled by hand. They would then be transported to various buildings throughout the plant that were designated "drying sheds." There the men would spread the wet "cornmeal" into shallow trays and place them in heated drying racks. Finally, the dried material would be transported, again in fiber drums, to a grinding operation and then packaged for sale. Later, as demand for 2,4,5-T increased, much of the drying operation would be replaced by a continuous "drum drying process."

During this period from 1949 to 1953, Dr. Swartz and the State Health Department began to suspect that the chemical rashes, which were later identified as a "chloracne," and the other symptoms the men were suffering from were not confined to the men exposed in the 1949 explosion. Indications were that the "problem" was related to the 2,4,5-T process itself.

Monsanto was advised to isolate the process and to refrain from reexposing those with problems to the 2,4,5-T operation. As will be detailed in plaintiff's argument below, Monsanto failed to make these changes.

In 1953, an agreement was entered into between Monsanto, the Union and Workmen's Compensation. The idea was that the parties would cooperate in an effort to determine the true nature of the problem at Nitro. All claims were to be held in abeyance. Throughout the period of this agreement Monsanto withheld information about 2,4,5-T and its health risks, misrepresented facts to the Commission and continually assured plaintiff and the Commission that there were no serious problems. As plaintiff will point out below in Section VI Monsanto knew the men were being exposed on a daily basis to a highly toxic substance.

In 1954, plaintiff and a number of other workers decided to prosecute their claims in spite of the agreement. Three years of hearings followed, punctuated by numerous examinations of the plaintiff and others by as many as seven to ten doctors.

Finally, in 1958 the Appeal Board ruled that plaintiff was not permanently injured but had received a chemical rash which had mostly cleared up as a result of his exposure to the 1949 autoclave "explosion." Exhibit 5.

All the while plaintiff's 1950 Workmen's Compensation claim was pending, from 1950 to 1957, he continued to work at Monsanto. During that time

he was exposed on a daily basis to 2,4,5-T, carbon disulfide, H_2S and numerous other chemicals.

Over the years plaintiff's physical condition has gradually deteriorated. A number of slow developing conditions have now surfaced and been diagnosed for the first time. His overall non-specific complaints now fit a symptom complex that can be related to his exposure while employed at Monsanto. For example, there now is identifiable profuse brain damage in plaintiff's right parietal region. Within the last year cardiac arrhythymia has developed. He suffers from a gross abnormality of the immune system, axonal degeneration of the median nerve right arm, cerebellum damage, and is now diagnosed as having a Type 4 hyperprebatalipoproteinemia as well as hypertension. Exhibit 2. It is these conditions and diseases that plaintiff now sues for.

Plaintiff left Monsanto in 1957 working for a variety of pipefitting and welding jobs as a member of the trade unions finally retiring in the state of Ohio where he now resides.

APPLICABLE LAW

I.

MONSANTO MUST SHOW THAT IT IS ENTITLED TO SUMMARY JUDGMENT, BECAUSE THERE ARE NO GENUINE ISSUES OF MATERIAL FACT BETWEEN THE PARTIES.

Summary judgment should be granted only when it is clear that there is no genuine issue of material fact. 56(c). This standard requires a perfectly clear finding that there is no dispute as to any material fact. Further, there must be no dispute as to the conclusions or inferences which may reasonably be drawn from any material fact. Pauley v. Combustion Engineering, 528 F.Supp. 759, 765, (W.Va. 1981), citing Morrison v. Nissan Motor Company,

Ltd., 601 F.2d 139 (4th Cir. 1979); Phoenix Savings and Loan, Inc., v. Aetna Casualty & Surety Co., 381 F.2d 245 (4th Cir. 1967). Where inquiry into the facts is desirable to clarify the application of the law, summary judgment should not be granted. Lewis v. Coleman, 257 F.Supp. 38 (S.D. W.Va. 1966). The record must show a right to judgment with such clarity as to leave no room for controversy. Prince v. Pittston Coal Co., 63 F.R.D. 28 (S.D. W.Va. 1974).

In a motion for summary judgment, the burden is on the moving party to meet these standards. The evidence, including any inferences which may be drawn therefrom is construed in the light most favorable to the opposing party. Taylor v. Chesapeake & Ohio Railway, 518 F.2d 536 (4th Cir. 1975).

Defendant has not met this burden. First, as will be shown below, the defendant has not raised every material issue of fact related to the issue of statute of limitations pleaded in plaintiff's complaint. Monsanto has failed to show that there is no genuine issue of fact whether it concealed material information regarding the plaintiffs' injuries and their relationship to the workplace. Second, the mere fact that this plaintiff filed a Workmen's Compensation claim for certain medical complaints, given the nature of the medical evidence, does not raise an uncontroverted fact that he knew or had reason to know in 1950 the true nature and extent of his claim then and certainly not the nature or existence of his claims today.

II.

MONSANTO DID NOT ADDRESS THE ISSUE OF CONCEALMENT AND OBSTRUCTION AND THUS FAILED TO RAISE AN ISSUE OF MATERIAL FACT, PRECLUDING SUMMARY JUDGMENT IN ITS FAVOR.

The plaintiff in his first amended complaint alleged in paragraphs 7 and 8 as follows:

> 7. That the Defendant did assure the Plaintiff that the illnesses from which he began to suffer during his employment were not permanent; that his health would improve; that the Defendant would itself directly pay for all medical expenses and any lost wages incurred by the Plaintiff; and the Defendant further assured him that, in any event, the chemnicals were not responsible for his illnesses and injuries.
>
> 8. That the Defendant undertook a policy and plan of corporate thinking to deliberately conceal and withhold from the Plaintiff, and others, information about the highly toxic and hazardous effects of these chemicals.

Monsanto has cited the West Virginia Statute of Limitations for Personal Actions Not Otherwise Provided For, §55-2-12 W. Va. Code, for the proposition that plaintiff's claims are time barred. Monsanto, however, failed to raise W. Va. Code §55-2-17 which provides:

> Where any such right as is mentioned in this article shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted.

Monsanto's burden, as the moving party, is to show that there is no genuine issue of material fact. Here, plaintiff pleaded, first, exposure to toxic chemicals causing a variety of medical illnesses, and secondly, concealment. The Statute of Limitations defense raises, therefore, two issues of material fact. The first is whether the action accrued within two years. The meaning of accrual will be argued below. The second issue, in light of the

plaintiff's pleading, is whether Monsanto's conduct amounts to "obstruction" within the meaning of the provisions of 55-2-17.

The "concealment" issue is clearly a material issue of fact, since the plaintiff could prevail on the Statute of Limitations issue by showing that Monsanto obstructed him and the obstruction continued until within two years of filing the suit. Having failed to meet this issue, Monsanto has failed to show that the adverse party could not prevail under any circumstances. Prince v. Pittson Co., supra.

The obstruction statute is an important part of determining the application of the Statute of Limitations, since proof of obstruction prevents a defendant from raising the Statute of Limitations. Duttine v. Savas, 455 F.Supp. 153 (S.D. W.Va. 1978).

Hundley v. Martinez, 158 S.E.2d 159 (W.Va. 1967), established the modern rule regarding the standard required to show obstruction sufficient to toll the Statute of Limitations. In Hundley, the plaintiff pleaded obstruction as follows:

> That the defendant well knew at the time that he had wrongfully removed a large part of the iris of the plaintiff's eye and had severed the aforesaid muscles controlling the pupil of the plaintiff's eye. He thereafter deliberately and fraudulently withheld this information from the plaintiff and fraudulently deceived the plaintiff by telling him that his eyesight would improve; and that he had trouble with the retina of his eye and that such trouble was the cause of his lack of ability to use his eye, which was wholly untrue since he knew that the condition would not and could not improve, and he knew that the plaintiff had no retina trouble whatsoever.

Supra, at 162.

As in Hundley, plaintiff here alleges that defendant had knowledge of the cause of plaintiff's illness, that plaintiff inquired of defendant as to the cause of his illness, that Monsanto, despite its knowledge to the contrary, told plaintiff his illness was not associated with its plant, and that defendant undertook a corporate plan of thinking to conceal this information.

The plaintiff's complaint and Hundley's are in essence identical. Both plaintiffs sought information peculiarly within the province of defendant. Both defendants not only denied responsibility for the condition, but mislead plaintiffs as to the cause. Such is the issue of the complaints. The plaintiffs have clearly given sufficient notice to defendant of their allegation of concealment and obstruction.

In Hundley, the Court held:

> The defendant says that there could be no concealment of the injury because the damage was open and apparent as evidenced by the enlarged pupil which could be readily viewed by the plaintiff every time he shaved. Is a layman going to be charged with knowledge of an injury on this evidence? Must he know how the eye should appear after a cataract operation? Certainly not! We consult and rely upon our physician for information concerning our physical condition, particularly after an operation. . .
>
> Clearly there was sufficient evidence in this case to warrant jury consideration and determination of the question as to whether or not Doctor Martinez fraudulently concealed from the plaintiff the condition of which he complains.

Hundley, supra, 165.

Here, as in Hundley, plaintiff admits to having health complaints. The actions of the defendant here as in Hundley prevented plaintiff's sooner

"discovery" of his cause of action. As will be demonstrated below, the evidence of concealment in this case is equal to or greater than the evidence of concealment in Hundley, supra.

In Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980), an action involving injury from toxic polyvinyl chloride fumes, the court held that where "concealment" was pleaded as tolling the limitation period and where relevant evidence exists on the issue summary judgment prior to trial is improper:

> Plaintiff's responses to defendants' motions for summary judgment claimed fraudulent concealment and argued that it tolls the statute of limitations. The testimony of two witnesses seems relevant on this issue. Defendants deny that any such concealment has been shown . . . . Viewed in this light . . . we cannot say that the issue was ripe for summary judgment.

Williams, supra at 739.

III.

ACTIONS FOR PERSONAL INJURIES IN WEST VIRGINIA ACCRUE WHEN THE PLAINTIFF KNEW OR IN THE EXERCISE OF REASONABLE DILIGENCE SHOULD HAVE KNOWN OF THE EXISTENCE OF HIS INJURY AND ITS CAUSE.

The discovery principle was first recognized in West Virginia in Petrelli v. W. V. Pittsburg Coal Co., 104 S.E. 103 (W.Va. 1920). "Where a cause of action accrues for the unlawful removal of coal by wrongfully extending mining operations into adjoining property, the Statute of Limitations begins to run only from the time of actual discovery of the trespass, or from the time when discovery was reasonably possible." Petrelli, supra, 103.

The concept was extended to "medical malpractice" cases in Baker v. Hendrix, 27 S.E. 275 (W.Va. 1943); Morgan v. Grace Hospital, Inc., 144 S.E.2d

156 (W.Va. 1978); Harrison v. Seltzer, 208 S.E.2d 312 (W.Va. 1980) and others. The common thread of reasoning is found in Morgan v. Grace Hospital, Inc., supra, at 161:

> It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had 'accrued' to the plaintiff until . . . she had a reasonable basis for believing or a reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the hysterectomy. (Emphasis added.)

Family Savings & Loan v. Ciccarello, 207 S.E.2d 157 (W.Va. 1974) extended the rule, to legal malpractice:

> We believe that the 'discovery rule' . . . . represents a distinct and marked trend in recent decisions of appellate courts throughout the nation and that it is in harmony with the rule announced by this Court in the decisions involving subterranean coal mining operations. (Emphasis added.)

Family Savings & Loan v. Ciccarello, supra, at 161, 162, citing Morgan v. Grace Hospital, Inc., supra.

In Roberts v. State Workmen's Compensation Commission & Union Carbide, No. 15021 (Dec'd May 1981), the Court interpreted strict statutory time limitation language in the Workmen's Compensation Act stating:

> Finally, we would reiterate that it would be fundamentally unfair to hold that a claim for O.P. benefits was barred before the disease manifested itself or before a reasonable person would have recognized the nature, seriousness and probable compensable character of the disease.

Roberts, supra, at 4.

Two West Virginia Federal Courts have held that the West Virginia Supreme Court would apply a discovery rule rather than the rule of Scott v. Rinehart and Dennis Co., 116 W. Va. 319, 180 S.E.2d 276 (1935), which is urged by Monsanto here.[1]

In Pauley v. Combustion Engineering, Inc., 528 F.Supp. 759 (D.C. S.D. W.Va. 1981), Judge Staker, extended the "discovery rule" to occupational diseases. The Court rejected the Scott decision[2] and adopted, instead, a "discovery rule":

> The basic purpose of a statute of limitations is to encourage promptness . . . Being mindful of the purpose, the court has continued to expand its adoption of the discovery rule in cases where the injury to the plaintiff is susceptible to concealment, . . . thus making it unfair and unjust to require the plaintiff to file his cause of action before he can reasonably discover his injury. (Emphasis added.)

Pauley, supra, at 763, 764.

In Patrick v. Sharon Steel Corporation, 549 F.Supp. 1259 (1982), Judge Haden held:

> . . . There is ample basis to conclude that the 'discovery rule' would be applied by West Virginia courts in determining the date the two year statute of limitation period commenced to run. . . This conclusion is based on the West Virginia Supreme Court's reasoning that the discovery rule should be extended to cases when 'such extension is designed to promote justice

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[1] As will be later shown, due to the evidence of concealment in this case defendant's motion must fail even if the "Scott" rule is applied.

[2] Scott stands for the proposition that a claim for occupational disease accrues at the time of last exposure. Suit must be brought within two years of that date absent concealment or fraud.

and right.' Family Savings and Loan, Inc., v. Ciccarello, 157 W.Va. 983, 991, 207 S.E.2d 157, 162 (1974).

Pauley, supra, 1263 (footnotes omitted).

The clear trend of the West Virginia courts is the adoption of the discovery rule. It is well within the power and reason of this Court to anticipate that the West Virginia Supreme Court would extend the discovery rule to occupational disease cases if it had the opportunity. It has consistently done so in other cases. This Court should adopt the rule that the cause of action accrues and the statute begins to run when the plaintiff knew, or should have known through the exercise of reasonable diligence, that he was injured and the legal cause of his injury.[2]

IV.

EQUITABLE ESTOPPEL

Defendant's Representations To The Workers, The Health Department And Workmen's Compensation Estopps It From Raising The Statute of Limitations Defense

In West Virginia, the "obstruction statute", §55-2-17, which suspends the statute of limitations during the period of indirect or direct obstruction

[2]This is the rule recently adopted by the West Virginia Supreme Court in Roberts, supra,: ". . . unfair to hold that a claim . . . was barred . . . before a reasonable person would have recognized the nature, seriousness and probable compensable character of the disease . . ."

of the bringing of a suit, embodies equitable principles. In Duttine v. Savas, 455 F.Supp. 153 (1978) this Court said:

> In light of these facts, the tolling of the statute by the application of §55-2-17 is an equitable solution to what would otherwise be an unjust and harsh result. Indeed, §55-2-17 is in keeping with equitable principles . . . . In general, the court may exercise its equitable jurisdiction and apply the doctrine of estoppel under appropriate facts to preclude a defendant from utilizing the statute of limitations as a bar, even in the absence of an express statutory basis for tolling the period. (citations omitted.)

Supra, at 161.

The Supreme Court has held that "no man may take advantage of his own wrong." Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 232 (1959). The Court there further said:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage.

citing Insurance Co. v. Wilkinson, 13 Wall. 222, 223.

The lower courts have applied these principles in numerous cases. See Anot., Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, 43 ALR3d 429.

"A person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon representations made." Bergeron v. Monsour, 152 F.2d 27, 30 (1st Cir. 1947). "Estoppel arises where

one, by his conduct, lulls another into a false security and into position he would not take only because of such conduct." United States For Humble Oil v. Fidelity and Casualty Co., 402 F.2d 893, 847 (4th Cir. 1968), quoting McWaters and Bartlett v. United States, 272 F.2d 291, 296 (10th Cir. 1959).

In City of Bedford v. James Zeffel & Co., 558 F.2d at 216, 218 (4th Cir. 1977), the Court said the "doctrine has been described as a 'standard of fair dealing applied by the Courts." Further, "one may be mislead as much by implication as by express statement." Supra, 218.

In Scarborough v. Atlantic Coastline R. Co., 178 F.2d 253 (4th Cir. 1949), the Court said, deciding a case in which estoppel was raised to prevent the imposition of the statute of limitatons, that:

> Vice Chancellor Leaming thus applies to statutes of limitations the ancient and beneficent doctrine of estoppel. And nothing is better settled, as a general principle, than the rule that, wherever found and in whatever guise, fraud will, in some way or manner, never be permitted to give an inequitable advantage to the one who has consciously perpetrated the fraud.

Supra, at 258.

In Louisville and Nashville R. Co. v. Disspain, 275 F.2d 25 (6th Cir. 1960) the Court held that the statute of limitations was tolled where a doctor told an employee he wasn't injured, when he in fact was. The Court took the position that the jury could have found that the misrepresentations of the doctor, although unintentional, tolled or estopped the running of the statute of limitations, so as to permit the bringing of the action after the statutory period of limitations had run.

In Pashley v. Pacific Electric R. Co., 153 P.2d 325 (1944) the Court held that where defendant voluntarily undertakes, through its agent, to make a full and fair disclosure of plaintiff's injuries, the defendant was responsible for the agent's failure to make full disclosure, and where defendant undertakes such disclosure, plaintiff may rely on the agent's misrepresentations.

The element of reliance on continuing medical care has been held to be present where a company provided medical care for a number of years following an employee's injury, and the expectation was kept alive by the employer's doctor's direction to the plaintiff to return when he felt more pain, the plaintiff having not been informed that the employer decided to cease treatment. National Lead Co. v. Workmen's Compensation Appeal Board, 66 Cal. Rptr. 41 (1967).

The evidence presented in Section VI below will show: that Monsanto made material misrepresentations of fact to the Health Department, Workmen's Compensation, the plaintiff and others concerning the toxicity of 2,4,5-T; that Monsanto failed to disclose material information; that the plaintiff and others had a right to rely on Monsanto's representations; and that the plaintiff and others acted or failed to act to their detriment as a result of Monsanto's bad faith conduct. As such, there exists a material issue of fact as to whether defendant is estopped from asserting the statute of limitations.

ARGUMENT

V.

PLAINTIFF DID NOT AND BY THE EXERCISE OF REASONABLE DILIGENCE COULD NOT HAVE KNOWN OR DISCOVERED HIS 1981 CAUSE OF ACTION AT THE TIME HIS WORKMEN'S COMPENSATION CLAIM WAS FILED IN 1950.

INTRODUCTION TO SECTION V

Plaintiff's lawsuit is for injuries and diseases resulting from long term exposure to among other substances dioxin, carbon disulfide (CS_2) and Hydrogen Disulfide (H_2S). The defendant relies on the fact of Plaintiff's 1950 Workmen's Compensation claim as uncontrovertable evidence that Plaintiff knew in 1950 of the claims he has asserted in 1981. Without considering the evidence of concealment and obstruction, which will be discussed later, the contradictions and questions of fact raised by the Workmen's Compensation records relied on by the defendant preclude entry of summary judgment.

In the first instance the Plaintiff was lead to believe, and Workmen's Compensation concluded, that Plaintiff's 1950 claim was for a chemical rash resulting from a one time exposure to unknown products spewing from a 1949 runaway chemical reaction. Defendant's motion presented no evidence that plaintiff knew in 1950 that he was complaining about repeated exposures to substances regularly produced by Monsanto and that his complaints were for long term permanent injuries. Second, the preponderance of the evidence at the compensation hearing was that plaintiff was not seriously injured and that whatever complaints he had were not related to work. Finally, plaintiff's 1981 claims are for permanent long term effects of repeated

chemical poisoning. Many of the injuries complained of here were not present in 1950 and many of the exposures occurred after the filing of the 1950 claim.

A. The Claim Was For A One Time Exposure To Unknown Products.

The plaintiff's claim, filed on his behalf by Monsanto on February 21, 1950, was for a chemical rash caused by a 1949 "explosion" liberating unknown products of decomposition. See Jeffers affidavit, Exhibit 1 and Exhibit 3. The claim, including the symptoms of chloracne, aches and pains and anxiety, were all related to the "explosion" by the company and by the claimant. Although the "explosion" occurred in the 2,4,5-T process the claim was never related to the ongoing 2,4,5-T process or the product 2,4,5-T. There is some confusion because on occasion doctors, board members, lawyers and witnesses would incorrectly refer to the explosion products as "2,4,5-T." This was merely an error of terminology. The injuries were claimed to have resulted from the 1949 autoclave explosion. The Appeal Board's opinion, used as a model in all 24 cases brought before it,[3] said:

> (this order was used for all cases including plaintiff's)
>
> Claimant was employed at the Monsanto Chemical Company on March 8, 1949, when, due to some unexplained cause, the contents of an autoclave were forced into the atmosphere. The released material settled upon the buildings and premises generally and many employees were exposed directly to it. Clean-up operations began immediately, and the men so engaged, including the claimant, Ival McClanahan, were likewise

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[3]The Court will recall that an agreement was reached between Monsanto, the Union and Workmen's Compensation to hold the cases in abeyance until the cause of the injuries could be determined. Twenty-four of these men hired a lawyer to appeal their claims. Jeffers was one of them.

> exposed to the released material. Almost at once employees began to experience skin eruption and irritation, which was diagnosed as acne or chlor-acne.

Exhibit 5, Page 5.

This Board later said that in the period following the 1949 explosion the chloracne cleared up and progressively improved in 1951 and 1952. Exhibit 5. The Workmen's Compensation Commissioner noted that Jeffers' last "injurious exposure occurred July 31, 1949" which dated marked the end of Jeffers' involvement of the clean-up operation following the March 1949 explosion. Exhibit 6. Jeffers continued to work in the 2,4,5-T process on and after that date. Monsanto in fact refused to identify or even speculate as to the chemical composition of the product of the explosion.[4] Monsanto's expert, Dr. Suskind, testified that 2,4,5-T would not cause the rash. Exhibit 8, pages 51, 52, 53.

Hearings were ultimately held on plaintiff's compensation claim. At the hearings, Dr. Halloran testified on behalf of the plaintiff. "He worked in and out of Building 41 for a couple of months, but noticed breaking out four weeks after starting in the building." Exhibit 9, Page 5. Building 41 housed the autoclave which "exploded." Jeffers testified that he was working in Building 41 at the time of his exposure. Exhibit 9, Page 22. Clearly Jeffers was complaining about the explosion chemicals, which were mistakenly called by Halloran and others 2,4,5-T and was not associating his complaints with 2,4,5-T. As a rule, the men considered 2,4,5-T safe and even took it home to use in their own yards and gardens. Jeffers, affidavit, Exhibit 1.

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[4] Lowell C. Wager, Director of Safety for Monsanto testified at the compensation hearings April 15, 1954, "We have no knowledge of the products of the composition in that explosion." Exhibit 7, Page 67.

Monsanto's medical experts Raymond Suskind, M.D. and Jerome T. Conn, M.D. testified on November 24 and December 6, 1956, respectively. They likewise focused on the "explosion." Suskind had examined a number of men in 1949, immediately following the 1949 explosion. He studied them again in 1953 and 1956. Suskind testified that in 1949 the men were suffering from systemic poisoning, but that it was not permanent. Exhibit 8, Page 16. In 1949, Suskind determined that recovery would be slow but complete. In 1950, Suskind again examined them and found that their symptoms were subsiding. Exhibit 8, Page 17. Again, his opinion was that the prognosis was excellent and that recovery would be complete. Exhibit 8, Page 19. Suskind again examined the men in 1953, and reported that the only findings consisted of a "few comedomes and cysts." He found no objective evidence of any damage or impairment of the liver, pancreas, heart, nerves or other organs.

None of the groups examined appeared to include C. A. Jeffers.

Following his testimony on the examinations, Suskind moved into the general area of the safety of 2,4,5-T. He testified that he was not able to induce acne in laboratory animals using "2,4,5-T or chemical materials which were observed in the chemical process which were made available to us." Emphasis added. Exhibit 8, Page 27. According to Suskind, 2,4,5-T also failed to produce acne in humans.

Suskind stated that the chloracne was not accompanied by a distrubance of the internal organs. Exhibit 8, Page 44. In 1953, Suskind said he found no evidence of systemic, or internal, intoxication. Exhibit 8, Page 46. Suskind finally expressed the opinion, even though the claim was for exposure as a result of the explosion, that 2,4,5-T is "certainly not toxic or acnegic." Exhibit 8, Page 52. The cross-examination on pages 79-81 make clear

that the cause of the claims was the explosion chemicals which Suskind refused to chemically identify. Exhibit 8, Page 81. Suskind testified that of the men he examined the only thing he found were very vague, minor complaints. Suskind said there was no normal reason to be concerned about a non-existent disease. Exhibit 8, Page 83.

Dr. Conn testified on December 6, 1956. Exhibit 10. He specialized in endocrinology and metabolism. Conn was brought in to refute the central theory of Dr. Halloran that the men including the plaintiff suffered from hyperinsulinism and that the conditions were a result of the exposure. Conn found that none of the men were suffering from hyperinsulinism or hypoglycemia. Exhibit 10, Page 30. Three of the men were mildly diabetic, but that did not indicate any general pattern. Exhibit 10, Page 34.

Nothing in the record supports a conclusion that plaintiff was claiming injuries resulting from repeated exposures to any production process at Nitro. Plaintiff simply thought he was injured as a result of the explosion.

B. The 1950 Workmen's Compensation Claim Is Not Reasonable Notice Of Plaintiff's 1981 Cause Of Action.

Cases that are complex in terms of disease, medical, and causation issues present special statute of limitations problems.

In Holcomb v. Richardson-Merrill, Inc., S.D. W.Va., Civil Action No. 79-2376CH, this court applied a discovery rule, following United States v. Kubrick, 100 S. Ct. 352 (1979), in a product liability case brought under the Federal Tort Claims Act, 28 U.S.C. §12 et seq. The Kubrick rule is that a

claim brought under the Act accrues once a plaintiff has knowledge of both his injury and its cause.

In Holcomb, an infant's parents brought suit against the manufacturer of a diphtheria-pertusis-tetanus vaccine for injuries suffered by their child when vaccinated using defendant's vaccine. Three vaccinations were administered between May 1974 and February 1975, by employees of the United States Government. Plaintiffs filed a claim under the Act on or about October 12, 1978.

In 1975, plaintiff's child was hospitalized at Walter Reed Army Hospital from February 14 to April 14, 1975, for treatment of encephalopathy. Depositions of treating physicians indicated that "it was very likely that she [Kelli] had a reaction to the pertusis component of the DPT vaccination." Another physician testified that the "probable" or the "most probable" diagnosis was post-immunization encephalopathy.

The plaintiffs cited language in medical records that the etiology was unknown. Another physician testified that DPT-induced encephalopathy was the "most likely" diagnosis but that no definite diagnosis was made, and that there was no definite way to diagnose post-pertusis encephalopathy. The U.S.A., also a defendant, continued to deny any causal relationship between the vaccination and the encephalopathy. Even though the parents were apparently told that there was a temporal relationship between the vaccination and the illness and even though a number of suggestions were made by doctors as to the cause the Court noted that this was "a significantly less definitive statement of the cause of the infant's injury when compared to the diagnosis given the plaintiff in Kubrick "that it was highly possible that [plaintiff's] hearing

loss was the result of the neomycin treatment administered at the hospital, quoting Memorandum Order, September 23, 1980, p. 7."

In the instant case the only physician to state an opinion that plaintiff was sick was Dr. Halloran. He developed a theory which related the cause of the illness to hypoglycemia and diabetes.

Dr. Conn testified and thoroughly discredited Dr. Halloran, as the Board noted:

> His conclusions were also reviewed by Dr. Jerome W. Conn, Director of the Department of Endocrinology and Metabolism at the University of Michigan, who found that 'The insulin use theory advanced by Dr. Halloran in the case has no application to the cases and Dr. Halloran's attempt to apply the theory to the cases, even in the light of Dr. Halloran's interpretation of findings, was not consistent or sound.'

Even claimants' counsel abandoned Dr. Halloran's theory of damages to the internal organs. Exhibit 5, Page 3.

Dr. Halloran was discredited not only by Monsanto's experts but the Occupational disease board doctor and other local doctors as well.

Dr. Nestman's report, dated July 25, 1955, stated, "He was all right until the explosion in March, 1949." Nestman's diagnosis was:

1. Tri-chlor-Acne-mild, this is a presumptive diagnosis.
2. Moderately severe psychoneurosis.

Exhibit 11.

Dr. Magee, an opthamologist, examined plaintiff and reported to Dr. Wallace, the plant physician, that his impression was:

1. Conjunctivitis, mild, cause undetermined.
2. Preshyopia.

A note at the bottom of this report, signed by L. C. Weger, and dated July 9, 1957, reads: "Discussed with Mr. Jeffers on 7-9-57. Told him his previous bills would be paid by Monsanto and further expenses would have to be paid by him, since this disease seems non-compensable."

Exhibit 12.

Physical examination records for the following years show the following information, other than notations that physical findings were within normal limits:

2/22/51 - chloracne, conjunctivitis
4/27/55 - chloracne

Exhibit 13.

The doctors found no objective evidence to support plaintiff's complaints. Dr. Halloran, the only doctor who related these complaints to work, was thoroughly discredited. How, when confronted with these almost unanimous medical opinions, could Jeffers do anything but believe that not only were his complaints not caused by the work, but that he wasn't sick at all?

In Holcomb, the defendant denied any relationship between the illness and innoculation. Here, Monsanto had likewise maintained that there was no relation between plaintiff's complaints and work - other than the explosion. Exhibit 8, 100-101, Exhibit 7, 64-69.

The record nowhere shows that Jeffers was ever told of the ailments and conditions he now suffers from. The aches and pains he described in 1950 could not give a layman notice of the extensive, wide-ranging physical disruption he now suffers from. The physicians at the time denied any such possibility. The Board went so far as to say that concern was caused by the delay in the proceedings. Once plaintiff was assured he was alright and the proceedings concluded he would stop complaining. Dr. Warden of the Occupational Disease Board testified:

> . . . it is our feeling that after a final conclusion is reached concerning these men that a great deal of this apprehension and bizzare symptomatology will diminish or disappear.

Exhibit 7, Page 59.

Dr. Prunty continued where Dr. Warden left off:

> . . . those subjective symptoms . . . will also disappear when the claimant is assured that he has no permanent physical disability.

Exhibit 7, Page 60.

The plant physician, Dr. Wallace, never advised Jeffers of the possibility of any illness being caused by 2,4,5-T and dioxin. Exhibit 14. All of this is far less than either the "temporal relationship" in Holcomb or the "highly possible" cause in Kubrick.

1. Workmen's Compensation Claim Is Not Notice Of Wrongful Conduct.

Defendant relies on McDaniel v. Johns-Manville Sales Corp., 542 F.Supp. 716 (N.D. Ill., E.D. 1982) for the proposition that filing a Workmen's

Compensation claim demonstrates an awareness of both injury and causation for statute of limitations purposes. McDaniel was an asbestosis case. It was one of a number of decisions in a complex group of cases consolidated for discovery purposes. Three of the defendant manufacturers of asbestos moved for summary judgment on the basis of the Illinois Statute of Limitations.

In reaching its decision the Court observed "It would be incumbent on plaintiffs to create a fact issue by submitting admissible evidence. On that score they have failed." McDaniel, supra, 719. The Court speculated on several areas of factual dispute, which plaintiffs could have raised, but failed to do so. If plaintiff had submitted evidence one, that no one knew asbestos would cause the plaintiffs' illnesses at the time the claim was filed, two, that had plaintiff investigated he would have been unable to discover the cause, and, three, that the words describing the claim were not on the form when the plaintiff signed it summary judgement would not have been entered.

In contrast, plaintiff here has submitted evidence that he signed the Workmen's Compensation claim form in blank, that he didn't know the cause of his present injuries at the time the claim was filed, and that he would have been unable to determine his present injury and its cause had he investigated further at the time of his Workmen's Compensation claim. See affidavit of Jeffers, Exhibit 1 and affidavit of Carnow, Exhibit 2.

Further, the nature of the McDaniels case differs from this case in several ways. First, the operative language of the claim is "occupational disease claimed as a result of exposure on the job." McDaniel, supra, 718. There the employee knew precisely the product to which he was exposed. Here, the operative language was "chemical rash on face due to unknown products of decomposition." At no time did Monsanto ever speculate as to the nature of the

chemicals. The explosion was portrayed by Monsanto as a one-time event, creating substances unknown before or since.

At an April 15, 1954, compensation hearing on plaintiff's claim, Lowel C. Weger, Safety Director at the time for Monsanto testified:

> A. "We have no knowledge of the products of the composition in that explosion."
>
> Q. "Would you be able to ever speculate as to what the composition of that product might have been?"
>
> A. "Chemically, no."
>
> Q. "You couldn't speculate with any degree of accuracy, is that correct?"
>
> A. "I don't think so, Mr. Hall. It is an unusual and only occurrence that I know of of that kind."
>
> Q. "Then as I understand it, that was an isolated incident which had no precedence before it or which has not occurred subsequent, is that correct?"
>
> A. "That's correct."

Exhibit 7, Pages 67, 68.

Applying McDaniel strictly in this case, plaintiff had reason to know that his chemical rash was caused by the products of the explosion. Such a statement hardly supports the conclusion that he knew that he would have a variety of medical problems over the years as the result of repeated exposure to the contaminant dioxin and other chemicals used in various processes by Monsanto. There simply was no factual relationship between the residue of the explosion and the production chemicals used by Monsanto.

The reasoning in McDaniel is inappropriate because exposure to dioxin causes an entirely different disease complex. It results in diseases which occur in others who have not been exposed to dioxin. Some of its effects are progressive. The individual will, particularly early on in the disease process, be sick and seemingly recover. The effect is increased with multiple exposures. It does not produce any discrete disease of its own, but causes a number of illnesses which commonly occur, and which an unknowledgeable person would not relate to chemical exposure. Carnow affidavit. Exhibit 2. How could plaintiff be expected not only to relate his popping joints, breaking out, skin condition and nervousness to a symptom complex, but also to relate that complex to exposure to a toxic substance at work?

The language of the Court in McDaniel that occupation-related exposure is indicative of wrongful conduct should be cautiously applied. The Court in McDaniel was clearly limiting its holding to the peculiar facts of asbestos exposure with its clear relationship with two discrete diseases, asbestosis and mesothelioma, and its well known and long established hazards. None of those characteristics are found in dioxin exposure.

Finally, in McDaniel, the Court fashioned a duty, on reasonable notice, to inquire further to determine if an actionable wrong was committed." McDaniel, supra, at 718, quoting Nolan v. Johns-Manville Asbestosis, 85 Ill. 2d 161, 171, 52 Ill. Dec. 1, 5, 521 N.E.2d 864, 868 (1981). In West Virginia, however, Judge Christie observed, in deciding a statute of limitations issue, that the fact that a plaintiff makes reasonable efforts to learn the truth should not bar him from later filing suit upon a determination of the true cause of action stating:

> A fortiori plaintiff is not debarred of relief where he made reasonable efforts to learn the truth, but without avail.

Culbertson v. Mo. McCall Coal Company, 275 F.Supp. 662 (S.D. W.Va. 1967).

Here, plaintiff, to no avail, made reasonable inquiry as to the nature of his 1950 injury and its cause. Only one doctor in seven found anything other than acne and no one could identify the cause. It cannot be said as a matter of law that based on plaintiff's 1950 Workmen's Compensation claim a reasonable person would have filed plaintiff's 1981 lawsuit in 1950.

2. Temporary Sickness Or Illness Not Reasonable Notice Of Permanent Injury In Plaintiff's Case.

In Schiele v. Hobart Corporation, 587 P.2d 1010 (Ore. 1978), cited by Monsanto on page 20 of its brief, the plaintiff brought suit in 1978 for injuries suffered as a result of exposure to the fumes from a plastic meat wrapping machine. Plaintiff was first exposed to the fumes when the grocery for which she worked bought a machine which wrapped meat in polyvinyl chloride wrapping film in 1972. The fumes were caused by a hot wire which cut the film. Her health problems began almost immediately and included coughing spells, dizziness, nausea, choking and difficulty catching her breath. The Court found that "almost from the outset, plaintiff associated these problems with the fumes." Schiele, supra, at 1010. In the summer of 1973 she complained to her employer but nothing was done. Her physical condition continued to deteriorate. At the end of her employment in 1974 she was in almost constant pain. She quit her job on March 12, 1974. After testing and x-rays during hospitalization in March, her doctor told her that the illness was possibly due to her exposure.

The defendant moved for summary judgment on the basis of a two year statute of limitations.

In applying a discovery rule and denying summary judgment the Court distinguished between permanent and temporary injury. "We do not believe the Legislature intended that the statute be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury." Schiele, supra, 1014. The Court held:

> [W]e cannot say as a matter of law that a reasonably prudent person would have apprehended more than two years prior to the commencement of plaintiff's action that she was being seriously or permanently injured. Many persons would probably have realized the seriousness of their condition and have gone to a doctor, but not everyone goes to a doctor with the same degree of alacrity. We cannot, therefore, say as a matter of law that anyone who is optimistic about his condition's taking a turn for the better is unreasonable.

Schiele, supra.

The Schiele case teaches an important point. In the absence of special knowledge gained through education or experience, people tend to believe their medical illnesses are temporary. The reasonable person expects, even in the absence of treatment, to get well.

Using Schiele for guidance, we see in this situation that the plaintiff was not advised of any permanent or serious consequences from working for Monsanto. He was reassured that its chemical processes were not responsible for the ailments, which were, in any event, trivial. He sought Workmen's Compensation for what proved to be, if the physicians were accurate,

a temporary condition in 1950. Plaintiff, in fact, testified in 1955 that he was getting better. Exhibit 9, Page 33.

Guidance may be found from the courts that have had to deal with other cases involving diseases that occur not only in an "exposed" population, but also in persons who have not been "exposed." The complexity of the problem is identifying the mechanism of the disease and its causation.

3. The Presence Of Common Symptoms Or Diseases That Occur In Persons Not Exposed Is Not Reasonable Notice.

In Allen v. United States, 527 F.Supp. 476 (1981), the plaintiffs were residents of areas of Nevada and Arizona alleging that they were negligently exposed to radiation by the government in the course of its open air nuclear testing program. They alleged suffering a wide degree of non-specific physical complaints.

As Monsanto notes, the Court in Allen did not say that a plaintiff had to have full knowledge of his illness. The Court also said, as Monsanto neglected to mention, that:

> Determining precisely what knowledge the hundreds of individual plaintiffs were "armed with" regarding the claims asserted herein, however, is not readily susceptible to wholesale a priori determination. The injuries alleged by the complaint herein are largely nonspecific as to cause. The fact that a plaintiff has discovered that he or she has contracted a form of leukemia, for example, does not without more lead a person to the conclusion that the Government has caused the disease through one means or another and that attorneys should be consulted as to the Government's potential liability. This is particularly true if, as plaintiffs have alleged, the Government has deliberately eschewed any cause-in-fact relationship between such injuries and its nuclear testing activities, and has consistently and with great authority made such denials for years. (Emphasis added.)

Allen, supra, at 490.

That is precisely the case here. First, as will be shown later in the "concealment" section of plaintiff's brief, Monsanto has consistently denied any connection between plaintiff's health complaints and the chemicals he was exposed to at work. This is true not only for this plaintiff but the entire Monsanto workforce. Second, plaintiff's complaints were headaches, various aches and pains, heart problems, shortness of breath, etc. Each of these non-specific conditions and complaints occur with regularity in the general population. How was the plaintiff to put these symptoms together, create a symptom complex, and then relate that complex to a particular disease and, finally, connect the disease to a long term repeated workplace exposure to, for example, dioxin? Just as the Allen, supra, plaintiffs knew the government had conducted nuclear tests in the area, how were they to make a connection between exposure to residual radiation and leukemia? Here, how could plaintiff have known, based on the records defendant relies on, in 1950, he was suffering from 2,3,7,8-tetrachlorodibenzo-p-dioxin poisoning? How could he have known that the exposure was continuous and repeated after the 1949 explosion materials were "cleaned-up"? How could he have known or even found out about his 1981 complaints related to carbon disulfide and its synergistic effect with dioxin and Hydrogen Disulfide? This was and is the situation facing not only the plaintiff here but approximately 150 other plaintiffs who have sued Monsanto.

The Court in Allen counselled caution in dealing with a case involving hundreds of plaintiffs alleging serious physical injuries:

> While the overall body of proof that the individual determinations may require may appear unduly burdensome, I remind the parties that the injuries alleged in this case are hardly

> speculative or de minimis; they are indeed grave and have often proved fatal. Where people's lives are involved, extraordinary care should be given to the presentation and evaluation of all of the evidence.

Allen, Supra, at 491.

4. Knowledge Of Illness and Apparent Cause May Not Be Reasonable Notice.

Another series of cases has arisen out of the controversy over diethylstilbisteol (DES), a drug widely used in the 1950's and 1960's to prevent miscarriages and now suspected to cause cancer in the children of the women who used the drug. One such case is Dawson v. Eli Lilly Ind. Co., 543 F.Supp. 1330 (U.S. Dist. Ct. D.C. 1982). The Court there focuses on the concept of knowledge of fault, as opposed to the knowledge of a causal relationship between the drug and the illness. In Dawson, the plaintiff admitted relating the illness suffered to the drug. The Court noted that in drug and medical treatment cases, if there is no opportunity to discover wrongful conduct, the statute of limitations is going to run before the plaintiff ever truly knows of the nature of his claim, since a reasonable person may associate his illness with medical treatment, but not malpractice. The Court made this analysis:

> In general, discovery rules are adopted to avoid the unfairness of interpreting a statute of limitations to accrue when the injury first occurs, if at that time plaintiff does not have enough information to bring suit. This policy is applied to different factual situations as they arise. Where the injury is latent, the claim is held not to accrue until the plaintiff discovers the injury. Where causation of an injury is unknown, the action accrues when both the injury and its cause have been (or should have been) discovered. Where the injury and causation are known, but not that there has been any

> wrongdoing, the action is held to accrue when the plaintiff discovered, or by due diligence should have discovered, the wrongdoing.

Dawson, supra, at 1338.

The problem in Dawson, and the cases it cites, is that a reasonable person may associate an illness with a drug or medical procedure, if for no other reason than their closeness in time, and fail, because of the layman's general ignorance of the specialized knowledge of medicine, to realize that his illness occurs as a result of some wrongdoing. In Dawson, the Court said:

> An ordinary plaintiff no more has the ability to determine the preventability or foreseeability of adverse effects from a drug than he does to determine whether adverse reactions to medical treatment are an inevitable or unforeseeable risk of the procedure as opposed to a result of malpractice. The same reasoning that has been applied to a malpractice case in this jurisdiction, and to numerous cases elsewhere, should be applied here.

Dawson, supra, at 1339.

Such reasoning is applicable to this case. The plaintiff was working in exotic chemicals. The plaintiff was uneducated in chemistry and medicine. He suffered some non-specific complaints, but physicians told him they were unrelated to work. The company told him he need not have concerns over the workplace. Plaintiff made, in 1950, a temporal connection between chloracne and certain non-specific symptoms and an explosion. From that, the defendant asks this Court to charge plaintiff with knowledge of later illnesses, which were unmanifested in 1950. Defendant further contends that the 1950 claim was notice to plaintiff that his illnesses were caused by repeated exposure to the contaminant dioxin and its synergistic effect with other chemicals. Defendant

urges this position in spite of Monsanto's, plaintiff's and Workmen's Compensation's 1950 agreement that the exposure was a one-time exposure to unknown substances in the 1949 explosion. Defendant urges this position despite seven medical opinions that plaintiff would get well, and that he had nothing to worry about. Such a position challenges all reason.

C. Diseases Resulting From Toxic Chemical Exposure Are Beyond The Reasonable Anticipation Of The Injured.

For this proposition the Court is directed to a series of cases involving so-called "meat worker's asthma."[5]

In Williams v. Borden, Inc., 637 F.2d 731 (U.S. Ca. 10th 1980), the plaintiff was a meat packer who brought suit for exposure to polyvinyl chloride. The District Court in Oklahoma granted motion for summary judgment

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[5]Meat worker's asthma was defined in Matter of Compensation of Bracke, 646 P.2d, 1333 (1982):

> Meat wrappers' asthma has only recently been generally recognized as a discrete medical condition. It is a form of reactive airway disease which results from exposure to polyvinyl chloride (PVC) fumes and thallic anydride. The disease acquired its colloquial name because food market meat wrappers are regularly exposed to these substances. Meat is wrapped in PVC film which produces the fumes when cut with a hot wire. Price label adhesives, when heated, emits thallic anhydride. Some meat wrappers become sensitized to the fumes so that they have asthmatic symptoms when subsequently exposed to them. Although the symptoms come and go, depending upon conditions of exposure, the sensitization is permanent; once sensitized, the person is sensitized for life. Sensitization does not get better or worse; it exists or it does not exist.

on defendant's motion in its favor on the statute of limitations issue. The Circuit Court reversed.

In Williams, the plaintiff worked from 1950 until 1972 in various supermarkets. In the spring of 1972 she began to cough. By July 10, 1972, she was so ill she couldn't work. In January, 1973 her condition was diagnosed by a California specialist. At that time, she began to suspect the relationship between her illness and work. She returned to work and mentioned to him in March or April, 1973, that her problems had returned, and he replied, "it could be because of the smoke", supra, 736. In 1975 she began to get bulletins from her Union discussing the health hazards of polyvinyl chloride. The plaintiff moved to Oklahoma City and began seeing another physician. He stated it was very probable that her condition comes with the broad term "meat wrappers' syndrome." In 1975 she filed for social security disability benefits stating the nature of the disability as "damage to my sinuses and bronchial tubes", with "total permanent damage" beginning more than three years before the "filing", supra, 737, 738. The Court held:

> Considering the whole record and the differing inferences reasonably possible with respect to the knowledge of the disease on the part of plaintiff as a reasonably prudent person in 1973, we cannot agree that the record supports a summary judgment dismissing plaintiff's case on limitations grounds. We are persuaded to agree with the conclusion of the Oregon Supreme Court reversing the summary judgment in its similar PVC case tht "we cannot say as a matter of law that a reasonably prudent person would have apprehended more than two years prior to the commencement of plaintiff's action that she was being seriously or permanently injured.

These cases demonstrate the reason summary judgment must be viewed with great caution in occupational disease cases. As stated by the Court in

Bracke, supra, at page 1335, quoting White v. State Ind. Acc. Comm., 362 P.2d 302, (1961):

> Although his weakened condition may manifest ill health its cause may be uncertain and puzzle even the most skillful of physicians. . .

Even though Bracke, supra, dealt with an issue of assignment of liability among multiple defendants the principle recognized there is instructive for this Court's consideration of the statute of limitations issue:

> Uncertainties as to the cause and date of onset of chronic occupational maladies make the assignment of liability to any one employer difficult and somewhat arbitrary.

Bracke, supra 1335, quoting Inkley v. Forest Fiber Products Co., 605 P.2d 1175.

In summary, plaintiff's 1950 Workmen's Compensation Claim did not amount to resaonable notice of plaintiff's 1981 cause of action. The record of the Workmen's Compensation hearing reveals that the plaintiff was told he had nothing wrong with him. His treating physician was discredited. He was given no reason to suspect more serious long-term illnesses. The chemicals of which he complains in 1981 were not at issue in 1950. Carnow Affidavit Exhibit 2. The hearings in the 50's did not constitute notice to the plaintiff of anything, except that he was healthy and he had gotten over any effects of the 1949 explosion and had nothing to worry about. Such a reassurance by the company and the seven physicians in no way put plaintiff on notice of anything. The most that can be said is that in 1950 he related certain physical complaints to the 1949 explosion, which the company said was a one-time occurrence which released products of unknown composition.

Monsanto is asking the Court to hold the plaintiff to a standard of scientific and medical knowledge which itself, with its personnel, resources and experience, denied having in 1950. It is asking to be allowed in 1950 to plead ignorance before the Workmen's Compensation Commission and in 1983, to be allowed to impute superior knowledge, that Monsanto itself claims it didn't have in 1950, to the plaintiff and group of uneducated manual laborers. Such a position is ludicrous.

VI.

THE DEFENDANT BY MISREPRESENTATION, AFFIRMATIVE ACTS AND FAILURE TO DISCLOSE HEALTH AND SAFETY INFORMATION OBSTRUCTED PLAINTIFF'S CLAIM WITHIN THE MEANING OF §55-2-17

The control of information began at the very inception of the 2,4,5-T process at Nitro. The next thirty years showed a course of conduct which was deliberately directed to conceal health and scientific information; to misinform plaintiff and others about the true state of their health and the true risks of their workplace.

A. Obstruction Within Meaning Of Statute.

The obstruction statute, set out earlier, has been interpreted at page 10, by three major cases. In addition to Hundley, supra, and Duttine, supra, the major statutory interpretation of the obstruction statute is found in Culbertson v. Jno. McCall Coal Company, 275 F.Supp. 662, (S.D. W.Va. 1967). In Culbertson, suit was brought by members of a coal mining partnership against its former sales agent, alleging that the agent defrauded it by misrepresenting the amount of coal sold and prices paid for the sold coal. The facts of the case describe a complex series of agreements between the plaintiffs, who were

coal miners and the defendant, a coal broker. During the period 1947-1957, plaintiffs alleged defendant defrauded them.

The statute of limitations issue was raised because suit wasn't filed until 1966. The plaintiffs' only response to the Statute of Limitations defense was that the defendant had obstructed the prosecution of their claim by deliberately misrepresenting the prices he received.

Judge Christie's opinion illustrates two important points which are applicable here. First, the relationship between the parties is very important in determining whether the plaintiff's cause of action has been obstructed:

> In considering whether Franks and Culbertson, in the exercise of reasonable diligence, should have discovered that McCall was misrepresenting to them the prices received by McCall for Whitewood's coal and underpaying Whitewood, the relationship between McCall and Whitewood must be considered, since the law governing such a fiduciary relationship is quite different from the law governing the relationship between parties who are dealing at arms length. (Emphasis added.)

Culbertson, supra, at 682.

> A number of decisions have laid down the rule tha failure to employ the necessary means to discover the fraud may be excused when plaintiff was lulled into a sense of security by reason of a relation of trust and confidence between himself and defendant, rendering it the duty of defendant to disclose the truth, and when it also appears that because of this confidence plaintiff was actually deterred from sooner discovering the fraud, or even suspecting that any fraud had been perpetrated on him; in such a case, it has been held, plaintiff is under no duty to make inquiry until something occurs to excite his suspicions, and this rule applies until the influence of the confidential relation has ceased. A fortiori plaintiff is not debarred of relief where he made reasonable efforts to learn the truth, but without avail. (Emphasis added.)

Second, if the act of concealment is one which naturally conceals itself, proof of such an act makes out a case of obstruction for purposes of the statute. Culbertson, supra, at 684. The Court went on:

> It has been stated many times that, if the basis of the action is actual fraud, mere silence is regarded as a continuation of the original fraud, and as constituting a fraudulent concealment . . . and this would seem to be especially applicable to cases where the parties bear to each other a trust or confidential relation.

Culbertson, supra, at 684 citing Cameron v. Cameron, 111 W.Va. 375, 380, 381 162 S.E. 173, 175.

The relationship between the parties is of material importance in determining what conduct constitutes concealment and what facts constitute notice of a cause of action.

1. A "Relationship of Trust" Existed Between Plaintiff And Defendant.

A fundamental relationship of master and servant existed between the plaintiff and the defendant. Of that relationship the West Virginia Supreme Court has held:

> Where there are latent defects or hazards, incident to an occupation, of which the master knows or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard.

Giebell v. Collins, 46 S.E., 569, 571 (1904).

In West Virginia, a servant may assume that his employer provides him with a reasonably safe working place. Spaulding v. ADS-Anker Data Systems, Midwest, Inc., 498 F.2d 517 (1974). It is the duty of the master to advise his servant of the state of his working place. The nature of the relationship is important here. It is obviously a relationship of trust.

Here, the relationship between plaintiff and Monsanto went further. Recognizing the hazardous nature of chemical plant employment Monsanto provided a "plant doctor." Following the 1949 autoclave explosion, Monsanto embarked on an undertaking to ostensibly treat and care for the plaintiff and others. Other doctors were called in. Dr. Suskind was retained to test and treat certain of the exposed workers. An agreement was reached with Workmen's Compensation to hold in abeyance the claims until a joint effort between the Union and Monsanto could discover the cause and true nature of the health complaints of plaintiff and others following the 1949 incident.

Monsanto had several medical programs which would support the plaintiff's understanding that it was monitoring his health. Monsanto provided a plant physician and nurses, a dispensary, an Industrial Hygiene Center, it monitored the men who had been exposed to P.A.B. for bladder cancer, it had health surveys, annual physicals, developed a computerized system to show correlations between employee illnesses and work histories, and it undertook examinations of employees by outside specialists to find any work related illnesses.

Because Monsanto, at least by implication, undertook to look after and treat plaintiff's work related health problems and risks, plaintiff had a right to rely on and trust that Monsanto would be open and candid about any information or knowledge concerning plaintiff's health or present or past

exposure risks. He had a right to trust that Monsanto would share with him new information regarding toxicity of present or past chemicals as it was learned. Monsanto affirmatively sought plaintiff out and assured him that he was under no threat of permanent or serious injury or disease.

This Court, citing Culbertson, supra, in Duttine v. Savas, 455 F.Supp. 153, 161 (S.D. W.Va. 1978) stated:

> However, Culbertson illustrates the appropriateness of an inquiry under §55-2-17 into the relationship of the parties and the attendant facts. (citations omitted.)

Based on the inherent nature of the employee/employer relationship in a dangerous industry such as the chemical industry, the relationship between plaintiff and defendant was surely one of trust. Monsanto was bound to act in good faith. Plaintiff had placed his health in trust and Monsanto had the duty of protecting it.

The following acts of fraud, concealment and bad faith on the part of Monsanto towards the plaintiff constitute a total breach of trust and constitute concealment within the meaning of §55-2-17. In such a case, as here, the Court "may exercise its equitable jurisdiction and apply the doctrine of estoppel . . . to preclude a defendant from utilizing the statute of limitations as a bar . . . ." Duttine, supra, at 161. As the facts presented below will demonstrate, Monsanto's bad faith conduct and obstruction of the discovery of plaintiff's cause of action is such that the defendant is now estopped from asserting the defense of statute of limitations on both statutory and equitable grounds.

2. Defendant's Bad Faith Misrepresentations To Plaintiff And Others Estopps It From Asserting The Statute Of Limitations And Constitutes "Obstruction" Within The Meaning Of W. Va. Code §55-2-17.

As the following evidence demonstrates, Monsanto abused and took advantage of its position with the plaintiff and others. Monsanto knew that it occupied a position of trust with its workers. It knew that the Nitro workforce was largely uneducated. There were no "experts" plaintiff and the other workers could turn to in Nitro, West Virginia in the 1950's or 60's. The only source of information plaintiff had about the Nitro plant was Monsanto itself. Monsanto knew this. Out of plaintiff's situation of isolation and necessary reliance on the "plant", Monsanto fashioned an effective program of misinformation and non-disclosure cast in an atmosphere of psuedo-paternalistic concern for the plaintiffs' welfare. The plaintiff and others were led to believe that Monsanto was doing what was best.

The following documents raise at the very least an inference of an issue of material fact as to whether Monsanto's bad faith actions are sufficient to prevent Monsanto from now asserting the Statute of Limitations. In light of the fundamental principle of equity and this Court's holding in Duttine, supra, the defendant is estopped from asserting the Statute of Limitations as a defense.

B. Evidence Of Monsanto's Plan Of Concealement And Bad Faith Constituting OBSTRUCTION Within The Meaning Of The Statute.

1. The beginning cover-up 1949-1953 - Monsanto's bad faith dealing with the Health Department and Plaintiff.

Following the 1949 explosion of the autoclave in the 2,4,5-T process described in the statement of facts, Monsanto brought in several doctors to

examine the men. The first was Louis Schwartz. He was a physician retired from the public health service who had a practice in industrial dermatology. Schwartz made a report to G. O. Nelson, the Monsanto Medical Officer at Nitro. See Exhibit 15. The report summarized the explosion and his findings of several of the men involved. In his comments, Schwartz advised that chloracne was the diagnosis for many of the men. Chloracne is a medical term of art for a condition resulting from exposure to certain chlorinated organic chemicals. The tarry residue from the explosion, Schwartz reported, was "probably" the cause of the chloracne.[6] Schwartz advised that the residue had not been thoroughly cleaned out of the building. He recommended that the building be decontaminated and that liver function tests be performed on the most seriously ill. A copy of this letter was sent to Emmet Kelley, the Medical Director of Monsanto in St. Louis.

On August 16, 1949, Dr. Schwartz again wrote to Dr. Nelson. Exhibit 16. The letter reflects a dramatic shift of his thinking. On Page 7 he writes:

> It will be noted that many of the workers complain of pain in the legs. It was at first thought that these were of psychogenic origin in some, and malingary in others, but after listening to all the symptoms I am forced to believe that it is part of the symptom complex of the same industrial exposure which caused the chloracne.

The plaintiff never saw this letter. Jeffers affidavit, Exhibit 1.

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[6] Monsanto would learn in 1953 that the cause of the acne condition was a substance normally produced during the 2,4,5-T process and in 1957 would learn that the definitive cause was "dioxin."

Dr. Schwartz again made detailed recommendations, including decontamination, providing clean changes of clothes, and isolating affected workers from the area.

A basic rule of occupational medicine is that if a worker has an adverse reaction to a chemical, he should be immediately removed from possible re-exposure. Carnow affidavit, Exhibit 2. In his job as pipefitter, Jeffers was permitted to continue to work in and around Building 41. This was not to be the last time that Monsanto was advised to remove affected men from the trichlorophenol process.

This was the last Dr. Schwartz was heard from. On December 5, 1949, Dr. Suskind made his first appearance and began a relationship with Monsanto that continues in 1983.

At the same time, Monsanto was also dealing with its union and the Health Department and Workmen's Compensation regarding this matter. Notice E-119, signed by the Plant Manager, mentioned that a ruling was being sought by Monsanto from the Compensation Commission to establish whether time lost due to the dermatitis conditions was compensable. The notice does not contain any other information bout the incident or the dermatitis. Monsanto did not identify it as chloracne. It related the "dermatitis" to the March 8, 1949, autoclave discharge. Exhibit 17.

In July, the Health Department became involved. On July 8, 1949, several employees and a representative of the U.M.W. met with an Industrial Hygienist at the Department of Health, Paul D. Haley. The employees related the story of the explosion and their examination by Dr. Schwartz. The employees wondered whether they were being exposed. They further complained

that Monsanto forced them back into the contaminated area before any decontamination efforts. They asked Haley to investigate the situation. Exhibit 18.

On July 11, 1949, Haley met with Durland, the Plant Manager, and Ed Volz, the Safety Director. They explained the "explosion." Durland said they sent samples of the material to their own laboratory and were unable to identify it. Haley suggested that the Public Health Service be asked to investigate and Durland agreed. Haley noted:

> He, however, expressed the opinion that they had decontaminated the area and that the cases of chloracne resulted from the initial exposure during the week preceding the onset of the chloracne.

Durland also advised him that no liver damage had been found, and that two cases of men who also had aches and pains were purely coincidental. Exhibit 18.

At the time Durland made his statements, Dr. Schwartz had already advised Monsanto that the building had not been decontaminated. He further noted that if exposures continued, liver tests should be performed, and that it was not coincidental that the men had other complaints.

On August 29, 1949, Haley received a copy of the Public Health Service report. It recommended, as did Schwartz, that the area be decontaminated, workers furnished with clean clothes, and severe cases of exposure be removed from the area. Exhibit 20.

The literature at that time included a study which showed that 2,4,5-T was toxic to rats, mice, guinea pigs and chicks. Exhibit 21. However, this was never communicated to the plaintiff. Jeffers affidavit. Exhibit 2.

Beginning in September there was a series of letters over the taking of samples. This was after Schwartz's second letter to Monsanto, which contained his suspicion that the men were suffering from a symptom complex, and that the building was still contaminating workers.

On September 21, 1949, Haley wrote Durland, saying that he had advised that testing on laboratory animals was possible. Exhibit 22.

Monsanto replied saying the information would be passed along to Emmet Kelley and asking Haley to recommend a laboratory. Exhibit 23. Haley recommended Mellon Institute. Exhibit 24.

On October 7, 1949, Kelley responded as follows:

> I know you realize that we have done everything we can to try to get at the bottom of this affair, but inasmuch as we cannot reproduce the occurrence chemically, I am of the opinion that while the expenditure of money for further laboratory tests on the part of Monsanto might be of importance scientifically, it would not give us any practical return from the viewpoint of treating these injured employees or forestalling such an event in the future.

Exhibit 25.

Haley sent a lengthy letter detailing his involvement and the proposed use of the samples. Exhibit 26.

On October 21, 1949, Kelley reversed himself and approved the testing. Exhibit 27. What happened to change his mind? What did he expect to have happen? At this time Monsanto had asked the Kettering Institute and Dr. Suskind to investigate the problem. Dr. Schwartz had suggested that the poisoning was systemic and the men should not be allowed to work in the area.

A reasonable inference from the correspondence is that Kelley thought Haley was proposing to examine the affected men and conduct new laboratory tests. Armed with the knowledge that such tests, based on Schwartz's suspicions, would reveal more serious problems than chloracne and result in the closing of the unit, if Schwartz's recommendations were followed, Kelley would certainly be leery of any further testing. His reaction was to say that such an investigation was not necessary. It was only after he realized that the requested tests involved only the testing of samples, and not employees, and secure in the knowledge that Monsanto had been unable to identify the compound, did he approve the testing. After the reports and recommendations of Schwartz, Haley and Campbell, it is not unreasonable that Monsanto did not want any other outsiders involved.

On December 5, 1949, Drs. Ashe and Suskind made their first report. Exhibit 28. At that time, seventy-seven people had symptoms as a result of the March 8, 1949, explosion. The report summarized their findings on several employees. They found an "intoxication" characterized by "acne form lesion, hepatitis, disturbed lipid metabolism, and probably mild central nervous system involvement." Ashe and Suskind likewise found systemic poisoning, and further recommended that the men not be re-exposed to phenols, chlorinated and nitrated aromatic compounds and other primary irritants. None of these findings were ever communicated to the plaintiff. Jeffers affidavit, Exhibit 1.

On December 19, 1949, Dr. Nelson, the plant physician, wrote to Dr. Ashe, challenging his findings and recommendations. Exhibit 29. Nelson suggested that part of the problem was the diet of the men and not the effects of any exposure. Ashe responded that the levels of fat were beyond the range which could have been produced by the home diet. Exhibit 30.

1949 ended with no definitive resolution of the cause and proper treatment for the victims of the explosion. A time line from Monsanto's files is attached as Exhibit 31. It notes that, in 1949, 150 to 280 workers in four plants developed chloracne. It also includes the comment, "Many other reports from 1936-49 cited." Also, in 1950, Dow Chemical began an acute testing program. Monsanto's own documents indicate that the standard in the industry was a realization that there was a correlation between 2,4,5-T and health problems in workers. Dow initiated a study. The question is, why didn't Monsanto? As of 1949, according to the Public Health Service report, 70 men had chloracne. A Monsanto report prepared in 1978 indicated that at least 114 men had dermatitis at the plant. Exhibit 32. The unanswered question is why didn't Monsanto act on the information at its disposal, as did Dow? In any event, this information was never communicated to the plaintiff. In fact, Workmen's Compensation was lead to believe as late as 1957 that chloracne was caused by a one-time explosion at Nitro.

In March of 1950, Monsanto sent out a notice that a daily change of coveralls would no longer be distributed to individuals no longer being treated for dermatitis. Exhibit 33. The implication was that further hygienic practices were not necessary to protect the employees from the product of the explosion. At the same time Monsanto had reason to believe it was the 2,4,5-T process itself that was causing the problem.

On March 7, 1950, the results of the testing by Mellon were sent to Monsanto. Its finding was that the sample of the explosion material was "an active producer of the rabbit ear response now associated with human chloracne production." Exhibit 34. The Mellon study was never communicated to plaintiff. Jeffers Affidavit, Exhibit 1.

On June 16, 1950, Dr. Suskind made another report. He found marked improvement. He said the men had been affected by a disturbance of the lipid metabolism that had affected several other systems. He made no findings, however, that contraindicated returning to their former duties. Exhibit 35.

In March of 1952, a union doctor wrote N. H. Dyer, head of the Department of Health, about having the Public Health Service do a survey of the Nitro plant. Dyer's reply was:

> Following that our own Department made exhaustive studies and as a result of all concerned working on the problem, the exposure was brought under control. This I believe is borne out by the fact that no new cases have developed from this particular operation for quite some time.

Exhibit 36.

Relying on Monsanto's representations, the Health Department was under the impression that there were no new cases of chloracne and the situation was under control. The fact is new cases were developing.

In December of 1952, the Health Department received a report from the Public Health Service, which was forwarded to J. Crease, Plant Manager at Nitro. The study was directed toward the chloronated intermediate process used in the manufacture of 2,4,5-T. According to this study, there were 80 cases of dermatitis, although only 12 men worked in the process. The report does not mention the 1949 explosion. The Public Health Service focused on what they believed to be a production problem. The large number of exposures was caused by maintenance and other workers rotating through the plant. The report made recommendations including isolation of other processes, keeping of detailed health records, improving operations, improved personal hygiene, and clinical examinations. Exhibit 37.

By 1952, two groups has been identified. One group had explosion-related chloracne cases. The second group described by the Public Health survey, was composed of those who rotated through the on-going 2,4,5-T process. Monsanto never advised Workmen's Compensation of that fact. It had a problem with acne in 2,4,5-T. To the contrary, it was steadfastly denied. Monsanto also knew that its men had a problem not only with chloracne, but with other symptoms including aches and pains in the joints, loss of libido, peripheral neuropathy, malaise, weakness and weight loss. The Public Health Service had ruled out the possibility that the men were malingerers but instead suspected that these were all part of the same symptom complex. This information also was never given to Workmen's Compensation or the plaintiff.

The real cover-up began in 1953. That was a crucial year. Prior to 1953, while certain problems were known to exist, it had not been necessary for Monsanto to do anything about them. The Workmen's Compensation claims, although pending, had not been acted upon. Dr. Suskind had given good prognosis and the Public Health Service and Dr. Schwartz had been removed from the case.

The opening volley was fired by Ed Volz, the Safety Director for Monsanto, on January 6, 1953. Exhibit 38. He rejected the recommendations of the Public Health Service in a letter directed to Halley at the Health Department. His first response was to the recommendation that the 2,4,5-T process should be isolated. He said the chloracne problem was well recognized and that employees would not "unduly expose themselves to known hazards."

The Public Health Service report expressed concern that, while only twelve people were employed in the process, 80 had chloracne. It had made several recommendations to correct the problem. Volz's response on behalf of Monsanto generally rejected the recommendations:

Public Health Service Recommendation:	Workers associated in any way way with the manufacture of the chlorinated hydrocarbon herbicide intermediate should have a detailed work history record. If possible, the worker should be maintained at one specific job. Only in this way will it be possible to obtain a clear idea as to exactly which operations are hazardous and to what degree the hazard exists. This will also provide a means of evaluating the effectiveness of any corrective measures used in the operation.
Monsanto Response:	In most chemical operations it is not economically practicable to keep personnel activities restricted to specific jobs. The 2,4,5-T process is no exception. We believe that the toxicity studies which have been completed and those currently being performed for us by the Mellon Institute present sufficient exposure data to determine process exposure points.

Exhibit 38.

In response to the report's recommendation that workers be maintained at one specific job, to isolate causes of illnesses, Monsanto said it was not economically feasible to so restrict activities. Volz said instead Mellon Institute studies were being conducted to isolate "exposure points."

Monsanto never presented any testimony regarding the Mellon study at the compensation hearings. The only Mellon report ever made available to plaintiff was a 1950 report which was turned over in 1983. If the study now in

plaintiff's possession, Exhibit 34, was the only study performed by Mellon Institute, then Volz made a material misrepresentation to the Health Department. He did so for the purpose of reassuring the Health Department that Monsanto had control of the situation. The impression was one of seeking expert help, when, in fact, Monsanto was doing nothing of the kind.

Volz said all workers were given a complete change of clothing. This is a direct contradiction to Monsanto Notice E-149, Exhibit 33, which announced that coverall changes were provided only for employees with active cases of dermatitis.

Public Health Service (P.H.S.)

Recommendation:	1.	"All workers involved in the operation should be instructed as to the hazardous nature of their work."
Monsanto Response:		This has been done not only in the 2,4,5-T department but on all jobs throughout the plant as well.

Exhibit 38.

The plaintiff was never advised of the 2,4,5-T hazards. Affidavit, Jeffers. Exhibit 1.

P.H.S. Recommendation:	4.	"Workers developing any evidence of toxicity should be immediately removed from further exposure."
Monsanto Response:		This is not consistent with the policy of attempting to limit the number of persons potentially exposed to a hazard of an insidious nature.
P.H.S. Recommendation:	5.	"All workers exposed to the operation should have regular routine histories and physical examinations at one month intervals."

Monsanto Response:	This recommendation will be considered.
P.H.S. Recommendation:	"On finding any evidence of toxicity in the workers, special examinations in the fields of internal medicine, neurology, and dermatology may be warranted. Indicated laboratory studies should be performed. Records of all examinations made should be detailed."
Monsanto Response:	This recommendation will be considered. However, clinical studies thus far have been of little value.

Exhibit 38, Page 4.

In short, Monsanto's response was that when one gets sick in 2,4,5-T, one would be made to continue to work in it. This corporate policy was contrary to the advice of Schwartz, Exhibit 16, Page 8. Suskind Exhibit 28, Page 16 and the Public Health Service, Exhibit 37, Page 6. Monsanto's policy was to continue to expose the plaintiff and others to chemicals which made them sick, after they were sick.

The true concern of Monsanto was with the part of the report that recommended:

P.H.S. Recommendation:	If corrective measures as outlined by the management do not stop the toxic manifestations resulting from the process, it is suggested that a comprehensive chemical, engineering, clinical, and laboratory investigation be made of the operation.

Exhibit 38, Page 4.

The implication of the recommendation was that the plant would have to be closed and possibly completely redesigned and rebuilt. In responding, Monsanto made a startling admission:

> Monsanto Response: Should the problem not be solved by Monsanto under the program currently underway, it appears doubtful that any outside agency would be better equipped to offer anything of a constructive nature. Enough work has already been done to establish which materials in the present process are hazardous. However, our scientists have discovered that it is not as simple to control the toxic agents chemically as one might think.

Exhibit 38, Page 5.

Monsanto knew in 1953 the source of the chloracne. It knew how sick the men were. The technology was available in 1953 to control the exposure to sodium trichlorophenol. The implication is clear. To act in good faith would have required Monsanto to make expenditures of money in the redesigning of the plant and in providing employees with rubber gloves, impervious clothing and other safety devices. Monsanto was not willing to undertake the expense. Instead, Monsanto continued to expose the men to chemicals it knew to have caused health problems of a serious nature. At no time did Monsanto tell this to the plaintiff. Jeffers affidavit, Exhibit 1. Monsanto's actions are convincing evidence of a plan to conceal the true risks of the entire operation of the 2,4,5-T plant from the plaintiff.

The toxicity of 2,4,5-T received further attention in 1953. An article published in Industrial Hygiene and Occupational Medicine, attached hereto as Exhibit 39, described the toxicity of 2,4,5-T in dogs. Amounts of 100 M.G. per K.G. in the dogs produced death.

A document found in the Health Department archive, is attached hereto as Exhibit 40. It is reasonable to infer that the document was written by Monsanto. It contains structural formulas, relates particular groups of chemicals to specific buildings and is based on detailed knowledge of the Nitro plant. It is dated "September, 1953." On page 8, Building 34 D & F is identified as containing 2,4,5-T processes. It reads:

> Building 34 D & F.
>
> 2,4,5-T
>
> Structural Formula
>
> Dermatitis produced here --
>
> 20 mg/kg lethal in dogs. Will cause heart and liver damage. Check ventilation on bagging operation, also conc. of dust mg/M_3

Exhibit 40, Page 8.

Monsanto never told plaintiff that 2,4,5-T would cause heart and liver damage. The plaintiff never saw this document. Affidavit, C. A. Jeffers. Exhibit 1.

1953 was remarkable for another reason. The cover-up shifted. It moved from simply failing to advise Monsanto employees of hazards to affirmative steps to conceal the state of Monsanto's knowledge.

2. The Cover-up Extends To Workmen's Compensation 1953-1957.

The Workmen's Compensation claims filed as a result of the 1949 explosion were heating up. Something had to be done. On June 11, 1953, there was a meeting of the Compensation Commission, the Occupational Disease Board,

the Union and Monsanto who appeared by Cresce, Dr. Wallace, Volz and its lawyers Paul Bowles and A. G. Stone. Exhibits 41, 42. An agreement was reached whereby a panel of three doctors would be chosen to examine and investigate the cases in order to get to the bottom of the problem. While appearing to agree, the documents show that Monsanto never intended to fully cooperate or abide by the agreement. Monsanto began a carefully orchestrated plan, monitored by its lawyers Bowles and Stone, to conceal material information from Compensation, the Union and the plaintiff. As the following documents show, Monsanto never intended for Workmen's Compensation or the plaintiff to find out the whole story.

The Court will recall that Monsanto's position throughout the Workmen's Compensation episode 1950-1957 was that the plaintiff and others had suffered from exposure to an unknown substance that appeared for the first and last time during the 1949 explosion and subsequent clean-up. Dr. Suskind testified that 2,4,5-T would not cause chloracne. The other symptoms were conclusively "proven" by Monsanto as not being related to any product in the workplace.

Consider the following information withheld from Workmen's Compensation and the plaintiff by Monsanto during the 1950-1957 period when the claims were pending.

a. Monsanto Knew in 1949 Of Other Workers Who Had Developed Chloracne And Other Health Problems Associated With A 2,4,5-T Process.

At the time Monsanto entered the agreement with Compensation and the Union it knew that there was nothing extraordinary about the health conditions

the plaintiff and others were complaining about. Look at Exhibit 31 where Monsanto notes other occurrences at four other plants where 2,4,5-T or at least a trichlorophenol process caused not only chloracne but a variety of health complaints. Monsanto, however, adopted an attitude of ignorance for the benefit of Workmen's Compensation, agreeing to join forces with the Union and Compensation to attempt to determine the true cause and effect of the 1949 Nitro "incident."

b. Toxicity And Health Information Pertaining To 2,4,5-T And "Dioxin" Withheld From Workmen's Compensation.

During the Compensation episode, Monsanto was engaged in two levels of activity regarding the "Nitro problem." On the surface it was presenting its "sham" opinions and evidence to Compensation as a show of good faith under the agreement. Monsanto even went so far, as will be shown below, as to meet privately with the Occupational Disease Board in an effort to influence them. All the while, below the surface, Monsanto was privately adding to its knowledge about the true cause and effect of exposure to 2,4,5-T. The following information was never shared with the plaintiff and the record does not disclose it was ever given to Workmen's Compensation.

Monsanto's time line, Exhibit 31, shows that in 1954 Dow published acute toxicity information for 2,4,5-T, showing it was fatal to rats, mice, guinea pigs, chicks, and a steer. There is no indication that this Board ever received this information, or that the Board had access to or knew of it.

In 1954, the knowledge that 2,4,5-T was toxic to laboratory animals continued to grow. Monsanto recognized a problem in its 2,4,5-T process.

Monsanto, keeping the focus on the explosion, testified, by C. C. Weger, that it did not know and could not speculate as to the compositon of the explosion materials. Monsanto did not volunteer that it knew it had a problem with the 2,4,5-T process producing chloracne. Exhibit 7.

On November 3, 1955, L. C. Weger wrote a letter describing tests being conducted by Dr. Suskind, in which recrystalized 2,4,5-T was tested on animals and human subjects, using a control substance known as Hallowax 1014, a known acne producer. Exhibit 43. A letter describing the same tests was written by Emet Kelley. Exhibit 44.

Suskind found that based on his tests "we can say that 2,4,5-T is by no means as active acnegenically as Hallowax 1014." Exhibit 43, Page 1. Laboratory animals exposed to 2,4,5-T showed no skin changes. However, "an autopsy of the animals showed pneumonia, some showed heart damage, all but two had changes in liver structure up to neurosis, and all but one showed change in kidney structure." Exhibit 43, Page 2.

Another test of 2,4,5-T on human subjects was reported not to cause chloracne, but the humans "almost all developed a pneumonitis. There was some liver damage." Exhibit 44. When Dr. Suskind testified, he said 2,4,5-T did not cause chloracne. Exhibit 8. 52, 100-101. He neglected to add that it or something in it caused pneumonia and liver trouble. None of this information was shared with the Workmen's Compensation Commission or the plaintiff.

A November, 1955, Monsanto memo admits certain reports were kept from Compensation. This memo reports that on November 18, L. C. Weger and Suskind, while plaintiff's case was pending, met privately with the Occupational Disease

Board. There is no indication that any representative of the claimants, or their lawyers, or the Union was present. See Exhibit 45.

The meeting began with Dr. Suskind discrediting a report of 2,4,5-T induced chloracne in rabbit ears, which was sent to Paul Halley of the Public Health Service, in 1950. It is remarkable that one of the authors of the report is R. E. Kelly, M.D., the Medical Director of Monsanto. One is inclined to ask, what in the world was going on? Monsanto was meeting in private with the Occupational Disease Board, in part to discredit a report prepared by Monsanto's own Medical Director and to discuss pending cases without the other side present.

The meeting continued with a discussion of chloracne, its causes, its relationship to emotional factors and 2,4,5-T. At that point, it was clear that one of the Board members was suspicious. Monsanto's memo of the meeting observes:

> Dr. Brick inquired whether the material which the board saw being packaged during their plant tour was 2,4,5-T and was told that it was. At this point he insinuated that Monsanto could be more careful in handling the 2,4,5-T and spoke of seeing continuous automatic packaging operations at the duPont plant. Dr. Brick also inferred that much of the information concerning the chlor-acne problem had at one time or another been held secret from the board. His impressions on these two matters did not appear to be reflected in the other board members.

Exhibit 45, Page 2.

According to this memo, Suskind advised the Board "there was absolutely no reaction from 2,4,5-T." Dr. Suskind did not mention its effect on animals or humans, in causing liver damage and pneumonia.

The memo described the effects of the meeting:

> The meeting seemed to be appreciated by the commissioner's representatives, and it is believed that a favorable impression was created.

Exhibit 45, Page 3.

The author of the memo recommended that a comprehensive story of the explosion be prepared. He also suggested that reports which had not been given to the Board earlier be given to it, with one condition:

> Such information can be given to them with the stipulation that it is for their evaluation only and is not to become part of the public records.

Exhibit 45, Page 3.

Presumably "for their evaulation only" means it would not be given to the Union, the employees or their lawyers.

The memo continues with the report of a meeting following the conference with Monsanto lawyers, A. G. Stone and Paul Bowles.

> We discussed the findings of Dr. R. H. Nestmann concerning psychoneurosis in most of the employees he has examined for us. Mr. Stone is apprehensive as to the implications that may be drawn if this is submitted as evidence. The attorneys and Dr. Suskind all read a paper which I obtained from Dr. Nestmann concerning some of his evaluations on other patients using the Cornell Medical Index, and Dr. Suskind suggested that he could have an opinion on the value of this type of testing from Dr. D. Hoss a psychiatrist at the Kettering Laboratory. I indicated to him that we would be interested in such opinion.
>
> The future work which has been outlined for consideration at the Kettering Laboratory was reviewed with the attorneys, and Mr. Stone made

> the point that while distilling the phenol may eliminate chlor-acne, it may not change the incidence of "Halloran's Disease."

Exhibit 45, Page 3.

Mr. Stone was worried about two things. One, the Plaintiffs complaints of "nerves" would be related to work -- psyconeurosis in 200 workers -- and two, that Compensation would find out that Monsanto knew the problem was not in the explosion materials but in the trichlorphenol process.

The final paragraph reveals Dr. Suskind and Monsanto knew of the association of chloracne with the production of 2,4,5-T. It was not limited to the explosion as the board and plaintiff had been lead to believe. The focus on the explosion was a smoke screen to cover the true problem, well known to Monsanto and its experts, which was that the incidence of chloracne and other health problems were associated with the production of 2,4,5-T and the product itself rather than just the explosion.

Dr. Suskind deliberately failed to advise the board of the adverse effects of 2,4,5-T. Monsanto's lawyers Bowles and Stone approved. Suskind deliberately failed to advise the board that 2,4,5-T was associated with chloracne. In fact, he said it would not cause chloracne and failed to disclose it was associated with liver disease, heart disease and pneumonia.

In its brief, Monsanto did not describe Dr. Suskind's testimony at the Compensation hearings, nor did it discuss this memo. The reason is clear. Monsanto met in private with the board, discussed whether to give it pertinent information, and Dr. Suskind deliberately misled the board about 2,4,5-T. Monsanto also knew that the complaints of the plaintiff were real and in all likelihood related to 2,4,5-T.

If the Volz document established the deliberate intent of Monsanto to expose its employees to known hazards, this memo establishes Monsanto's intention to conceal its knowledge, co-opt the Commission, and shield the truth of the hazards of the 2,4,5-T process from the workers and the public as early as 1955.

A June 22, 1956, meeting at the Kettering Institute further establishes the state of Monsanto's knowledge. Exhibit 46. There, Suskind reports on a test with a component of 2,4,5-T:

> It was not possible to use higher concentrations of Sodium TCP because of the extreme irritation of the skin so that while the Hallowax was applied as a 20% concentration the maximum concentration of any of the TCP samples was 7% and in some instances was held as low as 2.5% or 2.45% and 0.78% trichlorophenol.

Exhibit 46, Page 1.

Hallowax was the control, a sbustance known to produce chloracne. The sodium trichlorophenol (TCP) was an intermediate building block of 2,4,5-T. At the most, 1/3 as much TCP was needed as Hallowax to produce chloracne, and low 1/20th as much. This was never communicated to Workmen's Compensation.

The report concluded:

> Even in view of the differences in concentration, Dr. Suskind found our normal Sodium Trichlorophenate producing definite chlor-acne.

Exhibit 46, Page 1.

The second part of the report concerns Monsanto's knowledge of similar problems in Germany:

> Mr. Elmer Wheeler discussed his recent visit with BASF in Germany. He stated that essentially all the pertinent information is contained in his

> memorandum and emphasized that the people at BASF were very anxious to exchange information with Monsanto and Kettering on all phases of the problem. He was given the impression at the time of his visit that they were prepared to exchange all information including process data, but that it was not possible at the meeting since he did not have Monsanto process information with him. It appeared to Mr. Wheeler that the symptoms and complaints suffered by the workers in the German plant paralleled the Monsanto experience, but it was his opinion that the German cases were probably more severe. Dr. Oettel of BASF seemed particularly interested that the Monsanto cases had also presented objective complaints suggesting peripheral neuritis.

Exhibit 46, Page 2.

In 1956, Monsanto knew of the BASF incident, the similarity of the cases and the measures taken by BASF to dispose of the contaminated equipment. This parallel incident was never brought to the attention of the board, the workers or their counsel.

A further topic of the meeting was the possibility of Dr. Suskind testifying at the Compensation hearings:

> Mr. Paul Bowles discussed certain aspects of the chlor-acne claims now in litigation and reviewed for Dr. Suskind's benefit some of the medical aspects which have been alleged by the physician for the claimants. The possibility of Dr. Suskind appearing as an expert witness was discussed and it was apparent that Dr. Suskind feels that there was minimal evidence of liver disorders and in one case, evidence of nerve damage in people examined in 1949. He stated that there was no sign of such disorders in any of 35 people which the Kettering Group examined at Nitro in 1953. Dr. Suskind strongly urged that consideration be given to publication of all of the experimental results obtained to date so that it could be used most effectively in defending Monsanto's position. It was pointed out that none of the group present was in a position to give approval for publication but that the matter would be considered.

When Suskind testified five months later in November, no mention was made of the laboratory tests showing organic damage to test animals and subjects, the problem of trichlorophenol, and the BASF incident. Approval for publication was apparently not forthcoming.

3. Monsanto Discovers "Dioxin" In 2,4,5-T As The Cause Of Chloracne - The Cover-up Continues 1957-1963.

In 1957 the Compensation episode finally ends with an order denying the claim. Exhibit 5. Monsanto's time line shows that chloracne was definitively identified as caused by 2,3,7,8-tetrachlorodibenzo-p-dioxin in 1957. Exhibit 31. There is also a report that chloracne among production workers is caused by dioxin impurities in the 2,4,5-T process. Monsanto never told the plaintiff or Compensation. Exhibit 31.

Monsanto's own files include drafts of a document which describes the toxicity of 2,4,5-T and various commercial variations of 2,4,5-T. Exhibits 47 A, 47 B, 47 C and 47 D. 2,4,5-T was produced in a variety of combinations and esters, depending on its use and method of application. The symptoms and findings for all three are the same:

> Symptoms and Findings: Central nervous depression, weakness, anorexia, diarrhea, myotonia, coma, possible sudden death due to ventricular fibrillation. The concentrate may cause local irritation. Mild liver and kidney damage have been described.

The reference is given as:

Reference: National Clearinghouse for Poison Centers; Boston file GGH, 1957 and Monsanto Company file.

Exhibits 47 B, C, and D.

In 1957, Monsanto knew that 2,3,7,8-TCDD was a by-product contaminant of the 2,4,5-T production process, that it caused chloracne, that workers with chloracne have a number of other physical ailments including heart disease, peripheral neuropathy, and liver disease; that 2,4,5-T caused a wide variety of physical ailments in laboratory animals and human subjects; and that the Nitro plant had a serious problem with chloracne among workers exposed to the 2,4,5-T process. Despite this knowledge Monsanto's plant physician never told the plaintiff or any employee. Consider his deposition:

On May 26, 1983, Richard C. Wallace, M.D., testified that he had been the plant physician at Nitro since 1950. Exhibit 14. He testified that:

> Q. I am going to talk about some symptoms here. And I am going to ask you some questions. These are symptoms or complaints.
>
> Fatigue, persistent cough, sore throat, nausea, upset stomach, dizziness, lightheadedness, sleep difficulties, sleepiness, exhaustion, face red, burning and numb, shortness of breath, breathing problems, dark urine, urine frequency, urination urgency, blood in urine, runny nose, nose bleeds, eyes that water or are irritated, loss of vision, aching joints, leg pain, extremities numb and tingling, nervousness, anxiety, ear problems, kidney difficulty, loss of libido, diarrhea, loss of memory, loss of attention or concentration, lumps or lipomas, skin rashes, cancer, weight gain, weight loss, depression, personality change, Peyronie's disease, high blood pressure, chest pains, headaches.
>
> Can any of those symptoms or complaints be related to 2,3,7,8-tetrachlorodibenzo-paradioxin in your opinion?

A. Rash for certain.

Q. Rash?

A. Yes.

Q. Alright. And, of course, would you say chloracne could be?

A. Did you mention chloracne?

Q. No, I didn't mention chloracne. Would chloracne be a problem, that is a medical problem that is related to dioxin?

A. Dioxin is supposed to cause that type of rash. Is that what you are saying?

Q. Yes. Is that your answer?

A. Yes.

Q. That it will?

A. That is what I have read.

Q. Okay. Now will any of those other things in your opinion, can they be related to dioxin exposure?

A. I have heard of complaints that they have had from dioxin exposure.

Q. Pardon me?

A. I have heard some of those complaints. Not all of them.

Q. Which ones?

A. Well, leg aches, mostly subjective symptoms. I can't remember all of them you enumerated.

Q. Did you ever tell anybody that worked in that plant that the chloracne was caused or skin rashes were caused from dioxin?

A. No.

Q. Did you ever tell anybody in that plant, and I am talking about the workers, that this list of symptoms that I have related was caused from dioxin?

A. No.

Exhibit 14.

During the twenty-six years after Monsanto knew that physical illnesses were related to dioxin the plant physician never told the plaintiff or others that their problems were or might be caused by exposure to dioxin. Jeffers affidavit. Exhibit 1.

In 1962, Emmet Kelly visited Nitro, and reported as follows:

> The one point we both talked about was the general disregard of the workers and some of the supervision for general cleanliness. I know this reflects their general upbringing but there must be some way to elevate their standards. This is not a medical recommendation, but I think there would be a carry-over into department cleanliness and housekeeping which would have medical implications.

Exhibit 48.

Against this background of disrespect for the Nitro worker it is not surprising that during the period 1957 to 1963 Monsanto would fail to disclose important information regarding health risks in the plant. For example, Monsanto knew in 1957 that "Dioxin" was the problem. Yet no mention is made in the operations manuals used in the day to day operation of the plant.

The June 26, 1962, operation manual, titled Standard Manufacturing Process for sodium 2,4,5-Trichlorophenate in Department 895.06, is the "cook book" for making 2,4,5-T. It is one of a series of such documents which were used by supervisors to operate the plant. Exhibit 49. If an employee saw

anything, it was this document. Appendix J, on page 34, contains safety and toxicity data relating to 2,4,5-T.

> General - The Sodium TCP solution produced contains chemical compounds known as "chloracnegens." These materials, as yet not isolated or identified, produce a form of dermatitis known as chloracne, very similar in appearance to common acne. Care must be taken to avoid contacting the solution of Sodium TCP or the hot vapors from the solution. Personal cleanliness, frequent washing, barrier creams, are all necessary to forestall chloracne exposure.
>
> Toxicity
>
> 1. Tetrachlorobenzene - The material is mildly toxic, causing nausea. Respirators and mono-goggles are required for handling.
>
> 2. Sodium TCP - A corrosive material. Rubber gloves and goggles are required.

Exhibit 49, Page 34.

As established in Monsanto's own documents, it knew in 1957 that the 2,4,5-T chloracnegen was 2,3,7,8-tetrachlorodibenzo-p-dioxin. In addition to chloracne, it was associated with other health hazards such as peripheral neuropathy, heart disease and liver damage. This operating manual gives no indication of the serious problems associated with dioxin, and which were known to Monsanto as early as 1953.

Even though Jeffers left Monsanto in 1957, Monsanto's developing knowledge is important. Years later when Monsanto was fearful that a Union health study would reveal serious health problems and expose Monsanto's past practices Jeffers would be sought out by Monsanto to participate in its own health study. Why didn't Monsanto in good faith, make a full and complete

disclosure to Jeffers of its knowledge about "dioxin" at that time? Why wasn't Jeffers sought out earlier as Monsanto learned more and more about Dioxin?

4. The Viet Nam War - The Cover-up Intensifies 1963 - 1978.

The next major event in this scenario involves the Viet Nam war. The defoliation program was begun and grew to massive proportions. Monsanto manufactured 2,4-D at its Sauget, Illinois plant and 2,4,5-T at Nitro for Agent Orange. The government began its purchase of Agent Orange in 1963 and continued to buy it until 1969. Exhibit 50. The importance of the defense purchases to Monsanto is clear. A "2,4,5-T Acid Business Plan" was presented by Monsanto's Pesticide Product Board on January 25, 1968. The plan summarizes the market for 2,4,5-T as follows:

In 1962, sales of 2,4,5-T and its derivatives totaled $2.97 million. The gross profit on the sales was .84 million and the company netted .22 million. In 1967, sales totaled 6.7 million. Of the 5,868 million pounds produced, 5,028 were sold to the Defense Department. Sales rose to $6.70 million, the gross was $2.63 million and the net income was up exactly 400% to .88. The return on investment had nearly tripled. Exhibit 50, Page 2.

A graph of production from 1950 to 1974, projected, showed an erratic product performance until 1963. Indeed, in 1963 production had dropped from a 1962 high of over 2 million pounds, to the same level of production as in 1950, about one million pounds. In 1965, production was up to four million pounds, in 1968 six million pounds, and the projection was that production would level off at seven million pounds. In 1968, Monsanto's total production was sold to the Defense Department, 7.1 million pounds. By 1968, Defense had preempted the

entire national market for the product. In 1968, Monsanto was second only to Dow in production. Exhibit 50, Page 4, 8. The plan ended with the following statements on its chloracnegenic properties:

> The product as made at Nitro causes chloracne in humans. The compound, shown as TDD (Dioxin) above is one, and perhaps the only, major chloracnegen in our product. This material is known to carry through the T-Acid process giving product containing 3-50 ppm.

Exhibit 50, Page 15.

Again, there is no mention of the heart disease, liver damage, or any of the other problems identified in the '50's.

The importance of the market is illustrated by a letter detailing a proposal to "get more defoliant money" by proposing improved defoliants. "If the field tests were successful this [a mixture of 2,4 D and 'one of the fastest ionic amonium iodides' for a 'faster knock-out' and a 'long-term effect'] might become the Army defoliant and the war would take a new and interesting turn." Exhibit 51.

The Viet Nam war sealed Monsanto's commitment to its continued cover-up of dioxin. If the true hazards of 2,4,5-T were made known, Monsanto was faced with the prospect of losing the United States Government/Viet Nam War market of 7.1 million pounds each year.

On March 17, 1965, Emmet Kelly wrote one of the most important documents discovered to date:

> Enclosed is a sample of 2,3,7,8-tetrachlorodibenzyl-<u>para</u>-dioxane
>
> This was received from Dow Chemical Company, and according to them it is the most toxic compound

> they have ever experienced. It presumably is toxic by skin contact, as well as by inhalation. According to Dow it is 100 times as toxic as parathion.[1] It is, likewise, capable of causing an incapacitating chloracne.
>
> I would recommend that extreme care be used in handling; that dilutions be made under a hood; and that all equipment be washed out immediately, or disposed of. Even trace amounts of this (200 ppb) have caused chloracne in rabbits, according to Dow.
>
> This is being given to you to calibrate the VPC method of analyzing for this compound in our 2,4,5-T. I wish you would save some of it for me, as we would like to do some biological evaluation also.

Exhibit 52.

In June 1965, Dow Chemical circulated an analytical method for determining 2,3,5,8-TCDD, "Dioxin." Exhibit 54.

As of 1965, Monsanto knew of dioxin, how to detect it, its danger, its source and its effects. It knew even trace amounts of 200 ppb could cause

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[1] In Chemical Hazards of the Workplace, the effect of Parathion was described as:

> With severe intoxication by all routes, an excess of acetylcholine at the neuromuscular junctions of skeletal muscles causes weakness aggravated by exertion, involuntary twitchings, fasciculations, and eventually paralysis. The most serious consequence is paralysis of the respiratory muscles. Effects on the central nervous system include giddiness, confusion, ataxia, slurred speech, Cheyne-Stokes respiration, convulsions, coma, and loss of reflexes. The blood pressure may fall to low levels, and cardiac irregularities, including complete heart block, may occur.

an "incapacitating chloracne." Yet Monsanto casually reported that amounts of 3-50 PPM, or 3,000-50,000 PPB carried through the process in its 1968 Business Plan. Monsanto's lab records show as much as 100 PPM or 100,000 PPB dioxin content in the 2,4,5-T sold to the government. Exhibits 55, 56, 57 and 58.

In 1965, the technology existed for limiting Dioxin contamination to 1 PPM. Emmet Kelly recommended that 1 PPM would cause chloracne. Exhibit 59. In 1966 Dow built a facility to manufacture 2,4,5-T which limited Dioxin contamination. Exhibit 31. In 1969 Monsanto quit manufacturing 2,4,5-T.

5. Recent Evidence of Monsanto's Plan To Continue The Cover-up.

The end of production did not end the problem of 2,4,5-T. Another Monsanto time line demonstrates the course of events in the late seventies. See Exhibit 60. Two major events caused interest in the problem of 2,4,5-T and dioxin. One was the explosion at a Roche plant in Seveso, Italy, which contaminated a large area. The second was the increasing attention given to victims of exposure to Agent Orange. As Monsanto knew, there was a good possibility the "Nitro problem" would surface.

Monsanto began by attempting to get a "handle" on the problem. On October 15, 1979, presentation to the Environmental Policy Committee included a slide which read in part:

> Specific Problem at Nitro
>
> Employee concerns about the relationship between exposure to chemicals and poor health and decreased longevity highlighted by the PAB-bladder cancer problem of the '40's plus the 2,4,5-T-chloracne problem of the '50's and aggravated by the suspicious and clannish nature of the natives of Appalachia and the increased number of young workers.

Exhibit 61.

Earlier that year Monsanto had already formed a task force to meet the growing interest in Nitro. Part of its mission was to manage any problem that might arise from a proposed union health study of the Nitro workers. A June 1979 memo indicates Monsanto's concern:

> . . . to think through and formalize a strategy and a plan that will make certain all appropriate resources within or outside the Corporation are being applied to receive the many interrelated and difficult situations surrounding the Nitro Health Study involving trichlorophenol. This task group will include the Public Relations' communications plan.

Exhibit 62.

In a January 24, 1979, document the situation at Nitro was summarized this way:

> The compound 2,4,5 Trichlorophenol was made in the plant at Nitro . . . Our's was a 'dirty' process and we were plagued with chloracne problems. We now know that Dioxins were produced as byproducts. These are known hazards to human health.

Exhibit 63.

Another document described Nitro this way:

> If you'll pardon a little editorial comment . . . I'm sure you are aware that the problems at Nitro center on past practices 'catching up with us' and are not fundamentally rooted in a hostile press. They will simply be the bellows to kindle the smoldering ashes. Public relations will not be able to completely shield us from criticism; it cannot make past practices (which may have been accepted in the 1950's and 1960's) appear responsible when measured against today's standards.

Exhibit 64.

Actually, Monsanto's practices in the 1950's and 1960's were not even acceptable then. The fact is Monsanto knew in 1957 that the employees in the 1949 explosion had been exposed to dioxin formed in the 2,4,5-T process. It was known then to be highly toxic. Exhibits 31 and 60. Even in the 1950's and 1960's this was not acceptable practice.

How did Monsanto respond to the growing concern about past practices? One thing that happened was that Dr. Suskind again appeared on the scene. The Court has been led to believe that Suskind contacted Monsanto about seeing how the subjects of his earlier study were getting along. Suskind affidavit, Exhibit 65. However, a confidential Monsanto exhibit reveals that Dr. Selikoff, a doctor retained by the Union to do a study had called Suskind who, in turn, called Monsanto to alert the company about the union study. Monsanto then "conceived the idea of giving Dr. Suskind access to our records and people" to perform an "independent" study. Exhibit 66. Suskind returned at the invitation of Monsanto.

On July 18, 1979, Suskind signed a contract to perform the "independent" study, in consideration of $122,526.00. The contract included a provision that for five years after the final report, Suskind would testify on behalf of Monsanto. Exhibit 67. Monsanto also chose which subjects would take part in the study. Exhibits 68 and 69.

Monsanto recognized that it had not done a very good job of communicating with its Nitro employees. Documents which apparently explained certain aspects of exposure to toxic chemicals were never distributed at Nitro, although they were distributed elsewhere. Exhibit 70. The exhibit notes, however, "its just as well, since they are too long and complicated as written, and would probably not have been read or understood."

Disclosure of information was closely regulated. Monsanto had specific instructions entitled "How To Handle Employee And Local Union Requests For Employee Health Data." Exhibit 71. Where OSHA regulations were concerned, the instructions required management to advise an employee only when he had been exposed to chemicals in excess of OSHA limits. The actual level of the exposure would be revealed only where the employee specifically requests the information. Exhibit 71, Page 1.

Section IV, however, is most pertinent here. Requests regarding exposure to toxic chemicals in the past would be governed by a different set of instruction. Section IV required that requests by union representatives for "industrial hygiene data", "occupational disease cases data", list of chemicals with employees who were exposed and all data on monitoring/measuring would be handled as follows:

"Local union representatives will be told time is needed to prepare a response, that it is complicated, or that all parts of the data are not available." It specifically instructs that the union will not be told clearance is needed from St. Louis.

The next instruction, of course, was that the request be forwarded to St. Louis for clearance by corporate personnel, legal and labor relations departments. All responses were to be oral, unless the Union specifically requested it in writing. Exhibit 71, Page 1.

The instructions end with the admonishment, "Plant Management, with the concurrence of the operating company personnel department, should develop their own communications efforts. However, wherever possible, 'broad side' and/or 'antagonistic' and/or 'suspicious' union requests should be resisted as outlined in IV, above", emphasis added. Exhibit 71, Page 2.

Monsanto's continuing control of information is found in the way it responded to a Congressional inquiry for information on dump sites and haulers. Monsanto responded with misleading and incomplete answers. Exhibits 8323280 and 73. Exhibit 73 contains lists which contrast the information given to Congress with "actual composition of waste materials for Monsanto Internal Use only." Exhibit 73, Pages 3, 4, and 5.

Monsanto's public relations materials are also misleading. For example, a "Q and A", prepared by Monsanto to issue to the press regarding health studies, is attached as Exhibit 74. One question and answer is:

> Q2. How does Monsanto justify continuing the manufacture of 2,4,5-T until 1969 when workers continued to contract chloracne?
>
> A2. Dioxin was not chemically identified until 1957 and, of course, its relationship to chloracne was not established until that time. However, following the 1949 incident, Monsanto revised its 2,4,5-T process, instituted additional safety and industrial hygiene practices and later built an entirely new unit for the manufacture of the herbicide.

This statement is simply untrue. It shows the continuing effort to isolate dioxin and the 1949 explosion from the 2,4,5-T process. As was shown earlier, the relationship between 2,4,5-T and health problems was well known to Monsanto before 1957. The statement that Monsanto instituted additional safety practices was untrue. Volz refused in the 1950's to implement the procedures recommended by the Public Health Service and others. And as the exhibits show, Monsanto continued to experience exposure problems related to dioxin throughout the entire time it was manufactured.

Attached hereto are series of copies of the Nitro employee newspaper, see Exhibits 75 A, 75 B, 75 C, 75 D, 75 E, 75 F, 75 G, 75 H, 75 I, 75 J, 75 K,

75 L, 75 M, 75 N, 75 O and 75 P. The bulletins are most significant for what they do not say. The articles mention chloracne, but do not mention liver disorders, or any other of the health problems associated privately by Monsanto to 2,4,5-T and dioxin. Again, the 1949 explosion is pointed to as the culprit. On March 29, 1979, the paper reported the results of "an earlier dioxin study," referring to Suskind's studies from 1949 to 1953. Exhibit 75 E. Monsanto never before referred to the 1949-50 Suskind studies as "dioxin" studies. If they were why weren't they identified as such in 1957 when Monsanto learned dioxin was the problem?

The article further said:

> Thirty-six of the more severely affected workers (of over 200 exposed) were examined and treated over this four-year period, with symptoms characterized by acneform skin lesions, and, in a few, by peripheral nerve involvement (sensory changes, pain, and weakness) and transient liver dysfunction. With treatment, the acute symptoms improved with time, and in most cases steadily decreased in frequency and intensity.

Exhibit 75 E.

Dr. Suskind left the impression that all the symptoms had subsided by 1953. Monsanto's position in 1949 was that the men had not suffered any lasting injuries. This position continues unchanged through 1983.

The scope of the proposed study extended to both current and retired employees. Exhibit 75 F. The articles described monitoring and safety programs, all of which are designed to reenforce the employees' belief that Nitro is a safe plant. If Jeffers was sought out by Monsanto to participate in a public relations health study why wasn't he sought out earlier as Monsanto learned of the risks of Dioxin?

On June 1, 1979, Suskind appears in the Monsanto Workers publication, and signs an article, saying:

> I would like to take this opportunity to stress again that my responsibility is to the individual worker/patient, and no one else. This is an independent study conceived and conducted by the doctors at the University of Cincinnati. Monsanto is involved only in financing the study and working out the details of scheduling the examinations. Their objective, like ours, is to determine possible health effects due to 2,4,5-T and its contaminants.
>
> Raymond R. Suskind, M.D.

Exhibit 75 O.

Suskind does not mention that he later would give copies of his data to Monsanto but refuse to give copies to the employees. He fails to mention that he had a five year contract to testify in Monsanto's behalf. He doesn't say that the expanded study was Monsanto's idea, or that according to a 1978 Monsanto memo, "The study would remain in the overall control of Monsanto. Suskind doesn't let on that while he may be part of the consulting team, would not be in charge of the effort." Exhibit 76, Page 2. Monsanto's emphasis.

Numerous other documents show the coordinated public relation effort to manage the "Nitro problem." The documents went so far as to place safety and "PR" in the same category. Exhibit 77. The concern with "the public" was almost obsessive. Attached as group Exhibit 78 are a number of press releases and related materials demonstrate Monsanto's intense effort to manipulate information.

Monsanto's relationship with Suskind was one of mutual reliance. Monsanto was looking to Suskind to protect it from the Union study. Suskind in

turn reported that the union doctors, Moses and Selikoff, were only interested in appearing to be diligent for the benefit of their funding agency and the union. The implication was that they were not really worried about the quality of the study, but only looking to convince the union that they were earning their keep. A Monsanto memo reports the "race" to the public between Monsanto and the union with study results:

> I pointed out that questions were likely to arise about the status of his study, and why some similar report is not available. Suskind's official line is that a responsible scientist does not release partial results in public until he has a complete report available for anyone to see and evaluate.
>
> Nevertheless, I will continue to pursue Ida Blanche. If any tables are produced by the end of February, I will try to get Suskind's okay to at least say that they exist and are being interpreted.

Exhibit 79.

The documents described here are only a small part of those reviewed to date. Even these few documents clearly show that Monsanto concealed and obstructed plaintiff's cause of action by misstatement, bad faith, abuse of the trust between plaintiff and Monsanto, failures to disclose material information and outright fraud. Its goal was to reassure the workers that the plant was safe and that the chemicals were not the cause of their problems.

What is concealment and obstruction? If a master has a duty to advise an employee of latent hazards unknown to the employee, is it concealment to fail to do so? Culbertson says an act which naturally conceals itself is obstruction. What kinds of acts "naturally" conceal themselves? Here, the act was the failure to convey information, where there was a duty to do so.

Monsanto's response to direct inquires was misleading information. Where is the concealment? The concealment was rooted in Monsanto's knowledge that the plaintiff and his fellow workers had absolutely no way of uncovering the true answers to their questions. There was no one in the '50's and '60's to turn to except Monsanto for the answers. Monsanto was the "lord of information." It used its superior knowledge not only to keep the plaintiff and others ignorant but, when necessary, to frustrate any attempt to get at the truth about the toxicity and health risks of the chemicals used at Nitro.

The facts developed in the foregoing section support, at a minimum, the conclusion that there is a genuine issue of material fact whether Monsanto "obstructed" the plaintiff in bringing his cause of action within the meaning of 55-2-17. Even in the absence of an "obstruction statute" Monsanto's conduct was such that it is estopped on equitable principles from asserting the statute of limitations.

VII.

THE FACTUAL BASIS OF THE PLAINTIFF'S CLAIM IS TOO COMPLEX TO SUPPORT A MOTION FOR SUMMARY JUDGMENT

Monsanto cites Lewis v. Coleman, 257 F.Supp. 38 (S.D. W.Va. 1966), for the proposition that a complicated question of law is not a bar to summary judgment where there is no genuine issue of material fact. Monsanto Brief, page 9. Monsanto was anticipating that plaintiffs would argue that this case is too complex for summary judgment. Plaintiff argues that it is. The law here is not complex, but the facts are. There is a statute which tolls the Statute of Limitations if there was direct or indirect obstruction. 55-2-17. Obstruction is defined as an "affirmative act by the defendant to conceal the

existence of liability." Culbertson v. Ino. McCall Coal Co., supra. Defendant's conduct may estopp the assertion of the statute of limitations.

In Felix v. Young, 536 F.2d 1126 (6th Cir. 1976), the Court said: "As we have stated on many occasions, without a factual basis in the record, a District Court should be extremely hesitant to grant summary judgment on important and complex issues (citations omitted)."

In Kennedy v. Silas Mason Co., 334 U.S. 249, 68 S. Ct. 1031, 92 C.Ed. 1349 (1948), a group of employees in a government owned munitions plant brought suit for over-time wages. The District Court granted summary judgment in favor of the defendant. The Court said:

> The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine . . . .

Kennedy, supra, U.S., 256-257.

Here the Court is likewise confronted with thousands of documents which, at the least, support the inference that Monsanto obstructed the plaintiff in bringing this suit. The case involves complex issues of notice

The Court still does not have, since depositions have only recently begun, the full background of this lawsuit.

The principals which govern complex cases and weigh against dismissing them on motions for summary judgment, should be adopted here. See, e.g., White Motor Co. v. United States, 372 U.S. 253, 83 Sup. Ct. 696, _____ C.Ed. _____ (1063), (summary judgment not appropriate in anti-trust where motive and intent play a leading role); Eliot v. Eliot, 49 F.R.D. 283 (U.S. D.C. S.D. N.Y., 1970), (summary judgment not appropriate in complex cases where questions are not conveniently isolated as pure questions of law); Vermont Structural State Company v. Tatho Brothers Slate Co., 233 F.2d 9, Cert. Denied 77 S. Ct. 216, 352 U.S. 917, 1 C. Ed.2d 123 (Ca2d. 1956) (where patent cases turn on technical evidence requiring expert testimony, witness credibility and the technical nature of the evidence preclude summary judgment). See also, Wright and Miller, Federal Practice and Procedure: Civil §2732.

A related reason that Monsanto's motion should be denied is that the plaintiffs have raised factual issues which will turn, in part, on issues of intent and which will place great importance on the credibility of witnesses.

In Subin v. Goldsmith, 224 F.2d 753, (2d Cir. 1955) the Court reviews at length a number of demeanor cases, and cases in which the facts plaintiffs must prove are peculiarly within the knowledge of the defendant. The Court said:

> But where--as, e.g., in Fogelson v. American Woolen Company, and Bozant v. Bank of New York, supra--the facts asserted by movant are peculiarly within the knowledge of the movant, then the opponent must be given the opportunity to disprove that fact by cross-examination and by

> the demeanor of the movant while testifying. In such a case--a case like the one before us--the failure of the opponent to file a counter-affidavit has no significance.

Subin, supra, 760.

> In Bozant v. Bank of New York, 2 Cir., 156 F.2d 787, 790, we said, per Judge Learned Hand: "In conclusion we cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a complicated state of facts on motion for summary judgment. This is especially true where the plaintiff must rely for his case on what he can draw out of the defendant. Arnstein v. Porter, 2 Cir., 154 F.2d 4__. It appears to be somewhat difficult to persuade the district courts of this; but we are satisfied that it is true." In Colby v. Klune, 2 Cir., 178 F.2d 872, 873-875.

Subin, supra, 759.

Not only is defendant here in sole possession of the facts, it has shown precious little willingness to yield them up to plaintiffs.

These cases counsel against the granting of defendant's motion for summary judgment in light of the issues raised by the plaintiff in the foregoing section. To arrive at the truth in this case requires a careful review of many hundreds of documents and the testimony of individuals from a thirty-year history of the Nitro plant. Credibility will be extremely important. Given the complex medical and scientific evidence, the importance of credibility and the complex nature of the facts, summary judgment in this case is inappropriate.

VIII.

EVEN IF THE COURT APPLIES SCOTT, PLAINTIFFS HAVE ADEQUATELY RAISED THE ISSUE OF CONCEALMENT TO PRECLUDE SUMMARY JUDGMENT

Monsanto quotes at page 11 of its Brief the holding of Scott, supra.

> The West Virginia Supreme Court held that a right of action accrues "when the wrong is committed and in the absence of some act of concealment by the wrongdoer, the mere ignorance of the injured party of the actionable wrong will not suspend the statute." 116 W.Va. at 320, 180 S.E. at 276.

Even under Scott, the plaintiffs have adequately raised a question of fact whether Monsanto concealed the cause of action from the plaintiffs, as that is defined in 55-2-17, Culbertson, supra, Duttine, supra, and Handley, supra.

IX.

SENATE BILL 585 REVIVES THE CLAIMS OF PLAINTIFFS NOTWITHSTANDING THE APPLICABILITY OF A "DISCOVERY RULE"

Whether or not the Court decides to extend a "discovery rule" to the Statute of Limitations as urged by the plaintiffs in their brief, the Senate Bill 585 clearly revives the plaintiffs' actions.

> 1. Plaintiffs Were Exposed To Chemical Defoliants Or Herbicides, Including A Compound Of Agent Orange During Either Or Both The Korean And Viet Nam Conflicts.
>
> The "Act" provides in pertinent part:
>
> Every cause of action for an injury or death caused by contact with or exposure to chemical defoliants or herbicides, including agent orange, during either the Korean or Viet Nam conflict, which is barred as of the effective date of this

> section because the applicable period of limitation has expired is hereby revived and an action thereon may be commenced and prosecuted provided such action is commenced within two years of the effective date of this section.

During both the Korean and Viet Nam conflicts Monsanto was engaged in the production of chemical defoliants and herbicides, including agent orange, at its Nitro facility. In fact, 2,4,5-T, a herbicide used in Viet Nam, was produced pursuant to numerous government contracts at the Nitro plant in connection with the war effort. Plaintiff was exposed during this period in the early 1950's.

The clear purpose of the "Act" is to accord persons who as a result of exposure to the named families of chemicals were injured and/or died in a two year period in which to file their claims regardless of any existing statute of limitations. The "Act" is a recognition of the practical inability of ordinary non-expert persons to have fully appreciated the cause and effect of injuries resulting from exposure to these chemicals. By granting a two year reprieve the disparity that existed between the superior knowledge of the manufacturers and that of the persons exposed and the doctors and lawyers they could have reasonably been expected to have access to is rectified.

2. The Plain Meaning Of The "Act" Is To Include Plaintiff's Causes of Action.

While the "Act" appears in Chapter 16, Article 28 of the Code of West Virginia which provides for certain veterans' rights, the plain meaning of the language of the new section ten includes plaintiff. Although the Article hearing refers to "Assistance to Korean and Viet Nam Exposed to Certain Chemical Defoliants or Herbicides or other Causative Agents, Including Agent Orange," the section heading makes no reference to veterans, stating only

"Limitations of Actions and Suits." More importantly, the "Act's" preamble simply states that the new section 10 relates to "the limitation of actions and suits for damages resulting from exposure to chemical defoliants and herbicides." West Virginia Code Chapter 2, Article 2, Section 12 specifically provides that headlines and section headings are not to be construed as expressing legislative intent:

> Chapter, article or section headings, headlines or headnotes of any act of the legislature, whether in the act at the time of passage or inserted by the clerk . . . are hereby declared to be mere catchwords and shall not be deemed or construed to be titles of such chapters, articles or sections, or as any part thereof, or as indicating or expresing legislative intent or purpose.

Further, rules of statutory construction as approved by the West Virginia courts that statutes dealing with the same subject matter must be read "in pari materia."

> [s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.

Smith v. State Workmen's Compensation Commissioner, 219 S.E.2d 361 (W.Va. 1975) as cited in Newton v. Dailey, 92 W.Va. 91, 93, 280 S.E.2d 91 (1981).

By reading the "Act" in conjunction with the West Virginia Statute of Limitation it is clear that the legislature intended to amend the two year period of limitation found there to provide for those persons injured as a result of exposure to toxic substances such as phenoxy herbicides. Manifestly, there now exists in West Virginia a two year reprieve for those persons injured as a result of exposure to phenoxy herbicides during the Korean and Viet Nam

conflicts. They now have two years within which to file their claims whether the two year period of limitations has run or not.

X.

CONCLUSION

This is not a case which turns on law, but a case which turns on the facts. The facts, as developed in the documents, affidavits and depositions, show a corporation which has abrogated any sense of duty to its workers and the community of Nitro. Plaintiffs truly feel that they have exceeded their burden to raise reasonable inferences with different interpretations of the facts. These documents conclusively show that Monsanto made these men work in known dangerous conditions in direct contravention of medical recommendations. The documents conclusively show that the state of knowledge regarding 2,4,5-T was concealed from these workers, by means of the plant physician and the description of the toxicity of the chemicals in the operations manuals. The documents conclusively show that Monsanto embarked on a coordinated public relations program to manipulate opinion, and mislead its work force as to the safety of the plant. The documents conclusively show that Monsanto employed Raymond Suskind, M.D., for the purpose of "window dressing" its industrial health program, and concealing the true extent and nature of the employees' illnesses. The documents conclusively show that Monsanto made and sold to the United States government a chemical product for use by its soldiers known to be contaminated with dioxin to an extent far beyond the trace amounts described in Emmet Kelley's "Dow" letter. The documents conclusively show that Monsanto knowingly mislead the United States Congress in describing the contents of dumps for Nitro refuse. The documents conclusively show that Monsanto has mislead the Court in describing its relationship with Dr. Suskind, in arguing

that files of employees must be reviewed and compiled when in fact they are on a computerized system, and has attempted to manipulate this Court into unwittingly furthering a three decade old course of conduct to hide the truth and delay the ultimate exposure of Monsanto's responsibility for the sicknesses and deaths of these workers, and, indeed, the sufferings of the Agent Orange veterans.

Plaintiffs urge the Court that twelve of the plaintiffs have died in the last year. Plaintiffs verily believe that at least twelve more are so seriously ill that they would not survive another year. These documents tell one of the most frightful chapters in American business. It is time that chpater was brought to a close.

This Court should find that plaintiffs have met their burden in responding to Monsanto's motion, and that plaintiffs have demonstrated a set of facts on which they could prevail. The Court should find there is a geniune issue of material fact whether Monsanto concealed, or directly or indirectly obstructed the plaintiff in discovering his cause of action, and whether that course of conduct continued to within two years of the filing of his lawsuit. The Motion for Summary Judgment should be denied.

Respectfully submitted this 13th day of June, 1983.

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