

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

3
4 FRANCES E. KEMNER, ET AL.,)
5 Plaintiffs,)
6 v.)
7 MONSANTO COMPANY,)
8 Defendant.)

9
10
11 REPORT OF PROCEEDINGS

12 December 18, 1985

13
14 Before the HONORABLE RICHARD P. GOLDENHERSH, CIRCUIT JUDGE

15
16 APPEARANCES:

17 MR. REX CARR and MR. JEROME SEIGFREID, Attorneys at

18 Law, on Behalf of the Plaintiffs; and

19 MR. KENNETH HEINEMAN and MR. JOSEPH NASSIF, Attorneys

20 at Law, on behalf of the Defendant, Monsanto Company.

21
22 Kathleen Watson Brunsmann, RPR, CSR

23 Official Court Reporter

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RENATE D. KIMBROUGH

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1 BE IT REMEMBERED AND CERTIFIED, that heretofore,
2 on to-wit, Wednesday, December 18, 1985 the matter as
3 hereinbefore set forth came on for hearing before the
4 Honorable Richard P. Goldenherseh, Circuit Judge in and for
5 the Twentieth Judicial Circuit, and the following was had of
6 record, to-wit:

7
8 (The following Offer of Proof was had out
9 of the presence of the jury:)

10
11 THE COURT: Okay, gentlemen.

12 MR. HEINEMAN: Your Honor, at this time for
13 Defendant's Offer of Proof, we would like to call to the
14 stand Dr. Renate D. Kimbrough. Dr. Kimbrough, would you
15 come forward and be sworn?

16
17 RENATE D. KIMBROUGH,

18
19 having been called as a witness on behalf of the
20 Defendant Monsanto, having been sworn, testified
21 as follows:
22
23
24

DIRECT EXAMINATION

BY MR. HEINEMAN:

Q Would you state your name for the record, please.

A I'm Renate Kimbrough. My first name is spelled R-e-n-a-t-e, last name K-i-m-b-r-o-u-g-h.

Q Dr. Kimbrough, the microphone you see there before you does not amplify your voice in any way.

A Okay.

Q It's just there to record, so don't worry about it.

A Okay.

Q Would you give us your date of birth, please.

A January 14, 1933.

Q And your place of birth.

A Hannover, Germany.

Q Where do you reside at this time?

A 165 Avery, A-v-e-r-y, Drive, in Atlanta, Georgia.

Q And by whom are you employed?

A By the Centers for Disease Control.

Q In what capacity, ma'am?

A I'm a medical toxicologist, and I work in the Center for Environmental Health as a medical officer, primarily in the area of toxicology and environmental health and occupational health.

1 Q Would you describe for the Court, please, your
2 educational background.

3 A I graduated from medical school in Germany and
4 then immigrated to the United States and served an
5 internship in pathology at Northwestern University at
6 Evanston Hospital. Then moved to New York, worked at
7 Memorial Hospital for Cancer and Allied Diseases for a year.
8 Then moved to Atlanta and worked as a resident in pathology
9 at St. Joseph's Infirmary. Subsequently obtained a job at
10 the Centers for Disease Control in a toxicology laboratory
11 in 1962, and have worked for the federal government in the
12 area of toxicology and environmental health ever since then.

13 Q All right.

14 MR. HEINEMAN: I wonder if you would mark these
15 please.

16
17 Defendant Monsanto's Exhibits 1328 and 1329
18 were marked for identification by the court
19 reporter.

20
21 Q (By Mr. Heineman) Dr. Kimbrough, let me hand you
22 what's been marked as Defendant's Exhibit 1328 and ask you
23 to examine that and identify it for me, please.

24 A This is my Curriculum Vitae, which gives my

1 educational background, my certifications and the
2 publications and whatever activities.

3 Q Does it list the various professional boards of
4 which you're a member, and societies?

5 A Yes.

6 Q All right. And let me next hand you, if I may,
7 please, Defendant's Exhibit 1329, and ask you to examine
8 that and identify it for the record, please.

9 A This is my job description as to what I am
10 performing now at the Centers For Environmental Health.

11 Q And what is the nature of this document? By whom
12 is it prepared?

13 A It was prepared by the Center for Environmental
14 Health to describe what my activities and responsibilities
15 should be in the job that I'm presently holding.

16 Q And is this a document prepared according to the
17 usual business practices of the Centers for Disease Control?

18 A Yes.

19 Q And do they do this for other officials as well as
20 yourself?

21 A Yes. Everybody that works for the Federal
22 government has a job description.

23 Q All right. This one happens to apply to your
24 position?

1 A Yes.

2 Q All right. And is this kept and prepared and
3 maintained in the regular course of business by the Centers
4 for Disease Control?

5 A Yes. There's a copy in the Personnel Office and
6 also a copy in the Director's Office, and then I get a copy.

7 Q All right. Thank you.

8 MR. HEINEMAN: Your Honor, copies of these
9 documents have been provided to Counsel for the Plaintiffs.
10 It would obviously -- with this witness' brief time on the
11 stand today, it would save a great deal of time if we didn't
12 have to go through this whole thing, and I would, with the
13 Court's permission, I'd like to submit them to the Court as
14 part of our Offer of Proof in order to save time.

15 THE COURT: Any objection to that?

16 MR. CARR: I have no objection to anything Counsel
17 wants to do in an Offer of Proof, your Honor.

18 THE COURT: Fine.

19 MR. CARR: He may do what he wants.

20 THE COURT: Why don't you just submit them and
21 we'll save some time.

22 MR. HEINEMAN: Fine. I'd like to submit them to
23 the Court with our Offer of Proof.

24 THE COURT: Right.

1 Q (By Mr. Heineman) Dr. Kimbrough, in your official
2 capacity or in any capacity, personal or otherwise, do you
3 have any connection whatsoever with Monsanto Company?

4 A No. I mean except that I have done research work
5 on some of their compounds.

6 Q I see. Was that at their request?

7 A Oh, no. That was at the government's request.

8 Q All right. Now in terms of your appearance here
9 today, are you being paid or retained in any way by Monsanto
10 Company to be here?

11 A No. The federal government is paying for my
12 expenses.

13 Q All right. Now --

14
15 Defendant Monsanto's Exhibit 1330 was marked
16 for identification by the court reporter.

17
18 Q (By Mr. Heineman) Let me hand you what's been
19 marked as Defendant's Exhibit Number 1330, and ask you to
20 examine that and identify it for me please.

21 A This is a memo, which I wrote on January 30, 1977
22 at the Centers for Disease Control to record a telephone
23 conversation which I had with a Dr. Ted Appel, a physician,
24 who wanted to have information and discuss with me a problem

1 that he had with a patient because there had been a spill of
2 OCP crude in Sturgeon, Missouri.

3 Q All right. Doctor --

4 MR. CARR: Just one minute, Counsel, unless we've
5 left something at the office, I don't believe we've been
6 given this before, your Honor.

7 MR. NASSIF: COOSOS, Rex.

8 MR. CARR: Did you just give it to us this
9 morning?

10 MR. HEINEMAN: No, COOSOS.

11 MR. CARR: Go ahead, Counsel, we'll straighten it
12 out later. I can't find it now.

13 Q (By Mr. Heineman) Dr. Kimbrough, is this
14 telephone call that you received from Dr. Appel the first
15 that you knew of the Sturgeon incident?

16 A Yes.

17 Q And what was the subject of the call? What was
18 Dr. Appel's concern?

19 A He had a child that he thought had been exposed to
20 the vapors from the OCP crude, the phenol vapors. And he --
21 this child had had a respiratory arrest and was ill. He
22 wanted to know whether the exposure to the phenols could
23 have caused the problem in the child. And he also had
24 collected some urine and a blood specimen and he wanted

1 assistance from the Centers for Disease Control in the
2 analysis of these specimens for phenols. He was sent to us
3 through the Missouri Health Department.

4 Q All right.

5

6 Defendant Monsanto's Exhibit 1331 was marked
7 for identification by the court reporter.

8

9 Q (By Mr. Heineman) Let me hand you what's been
10 marked as Defendant's Exhibit 1331, which is a two page
11 document of handwritten notes and ask you if you can examine
12 that and identify it for me, please.

13 A These are --

14 MR. CARR: Counsel, it would assist us a great
15 deal, if you, because the things you've given us are not in
16 chronological order or any other order, for us to know what
17 she's referring to. We've got to go through and find this
18 unless you give us one.

19 MR. HEINEMAN: All right. I thought what we gave
20 you was in the order.

21 MR. CARR: It doesn't mean it's in the order now.
22 We've gone through what you gave us, Counsel. We found this
23 one now that you've just given the witness.

24 MR. HEINEMAN: All right.

1 Q (By Mr. Heineman) Now, Dr. Kimbrough, would you
2 identify the document, please.

3 A These are notes I took, they're in my handwriting,
4 and they pertain to this same telephone conversation. And
5 then subsequently from these notes I dictated the memo.

6 Q Which is Exhibit 1330?

7 A Yes.

8 Q And what was the sex of this child?

9 A I believe it was a boy, but I'm not sure whether
10 I'm saying it in the memo.

11 Q If you look at Defendant's Exhibit 1330 in the
12 third line there --

13 A Oh, yeah, six month old male child.

14 Q Oh.

15 A Okay.

16 Q Now, what was it that your agency undertook to do
17 in connection with this call, and why?

18 A Because of the concern of the physician and
19 because the Missouri State Health Department had asked us to
20 assist, we did accept the blood specimens and they were
21 subsequently analyzed in our laboratory.

22 Q All right.

23 A And we also then collected additional information
24 on the episode to see whether there were other problems,

1 whether there was anything else the Centers for Disease
2 Control ought to do. And because of our interest, we then
3 had a lot of conversations with the EPA and different people
4 that were involved.

5 Q Now, do the notes that are reflected in
6 Defendant's 1331, are those the notes that you received over
7 the telephone?

8 A Yes. This was information I received over the
9 telephone.

10 Q And on the first page of Exhibit 1331 do you
11 recall from whom you received the information as to the
12 contents of the tank car?

13 A Not exactly. From somebody that was -- from the
14 EPA or somebody that was involved with the spill.

15 Q Now if I can direct your attention again to
16 Exhibit 1330, does it contain a statement as to the air
17 levels?

18 A Yes.

19 Q What is that, ma'am?

20 A The levels have been below one part per million.

21 Q And that's air levels of what?

22 A Of the phenols and the orthochlorophenol.

23 Q Now, in the first paragraph of your memo there's a
24 statement near the end of the first paragraph about

1 occupational exposure. Do you see that?

2 A Yes.

3 Q And would you tell us how you reached that
4 conclusion? What information were you relying on?

5 A I was primarily relying on the measurements that
6 had been made, and then I had additional discussions with
7 the people that were working at the site.

8 Q Now what measurements were you familiar with that
9 had been made?

10 A These were air level measurements that I'm partly
11 referring to in my memo.

12 Q By whom were they made?

13 A The Environmental Protection Agency in Kansas
14 City.

15 Q All right. How did you reach the conclusion that
16 the air levels have been within the levels recommended for
17 occupational exposure?

18 A In the normal course of business, when I get
19 telephone calls from people about levels of chemicals in air
20 or in water, I then refer to textbooks and standards that
21 are available to me and look up what the levels are since
22 you can't always remember all these numbers. And then I
23 usually give people information as to whether I feel that
24 that is dangerous or it isn't. That's part of my work. I

1 did that, and I reviewed that with these people according to
2 this memo.

3 Q All right. Now on the last page of the
4 memorandum, which is Defendant's Exhibit 1330, in the last
5 -- the last sentence, it reads, "A 10cc sample of this
6 material will be mailed to us by the Kansas City EPA,"
7 correct?

8 A Yes.

9 Q Who was it that agreed to do that?

10 A According to my handwritten notes, I apparently
11 talked to a Mr. Gilmer and somebody by the name of McClurg.
12 I don't remember who that was. But one of those people
13 agreed to arrange it. I later talked to somebody by the
14 name of Kloopfer also.

15 Q Kloopfer?

16 A Kloopfer.

17 Q How do you spell that?

18 A K-l -- I think it's K-l-o-e-p-f-e-r.

19 Q What was your understanding of his -- the agency
20 he was with?

21 A He is with the EPA in Kansas City, and he's a
22 chemist.

23 Q All right. Did there come a time when a sample of
24 the material was sent to you?

1 A Yes.

2 Defendant Monsanto's Exhibit 1332 was marked
3 for identification by the court reporter.

4
5 Q (By Mr. Heineman) Let me hand you what's been
6 marked as Defendant's Exhibit 1332 and ask you to examine
7 that and identify it for me, please.

8 A This is a memo to the record, which was written at
9 the Centers For Disease Control by Dr. John Liddle, dated
10 February 15, 1979.

11 Q And I see written in the upper right-hand corner a
12 series of initials.

13 A Yes.

14 Q And one of those is R.K.

15 A Yes.

16 Q And is that you?

17 A Yes.

18 Q What is the significance of the fact that there's
19 initials written with a line underneath?

20 A These are different people that were working in
21 the laboratory, and he dictated the memo and then he routed
22 it to the different people, and I was the last one on the
23 list.

24 Q And did you receive a copy of this memorandum?

1 A The fact that I initialed it means that I read it.

2 Q All right. Is this a document prepared in the
3 ordinary course of business of your agency?

4 A Yes.

5 Q And Dr. Liddle is employed by whom?

6 A He is employed by the Centers for Disease Control.

7 Q And is he the chief of the Toxicology Branch?

8 A Yes.

9 Q And is --

10 A He's no longer. He's not now, but he was then.

11 Q He was at that time?

12 A Yes.

13 Q Is this a document that came out of your file?

14 A We had a file on this case and this document was in
15 that file. This is our case number, 9-7.

16 Q All right. Now, what is this memorandum about?

17 A He also received a telephone call from Dr. Ted
18 Appel, and he inquired as to the status of the analysis in
19 serum and urine samples obtained from a six month old male
20 child that he is presently treating. And we told him that
21 the analyses were under way.

22 And then Dr. Appel was told that some of the
23 phenols contained highly toxic dioxins, and so he and the
24 family were very concerned about it, and we said that we had

1 no plans to analyze for dioxins because the present
2 analytical techniques are inadequate to detect dioxins at
3 the levels that they would theoretically be in the
4 biological samples.

5 Here we're talking about blood and urine. We're
6 not talking about adipose tissue. The amount of sample that
7 we had would be insufficient.

8 Q Now with respect to the analytical techniques for
9 detecting dioxins in levels in blood and urine, were there
10 available techniques somewhere else in the country for doing
11 that sort of thing?

12 A At the time there weren't any methods that we --
13 anywhere that we knew about that would be reliable for blood
14 and for urine, simply because dioxins are soluble in fat so
15 they primarily concentrate in fatty tissue, and the amount
16 that you would have in blood would be much, much less.

17 Q At that time were you familiar with Drs. Tiernon
18 and Taylor at Wright State University?

19 A Yes.

20 Q All right. To your knowledge did they have the
21 capability at that time of analyzing blood and urine
22 accurately for the presence of tetra dioxins?

23 A Not on -- we didn't think on a specimen of 10
24 milliliters.

1 Q What's significant about the specimen of 10
2 milliliters?

3 A Well, once you get a much larger specimen, then,
4 of course, you could try and concentrate the dioxin and then
5 you would be able to increase your limit of detection.

6 Q All right. But on a specimen of 10 milliliters,
7 what was your understanding as to whether or not those two
8 scientists could detect it in blood and urine?

9 A As far as I knew, they were not able to do that
10 reliably.

11 Q Now when you said the methods were inadequate to
12 detect dioxins they would theoretically be in the biological
13 samples, what did you mean by that?

14 A I meant parts per trillion levels, low parts per
15 trillion concentrations.

16 Q Now in the next paragraph of this memorandum by
17 Dr. Liddle, do you see in the latter half of the third
18 paragraph a reference to Monsanto?

19 A It's the last line?

20 Q Well, actually it starts -- it has to do with the
21 conversation with Bob Kleopfer.

22 A Yes. The EPA has not detected any
23 tetrachlorodioxin in any sample related to this study and
24 that they were undertaking additional analysis to try and

1 identify the reason for the difference between Monsanto's
2 and their analysis.

3 Q All right. Now in the first paragraph immediately
4 above that, what was the information that your agency had
5 with respect to what Monsanto had determined?

6 A Monsanto Company had announced that their
7 laboratories had detected and identified tetrachlorodioxin--

8 MR. CARR: Your Honor, I would object, unless
9 Counsel makes it clear that she's reading -- that's not
10 information that she had but that Dr. Kleopfer from the EPA
11 gave her.

12 THE COURT: Objection is sustained. Could you
13 clarify that, please.

14 Q (By Mr. Heineman) Yes. That paragraph reflects a
15 conversation between Dr. Liddle and Dr. Kleopfer of the EPA;
16 correct?

17 A Yes.

18 Q And it's Dr. Kleopfer that's reporting this
19 information?

20 A Yes.

21 Q All right. And what is the information that Dr.
22 Liddle understood to be the case?

23 A That Monsanto had detected tetrachlorodioxin at a
24 level of 37 parts per billion, in the production of DCP

1 crude that was involved in the incident. And Monsanto also
2 stated that the tetrachlorodioxin detected in the phenol
3 material eluded at the same time as an authenticated 2,3,7,8
4 tetrachlorodioxin standard.

5 Q Is the chemist at Monsanto involved in that work
6 identified?

7 A Yes. His name was Jim Mieure.

8 Q All right.

9 A That's M-i-e-u-r-e. That's not right. It's M-i-
10 u-r.

11 Q Actually this one is spelled M-i-e-u-r-e.

12 A Okay. Sorry.

13 Q Now in the last paragraph on that first page, did
14 Mr. Kleopfer explain the efforts EPA had gone to to analyze
15 for dioxins?

16 A Yes.

17 Q And what was that?

18 A They analyzed for dioxins in a soil sample that
19 contained 7 percent by weight of the DCP crude phenol
20 mixture.

21 Q And what did Mr. Kleopfer report that they were
22 able to find?

23 A The lower limit of detection was .1 part per
24 billion for the 2,3,7,8 tetrachlorodibenzo-dioxin, and he

1 was not able to detect any tetracholrodioxin in any sample
2 related to this study. And that they were undertaking
3 additional analyses to try and identify the reason for the
4 difference between Monsanto's and their analysis.

5
6 Defendant Monsanto Exhibit 1333 was marked for
7 identification by the court reporter.

8
9 Q (By Mr. Heineman) Dr. Kimbrough, let me hand you
10 what's next been marked as Defendant's Exhibit 1333, and ask
11 you to examine that and identify it for me, please.

12 A This is a memo to the record which was written by
13 Dr. Larry Needham, who was and still is in the toxicology
14 branch of the Centers for Disease Control, and the subject
15 was again the OCP spill.

16 Q All right. Now, did you receive a copy of this
17 document as well?

18 A Again this was circulated and my initials are
19 there, and I marked that I've read it.

20 Q All right. And was this prepared in the regular
21 course of business of your agency?

22 A Yes.

23 Q And is circulated to you as part of that regular
24 procedure?

1 A Yes.

2 Q Is it maintained as a part of the regular course
3 of business of the agency?

4 A Yes, in this case file, 9-7.

5 Q Now, I'd like to direct your attention to the
6 first paragraph. What is it that was being reported by Dr.
7 Needham to the rest of you to whom this was being
8 circulated?

9 A That we had received a serum, one milliliter, and
10 five milliliters of urine sample from an infant who had
11 possibly been exposed by the air and as a result of an
12 overturned rail tank car to a mixture of phenols, 70 percent
13 of which was orthochlorophenol.

14 Q Now, is this the same -- is this the same infant
15 that was being reported about in the previous memorandum?

16 A To my knowledge we only received one sample from
17 an infant.

18 Q All right. In Defendant's Exhibit 1332, dated in
19 February, Dr. Liddle reported that the analyses were under
20 way, did he not?

21 A Yes.

22 Q But in March Dr. Needham reports the set of
23 samples; correct?

24 A No. He reported that he received the sample on

1 February the 2nd.

2 Q All right.

3 A The dates on these memos are really the date --
4 what we do is we dictate the information, it goes on tape,
5 and we're very short in support personnel, so the dates
6 really reflect the date when the secretary typed it, which
7 is not the way things should be done, but unfortunately we
8 just have a problem with that.

9 Q All right. So insofar as you know is it the same
10 sample that's being talked about?

11 A Yes.

12 Q By what method was this sample analyzed in your
13 agency?

14 A We did two things really. We tried high pressure
15 liquid chromatography. Then we also derivatized it and used
16 gas chromatography.

17 Q All right. Now, were you able to detect anything
18 in these samples in terms of the chemicals that were
19 expected to be there?

20 A No. Except we spiked samples. We just added
21 material for controlling material, because there we were
22 able to detect something. But not in the samples from the
23 patient.

24 Q All right. But the particular serum samples

1 referred to at the beginning of the memorandum, was any
2 orthochlorophenol detected in those?

3 A No.

4 Q In the last paragraph on the first page, were some
5 additional serum samples received?

6 A Yes.

7 Q What was that about? Where did those samples come
8 from?

9 A These were from adults, from other people that
10 thought they were exposed. They were from five patients.

11 Q And what were you able to find with respect to
12 those?

13 A When we first analyzed them we had some problems
14 identifying -- interpreting our results. Then on
15 reanalysis we were not able to identify any of these
16 phenols.

17 Q Now at the end of the second page there's a
18 handwritten paragraph. Do you see that?

19 A Yes.

20 Q And whose handwriting is that?

21 A That's mine.

22 Q In fact, your name appears below the handwriting;
23 correct?

24 A Yes.

1 Q To whom were you directing this remark and why did
2 you ask the question?

3 A Because Larry Needham made a statement in his memo
4 that I -- I just didn't think he had any information that he
5 could base that statement on.

6 Q Did you direct this to Dr. Needham?

7 A Yes. I also wanted it to go -- be on record.

8 Q All right. Why did you feel that he didn't have
9 any basis for the statement that the orthochlorophenol
10 contained dioxins and furans?

11 A Because normally in a low chlorinated phenol
12 mixture you wouldn't expect to find furans. If you're
13 primarily dealing with the 2,4,6-Trichlorophenol you really
14 shouldn't have any 2,3,7,8 tetrachlorodibenzo-dioxins. I
15 was just raising that issue.

16 Q Why do you say -- why do you suggest that you
17 would be dealing with 2,4,6-Trichlorophenol?

18 A Because that was the information that we were
19 given, that this product, and that was what I thought this
20 product represented, is that it was primarily the 2,4,6-
21 Trichlorophenol.

22 Q Now, as I understand it, you were given
23 information that the trichlorophenol would be 2,4,6.

24 A Yes. I was given that information, but that was

1 also what I knew about this particular product, and that's
2 in the literature.

3 Q All right. And where did you derive your
4 information about what you knew about this particular
5 product and what was in the literature?

6 A Part of it I got from the Environmental Protection
7 Agency during the telephone conversations that I had with
8 them, and then there are handbooks such as Zack/Gaffey and
9 so on that give you that type of information. You can also
10 look it up in the Merck Index.

11 Q Now, did the Centers for Disease Control reach a
12 conclusion with respect to this six month old infant?

13 A We felt that whatever the infant had was unrelated
14 to the incidence at Sturgson.

15 Q And why was that?

16 A Because, first of all, the child didn't seem to
17 have any exposure and the illness that was described didn't
18 really fit, and you can have illness in the general
19 population. You have that all the time.

20 Q Did the analysis that was performed on the samples
21 sent to you have anything to do with your conclusion with
22 respect to this six month old male child?

23 A Yes, it had something to do with it. But it's not
24 -- the illness that was described in the child really didn't

1 fit and we only did the analysis because we were asked to do
2 it by the Missouri State Health Department, because there
3 was a lot of agitation on the part of the physician. We
4 performed it as a service, not because we felt that this was
5 probably a phenol poisoning.

6 Q Now, did there come a time when you had
7 conversations with Harry Gilmer of the EPA?

8 A Yes.

9 Q And what do you recall about your calls or your
10 conversations with Harry Gilmer?

11 A He was concerned about the 2,3,7,8
12 tetrachlorodibenzo-dioxin. He wanted to know whether I felt
13 the fact that this had been found by Monsanto in the OCP
14 crude had any toxicological significance as far as the spill
15 in Sturgeon was concerned, and I told him that it didn't,
16 and that he didn't need to be concerned about it, that what
17 he ought to be concerned about was the phenol spill and he
18 ought to clean that up.

19 Q Now, according to the memorandums that we've just
20 been through, Monsanto wasn't able to identify the isomers
21 specifically as 2,3,7,8, were they?

22 A There was a lot of debate about it, although they
23 thought that it might be there. If what they thought was
24 the 2,3,7,8 --

1 MR. CARR: Your Honor, I object unless the witness
2 is repeating conversations she had with people at Monsanto.
3 It appears that she is, but I don't believe that she is.

4 THE COURT: Could you clarify. It's not really
5 clear what the source of all this is.

6 Q (By Mr. Kaineman) Yes. Doctor, would you
7 identify the source of the information that you're talking
8 about right now.

9 A The discussions I had were with th EPA and the on-
10 site coordinator at the spill.

11 Q That would be Harry Gilmer?

12 A Yes.

13 Q And Bob Kleopfer?

14 A Yes.

15 Q All right.

16 A And then there was a Dr. Siver from the EPA in
17 Washington. He was a medical adviser.

18 Q And your conversations were based -- your
19 conversations were with those three individuals; is that
20 right?

21 A Yes.

22 Q Did you have any conversations directly with
23 anybody from Monsanto?

24 A Not that I can recall.

1 Q All right. Now, I'm sorry, you were talking about
2 there was a debate about whether it was 2,3,7,8.

3 A Yes.

4 Q Would you elaborate on that for the record?

5 A I felt because of the fact that we were dealing
6 with the 2,4,6 that it most likely wasn't the 2,3,7,8-
7 tetrachlorodibenzo-dioxin. But even if Monsanto had
8 identified as the 2,3,7,8-tetrachlorodibenzo-dioxin, the
9 concentration that you found it, it wouldn't be of
10 toxicological significance, and, therefore, I didn't think
11 that the EPA or the -- during the clean up that they needed
12 to worry about the dioxin. They should just concentrate on
13 the phenol.

14 Q Now, I'd like to show you an exhibit which is
15 Defendant's Exhibit 1193-A, which is the second page of --
16 this is obviously a blow-up of a second page of Exhibit
17 1193. Why don't I give you the entire exhibit. First let
18 me hand you what's been marked as Defendant's Exhibit 1193,
19 and I would like to ask you whether 1193-A is accurate -- is
20 an accurate blow-up of the second page of that exhibit?

21 A Yes.

22 Q Okay. Now, directing your attention to the second
23 and third paragraphs, I'd like to ask you whether the third
24 paragraph on that page accurately sets forth the advice that

1 you gave to the EPA?

2 A Yes.

3 Q All right. Now why was it, Dr. Kimbrough, that
4 you felt that 37 parts per billion -- well, first of all,
5 let me ask you this: by the most toxic form of dioxin, what
6 was your understanding that Mr. Gilmer was referring to?

7 A What --

8 Q The most toxic form of dioxin.

9 A He was talking about the 2,3,7,8-
10 tetrachlorodibenzo-dioxin.

11 Q All right. Why did you feel that 37 parts per
12 billion of 2,3,7,8 TCDD would not increase the endangerment
13 to the town's people of Sturgeon?

14 A First of all, once the stuff was spilled, you have
15 dilution of some percentage, which would reduce the amount
16 in the material that the workers were coming in contact
17 with. I was really only concerned about the workers. I
18 wasn't concerned about the people in the town of Sturgeon at
19 all because they would really have no intimate contact with
20 this material.

21 Then secondly, the material in part would be bound
22 on soil, which would make it less available to the worker.

23 And thirdly, the worker would only be exposed to
24 it for a short period of time during the clean up. We have

1 never had any problems with people that spray 2,4,5 or have
2 in the past sprayed 2,4,5-T, that had at least these
3 concentrations and often higher concentrations in the
4 commercial pilot. That was the reasoning I went to.

5 Q You say the people that have sprayed 2,4,5-T had
6 at least these high concentrations of the product.
7 Concentrations of what?

8 A Of the 2,3,7,8-tetrachlorodibenzo-dioxin.

9 Q What is the form of tetra dioxin that's found in
10 2,4,5-T?

11 A It's the 2,3,7,8-tetrachlorodibenzo-dioxin. The
12 same material we're talking about -- we're presumably
13 talking about here.

14 Q When you say you haven't had any trouble with
15 those people, what information, source of material, what is
16 it that you're referring to upon which you base that
17 statement?

18 A The laboratory, when I started out working at the
19 Centers for Disease Control, was primarily interested in the
20 toxicity of pesticides, which includes herbicides. We were
21 in the past looking at applicators and health effects in
22 people in the general population from pesticides. So we
23 have never -- we used to collect reports of incidents. We
24 never had any reports that applicators, for instance, that

1 their health was affected.

2 Q What were the levels that you were aware of of
3 2,3,7,8-TCDD that would be found in the 2,4,5-T under those
4 conditions?

5 A In the 2,4,5-T that was used in the '60's and late
6 '50's, the levels varied on -- the highest concentration
7 that has ever been found has been 60 parts per million, but
8 on the average it ran around two parts per million. And
9 than in the '70's, as our analytical capabilities improved,
10 and manufacturing procedures changed, the levels dropped and
11 it was at .1 part per million, or sometimes 50 parts per
12 billion.

13 Q Now is it the policy of the Centers for Disease
14 Control, and particularly your particular area of that
15 agency, to respond to requests of the type that Harry Gilmer
16 was making?

17 A Yes.

18 Q Do you at times go out to the scene and do a
19 personal review of the situation?

20 A Yes. Either I or other people from the Centers
21 for Disease Control will.

22 Q Do you do that on an emergency basis at times?

23 A Yes. If we think it's necessary, if there's a
24 problem.

1 Q Now, how would you describe your reaction to Mr.
2 Gilmer's request, in relation to the other types of
3 responses that you've made.

4 A He actually, because of the concern about the
5 dioxin, at one point wanted me to come to Missouri. But I
6 didn't feel that that was necessary. He was concerned about
7 some of the workers having a skin rash. But I didn't feel
8 that there was any reason for me to go there. I did give
9 him the name of another physician in case he felt he had
10 additional problems. That was Dr. Taylor from the Cleveland
11 Clinic.

12 Q Dr. Taylor from the Cleveland Clinic?

13 A Yes.

14 Q Was he a dermatologist?

15 A Yes.

16 Q Did you feel that the skin rashes he was reporting
17 could in any way be due to dioxin exposure?

18 A No. The concern was that these people might have
19 chloracne, and I didn't -- I didn't think that what he was
20 describing was chloracne at all. But Dr. Taylor had a lot
21 of experience in that, and so if he didn't believe me I told
22 him he could call Jim Taylor and talk to him also.

23 Q Did you have an opinion at that time as to whether
24 or not at the levels that were being described for the

1 presence of TCDD and the product that was spilled there that
2 it would be likely or even possible that these rashes could
3 be chloracne?

4 A I felt that they couldn't be chloracne, that this
5 didn't make any sense.

6 Q Why was that?

7 A Because the concentrations were too low and
8 because it was in soil, and because it was bound to soil in
9 part.

10 Q Now did there come a time, Dr. Kimbrough, when you
11 had a conversation with a Dr. David Logan of D.S.H.A.?

12 A Yes.

13 Q All right. Was that in relation to the Sturgeon
14 matter?

15 A Yes.

16

17 Defendant Monsanto's Exhibit 1334 was marked
18 for identification by the court reporter.

19

20 Q (By Mr. Heineman) Let me hand you what's been
21 marked as Defendant's Exhibit Number 1334, and ask you to
22 examine that and identify it for me, please.

23 A This is a letter tha Dr. David Logan wrote to me
24 and the date on the letter is December 12, 1979, and he

1 states in his letter that, "As we discussed in our phone
2 conversation today, I'm sending you information concerning
3 the orthochlorophenol spill in Sturgeon, Missouri." He also
4 included some review data from a Dr. John Moore. "The
5 information I have received from Joseph Seifter at the EPA
6 is that the blood dioxin levels were confirmed and each
7 sample contained 60 percent 2,3,7,8-tetrachlorodibenzo-
8 dioxin. I would be grateful if you would review the
9 enclosed material and indicate if you feel that any further
10 monitoring or evaluation is warranted."

11 Q What was it that Dr. Logan was concerned about,
12 specifically?

13 A He was concerned about workers that had been
14 involved in the clean up and they supposedly had 2,3,7,8-
15 tetrachlorodibenzo-dioxin in their blood, and he wanted to
16 know whether O.S.H.A. needed to do something.

17 Q All right.

18 A O.S.H.A. is the Occupational Safety and Health
19 Administration.

20 Q Now, in this case we heard reference to an
21 organization called NIOSH. What is NIOSH and what are they
22 associated with?

23 A NIOSH is the National Institute of Occupational
24 Safety and Health, and it's one institute of the Centers for

1 Disease Control. Just the way I am in another institute,
2 which is the Center for Environmental Health. There is a
3 lot of collaboration between these two centers.

4 Q You mean between your center and the NIOSH?

5 A Yes.

6 Q What is the relationship between NIOSH and
7 O.S.H.A.?

8 A NIOSH performs within the Centers for Disease
9 Control research and gives medical assistance to O.S.H.A.
10 O.S.H.A., which is the Occupational Safety and Health
11 Administration, is in the Department of Labor, and they
12 enforce the air levels and exposure standards and safety
13 measures in the work place.

14

15 Defendant Monsanto's Exhibit 1335 was marked
16 for identification by the court reporter.

17

18 Q (By Mr. Heineman) Let me hand you what's been
19 marked as Defendant's Exhibit 1335 and ask you to examine
20 that and identify it for me, please.

21 A This is a letter which I wrote to Dr. Logan at the
22 Occupational Safety and Health Administration. It's dated
23 January 4, 1980.

24 Q Now was this -- is this document -- this document

1 was prepared by you in the ordinary course of your
2 activities as research medical officer for the Centers for
3 Disease Control?

4 A Yes.

5 Q And you have maintained a copy of this in the
6 files of your agency?

7 A Yes.

8 Q And does this accurately set forth the subject
9 matter that you were discussing with David Logan at that
10 time?

11 A Yes. He wanted advice on the blood levels that
12 had supposedly been measured or determined in the workers of
13 the 2,3,7,8-tetrachlorodibenzo-dioxin.

14 Q All right. And what was your position with
15 respect to those blood levels?

16 A I was not convinced that the workers actually had
17 measurable levels of 2,3,7,8-tetrachlorodibenzo-dioxin in
18 their blood following their exposure to the DCP crude.

19 Q Why was that?

20 A Well, because first of all I was still dubious
21 about this isomer actually being present, since we're
22 primarily dealing with the 2,4,6-Trichlorophenol. And then
23 the other problem that I had was the fact that it is
24 extremely difficult to identify 2,3,7,8-tetrachlorodibenzo-

1 dioxin at very low concentrations, and you would have to
2 either have huge amounts of blood, or you simply at the
3 state of the art wouldn't be able to detect it in the blood.

4 And we are still -- we have a good method for adipose
5 tissue, but we're still working on the method for blood, and
6 we still have not ironed out all of the problems.

7 Q You mean as of today?

8 A Yes.

9 Q And that's the chemistry branch of the CDC?

10 A Yes.

11 Q Now --

12 A Unless it was confirmed -- I'm sorry.

13 Q I'm sorry. Go ahead.

14 A Unless they were confirmed by another laboratory,
15 I just would not really accept that result.

16 Q Now did you suggest to Dr. Logan some things that
17 should be done?

18 A Yes.

19 Q All right. What was it that you thought he should
20 do?

21 A There ought to be further analysis of the identity
22 of the trichlorophenols in the DCP crude, and an attempt
23 should be made to collect all of the available information
24 on studies done in connection with this spill from different

1 agencies which were involved and these results should be
2 reviewed.

3 It should be determined what analyses were
4 conducted to establish the 60 percent of the blood -- that
5 60 percent of the blood dioxin was the 2,3,7,8-
6 tetrachlorodibenzo-dioxin, according to the information that
7 he had received from the Environmental Protection Agency.
8 The methodology and all of that should be looked into to
9 assure that this was really true, because we have had -- we
10 often get results at the CDC that we look into it, it turns
11 out not to be true.

12 Q Now, you mentioned at the bottom of the page, of
13 that first page, about wanting to determine whether the
14 workers could be exposed to TCDD in other circumstances.

15 A Yes.

16 Q Did you not?

17 A Yes.

18 Q Why would that be important?

19 A Well, first of all, we all have low body burdens
20 of these types of chemical in our body. As we improve our
21 methods of detection we can -- and we can detect lower
22 levels, we find it in people. Secondly, they are clean up
23 workers that are exposed to all sorts of things. They may
24 have had exposure somewhere else. Nobody did a pre-entry

1 examination on them, which is what you would have to do to
2 determine whether somebody gets body burdens, or whether
3 somebody's health is affected from a particular exposure.

4 Q What is your opinion, Dr. Kimbrough, as to the
5 source of the body burden that we all have?

6 A There are a number of sources. These types of
7 compounds can be produced through combustion and from
8 incinerators. You get this particular isomer and many other
9 isomers, also more highly chlorinated dioxins. It is
10 presently not known whether these more highly chlorinated
11 dioxins are transformed in the environment in lower
12 chlorinated compounds.

13 Then quite a number of commercial products contain
14 very low concentrations of these materials. 2,4,5-T was
15 used a lot and it contained the 2,3,7,8-tetrachlorodibenzo-
16 dioxin. Hexachlorophene was made from 2,4,5-
17 Trichlorophenol. It also contained trace amounts. That's
18 the germicide that used to be Physohex.

19 Other processes of combustion such as cigarette
20 smoke. From car exhaust you can get these types of
21 compounds. Always in very low concentrations. But all of
22 it, of course, adds to the burden in the environment.

23 It gets in sediments of rivers and also there are
24 wastes, chemical waste products from chemical companies.

1 Then from there it can be taken up by fish, and people
2 eating the fish could get burden exposed to these compounds.

3 Q Now, if I can direct your attention to the second
4 page of Exhibit 1335, your letter to Dr. Logan, the second
5 paragraph on that page discusses other serum samples, does
6 it not?

7 A Yes.

8 Q What is it that you were reporting to him there?
9 Were these samples that we had looked at in the other
10 exhibits?

11 A Yes.

12 Q And in the last paragraph that you related to Dr.
13 Logan, what is it that you were talking about there?

14 A About the fact that there was supposedly 30 parts
15 per billion of a tetrachlorodibenzo-dioxin in the OCP crude
16 and that if this analytical result is correct, the ratio
17 between the OCP crude and the detected dioxin would be three
18 times ten to the minus seven parts of OCP to one part
19 dioxin. When you have such a large ratio, I would have
20 suspected that the blood of the workers would have contained
21 some orthochlorophenol because there was just so much more
22 orthochlorophenol than this little bit of dioxin. So that
23 is another reason why these results in the blood really
24 didn't make any sense.

1 Q Now, I'm not sure I heard you correctly. Did you
2 use the term three times ten to the minus seven? Would that
3 relate to the dioxin or the OCP?

4 A Well, it's three times ten to the seven, as far as
5 the OCP is concerned. In other words, there is -- there are
6 only 30 parts per billion of dioxin in the
7 orthochlorophenol. So there is a tremendous ratio between
8 the amount of phenols and the little bit of dioxin.

9 Q All right. So under those circumstances you would
10 expect to find OCP --

11 A Yes.

12 Q -- in the blood if there had been exposure?

13 A Yes.

14 Q All right. Now, if, Dr. Kimbrough, if all of the
15 37 or 40 parts per billion, or 30 or 40, or whatever you
16 call it, 30 or 45, or whatever it is, parts per billions had
17 been 2,3,7,8, was it not your opinion that that would not be
18 of concern?

19 A Yes.

20 Q Then why would you be talking to Dr. Logan about
21 needing to figure out whether it was 2,3,7,8 or not? Did it
22 make any difference?

23 A It's always from a scientific point of view, you
24 always want to be accurate. So it was partly to confirm

1 that I was right.

2 Q Okay.

3 THE COURT: Before you get into your next subject,
4 can we take a short break?

5 MR. HEINEMAN: Sure.

6 THE COURT: We'll take a short recess.

7

8 (Short recess.)

9

10 Q (By Mr. Heineman) Dr. Kimbrough, did there come a
11 time when you ran some rabbit ear tests?

12 A Yes.

13 Q And what material did you in order to do that?

14 A I used the DCP crude, a sample from the lot that
15 was spilled in Sturgeon.

16 Q Now was this an environmental soil sample or the
17 material itself?

18 A No, it was the material itself.

19

20 Defendant Monsanto's Exhibit 1336 was marked
21 for identification by the court reporter.

22

23 Q (By Mr. Heineman) Let me hand you what's been
24 marked as Defendant's Exhibit 1336 and ask you to examine

1 that and identify it for me please.

2 A This is a report of the rabbit ear test that we
3 did. It's entitled "Volume VI Dermatoxicity of
4 orthochlorophenol to the rabbit ear."

5 Q Now, what is the -- what is a rabbit ear test and
6 what's it for and why is it used?

7 A It was developed because years ago we weren't able
8 to analyze for the 2,3,7,8-tetrachlorodibenzo-dioxin, and we
9 also didn't know really what it was. We just knew that some
10 of these products, like 2,4,5-T, and particularly the 2,4,5-
11 trichlorophenol in workers that were producing these
12 materials occasionally produced the skin lesions called
13 chloracne.

14 And one way to find out whether a particular
15 product would do that was to paint it on the rabbit ear, and
16 then the rabbit ear would respond sort of in the same way
17 people responded and would get these skin lesions on its
18 ear. And it's a simple biological screening test for that
19 reaction.

20 Q What is the -- excuse me. What is the purpose of
21 testing for chloracne either in a rabbit or in looking for
22 it in a human being?

23 A It's a response that can be elicited by 2,3,7,8-
24 tetrachlorodibenzo-dioxin, and compounds that are similar.

1 In the change you'd get this, a change in the hair
2 follicles. They dilate, enlarge, and you get little bumps.

3 Q And is chloracne thought by you to be a reliable
4 indicator of exposure to 2,3,7,8-TCDD?

5 A Yes. It's not the only chemical that causes that,
6 but it is one chemical that will cause that reaction.

7 Q Now, would you describe the circumstances of this
8 test? Did you perform this yourself?

9 A It was done by a technician under my direction.

10 Q All right. Would you tell us what you did on the
11 test, and what the results were.

12 A We took two rabbits. Since this was just a
13 screening test, we only used two animals. We took a small
14 amount of the material and applied it to the inside of the
15 rabbit ear daily for five days, and then we observed the
16 rabbits to see whether the rabbit would get this chloracne
17 type reaction. In rabbits you call it hyperkeratosis.
18 That's h-y-p-e-r-k-e-r-a-t-o-s-i-s. And the amount that we
19 put on was a tenth of a milliliter per day for five days.
20 So a total of five/tenths of a milliliter.

21 Q Now, was this the -- was this the raw OCP
22 solution, or did you dilute it in some way?

23 A No, we didn't dilute it.

24 Q What did you find with respect to the effect of

1 the test.

2 A There was skin irritation from the raw DCP, but
3 there was no chloracne.

4 Q Now when you say skin irritation, what was the
5 nature of the skin irritation?

6 A The ears looked sort of reddish and there was some
7 increase in the epithelium. There was some microscopic
8 changes. We took the ears, and we -- we killed the rabbits
9 and we took the ears and processed them and looked at them
10 under the microscope.

11 Q Now, if I look at the last two pages of this
12 exhibit, I see some -- an autopsy report, two autopsy
13 reports there. Are those in your handwriting?

14 A The lower -- the final comments, that's my
15 handwriting.

16 Q All right.

17 A The other was done by the technician..

18 Q Does the report of scarring appear there?

19 A Yes.

20 Q What sort of scarring was that?

21 A Well, that is the reaction -- it was a healing of
22 the skin irritation from the DCP crude.

23 Q Now, to me the term skin irritation can mean a
24 wide variety of things, a little reddening, a little

1 chapping, but it normally doesn't leave a scar, does it?

2 A No. But there was more damage than that. There
3 was -- it wasn't really ulceration, but it was a severe
4 irritation. What we did is we, after we had applied the
5 material, we kept the animals for a period of time since it
6 takes sometime for the chloracne to develop.

7 Q Is the chloracne in the rabbit ear readily
8 identifiable?

9 A Yes.

10 Q How about in human beings?

11 A Yes.

12 Q What conclusion did you reach as a result of
13 finding no hyperkeratosis in these two rabbits?

14 A That there was no 2,3,7,8-tetrachlorodibenzo-
15 dioxin in the OCP crude at concentrations above .5 parts per
16 million, because the sensitivity of the tests --

17 MR. CARR: At what level, Doctor, are you talking
18 about?

19 THE WITNESS: 0.5 parts per million. The
20 sensitivity of the test would not detect very low
21 concentrations.

22 Q (By Mr. Heineman) And what did you do with this
23 information once you developed it?

24 A I mentioned it in my discussions to these

1 different people that kept calling me about the episode and
2 felt that it was another indication that there was no acute
3 threat to the people.

4 Q Now, the 0.5 parts per million would be 500 parts
5 per billion, would it not?

6 A Yes.

7 Q And that's the detection limit of the test?

8 A Yes.

9 Q Now, was it your belief that a level --

10 MR. CARR: Your Honor, I know this is voir dire
11 sort of thing, but he's still leading, nevertheless. I must
12 object to it.

13 THE COURT: I don't think there should be any
14 leading questions in this also. Please rephrase it.

15 Q (By Mr. Heineman) What was your belief with
16 respect to that level in the DCP being a hazard to someone
17 exposed to it?

18 A I didn't feel that it would be a hazard, because
19 of the dilution that you would get once it got into the soil
20 and because in the past commercial products contained the
21 concentrations that were higher.

22 Q Higher than?

23 A Than the .5 parts per million.

24 Q Now, Dr. Kimbrough, I'd like you to assume that

1 there was an isomer specific test performed on the material,
2 on a reserve sample of the material in the tank car, in
3 which it was detected 45 parts per billion of 2,3,7,8-TCDD;
4 and assuming that level of contamination of the product
5 itself, and that that material was spilled at Sturgeon, do
6 you have an opinion as to whether or not that level of
7 dioxin in that material would be of any biological
8 consequence to anybody at Sturgeon?

9 A It wouldn't be to any of the people.

10 Q I'm sorry?

11 A It would not be to the people of Sturgeon.

12 Q Would it be of any consequence in your opinion to
13 the workers that would be involved in the clean up?

14 A No.

15 Q With respect to the town's people of Sturgeon, why
16 do you believe that it would not be of any biological
17 consequence?

18 A First of all, if they got exposed to it at all,
19 they would have very little contact with it. I mean they
20 don't live on the railroad track, or in the immediate area
21 around it. Besides that, you had the dilution that I was
22 talking about, and we at the Centers for Disease Control
23 have established that even for long term exposure, anything
24 below one part per billion would not create a risk to the

1 people living in such a contaminated area. This is for
2 life-time exposure.

3 Q Now, you suggested that the people would not be
4 living in the immediate area. What do you mean by
5 immediate? I would suggest to you that there were homes
6 nearby the railroad track. I mean within a couple hundred
7 feet perhaps of the railroad right-of-way. Do you believe
8 that people living in the homes that close to the railroad
9 right-of-way would be in any hazard at all in connection
10 with this concentration that I've just given you?

11 A Not with these concentrations, and besides that
12 most of the material was carted away.

13 Q Now, what are the factors in your view that lead
14 to your conclusion of a lack of biological effect?

15 A One factor is the dilution that you get. The
16 information that I received was that in most of the soil
17 samples the concentration was diluted by about 10 percent.
18 So if the highest level of TCDD were 45, that would get you
19 down to 4.5 parts per billion, which is very close to the
20 one point per billion level that we established for
21 residential areas.

22 You would not have anybody gardening on the
23 railroad track, or right immediately adjacent to it. So
24 there would not be intimate contact with whatever soil was

1 left. The material -- most of the material was removed.
2 And so by the time you go through all of that, there really
3 isn't anything left.

4 Q Now, what is -- do you have an opinion with
5 respect to photodegradation of 2,3,7,8-TCDD and whether that
6 occurred?

7 A It occurs when the material is exposed to U.V.
8 light. It disappears very rapidly. There's a paper by
9 Crosby, I think, where he said within 24 hours. Some people
10 say within 36 hours. We use it, or have used it as a
11 process of decontaminating laboratory service on surfaces,
12 where if you spilled something and then you use U.V. light
13 you can decontaminate you lab. But if the sunlight, or U.V.
14 light can't get to the material, then, of course, it doesn't
15 break down.

16 Q Now, would you differentiate --

17 MR. CARR: I couldn't hear the last part of the
18 witness' answer, your Honor.

19 THE COURT: Could you repeat the last part of your
20 answer, please.

21 THE WITNESS: I said that if the sunlight does not
22 get to the TCDD, then, of course, it can't be broken down.
23 In other words, it's on surfaces --

24 MR. CARR: I'm just interested in what you said.

1 You don't need to explain it to me.

2 THE WITNESS: Okay.

3 MR. CARR: If that is what you said.

4 THE WITNESS: Yes.

5 Q (By Mr. Heineman) Now if you use it in the
6 laboratory, that is ultraviolet light, to decontaminate a
7 laboratory, do you have any soil or anything that the
8 material would be adhering to? Would that affect the
9 ability of it to photodecompose?

10 A No. We don't have soil usually. I don't know.

11 MR. CARR: I couldn't hear that, understand the
12 last of that answer either. What was the last --

13 THE WITNESS: I do not know --

14 MR. CARR: You don't know?

15 THE WITNESS: -- whether the fact that it is
16 absorbed to soil affects that.

17 Q (By Mr. Heineman) Are you familiar with the
18 Crosby --

19 MR. CARR: Your Honor, this is leading again.

20 THE COURT: Objection is sustained. It is
21 leading. Gentlemen, could I see you at the bench for a
22 minute, please.

23

24 (The following proceedings were had at the bench.)

1
2 THE COURT: Okay. We'll break for lunch at this
3 time. We'll start again at 1:00.
4

5 (Lunch recess.)
6

7 Q (By Mr. Haineman) Dr. Kimbrough, just before we
8 broke at the lunch break I was asking you about
9 photodegradation. Do you recall that?

10 A Yes.

11 Q You had mentioned that you used ultraviolet light
12 in the laboratory.

13 A Yes.

14 Q You had mentioned that you used ultraviolet light
15 in the laboratory to decontaminate surfaces; correct?

16 A Yes.

17 Q And then I asked you about whether TCDD being
18 attached to soil, adhering to soil would have any effect.

19 A Yes.

20 Q And did I understand you correctly to say you
21 don't know?

22 A Yes. I don't know what the rate, whether the fact
23 that it was with the soil would influence it in any way.

24 Q Do you have an opinion whether TCDD adhered to

1 soil would photodecompose at all?

2 MR. CARR: Your Honor, even in this context, I
3 think the witness has to be shown some expertise in this
4 area.

5 THE COURT: Can you lay a foundation for that.

6 Q (By Mr. Heineman) Dr. Kimbrough, have you in your
7 capacity, have you studied the subject of photodecomposition
8 of TCDD?

9 A Yes. I've used it, and in connection with safety
10 in laboratory decontamination.

11 Q And have you done any work or reviewed any
12 literature with respect to photodecomposition of TCDD in
13 soil?

14 A There have been some recent papers that have
15 discussed that.

16 Q What papers are those?

17 A There was some documents that Dr. Schroy sent me
18 and then there was some work that the Air Force did.
19 Earlier, some of which is more in documents rather than --

20 Q I'm sorry, I didn't hear the last part.

21 A - It's in these Air Force documents that they put
22 out.

23 Q All right. What Air Force Study in particular are
24 you referring to?

1 A This is at the Eglund Air Force Base. In those
2 documents there's reference made to the photodegradation.

3 Q All right. Now, based upon your review of that
4 literature that you've mentioned --

5 MR. CARR: Your Honor, I submit this is not
6 sufficient qualification for an opinion.

7 THE COURT: The objection is well taken.
8 Sustained.

9 MR. HEINEMAN: Do you have Exhibit 1255?

10 Q (By Mr. Heineman) Dr. Kimbrough, let me hand you
11 what's been previously marked as Plaintiff's Exhibit 1255,
12 and I wonder if you would examine that and identify it for
13 the record, please.

14 A It's a paper which I wrote on the "Health
15 Implications of 2,3,7,8-tetrachlorodibenzodioxin (TCDD)
16 Contamination of Residential Soil."

17 Q And what -- you say you wrote it?

18 A Yes.

19 Q And when did you write it?

20 A It was started in 1981 and then went through a
21 number of revisions, and was finally published in 1984.

22 Q Was the document peer reviewed?

23 A Yes.

24 Q And did you incorporate comments of consultants?

1 A Yes.

2 Q Now, why did you do this document? Why did you
3 write this document?

4 A In Missouri after we had uncovered the
5 contamination of TCDD in the riding arenas in 1974, there
6 were, subsequently to that, rumors that there was more
7 contamination and so on, so eventually the Environmental
8 Protection Agency reopened the investigation and did further
9 analysis of various -- of soil in various areas in Missouri.
10 They found additional contamination with the 2,3,7,8-
11 tetrachlorodibenzo-dioxin.

12 Once they learned this, they then asked the Center
13 For Disease Control, and they specifically invited me to
14 come to Kansas City to discuss this with them. One of the
15 issues was the level of contamination of soil -- with TCDD
16 in the soil, and at what concentration they should be
17 concerned and what we thought of that from a health point of
18 view.

19 And having made some calculations, I suggested
20 that a level of concern should be in residential areas above
21 one part per billion. Anything below one part per billion
22 we would not have to be concerned about at all. Above that
23 it would then depend on the situation in the particular
24 area, whether we would have to take remedial action.

1 The question was also asked of us for the reason
2 of analysis, in other words, the chemist wanted to know how
3 far down do they have to measure. As you go down in your
4 measurements the analyses become more and more complicated,
5 and so they wanted to have a cut-off. In order to
6 competently detect one part per billion we made that cut off
7 to a high net parts per trillion.

8 Subsequently to that we felt that we should
9 document this advice, and we also asked consultants to
10 consider this further. And that then eventually resulted in
11 the publication of this paper.

12 Q Doctor, what is a tolerance level?

13 A It's a level that is set for a chemical in a
14 product, usually by the Food and Drug Administration, for
15 instance, or by the Environmental Protection Agency.

16 Q Is this one part per billion set forth in
17 Plaintiff's Exhibit 1255? Is that a tolerance level?

18 A No. You see, the Centers for Disease Control is
19 not a regulatory agency. It's a health advisory.

20 Q Do you consider the one part per billion in soil
21 to be the equivalent of a tolerance level?

22 A No. Because it is specific for areas rather than
23 something that should be applied throughout the United
24 States. It just depends -- you could have levels that could

1 be higher in certain areas. This was specifically for
2 residential areas where you have small children. We only
3 felt that below that level there shouldn't be any concern
4 because you then get -- from a health point of view you
5 don't have any problems. In addition to that you get into
6 background levels in the environment.

7 Q What do you mean you get into background levels?

8 A There is, because of the use of 2,4,5-T, for
9 instance, because of the incineration problems, there is
10 background contamination in general in our environment.
11 Most of the levels that we have found have been in the low
12 parts per trillion range.

13 Q When you said you found them, you mean as
14 background?

15 A Well, if you have a point source, for instance in
16 a -- you have a chemical dump where you found TCDD, and you
17 go out from that dump to try and determine how far the
18 contamination goes, you eventually -- and then if you have
19 control areas, eventually get to a point where you will pick
20 up TCDD, but it's no longer related to the dump area. It's
21 in that way when we made those types of studies that we
22 found that there is TCDD. Not everywhere, not in every
23 sample. But you find it.

24 Q Now, how is the background level related to the

1 one part per billion?

2 A It's much below that. It's in parts per trillion
3 levels.

4 Q Now was it your intention when you authored this
5 paper that one part per billion be a action level?

6 A Action level, of course, means different things to
7 different people. But what my intention was, was to say,
8 well, here we now have a level that's one part per billion,
9 or maybe that's above that. Let's look at the area, and see
10 what's going on. How uniform is the contamination, and do
11 we have to do something. Do we have to remove soil? Do we
12 have to keep people from having access to certain areas?
13 In those types of public health service measures, you would
14 then have to consider and review the situation.

15 Q Would an industrial or commercial site be
16 something that you might review?

17 A Yes. But then we would review it, yes. But then
18 you could leave higher levels there. We've done that in
19 certain areas.

20 Q What is your opinion with respect to a railroad
21 right-of-way?

22 A It would fall more into the commercial areas.

23 Q And would you consider one part per billion in
24 soil to be a level of concern in a railroad right-of-way?

1 A Not necessarily.

2 Q What would be the considerations that would enter
3 into your conclusion?

4 A It would depend on what the activities were in
5 that area and what type of exposure people might have, those
6 sorts of things.

7 Q All right. What specifically would you have in
8 mind in terms of making an assessment?

9 A In residential areas, the major exposure would
10 occur in toddlers, and the concern there was the ingestion
11 of soil, that when children play outside they would eat soil
12 and then they would get a certain dose from the soil. You
13 would not have to be concerned about that with grown-ups.
14 Most of the exposure there would be through the skin. The
15 absorption of the material from soil into the skin is much
16 less than when you ingest it. So the dose drops
17 precipitously.

18 Q Now if that is one of your criteria, how would you
19 then relate to a railroad right-of-way in terms of the one
20 part per billion?

21 A The one part per billion would certainly be safe
22 and you would be able to leave higher levels.

23 Q Well, for example, did you previously come up with
24 a figure a moment ago of 4.5 parts per billion when you took

1 45 and took 10 percent of it or something like that?

2 A Yes.

3 Q All right. Now would a 4.5 part per billion level
4 in soil be a concern to you as the author of Plaintiff's
5 Exhibit 1255?

6 A No. We made some calculations for the state of
7 New Jersey, where there were commercial areas where the
8 levels were five to seven parts per billion, and we advised
9 the state of New Jersey that since it was a commercial area
10 they would not have to take any remedial action.

11 Q When you say -- well, let me ask you this: would
12 five to seven parts per billion be as high as you would be
13 willing to go in terms of a level of concern in a commercial
14 area?

15 A No. But those were the levels that were there.

16 Q All right. Would you consider levels in soil of
17 one part per billion or less to be safe?

18 A Yes.

19 Q And why -- on what basis would you reach that
20 conclusion?

21 A The amount of exposure, the amount of up-take you
22 would get in a situation like that, over a lifetime would
23 not increase your risk of developing adverse health effects
24 from that type of exposure.

1 Q Would that be true in a residential area?

2 A That's for a residential area. That's what our
3 paper was based on.

4 Q And in terms of a commercial or industrial area
5 would you raise that level -- that, quote, safe, unquote,
6 level higher than one part per billion?

7 A You could. It would depend on the situation. It
8 would depend on who was there and what people were doing
9 that.

10 Q With respect to the background levels, I think the
11 parts per trillion that you mentioned, has the Center for
12 Disease Control observed any harm to human beings from those
13 background levels of TCDD?

14 A No.

15 Q What indicators do you look at in reaching that
16 conclusion?

17 A You can't really examine people individually that
18 live in -- just live anywhere. But by making surveillance
19 type observations in the general health of the population
20 you can determine whether there are changes in their well
21 being.

22 Q And have you made such determinations?

23 A The Centers for Disease Control and also the
24 National Center for Health Statistics does, and to some

1 extent the National Cancer Institute do these types of
2 surveys, mortality studies. We have a birth defect program.
3 We have a number of these types of programs where we do the
4 surveys.

5 MR. CARR: If I might get the record corrected, I
6 submit that I'm not examining the witness now, but Counsel
7 asked if you had done such work, the witness responded with
8 work that perhaps others at CDC did, or that NIOSH did, and
9 the record could interpret it to mean that she has done
10 that, and it might as well be corrected now, rather than
11 later.

12 THE COURT: I was unclear on that also. Could you
13 clarify that or follow it up rather, I suppose.

14 Q (By Mr. Heineman) Dr. Kimbrough, what work were
15 you referring to in the testimony you just gave?

16 A I was really referring to the work that's done in
17 general by the Public Health Service, and, of course, I am
18 involved in parts of that and I read about it.

19 Q All right.

20 A But I'm not the only one that's doing that.

21 Q How are you involved in parts of that?

22 A Well, when we do studies in different areas, I --
23 in other words epidemiology studies to determine whether
24 people in certain areas have been affected by something, you

1 also need to have control groups.

2 And in order to do your studies, you need to know
3 what the base lines are of well being, or of poor health in
4 the general population. So you're very much concerned with
5 background disease in the general population, otherwise you
6 couldn't do studies at all. It's in that connection that I
7 concern myself with that.

8 Q Now, I'd like you to assume that there has been a
9 chemical analysis done of some soil from the railroad right-
10 of-way in which 65 parts per trillion of TCDD have been
11 found. All right. Would you consider that to be of any
12 biological significance or any hazard or risk of any kind to
13 any resident of Sturgeon?

14 A No.

15 Q In terms of the background level or levels which
16 you talked about before, where would 65 parts per trillion
17 stand in terms of what you observe in the other studies and
18 tests that you've done?

19 A It depends again if you are in a rural area where
20 a lot of 2,4,5-T has been used in the past, you sometimes
21 may find such levels. You may find them on right-of-ways
22 where they have used a lot of 2,4,5-T for control of
23 vegetation.

24 MR. CARR: I didn't hear that, find it in what

1 areas?

2 THE WITNESS: The right-of-ways --

3 MR. CARR:: The right-of-ways. All right. Thank
4 you.

5 THE WITNESS: -- For high tension power lines and
6 those sorts of things. They've used a lot of 2,4,5-T.

7 Q (By Mr. Heineman) Would the same in your opinion
8 apply to a railroad right-of-way?

9 A It's possible. I would -- if I made such a
10 finding I would go out and get additional samples from other
11 areas of that railroad track to see whether that's a
12 background level.

13 Q Now, to your knowledge has EPA made a list of
14 dioxin sites in Missouri?

15 A Yes.

16 Q Have you or your study there in 1255, to your
17 knowledge, participated in any way in that -- in the
18 accumulation of that list?

19 A I'm sorry, I didn't understand. Did we do the
20 analysis or --

21 Q I'm sorry. No. What I'm asking is in the
22 compilation of that list by EPA, have you or has CDC
23 participated in that compilation?

24 A We did not compile the list. We only reviewed

1 some of the information that they accumulated in the
2 analysis. And the other -- other thing we did early on, was
3 because EPA uses a lot of contractors for their laboratory
4 work, we were concerned about the proficiency of the
5 laboratories. We sent our chemists out to assure that the
6 analyses would be correct that were done on the soil.

7 Q Did the EPA use, to your knowledge, the risk
8 assessment that's comprised in your paper there, Exhibit
9 1255, in making that compilation?

10 A Yes.

11 Q And did you participate with them in doing so?

12 A They would measure soil levels, they would get the
13 results of the soils that they had analyzed, and then they
14 would send us that information and we would review it. In
15 that respect we were involved with making these lists.

16 Q All right. Now is Sturgeon, Missouri on the EPA
17 list of Missouri dioxin sites?

18 A No.

19 Q Do you know why it is not?

20 A Because the levels are too low. There's no TCDD.
21 The levels are too low.

22 Q Now, with respect to your paper, this Plaintiff's
23 Exhibit 1255, I'd like to direct your attention to the
24 second page of the exhibit which is actually numbered 48.

1 What sort of estimations have you made of risk with respect
2 to TCDD? Well, strike that. That's too -- do you believe
3 the risk estimates that you've made are actual risks?

4 A No. They are a very conservative prediction which
5 is most likely overly conservative. But if you work for the
6 Public Health Service, you want to error on the side of
7 safety in order to protect the people.

8 Q Now with respect to TCDD, do you have an opinion
9 as to whether or not TCDD is a carcinogen. And I'd like you
10 to direct your answer both to animals on the one hand, and
11 human beings on the other, if you would, please.

12 A It has been shown to cause tumors in rats and also
13 in mice. It is considered to be what is called a promoter,
14 in that it makes it easier for tumors to develop out of
15 cells. It hasn't been shown -- we haven't been able to
16 substantiate that it causes cancer in humans. But because
17 it is a promoter in animals, in order to protect people we
18 have treated it as a carcinogen.

19 Q When you say you have treated it as a carcinogen,
20 in what context are you --

21 A In this risk assessment. In other words, because
22 of the findings that we made in animals, there might be a
23 possibility that it might have similar effects in humans,
24 although we've never been able to demonstrate that. Because

1 of that we made a risk assessment, based on the animal
2 cancer studies. If that finding was not there, then it is
3 common to simply use a safety factor for other toxic
4 effects.

5 Q In your opinion, would the dose response principle
6 apply to TCDD in terms of carcinogenicity?

7 A The dose response curve always applies. In other
8 words, if you -- you have even -- you can show that the
9 animal studies that we have show that. If you get less of a
10 dose, you get less animals with cancer. And as you reduce
11 your dose, eventually it -- you're just not able to show
12 that anymore.

13 Q What do you call that point where you're just not
14 able to show that anymore?

15 A It's a threshold that people talk about.

16 Q Is the term N.O.E.L. applicable?

17 A The No Observed Effect Level, which is another
18 term for it, that term changes all the time because of
19 different concepts.

20 Q In your opinion is there a No Observed Effect
21 level or threshold level for promotion?

22 A I think so.

23 Q And what do you base that on?

24 A There are animal experiments where different doses

1 have been given where at low doses you don't get any tumors.

2 You can then argue that if you had used more animals, maybe
3 in a few of those animals you might still find tumors.

4 You can extend that for awhile. But eventually
5 again you will end up not getting an increase of tumors over
6 background tumors in animals.

7 The other thing is that there are many, many
8 promoters that people get exposed to that occur naturally.
9 In food and in air and -- I mean we all should be really
10 wiped out if all these low level promoters would cause an
11 effect. The other thing is that once you get it in these
12 very low concentrations, sometimes because you're exposed to
13 so many different things, they actually may cancel each
14 other out. There's a lot that really still needs to be
15 worked on to sort that out.

16 Q Do you have an opinion as to whether or not one
17 molecule of dioxin could cause cancer?

18 A Not in practice.

19 Q I'm sorry, I didn't understand you.

20 A Not in practice. I mean there are people that
21 come from molecular biology, chemically these series. But I
22 don't think that's the case.

23 Q And why not?

24 A First of all, the molecule would have to get to

1 the target cell, and would have to affect the cell. Then --
2 and that goes through -- it first of all has to get into the
3 body, then it has to go from the stomach, let's say, to the
4 liver, or to the lung. It may not ever really be absorbed.
5 It may just be excreted.

6 Then a promoter does not act the way an initiator
7 does in that it just hits the DNA, and that's it, and
8 there's a change in the cell, and then eventually the cell
9 will develop into a cancer. It has to be there for long
10 periods of time.

11 We also know that although the 2,3,7,8-
12 tetrachlorodibenzo-dioxin is persistent, it will eventually
13 be excreted. So the body would get rid of it. We know from
14 people that stop smoking cigarettes, and the compounds that
15 cause lung cancer in people are promoters, and that once
16 they stop smoking cigarettes, after a period of about 10 or
17 15 years their lung cancer rate drops, so that they are back
18 to background.

19 That tells you that in order to get cancer from a
20 promoter, the promoter has to continuously be there. But
21 since the body also excretes TCDD, unless you are
22 continuously exposed to this material, you won't develop a
23 cancer. So all of that doesn't fit with this one molecule
24 idea.

1 Q Dr. Kimbrough, if there is a background level in
2 the human population of TCDD in adipose tissue, does that
3 indicate that there is a constant exposure to TCDD?

4 A Yes, it is. But the levels are -- the levels are
5 so low that it wouldn't have a sufficient impact to make any
6 difference in people's health.

7 Q Would it have a sufficient impact to act as a
8 promoter?

9 A I don't think so. You see, I was talking about --
10 and again cigarette smoking is a good example that just has
11 been studied more. We are also exposed to these same types
12 of chemicals at much lower concentrations through air in
13 general. But still the people that quit smoking have a much
14 lower incidence of lung cancer. The other thing is that
15 once exposure is reduced, and even if you are exposed,
16 there's also repair, which we seem to forget.

17 Q Repair of what?

18 A The body tries to repair itself. For instance, if
19 you have damage to DNA, then the body tries to get rid of
20 that, excrete it. Humans are much better able to do so than
21 rodents.

22 Q Dr. Kimbrough, with respect to the roots of
23 exposure that are discussed in your paper, Plaintiff's
24 Exhibit 1255, is in your opinion exposure to TCDD in air of

1 any significance ?

2 A No.

3 Q In making your risk assessment, have you taken
4 into account inhalation of vaporized TCDD?

5 A No. It doesn't really vaporize.

6 Q Now why do you believe it's insignificant, and why
7 do you believe it doesn't really vaporize?

8 A It has a very low vapor pressure. I talked to --
9 as I said, we had a group of consultants. I talked to a
10 number of chemists. We discussed all of this. I called
11 people on the telephone. I came to the conclusion that
12 after making calculations, what the amount could possibly be
13 that could be in air, or what you might get on dust from
14 soil in vegetated areas, that it really had no contribution
15 to the exposure that people were getting through skin and
16 ingestion of soil.

17 The only area where that might create a problem
18 and would have to be considered would be in enclosed riding
19 arenas, because when the horses ride around, if you don't
20 control for dust you do have development of dust. I asked
21 the Environmental Protection Agency actually to measure that.

22 And I still don't have the results.

23 Q Now, Dr. Kimbrough, I'd like to direct your

24 attention, if I may, to the Missouri Dioxin Health Study.

1 Are you familiar with that study?

2 A Yes.

3 Q And did you have any participation in it?

4 A I was initially involved in the design of the
5 study and in discussing with the people that were actually
6 executing the study on how to organize it and the flow of
7 specimens and that sort of thing. And then I reviewed a
8 draft of the report.

9 Q Who were the people that you were meeting with or
10 talking with in connection with the design of the study?

11 A One was Richard Hoffman, who was -- well, he still
12 is an EIS officer who was assigned to the state of Missouri,
13 Henry Falk who works at CDC in Atlanta. He's an
14 epidemiologist. And then Dr. Ayer and Dr. Webb from St.
15 Louis, I guess, Missouri. And Dr. Darnell from the Missouri
16 State Health Department.

17 Q Is that H. Denny Donnell

18 A Yes.

19 Q Now when you say you worked on the original
20 design, what do you mean by the design?

21 A Well, we talked about how to estimate exposure,
22 for instance, of the people. And the types of tests we
23 should do that would be most useful in detecting early
24 health effects, because we're talking about relatively low

1 exposure, and what would give us the most mileage. And then
2 the other sorts of conversations, such as how to transport
3 the specimens and how to make sure they would be all right,
4 and who should do the analysis.

5 Q In designing the study were you looking for health
6 effects?

7 A We designed the study to, if there were any health
8 effects, that we would have the sensitive measures. We
9 didn't really necessarily expect any health effects. We
10 were hoping that -- and we still hope that the population
11 really hasn't been exposed to enough TCDD that there will be
12 health effects.

13 Q Were you trying to hide or disregard health
14 effects in any way?

15 A No. We were -- what we were trying to do was to
16 see whether there was anything at all, and that's part of
17 the reason why I was involved, in trying to make the tests
18 as sensitive as possible. We were also concerned that the
19 group of people we were looking at was not particularly
20 large.

21 MR. CARR: I'm sorry, I didn't get that last word.
22 Large?

23 THE WITNESS: Yes. The number of people.

24 MR. CARR: That's all right. I just wanted the

1 last word.

2 Q (By Mr. Heineman) Now the study defines a high
3 risk group and a low risk group, does it not?

4 A Yes.

5 MR. CARR: Your Honor, it was leading. I wish the
6 witness would describe what it shows and not Mr. Heineman.

7 THE COURT: Yes. Could you rephrase.

8 Q (By Mr. Heineman) In your design of the study,
9 Dr. Kimbrough, how did you set up the group that you looked
10 at?

11 A We took a group of people that were exposed in
12 Times Beach that had had relatively high exposure to that
13 area, and that we called the high risk group. Then we
14 established a control group, which we called the low risk
15 group. Figuring that that group really hadn't had any
16 exposure. You can never get away from background.

17 Q What do you mean from background?

18 A Well, the general population we do have very low
19 background levels. But it's a control group.

20 Q How did your low risk group -- while in designing
21 the study, how did you account for the background level in
22 determining a low risk group?

23 A Well, they were simply representing the general
24 population.

1 Q By the general population, the general population
2 of what, where?

3 A Of that area in Missouri.

4 Q Did your low risk group come from any areas of
5 contamination?

6 A No.

7 Q With respect to the high risk group, what
8 determinations of exposure did you make there?

9 A We simply had the soil analyses from the areas
10 that these people were living in and we administered a
11 questionnaire to try and determine how much contact they
12 actually had with that area. We're now trying to follow
13 that up by measuring and actually measuring adipose tissue
14 levels. But that's a very slow process and not everybody
15 wants to donate fat.

16 Q In order to find the effects to the people in the
17 Missouri Dioxin Health Study, in your opinion, could you
18 combine two groups in order to find the total number of
19 people that had a particular condition you were looking for?

20 A No.

21 Q Why not?

22 A Because one is a control group.

23 Q Well, now did you find --

24 MR. CARR: Objection, your Honor. Well, never

1 mind.

2 Q (By Mr. Heineman) Did you find some of these
3 conditions in the control group?

4 A You always find abnormalities, some abnormalities,
5 if you do population studies, in the controls, as well as
6 the exposed. The reason you have a control and an exposed
7 group is to see whether whatever you're looking for and what
8 you think a chemical causes is more frequent, because a lot
9 of things are very non-specific.

10 Q In your opinion -- well, do you have an opinion as
11 to what the Times Beach Study or the Missouri Dioxin Health
12 Study actually found?

13 A We really didn't find anything important, anything
14 of any importance. There was some changes, but they really
15 didn't indicate any disease. We're doing additional studies
16 in other people to get more information.

17 Q I'd like to ask you your opinion as to whether or
18 not chloracne is a marker for biologically effective dioxin
19 exposure?

20 A Yes.

21 Q Do I understand -- what is your opinion?

22 A Well, usually when people have had exposure to
23 dioxin where they have any sort of illness, one of the
24 things that they also have is chloracne.

1 Now chloracne can be caused by contact of the skin
2 with the chemical, with the 2,3,7,8-tetrachlorodibenzo-
3 dioxin. It's possible that you can have chloracne without
4 having any other effects because of this local effect.

5 On the other hand, it can be part of a systemic
6 disease in that people will have chloracne, they will then
7 also have other things.

8 Q Now, if a -- if a population has been exposed to
9 dioxin and had a sufficient dose to cause systemic effects,
10 would you expect to find chloracne in that population?

11 A Yes.

12 Q To what extent?

13 A In -- probably in most people. There is some
14 argument there, and I don't think anybody has an answer,
15 that you might have some people that would not develop
16 chloracne, that would also have been exposed. But the
17 majority of people would show chloracne.

18 Q If you had a group with no chloracne in a
19 population allegedly exposed to dioxin, would you expect to
20 find any health problems attributable to dioxin?

21 A I would not expect to find any acute health
22 effects.

23 Q How about long term health effects?

24 A Of course, the problem is that in these situations

1 you usually remove people from exposure. Once you have done
2 so, then you wouldn't expect to see anything else later on,
3 or at least my experience has been that you don't so far.

4 If you had continuous exposure, then it would
5 depend on the dose. We've talked about the background
6 levels in the general population that don't seem to cause
7 any effects.

8 If you had much higher levels -- I don't have an
9 answer for that. The only answer I have is that in people
10 that have had high exposure, we haven't really been able to
11 come up with counterfeits either.

12 Q Would you expect, if there were 4.1 parts per
13 billion of 2,3,7,8-TCDD in the soil, would you expect long
14 term exposure to soil with that level of dioxin in it to
15 cause any health effects?

16 A No.

17 Q Why is that?

18 A Because the dose is too low. I mean the amount is
19 too low. The amount people would get would be negligible.

20 Q Dr. Kimbrough, I'm going to hand you some exhibits
21 which have been previously marked in evidence. The first is
22 Plaintiff's Exhibit 1627 and Defendant's Exhibit 1266. Now
23 if you look in the beginning of 1627, particularly at page
24 VI. Do you see that?

1 A Yes.

2 Q What is that list of people?

3 A It's a review panel of -- it's entitled
4 Polychlorinated-dibenzo-para-dioxin, peer review panel
5 members, which met July 27, 28 and 29, 1983 in Cincinnati,
6 Ohio.

7 Q All right. Now are you on that list?

8 A Yes.

9 Q All right. Now would you tell me did you attend a
10 meeting in July of 1983 in Cincinnati, Ohio?

11 A Yes.

12 Q All right. What occurred at that meeting?

13 A We were given actually three drafts of preliminary
14 documents that the EPA had developed to try and set what
15 they told us at the time they were primarily concerned about
16 was a level of TCDD in water. And they had written these
17 documents to support that level.

18 There was also something about soil, but they felt
19 it was -- I was told that they weren't that concerned about
20 that, they were primarily concerned about the level in
21 water. They had something on air.

22 They said that the back up information for these
23 three documents was the same and we should just concern
24 ourselves with that. There were a number of these different

1 people listed, and we had rather heated debates at this
2 meeting.

3 Q All right. Now at the conclusion of that meeting
4 -- well, first of all, is Plaintiff's Exhibit 1627 and
5 Defendant's Exhibit 1266, are those the documents that you
6 reviewed at that Cincinnati, Ohio meeting?

7 A I had the feeling they weren't quite this thick.
8 But I would have to -- they certainly didn't have this
9 heading. They were just pieces that I got, that they sent
10 me.

11 Q Did they have a title of some sort?

12 A In the title there was something about soil in one
13 of them, and about water in the other. It had TCDD in it.
14 I don't think it was called a health assessment document.
15 But I would have to go back to my --

16 MR. CARR: I didn't get that. They were called a
17 health assessment document?

18 THE WITNESS: I don't think they were.

19 MR. CARR: Okay.

20 THE WITNESS: But I would have to go back to my
21 records to determine that.

22 Q (By Mr. Heineman) Doctor, were the two documents
23 that you have before you, Plaintiff's 1627 and Defendant's
24 1266 ever sent to you for your review or comment?

1 A No. The only thing I saw were these drafts before
2 the meeting.

3 Q Did the EPA ever get back to you after that
4 meeting for comment with respect to what had gone on at that
5 meeting?

6 A No. I was rather critical.

7 Q Critical of what?

8 A Well, the first thing was that they were setting a
9 water level that you couldn't measure. I felt that that was
10 rather ridiculous. There were a number of other things that
11 I didn't agree with.

12 Q Now with respect to Plaintiff's Exhibit 1665, if
13 you look at the beginning of that on page VI, do you see the
14 same kind of list?

15 A Yes.

16 Q Are you listed as a peer review panel member
17 there?

18 A Yes.

19 Q Did you ever see this document, Plaintiff's Exhibit
20 1665, before it was published?

21 A No.

22 Q Was it ever submitted to you or any draft of it
23 ever submitted to you for comment?

24 A No. The only thing I was involved with was the

1 meeting in 1983.

2 Q Dr. Kimbrough, I'd like to direct your attention,
3 if I may, to pages 11-88 and 11-89 in Exhibit Number 1665.
4 In addition, pages 11-90 and 11-91. I would like to ask you
5 if you agree with the assessment made on those pages with
6 respect to the Fingerhut review of soft tissue sarcoma.

7 A No.

8 Q Why not?

9 A Because of -- Marilyn Fingerhut works at NIOSH,
10 the National Institute of Occupational Safety and Health,
11 and she did a very careful examination of this problem, and
12 partly on my urging, which I had done earlier, she also had
13 the tumors reviewed by pathologists that are competent in
14 the morphology of soft tissue sarcomas.

15 She found that, number one, the diagnosis of the
16 soft tissue sarcomas are not always correct made by general
17 pathologists simply because they're rare tumors, and general
18 pathologists have little experience with it. And she also
19 very carefully looked at and reviewed the exposures that the
20 workers had had. And I have great confidence in her, and I
21 think she's a very competent person. I don't -- these
22 people don't have any -- it had no direct relation to that
23 study.

24 Q So do you agree with everything that's in this

1 book?

2 A No. I mean I don't really know what's in the
3 book. But I certainly don't agree with this.

4 Q Now, Dr. Kimbrough, I'd like to ask you your
5 opinions with respect to porphyria and whether porphyria is
6 caused in human beings by exposure to 2,3,7,8-TCDD. Do you
7 have an opinion on that subject?

8 A That's some debate. It's really not clear. The
9 only time it has been described has been in two plants, one
10 is the Diamond Shamrock Plant, and the other one is the
11 plant in Czechoslovakia. I can never pronounce it.
12 Spolana, or something like that. That Dr. Jirasek reported.

13 In both of those plants you have other exposures,
14 and what's puzzling is that in Germany in the plants where
15 you had really severe outbreaks, particularly at B.A.S.F.,
16 they didn't find any porphyria. And so -- at Nitro we
17 didn't find any porphyria. So it's possible that TCDD per
18 se doesn't really cause porphyria cutanea tarda in people.

19 Q Now, what other chemicals were they exposed to at
20 Spolana and Diamond Shamrock that might have caused the
21 porphyria?

22 A Both places apparently had hexachlorobenzene, and
23 so the workers were also exposed to that. Hexachlorobenzene
24 caused a severe poisoning outbreak in Turkey, where all the

1 people had porphyria cutanea tarda.

2 Q Now can -- well, differentiate for me, if you
3 would, please, between porphyria cutanea tarda, porphyria,
4 and abnormal porphyrin levels.

5 A The disease is something that starts in the liver.
6 It is an enzyme, this uroporphyrinogen decarboxylase. If
7 that's inhibited, then you get more of these types of
8 porphyrins. Once they -- and they are excreted in urine
9 usually. Once they reach a relatively high level, people
10 will then become affected in that they -- the skin color
11 changes to some extent. They become more sensitive to
12 sunlight. They get blistering.

13 Usually in combination with that you get increased
14 hair growth. The people, for instance, in Turkey very much
15 resembled the pictures of werewolves. You can get increased
16 pigmentation in teeth. That's the porphyria cutanea tarda.
17 That's sort of the end stage of this.

18 The early changes that have been noted are really
19 not a disease. You simply have increased excretion of some
20 of these porphyrins.

21 ^{Doss} Dr. Doss has developed a classification where he
22 calls very early changes which are not really an increase in
23 porphyrins, in urine, it's simply a change in the ratio,
24 Type A, and then once you get a slight increase it's Type B

1 and Type C, and his Type D is the disease actually.

2 We have done quite a number of tests on urine and
3 screened populations. The Type A seems to be a normal
4 variant in the general population that is unrelated to any
5 sort of exposure. We've seen many people with that.

6 There are people in the population that normally
7 have a defect of this enzyme, this uroporphyrinogen
8 decarboxylase, where that either is depressed or it's really
9 not in the liver. They would be much more sensitive to
10 certain types of exposures.

11 It's nothing that specific either for ICDD or for
12 hexachlorobenzene. People that drink a lot of alcohol might
13 show changes in their porphyrin metabolism. So would women
14 that are on birth control pills. People that take
15 barbiturates or other types of medications. So in order to
16 sort all this out you would have to take a very careful
17 history on these people.

18 Q Is there any -- now when you're talking about
19 these porphyrins, and these porphyrin abnormalities, are you
20 talking about only those that are induced in some way, or
21 are you including genetic porphyrias?

22 A Well, there are different types of porphyrias. I
23 am only talking about those porphyrias that are as a result
24 of an effect on this particular enzyme in the liver. There

1 are other types of porphyrias that really originate more in
2 the bone marrow.

3 You can -- there are people that have congenital
4 defects that they can have a -- I mean there are a number of
5 different types -- I don't want to give a lecture -- that
6 are unrelated to this type of porphyria. Lead, for
7 instance, causes increase of excretion of coproporphyrin.

8 Q What does?

9 A Lead. But that's a different type of porphyria,
10 that doesn't really start in the liver.

11 Q Now do the genetic porphyrias start -- are they --
12 do they affect the liver?

13 A No, not all of them. Just one type.

14 Q What's that?

15 A That's the porphyria cutanea tarda. There is a
16 sub population that has a defect of this enzyme, and just
17 any little exposure can kick it off, where normal people
18 wouldn't be affected at all.

19 Q And is that the only genetic type of porphyria
20 that affects the liver?

21 A The liver is always involved in this process, but
22 this is where the liver is the primary organ, so to speak.

23 Q Now with respect to that, to what we have been
24 referring to as a C.U. ratio, or copro/uro ratio, an

1 inversion of that ratio, do you consider that to be
2 significant?

3 A If it's just the very early inversion, the Type A,
4 I don't. But if you also have an increase of the
5 uroporphyrins, and an increase of the heptacarboxyporphyrin,
6 in other words, the dose is Type B, that seems to be an
7 early indicator. But whether that will ever really develop
8 into a disease is something we really don't have enough
9 informaion on yet.

10 Q Now can abnormal porphyrin levels occur in a
11 totally general unexposed population?

12 A Yes. Unexposed to TCDD?

13 Q Yes.

14 A Yes.

15 Q What do you base that on?

16 A Well, alcohol, for instance, causes it. Drugs,
17 women that take birth control pills, barbiturates.

18 Q Okay.

19 MR. HEINEMAN: Could I have just a moment, your
20 Honor.

21 THE COURT: sure.

22 Q (By Mr. Heineman) Dr. Kimbrogh, with respect to
23 this hexachlorobenzene that you just mentioned that you
24 publishd on that subject.

1 A Yes.

2 Q When did you do that?

3 A I guess the first time -- this has always been
4 very puzzling. We discuss this with colleagues and stuff
5 like that. The first time I mentioned it, I guess, was in
6 the paper in the '70's.

7 MR. HEINEMAN: I have no further questions at this
8 time, your Honor.

9 THE COURT: Okay. Gentlemen, could I see you at
10 the bench for a minute.

11

12 (The following proceedings were had at the bench
13 off the record.)

14

15 CROSS EXAMINATION

16

17 BY MR. CARR:

18 Q Dr. Kimbrough, we haven't met, but my name is Rex
19 Carr. I'm one of the attorneys that represent the
20 Plaintiffs in this case. Mr. Seigfreid, my colleague, is
21 the other attorney that represents the plaintiffs.

22 When you were testifying about the laboratory
23 results and their use, what percentage of people would you
24 expect to have an abnormal result on any given laboratory

1 test?

2 A You could have quite a number. It would depend on
3 what is called abnormal.

4 Q Well, by what's called abnormal by doctors in your
5 profession and by laboratories that you use. On the
6 laboratory tests that are given, what percentage of
7 abnormalities would you expect to find in a given so-called
8 normal population?

9 A The laboratory tests that are run in different
10 laboratories show some variations. They may be slightly
11 above or slightly below what the normal range of a
12 laboratory is. We usually, if you just have slight
13 elevations, don't consider that abnormal. What we might do
14 is if we still have serum, we run the test. On the other
15 hand, if you had rarely elevated liver function tests, I
16 mean severely elevated that would be consistent with these,
17 then you would see very few of those.

18 Q Doctor, my question is, perhaps you misunderstood
19 it, let me put it to you again, in a normal laboratory test,
20 in the results that you would expect from a normal healthy
21 population, what percent of those people would have -- would
22 you expect to have an abnormal lab test result?

23 A Quite -- statistically, quite a number could have
24 a small, a slightly changed laboratory test.

1 Q My question again, Dr. Kimbrough, is in the
2 laboratories that are used and the reference ranges that are
3 used by laboratories, what percentage of people that would
4 go into those laboratories in a normally healthy group of
5 people would you expect to have a lab test result that the
6 laboratory would call abnormal?

7 A If you ran 20 tests on a person you might find one
8 slightly abnormal test.

9 Q All right.

10 A So if you had, you would find one -- you could
11 have one abnormal test in each one of these people that you
12 were testing. You can't answer that question really.

13 Q What you're saying, you would expect in a normal
14 population one abnormal test result out of 20?

15 A Depending on the test, yes, or maybe one out of
16 ten.

17 Q Ma'am?

18 A Maybe one out of ten. It just depends on the
19 test.

20 Q Well, what I would like for you to give us, Dr.
21 Kimbrough, is it one out of 20 abnormal test results that
22 you ordinarily expect to find?

23 A At least.

24 Q Well, the reason I ask that is because others have

1 said in the reference ranges used by laboratories, you
2 expect a variant or a five percent abnormal result in any
3 given normal population. I'm asking you do you agree with
4 that. I take it you do if you say one out of 20.

5 A I guess my answer really was that depending on how
6 much of a change you have, it could be more.

7 Q Well, Dr. Kimbrough, the laboratories use a
8 reference range, do they not? What they consider normal
9 results.

10 A Yes.

11 Q And anything below that reference range or
12 anything above that reference range, anything outside that
13 reference range is called abnormal, is it not by the
14 laboratory?

15 A Well, not by -- not necessarily.

16 Q You don't see the results come through from the
17 laboratories, they have a reference range, and then they
18 have a column headed abnormal results, and in that column
19 that's headed abnormal results they put those results that
20 are outside the reference ranges used by that laboratory.
21 Don't you see that, ma'am?

22 A No. I don't seem to be able to get my point
23 across.

24 Q Well, I don't think you understand my question.

1 You have seen laboratory reports, have you not?

2 A Yes.

3 Q Dr. Kimbrough?

4 A Yes. Yes.

5 Q And in those laboratory reports, the laboratories
6 use what's called a reference range of normal values, don't
7 they, ma'am?

8 A Yes.

9 Q And do you not see that they report as abnormal
10 any lab results that fall outside that normal reference
11 range?

12 A They only put that as abnormal. They give their
13 normal range, and they say and this is the result. And then
14 they leave it up to the physician to interpret that result.

15 Q Dr. Kimbrogh, you haven't seen results, lab
16 results where they put it in the abnormal column?

17 A Yes. But then it's up to the physician --

18 Q I'm not talking about --

19 A -- to interpret the result.

20 Q I'm not quarreling with how the doctors use it.

21 I'm talking now about the report that you get from the
22 laboratory. Do you not see the results reported in an
23 abnormal column, if they are abnormal?

24 A It depends on the laboratory.

1 Q Well, do you have Plaintiff's, I think it's
2 probably 262. I think that might be our lab results. It's
3 a big thick -- maybe I've got it. Have you ever used or
4 seen reports put out by, oh, Smith Kline, for instance?

5 A No. I may have.

6 Q Dr. Kimbrough, I show you what's been earlier
7 marked Plaintiff's Exhibit 262. This is a report by the
8 Smith Kline Laboratory. You see one column, they have
9 what's called reference values.

10 A Yes.

11 Q And another column they have abnormal results.

12 A Yes.

13 Q And another column they have the result.

14 A Yes.

15 Q And do you see in the abnormal result column they
16 have things listed there.

17 A Yes.

18 Q Now my question to you, Dr. Kimbrough, is is your
19 answer that five percent of the population in any given
20 laboratory test, five percent of the laboratories results --
21 75 percent of the people would have an abnormal lab result?

22 A It depends on the types --

23 Q Is that what you're saying, Dr. Kimbrough?

24 A It depends on the types of tests --

1 Q Excuse me. Is that what you're saying then?

2 A You could have that, yes. It just all depends.

3 Q Doctor, I'm asking you, there are all kinds of
4 weird things that can happen. But in the reference ranges
5 that are used by a laboratory, don't they set up what they
6 expect a normal person to fall within these limits?

7 A Yes.

8 Q Yes. And that's what -- if they had 75 percent of
9 the people that came in and fell outside those ranges, they
10 would change their normals, wouldn't they, Doctor?

11 A No, not necessarily. You see, it depends on the
12 population you're looking at.

13 Q Well, if you're looking at a healthy population to
14 get your normals. If 75 percent of your healthy people,
15 unexposed, undiseased, and not sick, normal healthy people
16 came in and 75 percent of those had values in their lab
17 tests outside the normal ranges used by that laboratory,
18 wouldn't they change their normals?

19 A Not if the ranges fell out just a little bit on
20 either side. If it's just a few units.

21 Q Doctor, wouldn't they just change their results to
22 go up that little bit?

23 A Sometimes they might. It depends on the test.

24 Q Well, in point of fact, isn't it a fact that the

1 laboratories use normal values determined by statistics,
2 nation-wide statistics in many instances, and in other
3 instances from their own local control group of healthy
4 people, that that's what determines reference ranges, normal
5 reference ranges for laboratories?

6 A Yes.

7 Q And in that nature, and with regard to that, Dr.
8 Kimbrough, what percent of people is considered normal to
9 fall out of those reference ranges?

10 A If you have just really very slight changes
11 outside of the reference range, that's really not considered
12 to be significant.

13 Q Doctor, I didn't ask you that, did I? Would you
14 listen to the question that I asked you. I'm not asking you
15 now to assess the significance or the importance of a
16 particular lab test or result. I know that's what you're
17 here to do. But I'm not asking you to do that at this point
18 in time, Dr. Kimbrough. Would you answer the question that
19 I gave you, please, ma'am.

20 A Could you repeat the question.

21 MR. CARR: Would you read the question to her
22 again, please.

23

24 (Question read.)

1
2 THE WITNESS: I don't know whether the
3 laboratories have -- not all laboratories have nation-wide
4 statistics. If they do, you can have a fall out anywhere
5 between 20 and 50 percent.

6 Q (By Mr. Carr) Doctor, assume, if you would, that
7 there has been testimony in this case by a number of doctors
8 that the normals used by laboratories or in some instances
9 based upon a long history of gathering statistics, in some
10 types of cases immune studies, for instance, they run
11 control groups, take into consideration what you know to be
12 the way in which laboratories fashion their normals. Will
13 you do that, ma'am? Have you practiced medicine, Dr.
14 Kimbrough?

15 A I used to work in a clinical laboratory.

16 Q Have you practiced medicine, Dr. Kimbrough?

17 A Since I had my training I worked in the Public
18 Health Service, and so I didn't practice medicine.

19 Q You have never practiced medicine?

20 A As a -- no, not after my residency.

21 Q Have you ever treated or cared for a sick person?

22 A I did as an intern.

23 Q In getting your training?

24 A Yes.

1 Q Now, Doctor, in your training there, your
2 laboratory reported to you results in various lab tests,
3 didn't they?

4 A Yes.

5 Q And they used a reference range, didn't they,
6 ma'am?

7 A Yes.

8 Q Now, in those reference ranges what do you expect
9 to be the percentage of people that would be abnormal in a
10 normal given population, normal healthy population?

11 A Depending on the test, somewhere between 20 and 50
12 percent.

13 Q Doctor, what you're saying, if I understand you
14 correctly, that 20 percent of the people would have abnormal
15 hematocrits if they went in and had them checked?

16 A Depending on the population you might --

17 Q On the normal population, the normal healthy
18 population, would 20 percent of the people have abnormal
19 hemoglobins, or hematocrits?

20 A You could have more than 20.

21 Q Under what circumstance?

22 A If you have -- you have a lot of people that have
23 slight anemias, you could have a slightly lower hematocrit.

24 Q They have what?

1 A An anemia.

2 Q Doctor, that would be an indication of a disease.
3 That's not a healthy person. You apparently misunderstood
4 my question. If you have an anemia, you're not a normal
5 healthy person, are you, ma'am?

6 A No.

7 Q All right. Now a normal healthy person, would you
8 expect 20 percent of the population to have an abnormal
9 hematocrit?

10 A It depends on what you call abnormal.

11 Q A person who is healthy, who does not have anemia.

12 A It could vary. It could be slightly lower.

13 Q Slightly lower than what?

14 A Than what the laboratory has established as a
15 reference.

16 Q Doctor, that's what I'm asking you. What
17 percentage of people, normal healthy people without anemia
18 would you expect to have a hematocrit result outside the
19 normal laboratory reference range?

20 A Somewhere between 20 and 30 percent.

21 Q Well, then you still would expect 20 percent of
22 the people to walk into the laboratory to have an abnormal
23 hematocrit?

24 A It's not really abnormal. It's slightly --

1 Q Doctor --

2 A -- away from the reference standard.

3 Q You understand what I'm asking you, normal is
4 within the reference ranges of the laboratory, outside the
5 reference range of the laboratory is abnormal. Do you
6 understand that? Now what I'm asking you, ma'am, is what
7 percentage of people would you expect to have a lab result
8 in hematocrit falling outside the laboratory reference range
9 called normal?

10 MR. HEINEMAN: Excuse me, your Honor. Mr. Carr,
11 are you asking her to assume that?

12 MR. CARR: I'm not asking her to assume anything.
13 I'm asking her a specific question.

14 THE WITNESS: I guess I can't really answer your
15 question.

16 Q (By Mr. Carr) Why not, ma'am?

17 A Because we can't talk about it in a way that it's
18 meaningful to me.

19 Q Doctor, the normal -- the reference ranges used by
20 a laboratory, you understand what that is, don't you, ma'am?

21 A Yes.

22 Q Hematocrits, for instance, this particular
23 laboratory has it in their units, 42 to 52 in percentages.

24 A Some people have 40 to 50. There are slight

1 changes in the numbers.

2 Q 40 to 50 some people have that.

3 A Yes.

4 Q Now what I'm asking you, you do understand what
5 I'm asking you, how many people in a healthy group of
6 people, not disease, no anemia, nothing wrong with them,
7 they're healthy people, how many people do you expect to
8 have a hematocrit result that would fall outside the
9 laboratory reference range?

10 A And the reason I've given you ranges of
11 percentages is that if you consider everything, if you're
12 very dogmatic, and you say he is 40 and if it's 39 or 38,
13 that's abnormal, that's outside, then you would get a whole
14 lot more people than when you would give a little leeway.

15 For instance, where instead of it being 40, it was
16 35 or 34. All of these laboratories tests are just not that
17 precise. To argue about --

18 Q Doctor, they are precise within their reference
19 range. They are very precise. They may not know -- isn't
20 that right? There isn't any inprecision when you have a
21 reference value of 42 to 52 percent, is there? Is there any
22 inprecision in that?

23 A It's a biological test.

24 Q Yes.

1 A And it doesn't mean anything.

2 Q Doctor, I'm --

3 A It doesn't mean anything.

4 Q Doctor, I'm not asking you whether it means
5 anything. I'm not asking you the significance of it. I'm
6 not asking if it means they've got anemia, or --

7 MR. CARR: Your Honor, I've already imposed on the
8 witness' time.

9 THE COURT: I've lost track of it myself. Okay.
10 Doctor, thank you very much. We understand you have to go
11 at this time. Thank you.

12 Gentlemen, we'll take a short break and then we'll
13 go back to our other matters in chambers.

14

15 (Short recess.)

16

17 (The following proceedings were had in chambers.)

18

19 MR. CARR: Before we get started on this, I'd like
20 to find out from Counsel when and for how long Dr. Kimbrough
21 is going to be available to come back.

22 MR. HEINEMAN: She's available to come back in, I
23 believe, the second week of January, or the end of the first
24 week of January.

1 MR. CARR: She can stay until we complete the --

2 MR. NASSIF: She said she would come back at
3 least for another full day. We didn't ask her for any more
4 time.

5 MR. CARR: And what I would like, I move for
6 Defendants to produce all communications they have had with
7 that agency or anybody connected with that agency, or with
8 th federal government relating to her appearance here and
9 the circumstances, all memos and anything else that was sent
10 to her or to anybody else by the defendants to procure her
11 presence or somebody else from the CDC.

12 THE COURT: Any objection to those?

13 MR. NASSIF: Sure, your Honor. I mean I don't,
14 first of all, I don't know what all that entails. I'd have
15 to see what documents are included in that, in terms of
16 contacts. I'm sure a lot of them include contacts by
17 Counsel, perhaps with Counsel for the CDC.

18 THE COURT: You haven't seen them yet?

19 MR. NASSIF: I haven't seen them. I wasn't the
20 one responsible for making the direct contacts. I didn't
21 write those documents. That's why I don't know -- Bruce and
22 Jayne Rudolph, I think.

23 THE COURT: She's been around. Why don't you give
24 me your response tomorrow morning.

1 MR. NASSIF: Can I give you tomorrow at noontime?

2 THE COURT: Tomorrow at noon is fine, sure.

3 MR. NASSIF: Would that be early enough?

4 THE COURT: Sure. That's no problem. Yes, you

5 look it over and decide what position you want to take.

6 MR. NASSIF: Can I have a clarification on this,
7 your Honor? You said any contacts with the federal
8 government, EPA, anybody, but only in regards to her
9 testifying?

10 MR. CARR: Yes.

11 MR. NASSIF: Only in regards to her testifying.

12 MR. CARR: Or somebody from the CDC.

13 MR. NASSIF: Or somebody -- somebody from CDC
14 testifying in this case.

15 MR. CARR: Yes.

16 THE COURT: Her or someone in her stead, basically.

17 MR. NASSIF: Testifying in this case.

18 MR. CARR: Obviously if it's a related case in
19 dioxin, I'd want that as well.

20 MR. NASSIF: No, no.

21 MR. CARR: If you got her original agreement to
22 testify in the Agent Orange case, I want -- I want whatever
23 contacts Monsanto has had with the CDC or any other agency
24 of the federal government with reference to appearance of

1 the Department of Health or CDC personnel to testify at this
2 trial or any other trial.

3 MR. NASSIF: Well, your Honor, I will object to
4 that. I don't see how it's relevant if other law firms in
5 other law suits have made contacts with the CDC that I don't
6 happen to know about, in either the Agent Orange case, the
7 Nitro case, or some other dioxin case, or other non-dioxin
8 case. He hasn't even limited to dioxin.

9 MR. CARR: I'll limit it to dioxin cases.

10 MR. NASSIF: You will limit it to dioxin?

11 MR. CARR: Oh, yes

12 MR. NASSIF: Okay. Still, your Honor, we're
13 talking about what happened in the Agent Orange situation,
14 in the Nitro situation. I had no personal knowledge of
15 that. Mr. Heineman's firm did not handle that. I don't
16 know what relevance it is to this lawsuit, there is in terms
17 of this lawsuit.

18 There were contacts made about Dr. Kimbrough
19 testifying. We've provided in the course of one of our
20 motions a response back from the CDC to that which you have
21 received, Mr. Carr has received a copy of it. We would be
22 glad -- you know, I don't mind suggesting or not objecting
23 to us providing any documents that preceded this response
24 from the CDC in terms of her testimony.

1 But in terms of the Agent Orange case, and in
2 terms of the Nitro case there is absolutely no relevance.
3 Different law firms, different parties in terms of the
4 plaintiffs, and so we would object to that. I can tell you
5 that right now, your Honor.

6 MR. CARR: The parties only want -- only one half
7 of the parties are different. The defendant in those cases
8 are exactly the same.

9 The reason it comes up, because the letter that
10 Ryder gave, I don't know what he said, but the letter he
11 gave to us attached to his affidavit indicates that they
12 went higher than just the CDC, how much higher they went,
13 and they expressed -- and the Health Department now says
14 this is a matter of governmental interest.

15 This case is now out of the private sector and in
16 the public sector. And I don't know how they have come to
17 that conclusion, that it is now of a public and governmental
18 interest. It may be that they came to that conclusion
19 because they were involved in the Agent Orange case and
20 there's being claims made against the government, the
21 government should compensate the veterans in the Agent
22 Orange case, and it is now of governmental concern. It may
23 be the same kind of thing took place in the Nitro case.

24 So just because these Counsel have not -- have had

1 particular contact doesn't mean that the federal government
2 has not been influenced by Monsanto in one way or the other,
3 in one or more of these cases, so as to end up resulting in
4 this lady's appearance.

5 I don't know if the Court saw it or -- obviously
6 it wouldn't be on the record, but she is not a willing
7 witness in the sense of being cross examined. She is
8 immediately not responding to the questions. She is looking
9 to Counsel, Monsanto's Counsel apparently for guidance. I
10 don't know if the Court noted it or not.

11 THE COURT: I noticed that.

12 MR. CARR: Everytime I asked a question that might
13 have some significance, she looked over to Heineman for
14 guidance as to how she should answer that question. That
15 doesn't strike me as an impartial witness of the federal
16 government here to call the strikes and balls. That's the
17 reason that I'm now motivated to ask for this discovery.

18 MR. NASSIF: Well, your Honor, once again, first
19 of all I would -- I object to Mr. Carr's comment about the
20 fact that she was looking over to Monsanto's Counsel for
21 guidance. I'm sure if she was looking around the room, it
22 was more a result of what Mr. Carr was attempting to get her
23 to answer and had nothing to do with looking to us for
24 guidance.

1 THE COURT: She was looking directly at the two of
2 you or one of you. I noticed that a number of times.

3 MR. NASSIF: Your Honor, maybe the only other
4 option was to look at Mr. Carr. Since he was not pleasantly
5 happy with her responses, I can see why she was not looking
6 at him.

7 THE COURT: Well, if he's the person attacking
8 her, she might logically be looking at him.

9 MR. NASSIF: The fact that she would not answer
10 questions having to do with what is considered to be
11 laboratory normals, I'm not even sure she knows what
12 relevance this has to this case at all. It was not any
13 information that she had been asked about on direct
14 examination. For all I know she just did not believe he
15 understood what labs did. That confusion, more than
16 anything else, could have resulted in her looking around the
17 room.

18 THE COURT: I think that's a highly improbable
19 scenario. As a general proposition, I think those
20 communications would be relevant.

21 MR. NASSIF: What communications, your Honor?

22 THE COURT: The ones he's asking for. As a
23 general proposition.

24 MR. NASSIF: As far as all contacts in all cases?

1 THE COURT: As far as the contacts on the dioxin
2 cases. Again as has been my policy before, if you have
3 problems with the particular documents, privilege or
4 whatever, you submit them to me in camera and I'll go
5 through them. I don't think -- apparently there's no
6 problem as far as the contacts with CDC and/or someone
7 higher up, or a parent organization or whatever, as this
8 particular appearance is concerned. But as far as the
9 others, I think they would be relevant, and I think they
10 should be produced. If you have any problems with any of
11 them, individually, you can submit them to me in camera.

12 MR. NASSIF: Are you saying, your Honor, that
13 you're not going to give me an opportunity to respond at
14 tomorrow noon?

15 THE COURT: I thought you were responding.

16 MR. NASSIF: I responded to the other cases issue.

17 THE COURT: Yes, that's what I responded to.

18 MR. NASSIF: Well, your Honor, I still would only
19 say, your Honor, that in terms of whatever responses we
20 have, we may have a further objection, and you've indicated
21 that we are to handle that objection in terms of any
22 privileged information. I don't know if there are other
23 objections other than privilege that I would want to raise
24 to those responses, not knowing what they were, or what was

1 said. But I still -- I understand you to be ordering us to
2 produce documents having to do with other cases other --
3 other dioxin cases, where there might have been contacts
4 with the Center for Disease Control pertaining to people
5 testifying.

6 THE COURT: Her or other people testifying.

7 MR. NASSIF: Her or other people testifying.

8 MR. CARR: Your Honor, my request wasn't limited
9 to the CDC. My request was directed at any government
10 person, elected or appointed or employed, that they may have
11 conacted toward the end of getting a CDC employee to testify
12 in this case.

13 THE COURT: I believe that was your request. That
14 is right. I misspoke as to the scope. Now you are going to
15 look at the documents as far as this case is concerned and
16 respond tomorrow afternoon; right?

17 MR. NASSIF: I'm going to attempt to do that.

18 THE COURT: I'm not ruling on that.

19 MR. NASSIF: I'm anticipating there are very few
20 documents, and that I can do it by noon.

21 THE COURT: I'm not ruling on that part yet.

22 MR. NASSIF: Okay.

23 THE COURT: But as to the other, I felt we just
24 finished colloquy to its relevance. I think it would be

1 relevant. Any other particular matters, you know, I'd also
2 like by then some indications as to how quickly you can get
3 those documents.

4 MR. NASSIF: I was just going to say, if I have to
5 go to other cases and -- well, it wouldn't even be limited
6 to other cases. It would be if anybody within Monsanto
7 involved in Agent Orange or Nitro made a contact or any
8 dioxin cases.

9 THE COURT: Or any outside lawfirms.

10 MR. NASSIF: Or any of the outside lawfirms. That
11 is certainly a much broader search than limiting it to the
12 activities that we did.

13 THE COURT: Right. I understand that. That's why
14 I'd like tomorrow also. I'm not asking you today how
15 quickly you can have those.

16 MR. NASSIF: I need to contact some people and see
17 what they tell me.

18 THE COURT: Right.

19 MR. CARR: Your Honor, it's not specific on the
20 record, and it's not on the record at all, but I assume that
21 I better put it on the record, we've been given some
22 documents by Monsanto that were from the office of the CDC.
23 I have assumed that that's all the documents that they've
24 received from the CDC. But just to make sure, I'd like to

1 have assurance from Counsel or some statement from Counsel
2 that there is nothing that they have from CDC that they have
3 not produced or production of it.

4 MR. NASSIF: To the best of my knowledge, there is
5 nothing that we have received from the CDC that we have not
6 produced.

7 THE COURT: Okay.

8 MR. CARR: Okay.

9 THE COURT: Very good. I guess we may as well go
10 through these in order.

11 MR. CARR: We may have a little problem there
12 because I don't know whether I went through them in order.

13 THE COURT: How about Bolejack first?

14 MR. CARR: Yes, Bolejack.

15 THE COURT: Okay. Mr. Carr, first, any
16 objections?

17 MR. HARVEY: Before we start, we accidentally left
18 off the name of one of the depositions we'd like to read,
19 and that was Mr. Ken Gross. I spoke to Mr. Seigfreid and
20 Mr. Carr --

21 THE COURT: Ken Gross?

22 MR. HARVEY: Ken Gross, G-r-o-s-s.

23 THE COURT: I haven't even pulled it and read it.
24 If we get there, we'll clean him up tomorrow. I'll have to

1 get my Clerk to pull it. Any objections? Prefacing all of
2 this as just a standing proposition, we won't read back and
3 forth colloquy of counsel, you know, going off the record or
4 anything like that, like we have been before. All of that
5 is just sort of automatically excluded, unless otherwise
6 indicated. Objections whether sustained or not will be
7 excluded.

8 MR. CARR: On page 7, your Honor, we withdraw
9 those objections on there.

10 THE COURT: Okay. So --

11 MR. HARVEY: This is David Bolejack?

12 THE COURT: So 6 and 7 --

13 MR. CARR: You would need 6 through 13 out. No,
14 make it 4 through 13 out, because he asked a new question.

15 THE COURT: Right.

16 MR. CARR: 16 through 20 also. No, he gave an
17 answer. 18 he answered. 16 through 17 is out.

18 MR. NASSIF: What page are you on?

19 THE COURT: Page 7.

20 MR. CARR: 7.

21 THE COURT: 22 would be out.

22 MR. CARR: 19 is in, 22 would be out.

23 THE COURT: Okay. That's all on that page.

24 MR. CARR: The next page would be on page 10, your

1 relevant. Any other particular matters, you know, I'd also
2 like by then some indications as to how quickly you can get
3 those documents.

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5 go to other cases and -- well, it wouldn't even be limited
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19 THE COURT: Page 7.

20 MR. CARR: 7.

21 THE COURT: 22 would be out.

22 MR. CARR: 19 is in, 22 would be out.

23 THE COURT: Okay. That's all on that page.

24 MR. CARR: The next page would be on page 10, your

1 Honor. Line 10 and a half where they say his initiative was
2 below average. That's kind of a character assassination
3 called for in the question, and then they went into it a
4 little more, what do you mean by that, a little self
5 motivation, he was slow about everything he did. I'd like
6 for 10 and a half through 25 on that page to be stricken.

7 And on the next page, it deals with the same
8 subject, page 11, line 1 over through page 13 line 9. All
9 of that has to do with his -- how he works and his
10 motivaion, and what kind of fellow he was.

11 THE COURT: Who is handling this?

12 MR. HARVEY: Your Honor, if I could respond to
13 that, first of all I'd state for the record we haven't
14 received a list of objections prior to coming in here.

15 THE COURT: We had agreed that because of the time
16 squeeze on this there wasn't time to prepare it.

17 MR. HARVEY: All right.

18 THE COURT: We talked about possibly doing it and
19 decided there wasn't -- as a practical matter -- as a
20 practical matter there was not enough time to do so.

21 MR. HARVEY: Okay. With respect to Mr. Carr's
22 objections, going to page 10, line 10 and a half through
23 page 13 line 9, these questions are specifically directed at
24 eliciting information from a person who had -- in other

1 words, there was a Foundation laid as to her knowledge of Ed
2 Vaught, and his physical condition prior to this spill. One
3 of Ed Vaught's complaints, and Dr. Carnow's trial testimony
4 dealt with the alleged problem of fatigue that Mr. Vaught
5 claims he has experienced since the time of the spill.

6 The testimony here goes to Ed Vaught's initiative,
7 his productivity, and other factors such as his weight,
8 energy levels. On page 12 the question is could you
9 describe Ed Vaught's energy levels. Did he show fatigue.
10 The answer was that he was slow. And in general I take it
11 Mr. Carr's objection, beginning on page 10, line 10 and a
12 half, that it was a non-responsive answer; is that correct?
13 Am I mischaracterizing that?

14 MR. CARR: Let me withdraw my objection. This is
15 about fatigue and energy level on page 12. It's all right
16 with me if you read that. The reason I objected to it was
17 because he said no, I don't believe it was fatigue, I
18 believe it was just slow. That really isn't material. But
19 your question that I don't believe he was fatigued might be
20 relevant.

21 THE COURT: I'm lost.

22 MR. CARR: I'm lost too, Judge. I've jumped over
23 to page 12 where he mentioned they asked a question about
24 fatigue. I don't remember Carnow going into fatigue. But

1 if he did -- did he go into fatigue?

2 MR. HARVEY: Yes, on the February 27th, on page
3 167 through 170 of the trial transcript he did.

4 THE COURT: So basically you're saying on page 12,
5 lines 10 through 15 you aren't objecting to?

6 MR. CARR: That's correct, your Honor.

7 MR. HARVEY: It would be line 9.

8 MR. CARR: No, 10.

9 MR. HARVEY: I'm sorry, I was on the wrong page.
10 But you're still objecting to the rest of it?

11 MR. CARR: Yes.

12 MR. HARVEY: One additional comment on the rest of
13 it.

14 THE COURT: Sure.

15 MR. HARVEY: The initiative would certainly be
16 something that his employer, Mr. Bolejack, the supervisor,
17 would be in a position to observe with respect to his work.

18 MR. CARR: We agree, that's so. But this has
19 nothing to do with his injuries.

20 THE COURT: I think it should go out. I would
21 sustain the objection. So line 10 and a half down to the
22 bottom of page 10, all of 11, lines 1 through 9 on page 12,
23 lines 16 through 25 on page 12, lines 1 through 8 I guess --
24 well, no, 1 through 9.

1 MR. HARVEY: Wouldn't the testimony on page 12,
2 beginning at line 16 be relative to the follow-up question
3 on the fatigue aspect?

4 THE COURT: I didn't hear the last part.

5 MR. HARVEY: Wouldn't that be relative as a
6 follow-up question on the fatigue aspects? It talks about
7 his operating the machine, and his activity level there.

8 THE COURT: Which question? The one at the bottom
9 of the page?

10 MR. HARVEY: Page 12, line 16 through page 13 line
11 6 where the questions are following up on the fatigue issue.
12 I mean these are observations of fact from which -- well, he
13 might not have characterized it.

14 MR. CARR: I'll withdraw the objection to that,
15 Judge. That's all right.

16 THE COURT: Okay. Then it's not objected to.
17 Then the striking will just go through line 9 of page 12,
18 and the others are okay. All right. Any other objections
19 on that deposition?

20 MR. CARR: No, Judge.

21 THE COURT: Okay. Do you have any objections?

22 MR. HARVEY: Do you intend to read the cross
23 examination?

24 THE COURT: I'm sorry, what did you say?

1 MR. HARVEY: The question is do Plaintiffs intend
2 to read the cross examination?

3 THE COURT: You're reading it. Are you going to
4 read it or not?

5 MR. HARVEY: I thought the custom was if the cross
6 examination --

7 THE COURT: I see what you're saying.

8 MR. CARR: We'll read the cross examination here.

9 MR. NASSIF: Is there anything in cross we want to
10 object to?

11 MR. HARVEY: That was what I was getting at.

12 THE COURT: Fine.

13 MR. HARVEY: We would object to the question --
14 well that part of the answer on page 14 line 1 and a half,
15 beginning with the second sentence there as being non-
16 responsive to the question that was requested.

17 THE COURT: Let me read the question again.

18 MR. HARVEY: Beginning there down to line 6 of
19 page 14.

20 MR. CARR: The objection, Counsel, of non-
21 responsiveness is one that the questioner may make, not the
22 other fellow.

23 THE COURT: That's right.

24 MR. HARVEY: Well, I stand corrected. If that's

1 the case.

2 MR. CARR: I wish it weren't. I wish it weren't
3 the case.

4 THE COURT: I wish it weren't either.

5 MR. CARR: I wish anybody could make that
6 objection. I used to, but somebody educated me years ago,
7 unfortunately.

8 THE COURT: Any other objections?

9 MR. HARVEY: No.

10 THE COURT: Fine. That one is cleared up. Do you
11 have Jim Cristal's done?

12 MR. CARR: I do.

13 THE COURT: Great. Any objections on that?

14 MR. CARR: Page 16 is my first note.

15 THE COURT: Okay.

16 MR. CARR: Line 8. Line 6 actually. Page 6, line
17 6 through page 17, line 8.

18 THE COURT: Anybody want to say anything about it?

19 MR. CARR: What we said earlier on other similar
20 situations, Judge.

21 THE COURT: Anything you want to say about it?

22 MR. NASSIF: We just would say our objections we
23 had last time.

24 THE COURT: We've gone through this a dozen times

1 before. Let's incorporate it.

2 MR. NASSIF: Okay, your Honor.

3 THE COURT: Incorporate prior objections. It's
4 stricken. Arguments proper and so are incorporated. So all
5 of that is stricken.

6 MR. HARVEY: Do we need to state the point that's
7 being made as far as the objection?

8 MR. CARR: I'm sorry, I couldn't hear you.

9 MR. HARVEY: Do we need to state the point that's
10 being made as far as the objection, as far as what we are
11 incorporating?

12 THE COURT: That has been repeated a dozen times,
13 I really don't think we have to.

14 MR. NASSIF: I think that's right.

15 MR. CARR: Next objection would be page 19, line 9
16 through page 20, line 20.

17 THE COURT: I think that would be the same type of
18 thing.

19 MR. NASSIF: It's the same as the other one.

20 MR. HARVEY: We would again incorporate our
21 objections.

22 THE COURT: I'm incorporating plaintiffs' and
23 defendant's and I'll strike it.

24 MR. CARR: Page 21, line 1 through page 22, line

1 13.

2 MR. NASSIF: 22, line 13?

3 THE COURT: Right.

4 MR. CARR: Yes. Actually I guess it's line 12.

5 THE COURT: Line 12 is fine. Okay. I think we've
6 been through this before too. I'll incorporate what
7 everyone said on it before. I'm striking it. We'll
8 incorporate on that, I guess. Any other objections?

9 MR. CARR: On page 22 we will not read any of that
10 business, Judge, from 22 to the end of the deposition.

11 THE COURT: So you're not going to read the cross?

12 MR. CARR: No.

13 THE COURT: Do you have any objections?

14 MR. HARVEY: We would read the cross.

15 THE COURT: Fine.

16 MR. HARVEY: And I'm trying to see what was taken
17 out.

18 THE COURT: There's an objection in the cross on
19 24.

20 MR. CARR: That's not our objection, is it?

21 THE COURT: No, that's their's.

22 MR. HARVEY: There aren't any answers after that.

23 MR. CARR: His answer is most of them.

24 MR. HARVEY: Right. Yes, we would withdraw that

1 objection.

2 THE COURT: Okay. So on page 24, 22 --

3 MR. HARVEY: If I could have just a second here.

4 THE COURT: -- to the end of the deposition.

5 MR. HARVEY: Right.

6 THE COURT: Anything else?

7 MR. HARVEY: No.

8 MR. NASSIF: No.

9 THE COURT: Great. Do you have Edith Daniels
10 done?

11 MR. CARR: Yes, I do. Edith McCoy Daniels.

12 THE COURT: Are you going to read these
13 authenticating depositions or not? The ones authenticating
14 the records?

15 MR. HARVEY: I don't know that I'd be in a
16 position to address that.

17 MR. NASSIF: Are they on the list?

18 THE COURT: I think she pulled any depositions
19 that had the name. Cristal also had on that authenticated
20 some records. You're not going to read those?

21 MR. NASSIF: No.

22 MR. HARVEY: Not at this time.

23 MR. CARR: They're already in evidence.

24 MR. NASSIF: They're already in evidence. I think

1 Plaintiffs stipulated to that.

2 THE COURT: She pulled anything with the name on
3 it, which is excellent. Edith McCoy Daniels is next.

4 MR. CARR: Page 7 from line 3 to the end of the
5 deposition --

6 MR. NASSIF: Time out.

7 MR. CARR: Page 7, line 3 to the end of the
8 deposition. It is all too remote in time and nothing
9 remotely connected to the spill or any physical or any other
10 condition that could be associated with that spill, nothing
11 relevant or material is in there.

12 How long was Cecil in jail? She got mad at Edith
13 or something, put Edith in Eddie's car. He tore the inside
14 of that car up. Big dog woke me up touching my hair. He
15 was a big dog. He could lay his mouth about on the table.
16 I don't know what kind it was.

17 Well, anyway, none of this has any relevancy or
18 materiality.

19 MR. HARVEY: My response to that, Judge, is that I
20 believe it does have quite a bit of relevancy and
21 materiality. One of the things that Dr. Carnow testified to
22 on January 23, in pages 58 through 72 of his testimony was
23 that Miss Jennings is suffering from increased irritability
24 and short temperedness as a result of the spill. Not only

1 that, not only did he testify to that, it is contained in
2 his report, which has been admitted into evidence before the
3 jury.

4 Now here in this deposition, and in another one
5 that will be presented as well, we have a person who is in
6 close contact with Miss Jennings for many, many years prior
7 to the spill, even knew her as a family member during the
8 time her husband was alive. Many of the factors that Mr.
9 Carr is objecting to are direct personal observations on her
10 part, or accounted to her by a person who is no longer
11 living and is unavailable, and unavailable as a witness,
12 and, therefore, would fall under that exception of the
13 hearsay rule.

14 They are observations that could lead a person of
15 ordinary intelligence to conclude from these experiences and
16 these contacts, and the general context of Miss Jennings
17 pre-spill history that she indeed had this problem of short
18 temperedness and irritability long before the spill, and it
19 was part of her personal make-up, unfortunately.

20 MR. CARR: Judge, just going to the first three
21 pages, everything discussed there is talking to Eddie.
22 There is no -- if you want to go point by point. On page 7
23 and 8 it discusses how often she saw her brother Cecil. How
24 long would you see him from the year '70, '74. Well, pretty

1 often in those years. I would get real worried and he would
2 come up and talk to us. I think he wouldn't talk to other
3 people.

4 So, in other words, Cecil went to them and talked
5 to them at their farm about once a week. All he ever did,
6 he was real worried and he just wanted to talk. Did Cecil
7 ever talk to you about his relationship with Dorothy
8 Jennings, and about Dorothy. Yeah. What did he tell you
9 about Dorothy?

10 And then it goes on how they didn't get along,
11 they were always fighting over money. I don't think Dorothy
12 took him for treatments much. I think one of the neighbors
13 took him for treatments. What was he sick with? Cancer.

14 I'm up to page 11 right now, Judge, and there's
15 nothing at all that could even be remotely connected with
16 this case. On page 12 she was very fussy with Eddie all the
17 time. Never got along with Eddie. Cecil paid more
18 attention to Eddie than her boy. Got nothing to do with
19 anything.

20 Page 13 Robert got a check from his father, I
21 don't know how much. You said Dorothy and Cecil couldn't
22 get along. What did you mean when you said that? Well, I
23 think they never did get along from the start, when Dad was
24 sick and so forth. All garbage.

1 Dad was real sick, Cecil would come in here to
2 help and they got into a fuss at night. She had Cecil
3 thrown in jail that night. God. When Dad died -- how long
4 was Cecil in jail?

5 15 is about the dog being put in the car and
6 tearing up the car. And then she says I would say -- what
7 could you tell me about her disposition. I would say --
8 this is on page 16 -- I would say she was irritable. What
9 do you mean? She was never happy with anybody or anything.

10 What about her -- anything else about her
11 disposition you can tell us? No. I just know she was never
12 very happy.

13 Well, so what? A lot of people aren't very happy.

14 MR. HARVEY: A lot of people are trying to cash in
15 on it.

16 MR. CARR: Well, if you look at her testimony, you
17 won't find her making one single complaint.

18 MR. HARVEY: But she did to Dr. Carnow, and Dr.
19 Carnow presented that testimony to the jury.

20 MR. CARR: Not about happiness.

21 MR. HARVEY: Irritability, short temperedness.
22 Those are all part of the mood changes, the general types of
23 things.

24 MR. CARR: On page 17 it shows she hated him. She

1 may have had a foundation to hate him. Certainly nothing
2 that can be relevant to this case. It had to have been
3 apparently still long before '74, I guess. I don't know.
4 She's not even specific as to when that occurred.

5 MR. HARVEY: Responding point by point, the
6 testimony presented on those pages, while some of it may be
7 a little bit general in nature, is nevertheless based upon
8 or directed at Miss Jennings' overall demeanor.

9 Those questions, for example, she says -- she
10 characterizes her as being irritable, directly contradicting
11 Dr. Carnow's testimony. Describes her in a fashion that as
12 a whole this testimony shows that a person who knew Miss
13 Jennings before the spill perceived her to be an irritable,
14 short tempered, vitriolic person.

15 Those are unfortunate things to say about a
16 person. Whatever her motivation might have been, if there
17 was some personal problems between these two people is
18 something that could have been brought out on cross
19 examination, or something that should go to the weight of
20 the testimony, certainly not its admissibility.

21 MR. CARR: Judge, everything I see that they've
22 asked about irritability was connected to the marriage to
23 Cecil, during the period -- on the bottom of page 15, during
24 the period Cecil was married to Dorothy Jennings. How was

1 her disposition, was she irritable, was she calm. Could you
2 tell me about her disposition. The objection is made there,
3 lack of foundation in the form of the question. That's a
4 good objection right there to that question.

5 MR. HARVEY: Where are you?

6 MR. CARR: Bottom of page 15, top of page 16. The
7 only thing that was put in there is the improper question
8 and the form of the question.

9 THE COURT: Do you have anything more to say?

10 MR. CARR: No, Judge.

11 THE COURT: Do you have anything more to say?

12 MR. HARVEY: Just generally that the testimony
13 here, even as it goes to her relationship, it is not just
14 limited to her relationship with Cecil, but goes to her
15 relationship with other people as well. And her
16 relationship with Cecil being the most readily apparent
17 factor in observing Miss Jennings behavior and
18 characterizing her moods, her demeanor as irritable, and as
19 short tempered, at a time before the spill shows that she
20 had a pre-existing condition in this case. It's directly
21 relevant on those points, and not to mention her pre-
22 occupation with money.

23 MR. CARR: What's that got to do with anything?

24 MR. HARVEY: Motive.

1 THE COURT: Do you have anything to say?

2 MR. CARR: No, Judge.

3 THE COURT: I'm sustaining the objection to it.
4 That was my impression when I initially read this. I am
5 striking all that that he's objecting to.

6 MR. NASSIF: Judge, are you striking the part that
7 has to do as well on page 26 with how often Dorothy Jennings
8 would have upset spells, which I think goes to the issue of
9 short temperedness? About everytime we came up -- I don't
10 know how often that was -- if that doesn't go to short
11 temperedness, and the question is not objected to at that
12 point.

13 THE COURT: No, at that point it wasn't objected
14 to.

15 MR. CARR: It's all remote in time. It was all
16 before -- time isn't even fixed. It would be sometime
17 before Cecil died. That could have been 50 years before.

18 MR. NASSIF: No. If you look at the deposition,
19 you can focus on the time. Of course, you've struck all
20 that.

21 MR. CARR: If you look on page 25, every week is
22 when I told you she didn't get along with Cecil, with my
23 folks. Your folks, is your dad still alive? Dad died in
24 May of '63. Mom died in '66.

1 MR. NASSIF: Right.

2 MR. CARR: Now that's 23 years. No, 13 years
3 before the spill occurred.

4 MR. NASSIF: 15 years before the spill she was
5 blowing her top. It doesn't seem to me to be remote in
6 time. She's a 50 year old woman.

7 MR. CARR: About the time they were married. Does
8 that tell you something? And I might point out in the
9 winter of '79, that would be admittedly before the spill,
10 they visited her and she was nice, peaceful and happy. In
11 the winter of '79.

12 MR. NASSIF: We'll read that part too.

13 MR. CARR: I know, but the point is, because that
14 takes away from the irritable problem. It's clear she got
15 happy when Cecil died and it was a bad marriage and she said
16 on page 27 the main thing Dorothy and Cecil didn't get
17 along.

18 MR. NASSIF: As I remember Dorothy Jennings, your
19 Honor --

20 MR. CARR: She's a very nice little lady.

21 MR. NASSIF: She's had several strange
22 relationships, or strained relationships with her husband.
23 I think it just goes to temperament.

24 THE COURT: If I remember correctly, I limited a

1 lot of the interrogation of her and some other witnesses
2 about what I considered non-relevant elements of the
3 marital relations or lack of them. I think that whoever
4 characterizes this as garbage, I don't remember which of you
5 did, was awfully accurate. I'm striking it. Okay.

6 Who is next? Iris Dennison is next if you've got
7 her done.

8 MR. CARR: Have you done these too, Judge?

9 THE COURT: I've done all of them.

10 MR. CARR: Great.

11 THE COURT: I may not have done the last two. I
12 think I've done everything but that.

13 MR. CARR: Let's see, Dennison.

14 THE COURT: As a matter of fact, if you'll wait
15 just a minute -- I'll get it tomorrow.

16 MR. CARR: The first objection I have on
17 Dennison's deposition is page 12, line 21 and a half. Now
18 Ed Vaught had already dropped out of school.

19 THE COURT: Down through where?

20 MR. CARR: Just that part, 21 and a half to 23,
21 just that sentence. My next one would be on page 25.

22 MR. NASSIF: Why are you objecting to that?

23 MR. CARR: It has no relevance to anything. Ed
24 Vaught had already dropped out of school and Dominguez had

1 dropped out of school. Dominguez had not actually dropped
2 out of school, he transferred.

3 MR. HARVEY: John Dominguez?

4 MR. CARR: Yes. Sunnydale.

5 MR. HARVEY: This is Sunnydale.

6 MR. CARR: Wherever he transferred to. He went to
7 college, I know that. That's the oldest Dominguez boy. It
8 is not important whether he has or not. It has no relevance
9 to this case that Ed Vaught and Dominguez had dropped out of
10 school.

11 THE COURT: What's your position?

12 MR. HARVEY: Well, with respect to Dominguez the
13 testimony wasn't really directed at him. But as far as Ed
14 Vaught, it goes to whether or not she was still having
15 contacts with him in 1979 at the time of the spill.

16 MR. CARR: She obviously could not have had any
17 contact with Vaught, that's what she was saying.

18 THE COURT: I agree with the objection. I'm
19 striking it. Where is your next objection?

20 MR. HARVEY: That's through line 23?

21 THE COURT: Yes.

22 MR. CARR: The next one is on page 25, your Honor,
23 line 19 over to page 30. Over to page 30. I don't see
24 where any of that -- ove to page 30, line 1. Most of this

1 is Hagen's cross examination, I believe, isn't it, or is it
2 all?

3 MR. HARVEY: Yes.

4 THE COURT: I think it is. You're not going to
5 read that?

6 MR. CARR: That's correct, your Honor.

7 THE COURT: Do you have any objections to
8 anything, or are you going to read that? She just started
9 cross examining the page before.

10 MR. HARVEY: The only thing I would want to read
11 on the cross examination -- I take it Mr. Carr is not going
12 to read any of the cross examination.

13 MR. CARR: Yes, we're reading the cross
14 examination.

15 THE COURT: From page 25, line 19 to the end of
16 the deposition he's not. Up to that point he is. She
17 started the page before.

18 MR. HARVEY: Okay. We would then offer, I guess,
19 page 25, line 19 through page 26, line 7. It goes to
20 background, length of time at Sunnydale. There's no
21 objection to it. He's just not going to read it.

22 THE COURT: Do you have any objection to that?

23 MR. CARR: I don't care, Judge. It doesn't have
24 to do with anything, but if they want to read it.

1 THE COURT: Okay. We'll leave it in. Any other
2 objections?

3 MR. HARVEY: No, we won't offer anything passed
4 line 7 on page 26.

5 THE COURT: Okay. All right. I did read the last
6 two depositions. Embree, do you have Embree?

7 MR. CARR: Yes. Page 15, line 16 to line 21.

8 THE COURT: We've been through that before too,
9 comment on other people's --

10 MR. NASSIF: Right.

11 THE COURT: I'll incorporate what each of you have
12 argued on that. I'm striking it.

13 MR. HARVEY: Could I add to that objection, or to
14 our response?

15 MR. CARR: Sure, you can add to my objection
16 anytime you want.

17 MR. HARVEY: Not to your objection, but to our
18 response to your objection. I would direct the Court's
19 attention to the case of Darrough v. White Motor Company.

20 THE COURT: Do you have a copy of it?

21 MR. HARVEY: 74 Ill.App.3d 560, 30 Ill Dec.

22 THE COURT: 560.

23 MR. HARVEY: I've got those, where the defendant
24 entered into evidence the absence of injuries in a similar

1 situation, and it was held to be admissible. It's our
2 position that logically a proof of, as the Court said, proof
3 of -- let's see -- the non-existence of proof of an injury
4 during a period of similar exposure would be relevant.

5 MR. CARR: We never said it wasn't, Counsel.

6 MR. NASSIF: It only applies to people testifying
7 about somebody else.

8 MR. HARVEY: And a person who is in a position to
9 observe someone who is in a similarly situated condition
10 would have the knowledge that would be pertinent to
11 expressing their opinion as to the health of the similarly
12 situated individual, whether or not it be a plaintiff in the
13 case.

14 THE COURT: I think that's been argued before. I
15 don't remember if this case has been cited. I will look at
16 it this evening. If I've changed my mind, I will let you
17 know and we can argue it further. But at this point in time
18 I think the point itself has been argued before.

19 MR. HARVEY: Okay.

20 THE COURT: It would, therefore, be incorporated.
21 But I will look at the case tonight. If there's any change
22 I'll let you know in the morning.

23 Any other objections?

24 MR. CARR: On page 16, line 6 and 7, referring to

1 Matthew.

2 THE COURT: Same type of thing. If I have any
3 change, I'll let you know in the morning.

4 MR. CARR: On this one we don't intend to read the
5 cross. That's all. We just don't intend to read the cross,
6 and the redirect would be their thing to read if they want
7 to read it.

8 THE COURT: Okay. Do you have any objections to
9 anything, or are you going to read it?

10 MR. HARVEY: We would read the cross up to page
11 18, line 3, but not the redirect or anything passed that.

12 MR. CARR: Well, if they're going to read part of
13 it, Judge, we will read the rest of it then.

14 THE COURT: Okay.

15 MR. HARVEY: In that case, we'll read the
16 redirect.

17 THE COURT: Now looking at the whole deposition,
18 does anyone have any objections to anything else? Fine.

19 I think the next is Kelli Evans.

20 MR. CARR: Page 13, line 25 over to page 14, line
21 19.

22 THE COURT: Okay. I think we've been through
23 these before too. I'll incorporate what everyone said and
24 I'm striking it. Any other objections?

1 MR. CARR: Page 15, line 12 to line 16 on that
2 same page.

3 THE COURT: Same ruling. We've been through this
4 before a number of times.

5 MR. NASSIF: How far on line 16?

6 THE COURT: Through line 16.

7 MR. CARR: Just four lines there. Page 16, line 9
8 through line 14.

9 THE COURT: Same thing, I'll incorporate the
10 arguments and strike it.

11 MR. CARR: Page 17, line 3 to line 12.

12 MR. NASSIF: Can you hold on just a second? Are
13 you leaving in the question on page 16, "Does she seem to
14 give a positive or enthusiastic attitude?" Line 6, page 16,
15 the answer is yes.

16 MR. CARR: Yes.

17 MR. NASSIF: She can report on that, but you're
18 objecting to people that indicate that they're fussy or
19 short tempered or something else?

20 THE COURT: They were different grounds, Counsel.

21 MR. NASSIF: Okay.

22 THE COURT: That same ruling as before. I'll
23 incorporate the arguments on it.

24 MR. CARR: 16, lines 8, 9 and 10.

1 THE COURT: Same ruling, incorporate it.

2 MR. CARR: 19, lines 17 over to page 20, line 12.

3 THE COURT: We've been through this a number of
4 times, same ruling. I'll incorporate all arguments.

5 MR. CARR: Page 21, line 21 to page 22, line 7.

6 THE COURT: We've been through this, same ruling
7 and I'll incorporate all arguments.

8 MR. CARR: Page 22, line 18 through page 19, line
9 4.

10 MR. HARVEY: Wait a minute. Page 22, line 19
11 through --

12 THE COURT: Line 18.

13 MR. HARVEY: 18 through --

14 MR. CARR: Page 23.

15 THE COURT: Line 4.

16 MR. CARR: I've got line 10.

17 THE COURT: Yes.

18 MR. HARVEY: I would respond, I don't believe
19 we've addressed the issue on page 22, line 18 through line
20 23. This is a physical education teacher whose background
21 or training in physical education, and, in fact, her duties
22 and responsibilities as a physical education instructor
23 require her to observe the physical activities of those
24 students who are charged under her care and supervision.

1 Jessica White is one of those students who is
2 charged under her care and supervision. She has an
3 opportunity to observe, and, in fact, is trained and has a
4 duty to report on those things, so it can be determined
5 whether or not the student should receive a proper grade, or
6 is conducting herself at the same level of activity and
7 skill as the other students who are at her age level. One
8 of the problems -- I'm sorry, Robin.

9 MR. CARR: It says here Jesse, is what I've got.

10 MR. HARVEY: The analogy is to Jesse. She's a
11 little more passive than Jessica.

12 MR. CARR: All right. I see it.

13 THE COURT: Okay. Were you done?

14 MR. HARVEY: Yes.

15 THE COURT: Do you have anything to add?

16 MR. CARR: One response to that, Judge, is that I
17 don't know that we ever suggested that she doesn't have --
18 that she is earth bound, or that she has no hand/eye
19 coordination. This is suggesting an illness that we don't
20 claim that she's had.

21 MR. NASSIF: Finger and hand discomfort.

22 MR. HARVEY: She has finger and hand discomfort.
23 So I believe that would affect her hand-to-eye coordination,
24 or could very well affect it, in playing games such as

1 volleyball, or the other games she describes in here.
2 Peripheral neuropathy I believe is one of the things that's
3 commonly raised, however, it may be characterized. I think
4 some abnormalities were reported by Dr. Carnow with respect
5 to Robin.

6 MR. CARR: That she had no hand-to-eye
7 coordination, we never claimed that.

8 MR. HARVEY: You may not have claimed hand-to-eye
9 coordination.

10 MR. CARR: That's what you're asking, though.

11 MR. HARVEY: The claim that was made with her
12 would be finger and hand pain over something that would --
13 this would be the objective observation that would tend to
14 rebut the complaint. She couldn't very well testify that
15 Robin Bowen didn't have finger and hand discomfort or pain
16 other than -- you'd certainly object to that, on the basis
17 that she wouldn't know it. We would say that the lack of
18 any complaint would indicate that she didn't have it. But
19 she could testify to the objective observation of no
20 impairment.

21 MR. CARR: She's already testified that she's able
22 to participate in physical activities. She does fine. A
23 little more passive. My objection to this question is that
24 you are suggesting that she should have that problem, by

1 asking does she have no hand-to-eye coordination. That's
2 improper to suggest that, unless you know that we have
3 claimed that she has no -- that she has claimed that she has
4 no hand-to-eye coordination, or, in fact, being earth bound.
5 That's what I'm quarreling with in this question.

6 THE COURT: I'm sustaining the objection to it on
7 the grounds that were argued. I thought we had gone through
8 this before, but on the grounds that have been argued this
9 afternoon. I am sustaining it.

10 MR. CARR: Page 23, line 15 and a half.

11 MR. HARVEY: Excuse me just a second.

12 MR. CARR: 15 and a half through --

13 THE COURT: Where I have noticed that type of
14 thing.

15 MR. CARR: Yes. But not with Robin.

16 THE COURT: He's starting at 15 and a half. I
17 have noticed that type of thing.

18 MR. CARR: Down to line 22. The same reason I've
19 given before.

20 THE COURT: We've been through that a hundred
21 times. I'll sustain the objection.

22 MR. HARVEY: IF I could make an Offer of Proof on
23 that one, your Honor. Robin -- or an offer of relevancy.
24 In any event, Robin Bowen in her testimony -- actually it was

1 her mother's testimony in her behalf, testified that she had
2 persistent colds and fevers, and I believe a chronic cough,
3 a problem with a persistent cough. That's on pages 170
4 through 72 of the trial transcript of October 4, 1984. If
5 you had a persistent cough, there's certainly nobody better
6 qualified or somebody in a better position to observe this.

7 MR. CARR: I agree that what you say is correct. I
8 don't have the transcript with me. Based upon your
9 recommendation that her mother testified that way at a
10 relevant point in time while she was in school with this
11 teacher, I have to check the transcript. I assume Robin
12 Bowen had a persistent cough.

13 THE COURT: Why don't you check that point. I'll
14 reserve ruling on it. Tell me tomorrow morning. Okay.

15 MR. CARR: On the same page, line 25, running over
16 to page 25, line 11. Basically all of page 24 and half of
17 25.

18 THE COURT: I think we've gone over this type of
19 thing.

20 MR. HARVEY: I guess I again would offer, she
21 complains of a rash or unusual skin condition, and the
22 teacher -- she makes that complaint to Dr. Carnow as well,
23 stated on January 10th of this year, on page 154 that she
24 had a very active rash for someone who was so young,

1 inferring that it was related to the spill, and Mz. Evans
2 here testifies that if it was something that would stand out
3 she was sure she would notice it.

4 MR. CARR: You're asking white patches or
5 discoloration.

6 MR. HARVEY: Rash would be discoloration.

7 MR. CARR: Would not. I don't consider a rash --
8 if I meant a rash, I'd say rash. I don't say discoloraion.
9 Discoloration would be like a bruise.

10 THE COURT: I'm sustaining the objection.
11 Anything else?

12 MR. HARVEY: On page 23, just for clarification,
13 you've reserved ruling on lines 11 through 21?

14 MR. CARR: No. I'm not objecting to 11 through 15
15 and a quarter.

16 THE COURT: Where it starts I have noticed, down
17 through line 22, I'm reserving ruling on it while the
18 transcript is checked. Okay. Any other objections?

19 MR. CARR: Yes, your Honor. Did you rule out all
20 of 24?

21 THE COURT: Right.

22 MR. CARR: Page 27 then, line 8, to line 20.

23 THE COURT: Through line 20?

24 MR. CARR: Yes. Page 27.

1 THE COURT: That doesn't make any sense at all.
2 That goes out. Any other objections?

3 MR. CARR: Page 29, line 18 to page 30, line 13.

4 THE COURT: I think this is the type of thing
5 we've gone through before too.

6 MR. HARVEY: If I could state something for the
7 record.

8 THE COURT: Sure.

9 MR. HARVEY: One of the problems that's reported
10 in Dr. Carnow's report, and his testimony is also directed
11 at this on February 21, is that Debbie Rush was fatigued. I
12 believe it was in the afternoon when her fatigue was most
13 prevalent, according to her or her mother. And that was, as
14 you can tell from the way the question was phrased, that's
15 why it was phrased that way. It was in specific rebuttal to
16 a specific complaint that we anticipated would be placed
17 before this jury through Dr. Carnow's report.

18 MR. CARR: If you're representing that, Counsel, I
19 certainly will withdraw my objection to it.

20 THE COURT: That's that first question and answer
21 then?

22 MR. CARR: Yes, on page 29.

23 THE COURT: Okay. Objection is withdrawn.

24 MR. HARVEY: With the colds, Dr. Carnow testified

1 tha Debbie had colds once or twice a month. On page 58 of
2 his February 21 testimony. The question and answer on page
3 30, line 1 through 4, "Have you ever seen her exhibit the
4 symptoms of someone with a cold or runny nose?" She said,
5 "I can't remember. Nothing real noticeable, or I'm sure I
6 would really remember that."

7 MR. NASSIF: It starts on page 29, line 23 at the
8 bottom.

9 MR. HARVEY: Right, the rebuttle to that begins on
10 line 23. Again her exposure to this person is on a three
11 times a week basis, doing activities where a cold would be
12 likely to manifest itself.

13 MR. CARR: What's the testimony about Debbie Rush,
14 that she had colds all the time?

15 MR. NASSIF: Colds once or twice a month, and
16 occasional sore throats with colds.

17 MR. CARR: I'll withdraw the objection to 1
18 through 4 on page 30. She's never complained to anybody, we
19 haven't suggested that she needs to complain to anybody.

20 MR. HARVEY: I don't think it would hardly be
21 unusual, if somebody has a cold or congested to complain to
22 her P.E. teacher, especially given the nature of the
23 activities.

24 THE COURT: Not necessarily. I've ruled on that

1 before. I don't think that's necessarily true. The
2 objection is sustained on that.

3 MR. HARVEY: On lines 23 through 25 on page 29?

4 THE COURT: Right.

5 MR. HARVEY: It's withdrawn on lines 18 through
6 21.

7 THE COURT: 1 through 4 on page 30.

8 MR. HARVEY: The objection is still made --

9 MR. CARR: 8 through 13 is now the remaining part
10 the Judge has stricken.

11 THE COURT: I thought it was 5.

12 MR. CARR: I'm sorry, 5. I'm sorry, Judge.

13 THE COURT: Any other objections?

14 MR. CARR: Page 31, line 14.

15 MR. HARVEY: Again on the record, on the
16 headaches, she complained of having headaches all the time.
17 Barbara Rush did, when she testified on Debbie's behalf. On
18 page 104 through 108 of the November 13 transcript. Dr.
19 Carnow also testified that there was a symptom that Debbie
20 was having problems with on February 21, page 62.

21 MR. CARR: It doesn't mean she should come
22 complaining to people of headaches.

23 MR. HARVEY: There's also visible manifestations
24 of a headache that a little girl would be likely to make.

1 MR. CARR: Who says so?

2 MR. NASSIF: My six year old daughter, among
3 others.

4 MR. HARVEY: My three year old daughter.

5 THE COURT: Well, my 12 year old walked around
6 with a broken arm for two days.

7 MR. NASSIF: It wasn't a headache. Judge, on page
8 30, line 8, have you ever seen her standing off to the side
9 rubbing her forehead, making a face like she was in pain.
10 Once again, if a person has a headache, it's pretty tough to
11 go through physical education class. She says no, this is
12 all I've noticed, the hand to the side when she runs.

13 THE COURT: We've been through this a lot. I
14 don't think that the position here makes this argument. I
15 would incorporate the arguments that you made before, both
16 sides, and make the same ruling. I don't think it should be
17 read.

18 MR. CARR: On page 31, Judge, line 14 to line 18.

19 MR. HARVEY: On the same grounds of relevancy?

20 THE COURT: The same grounds of relevancy.

21 MR. NASSIF: Your Honor, there's testimony by her
22 mother that she has frequent stomach aches, as I recollect.
23 Have you ever seen her holding the front of her stomach,
24 doubled over?

1 MR. CARR: Is that what you do when you have a
2 stomach ache, you hold the front of your stomach and double
3 over? It's news to me. It's a suggestive question.

4 MR. NASSIF: For a little kid.

5 MR. CARR: There's no evidence that she ever did
6 hold the front of her stomach, or we ever claimed that she
7 held the front of her stomach, or doubled over forward.

8 MR. HARVEY: All these things, the headaches, or
9 the stomach pains, or whatever, they're objective
10 manifestations that one might associate with that type of
11 injury, or that illness if it in fact existed. At the every
12 least, it would allow a reasonable person to guage the
13 severity with which this person is supposedly afflicted with
14 these things. Did she have a stomach ache, well, not enough
15 for her to do anything that one might do when they really
16 have that problem.

17 THE COURT: Okay. I disagree. My ruling is on
18 the basis we've gone through this before. There is no
19 relevancy. This is such a nebulous, non-objective, multiple
20 interpretation type of matter. It has virtually no
21 probative value. It is not relevant. And there's no reason
22 to let it be in here in an evidence deposition. The
23 objection is sustained.

24 MR. CARR: On that same page, Judge, line 23, ove

1 to page 32, line 6.

2 THE COURT: I'll incorporate --

3 MR. HARVEY: For the record she did testify -- her
4 mother testified and Dr. Carnow both testified as to her
5 having frequent ear infections. The mother on 11-13-84,
6 page 112. Nausea and queasiness were testified to by Dr.
7 Carnow on February 21, page 57, and the ear infections on
8 page 56 on the same day. Claimed that they occurred
9 monthly.

10 MR. CARR: Whether she did or did not has got
11 nothing to do with her complaints. Not obligated to
12 complain to anybody.

13 THE COURT: Objection is sustained. Any other
14 objections?

15 MR. CARR: On page 33, line 25 over to page 35,
16 line 16.

17 MR. HARVEY: With respect to the -- we'll stand on
18 our other objections. But with respect -- we'll stand on
19 our objections.

20 THE COURT: Same ruling. It's out.

21 MR. CARR: Page 36, line 9. I withdraw that line
22 9, and make it line 12. Over to page 37, line 17.

23 THE COURT: We've been through all this, haven't
24 we?

1 MR. HARVEY: Well, this is Julia Kemner we're
2 talking about here.

3 MR. NASSIF: We've covered all that stuff, Ed.

4 THE COURT: I think we have.

5 MR. HARVEY: The observation on the rash, that is
6 a question that goes to the observation. In the trial Joyce
7 Kemner testified that she had eczema. That was the main
8 point, it would be relevant to that.

9 THE COURT: I'm sustaining the objection. Let's
10 take a short break and then we'll go back to this.

11

12 (Short recess.)

13

14 THE COURT: I have read this Darrough v. White
15 Motor Company, and I disagree with your interpretation of
16 it. I am going to sustain the position that I took before.
17 The Appellate Court very strictly construed the question,
18 and I don't think it's really on point with this, when they
19 said, The question of whether, in defense of a charge of
20 strict liability defective product based on defective
21 design, a manufacturer may show evidence of nonoccurrence of
22 injury from similar products, stating that that question had
23 not been directly decided in Illinois.

24 They cite immediately after that Liberty Mutual on

1 the proposition that I think is more in keeping with this
2 case. They state generally that it's a question of
3 discretion for the Court, and in the exercise of my
4 discretion, in view of the various factors of exposure,
5 amounts, individual variabilities as to reactions, and a lot
6 of other factors which have been gone into hundreds of times
7 in this case, and in the exercise of my discretion, I don't
8 think that it's relevant. So I am taking the same position
9 that I did before as far as the other person involved. I've
10 taken that consistently on other grounds also. I would
11 incorporate those other grounds as the basis for my ruling
12 also.

13 I think the last one we had done was up to line 17
14 on page 37.

15 MR. CARR: Page 37, line 23 to page 38, line 7.

16 THE COURT: We've gone through this in a lot of
17 these depositions.

18 MR. NASSIF: But, Judge, the thing about sitting
19 out, having to do with did she miss your class a lot. I
20 don't remember that as being something that we said was
21 excludeable. It's a phys. ed. teacher.

22 THE COURT: I disagree. I think it has been
23 covered.

24 MR. HARVEY: It explains what's on line 18 through

1 22 where the question is have you ever received a note from
2 her parents asking her to sit or stand outdoors. The
3 response was there was one occasion. Then that is clarified
4 in line 23 to 25 to show that this wasn't a regular
5 occurrence. It was a one time event.

6 MR. CARR: I got one note one time. That's as
7 specific as you can get. She may have missed a class. She
8 had gone once to the doctor, she may have missed a class for
9 that. That doesn't make you anything except a great
10 attempter.

11 MR. HARVEY: The question on 23, if the one stays
12 in, the other should too, to explain that. Well, there's
13 one time where she had a cold and another time she went to a
14 doctor, leaves one --

15 MR. CARR: The question suggests that she should
16 be a regular sitter-outer, and we haven't argued that at
17 all.

18 MR. HARVEY: I haven't suggested that she's more
19 susceptible to colds.

20 MR. CARR: All kinds of people have colds and go
21 to school. You're suggesting here that she should be a
22 regular sitter-outer.

23 MR. HARVEY: The point is that there was one time
24 when she had a cold and her mother did ask her to sit out.

1 MR. CARR: Right.

2 MR. HARVEY: There was a time when she went to a
3 doctor. The fact that she had a cold and she had to sit out
4 once indicates by not being a regular sitter-outer,
5 indicates that if she did have this cold on one occasion
6 where she did sit out, the rest of the time she didn't would
7 go to the variation of that.

8 THE COURT: I'm adopting the ruling that I made
9 before. I'll take them over the objections, arguments that
10 were made before.

11 MR. CARR: The next one would be on page 45, line
12 11 to line 15.

13 MR. HARVEY: Our response to that, your Honor, is
14 that if that is going to come out, which we don't think it
15 should, then also the material on line 7 through 10 should
16 be removed, because it's the same sort of thing. If it's
17 not relevant on the one hand, it's not relevant on the
18 other. If we're going to leave the material, line 7 through
19 10 on page 45 in, we certainly ought to leave 11 through 15
20 in to explain it and put it in context with respect to the
21 plaintiffs in this case. We've taken out all material about
22 notes.

23 MR. CARR: Okay. The two of the girls were not --
24 you may be right. The notes from the two girls were not

1 connected with any of the ones being asked about.

2 MR. HARVEY: Yes, they were. I take that back.

3 MR. CARR: Well, then --

4 MR. NASSIF: No, no, no notes from any parents of
5 any of the children you've just spoken about.

6 MR. HARVEY: You're right.

7 MR. NASSIF: It doesn't have anything to do with
8 the kids that she testified about that are plaintiffs in
9 this case.

10 THE COURT: We'll take it all out then, 7 through
11 15.

12 MR. CARR: No, they're two different things. One
13 is to be excused from P.E., from physical activity, and P.E.
14 class, short periods of time. The next question, line 11 is
15 from doctors regarding any of those children suggesting that
16 they shouldn't go outside. That's in a different point.

17 MR. HARVEY: Well, your Honor, the point that's
18 raised is that the activity and P.E. of going outside one
19 way or the other, it's still a note from the parent. If
20 it's irrelevant on the one hand, it ought to be irrelevant
21 on the other.

22 MR. CARR: I don't follow you.

23 MR. NASSIF: Your Honor, I don't think those --

24 MR. CARR: She had a doctor's note about a kidney

1 problem. They referred to that. I think earlier on.

2 MR. NASSIF: Lee Kemner, or somebody else,
3 mentioned another note. That's a question about the two
4 notes refer to --

5 THE COURT: Okay. Rush is on page 44. Where is
6 the other one?

7 MR. CARR: On 37.

8 THE COURT: Okay. I stand corrected. I'll strike
9 11 through 15. I'll leave the other part in. It does
10 relate to that. Any other objections?

11 MR. CARR: No, your Honor, that's all I have.

12 THE COURT: Do you have any objections?

13 MR. CARR: We don't intend to read any of the
14 cross examination.

15 MR. HARVEY: We do, your Honor.

16 THE COURT: All right. Fine. Do you have any
17 objections to any of it?

18 MR. HARVEY: We don't intend to read any of the
19 cross by Mr. Wooler.

20 THE COURT: I think I struck it all out. No, I'm
21 sorry, I didn't. That one question.

22 MR. CARR: Well, we won't read 7 through 10 if
23 you're not going to read it anyway.

24 MR. HARVEY: Okay.

1 THE COURT: So it's all out again.

2 MR. HARVEY: Mr. Wooler's is all out.

3 THE COURT: Do you have any objections to anything
4 that's left in?

5 MR. HARVEY: We would read --

6 THE COURT: I'm assuming you're reading everything
7 else. Do you have any objections to anything?

8 MR. HARVEY: The reason I state that is Mr. Wooler
9 took her up on cross again. I would read his cross on page
10 49.

11 THE COURT: Okay. Fine. Do you have any
12 objections to anything that you intend to read?

13 MR. HARVEY: No, your Honor.

14 THE COURT: Fine. Great. Next would be Mable
15 Gray.

16 MR. CARR: We move to strike everything from line
17 6 through the end of the deposition.

18 MR. HARVEY: What page?

19 MR. CARR: Page 5. Except the parts on page 9,
20 line 16 to page 10, line 2.

21 THE COURT: Well, I think in view of my prior
22 rulings, I ought to strike it all. I'm going to incorporate
23 all of the objections, and I think that part, on the basis
24 of my prior rulings I think it should be stricken also.

1 MR. HARVEY: Which part?

2 THE COURT: All of it will be stricken, including
3 the part that he wants left in.

4 MR. CARR: It's fine with me to strike it.

5 THE COURT: In view of my prior rulings.

6 MR. HARVEY: Nobody is objecting to it, your
7 Honor.

8 THE COURT: He wanted it left in.

9 MR. CARR: All I'm saying is it's not
10 objectionable.

11 THE COURT: I thought you were objecting to it.

12 MR. HARVEY: No, we want to read the whole thing.

13 MR. CARR: I think it's proper, because they said
14 this person says she was terribly fatigued all the time and
15 had lots of back problems.

16 THE COURT: Well, if no one is objecting to it,
17 I'll leave it in then.

18 MR. CARR: I won't object to it, because I think
19 it's proper.

20 THE COURT: Are you objecting to it?

21 MR. HARVEY: No, we're offering it.

22 THE COURT: Fine. All right. I got confused
23 then.

24 MR. HARVEY: We would make the same record that we

1 made with respect to Edith Daniels' deposition on the
2 irritability and the short temperedness, except the woman
3 went into it in considerable more detail, even greater than
4 Edith Daniels did, as to the specifics and the
5 characterization of Miss Jennings vitriolic nature, or short
6 tempered, irritable disposition, and all these things are
7 items that have appeared in court before the jury. They're
8 relevant for that reason.

9 THE COURT: Same ruling as before, again. Whoever
10 characterized it as garbage wasn't far off.

11 MR. NASSIF: Are you striking everything, your
12 Honor?

13 THE COURT: No, no one is objecting to that one
14 part.

15 MR. NASSIF: I mean everything other than --

16 THE COURT: Everything other than that.

17 MR. NASSIF: Your Honor, what about the part about
18 her seeing a psychiatrist?

19 THE COURT: Pardon? What page?

20 MR. NASSIF: Page 10, your Honor. Begins on page
21 10, carries to the bottom of page 10.

22 THE COURT: Bottom of page 10?

23 MR. CARR: What's that got to do with anything?

24 THE COURT: It doesn't have anything to do with

1 it.

2 MR. CARR: Just because most psychiatrists have
3 mental problems. If you want to be a psychiatrist that's
4 evidence of a mental problem. You may be right.

5 MR. NASSIF: I didn't say that.

6 MR. CARR: No, but you may be right.

7 MR. NASSIF: I'm just saying some strange things
8 are sometimes indicative --

9 MR. CARR: This is really great, she was one of
10 the meanest people I have ever known, and I've worked for
11 the public for 40 years, and with lots of people, but I've
12 never seen one that was as mean as she is.

13 MR. NASSIF: Wait a minute. What about her
14 smoking?

15 MR. HARVEY: Page 13.

16 MR. CARR: Is there an issue on smoking?

17 MR. NASSIF: Excessive smoking can cause
18 headaches.

19 MR. CARR: Is there an issue? Did we ever deny --

20 MR. NASSIF: Yes, you did.

21 MR. HARVEY: She doesn't say --

22 MR. NASSIF: No, no. During her testimony, as I
23 recall, she said she smoked and there was an issue regarding
24 the degree, that she smoked, and I can't give you a

1 reference right now.

2 MR. CARR: This is remote in time anyway. At one
3 time she smoked a lot. That could have been anywhere in
4 the past 40 years.

5 THE COURT: She did admit at one time she did smoke
6 an awful lot. I don't think that's an issue. I think the
7 question was what she had cut back to.

8 MR. NASSIF: There was a question of whether or
9 not -- yes. How long that had persisted. I thought she
10 indicated -- she sort of downplayed it, your Honor, as I
11 recollect.

12 THE COURT: There was some fight as to how much
13 she was still smoking.

14 MR. NASSIF: Right.

15 THE COURT: I don't think there was any issue as
16 to her having at one point in time smoked an awful lot. I
17 don't think that was an issue at all.

18 MR. HARVEY: With respect to both witnesses
19 remarks as to her apparent passion for going after money,
20 which would be relevant to any secondary gain that there
21 might be in bringing this lawsuit.

22 MR. CARR: That's not an issue that you can put
23 evidence in on, Counsel. You cannot get at somebody's
24 character the way. That's character assassination. The

1 next one --

2 THE COURT: Regina Jasper.

3 MR. CARR: Page 6, line 16 to 25. On the subject
4 7, 8, 9, 10 and 11 -- 6, 7, 8, 9, 10, and 11, all that
5 business about them buying a house.

6 THE COURT: Until where on 11?

7 MR. CARR: All of 11, page 12, line 1 and 2.
8 Okay. Over to page 12, line 2 is the best way to put it.

9 THE COURT: Okay. So 6, line 16 through 12, line
10 2?

11 MR. CARR: On page 6 over to page 12, line 1 and
12 2.

13 MR. NASSIF: Are you objecting to that as
14 irrelevant?

15 MR. CARR: Indeed we are.

16 MR. HARVEY: Our position, I think, would be Bill
17 Kamner has put his property damage, and the relative
18 property damage in Sturgeon, or the unwillingness of a
19 contractor or anybody else to build in Sturgeon because of
20 the effect of the spill diluting the property values and
21 making it a less attractive place to live.

22 Here's a person who moved into Sturgeon in April
23 of '79 immediately after the spill, while the clean-up was
24 still going on, and bought a place just a block off the

1 railroad tracks on East Davis Street, having shopped around
2 and fully aware of the spill, and went in and sold her house
3 later in 1983 for a substantial profit. She bought it in
4 '79 for \$19,500 and sold it in '83 for \$26,500, showing an
5 increase in property value, in the market value of her home.

6 In the very town where Bill Kemner is claiming his property
7 is worth less.

8 MR. NASSIF: A portion of his property.

9 MR. CARR: I don't think it's probative of
10 anything, the fact that somebody bought a house or sold a
11 house does not reflect on the market value of Bill Kemner's
12 pasture land. We haven't even put it in as a value for
13 subdividing, although that's one aspect of it.

14 MR. NASSIF: Sure, you did, Rex. You put in
15 evidence that the fact that some contractor wanted to
16 develop it or something.

17 MR. CARR: Did not put on any evidence as to the
18 value of that. We are not claiming value on the subdivided
19 property.

20 MR. NASSIF: But you are saying that a subdivider
21 -- well, okay. You didn't put that on as your evidence of
22 the property, however, you did bring that as a lost
23 opportunity. It was put into evidence.

24 THE COURT: I believe that's correct.

1 MR. NASSIF: Here is an example of a situation
2 where an opportunity was very good, despite being a block
3 from the railroad tracks.

4 THE COURT: I don't think it's probative. I think
5 we've gone through this before, but regardless of whether we
6 have or not, there are so many touch stones you have to
7 handle as far as comparables. There is nothing here that
8 makes this probative. In no way does it comply with
9 anything.

10 MR. HARVEY: Through page where?

11 THE COURT: Page 12, line 2.

12 MR. HARVEY: I don't think you wanted to go that
13 far, do you, Mr. Carr? Starting on page 8, line 5, that's
14 where the decision to buy a house and the property value
15 testimony ends. Beginning on page 8 we get into the
16 testimony where you haven't objected to and we left out,
17 where she lived, where she went in Sturgeon.

18 MR. CARR: Well, if you're using that for the
19 purpose of subsequent questions about health, that's
20 perfectly all right.

21 MR. HARVEY: That's exactly what it's used for.

22 THE COURT: There is some stuff in here about
23 values on page 10, values of financing.

24 MR. HARVEY: We skip back into that.

1 THE COURT: All right. Okay. Let's go to page 8
2 through line 8, and then we can read from line 9.

3 MR. CARR: On page 8 what line did you say?

4 THE COURT: Start on line 9. That's where they
5 marked the map so that she can show where she lives. On
6 the last line of that, start getting into property values
7 again. Line 25 would have to go out on page 9. On page 10,
8 all of page 10, all o page 11, and the first two lines of
9 page 12 will all go out.

10 MR. CARR: To recap now, Judge.

11 THE COURT: Everything will go out except on page
12 8, line 9 through page 9, line 24. That's the only part
13 that doesn't deal with property value.

14 MR. CARR: Okay.

15 THE COURT: Any other objections?

16 MR. CARR: Page 16, line 5 to 25.

17 MR. HARVEY: Our response would be -- This is a
18 child who wouldn't be in a position to testify for herself,
19 just as the plaintiffs have testified. The plaintiffs'
20 parents have testified to the health of their children, this
21 woman ought to be allowed to testify to the health of her
22 child, as something she would readily observe. The child is
23 unable to testify as to her own health, that's why the
24 plaintiffs testified to the health of their children.

1 MR. CARR: This is not a doctor here that you're
2 asking the question if they developed any health problem.

3 MR. HARVEY: Neither were the mothers of the
4 plaintiffs.

5 MR. CARR: Did you ask her what problems she's
6 had. What problems -- something that could be that she
7 could diagnose. But none of our people diagnosed anything.

8 MR. HARVEY: Well, but they would state -- the
9 question you would pose would be almost identical. What
10 health problems have any of you had, or has your daughter
11 had, Mrs. Plaintiff, since the time of the spill, and they
12 would go on and expound to the problems.

13 MR. NASSIF: You also had the mother compare their
14 health before and after the spill.

15 MR. HARVEY: That's exactly what we did here.

16 MR. CARR: Correct me if I'm wrong, but hasn't the
17 Court stricken these questions like this in the past?

18 THE COURT: I have on all the other depositions.

19 MR. CARR: All right. We'll stand by that, Judge.
20 I forget all the reasons we had now.

21 MR. NASSIF: Your Honor, I don't know if all --
22 what the reasons were when you struck these before, but I
23 don't recall right now if they were worded differently from
24 these questions or not.

1 THE COURT: I think they were pretty much the same.
2 Fell into a pretty consistent pattern.

3 MR. CARR: Your Honor, the Plaintiffs have
4 obviously been able to testify about their children to
5 questions identical to what these questions are. A mother
6 would know if her child has experienced health problems
7 simply from the fact that she would be the one taking the
8 child to the doctor. These Plaintiffs have talked
9 repeatedly, testified repeatedly about taking their children
10 to doctors and what the doctors told them.

11 MR. HARVEY: Even in instances when, like with
12 Timothy Bowen, when Carol Bowen testified about his health,
13 muscle aches and alleged pains, some of these children
14 testified for themselves, but the mother would always be the
15 one to expound upon it.

16 THE COURT: Any further argument?

17 MR. CARR: No, Judge.

18 THE COURT: It's out. Any other objections?

19 MR. CARR: Page 17, lines 1 to 17. I really don't
20 mind -- well, it's got no relevance. It could have. We'll
21 just object to 1 to 4, your Honor.

22 THE COURT: It will be the same on that. Any
23 other objections?

24 MR. CARR: Page 19, lines 4 to 25. And all of

1 page 20 and 21, down to 22 -- to line 22.

2 MR. HARVEY: Down through line 21 on page 20?

3 THE COURT: Yes. 22.

4 MR. CARR: 22.

5 MR. HARVEY: I'm sorry.

6 THE COURT: I know it's confusing.

7 MR. NASSIF: Entire page 20 is struck, or is
8 objected to, all the way down to line 21 on page 21?

9 THE COURT: Right.

10 MR. HARVEY: Our position is the same, your Honor.

11 THE COURT: Okay. I'll strike it.

12 MR. CARR: We won't read any cross.

13 THE COURT: I'm starting on 22.

14 MR. HARVEY: We don't want to read any cross
15 either, your Honor. We won't read any of Mr. Axlerod
16 either.

17 THE COURT: What about Wooler? He starts on 23,
18 line 4.

19 MR. NASSIF: No.

20 MR. HARVEY: No.

21 THE COURT: Now do you have any objection on the
22 parts that are going to be read?

23 MR. HARVEY: No.

24 THE COURT: Okay, fine.

1 MR. CARR: I don't think there's any parts going
2 to be read.

3 MR. NASSIF: No, no.

4 THE COURT: Anything else that's left?

5 MR. HARVEY: You mean the deposition as a whole?

6 THE COURT: Yes. Right.

7 MR. HARVEY: Yes, the deposition will end, I
8 guess--

9 THE COURT: Kenneth Rall.

10 MR. CARR: Okay. Page 10, line 25, over to one
11 half of the line on 1 on page 11. I just want to strike out
12 that part I wouldn't recommend him to anybody, and let the
13 answer stay, quote, he was there, but that's all.

14 THE COURT: Do you mind if I mark on your's?

15 MR. NASSIF: No, go ahead, Judge.

16 MR. CARR: The question is how do you know he was
17 an average worker. Well, he was there, but that's all.

18 MR. HARVEY: What's the grounds for your
19 objection?

20 MR. CARR: It's character assassination, uncalled
21 for whether he would or would not recommend him to anybody.

22 MR. HARVEY: The question is whether or not he's a
23 good worker, that's his assessment of his work ability.

24 MR. CARR: His answer was he was just an average

1 worker.

2 MR. HARVEY: How do you know that, I wouldn't
3 recommend him to anybody. That's characterization of his
4 answer. He's entitled to express it in those terms, whether
5 or not an employer would recommend an employee to somebody
6 else is certainly the manner in which they'd assess his work
7 ability.

8 THE COURT: I think I'll deny the objection. I
9 think that's proper. You still have a service letter over
10 there, so that even makes it more relevant.

11 MR. NASSIF: Good point, your Honor.

12 MR. CARR: 12, lines 22 to 25, and then all of --
13 all down to page 18, line 21, actually the only thing
14 apparently my notes indicate that we're not objecting to is
15 line 22 on page 12, over to page 22, lines 1 to 20 on page
16 18.

17 THE COURT: I'm lost. Could you go through that
18 one more time.

19 MR. HARVEY: You don't want that in there about
20 him stealing?

21 MR. CARR: That's correct. The only thing that we
22 don't object to.

23 THE COURT: In the rest of the deposition?

24 MR. CARR: Yes.

1 THE COURT: Is on page 18, lines 1 to 20? All
2 right, that sounds good to me.

3 MR. NASSIF: Your Honor, just so you can focus on
4 it, would you focus on line 16, page 13, where he talks
5 about his employment being terminated, asks him why. That
6 goes to his credibility. It goes to his believeability.

7 THE COURT: Page 16, line 13.

8 MR. NASSIF: Page 13, line 16, your Honor.
9 Beginning there with why he terminated his employment.

10 MR. CARR: That's a conviction without a trial,
11 Joseph.

12 MR. NASSIF: He's giving a reason for why he
13 terminated his employment.

14 MR. CARR: Well, it might be relevant if we
15 claimed that he quit because he was sick or tired or
16 couldn't do the work. Perhaps that, the only relevant thing
17 -- there's nothing relevant about it at all.

18 THE COURT: We had a couple of instances of
19 offenses or potential offenses. Didn't we go over this one
20 too with this guy in Court?

21 MR. HARVEY: I don't know. We had a bunch of them
22 with the Vaughns.

23 MR. NASSIF: I think there was -- I think he was
24 asked.

1 MR. CARR: There was a guy that was convicted of
2 something.

3 MR. HARVEY: Ed Vaught was convicted of something.

4 THE COURT: A couple of things, like one of them
5 spent a night in jail for something. I think I barred
6 everything that didn't result in a conviction. If I
7 remember correctly. I think one of them spent a night in
8 jail or something, I think this one was in on it too on
9 testimony, or attempted testimony.

10 MR. HARVEY: We're not claiming that this is
11 impeachment by way of a felony or anything like that, but
12 impeachment as to his tendency to have a character trait
13 towards truthfulness or honesty, and there's a prior bad act
14 here.

15 MR. CARR: You think that's proper to do that? Do
16 you really think that's proper to do that? That's the way
17 you're going to impeach somebody's credibility is to bring
18 in the fact that an employer fired him for stealing? Not
19 likely. Not likely. That isn't one of the approved methods
20 of attacking one's credibility.

21 MR. NASSIF: Well, not all of it discusses his
22 stealing.

23 THE COURT: I hate to tell you, but your Xerox
24 machine is dead, the last few pages I can't read.

1 MR. CARR: Mine works.

2 THE COURT: From about 19 on I can't read a thing.

3 MR. CARR: 19 is discussing being fired. Then
4 about the families come in. The Vaught family comes in.
5 Then the complaint about health problems. Did he ever
6 complain to you of headaches or stomach aches? Didn't
7 require any -- Ronald and Robert Vaught was threatening to
8 sue you because of emotional distress. Any other member of
9 the family threaten to sue you for firing Ronald and Robert?

10 No.

11 MR. NASSIF: Your Honor, you can cut the stealing,
12 the stealing parts can come right now, and the fact that he
13 was terminated. You didn't have to say how did that come
14 about. Then go on to the next page.

15 MR. CARR: I don't think putting in that part
16 about he was terminated --

17 THE COURT: What are you agreeing to?

18 MR. CARR: That he was terminated.

19 MR. NASSIF: Line 16 through 18 on page 13.

20 MR. CARR: There's no problem with that.

21 THE COURT: 16 through 18 is okay.

22 MR. NASSIF: Then you go over -- then you go over
23 to page 14 and it says, on line 13, your Honor, were you the
24 person that actually fired him? Yeah. Okay. What happened

1 after you fired him? That was it. And then there's nothing
2 in there about stealing.

3 THE COURT: Any problem with that?

4 MR. CARR: You've got the fact in that he was
5 eventually terminated. I don't think you need to put in, I
6 see no relevance that you were the person that actually
7 fired him.

8 MR. NASSIF: We're not repeating it, because he
9 never said that he was the one that did it.

10 MR. CARR: What's that got to do with anything?

11 MR. NASSIF: Because they all show up to talk to
12 him. I want to leave that part in there as well.

13 MR. CARR: No. That's the only reason you want to
14 leave that in there.

15 MR. NASSIF: They threaten to sue the guy.

16 MR. CARR: What issue in this case is that
17 probative on? Well, five minutes have passed, and you
18 haven't thought about anything.

19 MR. NASSIF: I know something about time, five
20 minutes have not passed. Because I think before I stick my
21 foot in my mouth, I don't intend to be criticized as opposed
22 to some other people who don't think before they put their
23 foot in their mouth. Your Honor, I think it goes to this guy
24 has claimed he has had headaches and nausea, and I think the

1 fact that he has these employment problems can be and the
2 fact that he got so irritated about being fired that he got
3 his whole family together to go out there is potentially --

4 MR. CARR: Lee the record show that he's saying
5 this with one big grin on his face.

6 MR. NASSIS: -- is relevant on the issue of the
7 causes of his nausea, his vomiting, and his headaches. I
8 mean he obviously got very upset about this thing, so upset
9 that he threatened to sue his former employer.

10 MR. CARR: He didn't, his family did.

11 MR. NASSIF: It was because he was so upset he
12 couldn't even get the words out of his mouth.

13

14 (Discussion held off the record.)

15

16 MR. NASSIF: It goes to the issue, your Honor, of
17 the nausea, the headaches, the other things that Dr. Carnow
18 testified in terms of fatigue, depression.

19 THE COURT: I don't think it really does. I'm
20 going to sustain the objection, and also noting again as I
21 did before, suing an employer in Missouri is different than
22 suing an employer in Illinois, under that service letter
23 statute. I don't think that service letter statute -- I
24 don't think there's anything probative in it. As to the

1 other things about observations or potential observations,
2 we've gone through that a million times.

3 MR. HARVEY: IF I may, just to add to the
4 probative --

5 THE COURT: Just one thing. What are we reading?
6 I know we're reading on page 13, line 16 through 18. There
7 was something else that you didn't object to.

8 MR. CARR: Lines 1 to 20 on page 18 is my notes.

9 THE COURT: Okay. All right. I had lost it.

10 MR. HARVEY: On the issue that you just ruled on,
11 on the probative nature of it.

12 THE COURT: And relevancy.

13 MR. HARVEY: Robert Vaught's trial testimony, and
14 Dr. Carnow's trial testimony both indicated that Robert
15 Vaught's headaches and abdominal pain did arise after the
16 termination of this employment. Some of the Vaughts, I
17 believe it's Robert -- some of them have tremors --

18 THE COURT: They've all got tremors.

19 MR. HARVEY: I guess they've alleged they have it,
20 that shows that this is the sort of thing that would have
21 some bearing on that.

22 THE COURT: I don't think so. All the
23 circumstances of that firing, if it had any marginal
24 probative value like that, the nature of it so outweigh,

1 there's just no way I'm going to get it in. There are a few
2 parts of this that have not been objected to. Do you have
3 any objections to any parts of that?

4 MR. HARVEY: I'm not sure if you've ruled on this
5 part or not, your Honor. There's several different subjects
6 that were dealt with here and one of them --

7 THE COURT: I said the other subjects we had gone
8 though before.

9 MR. HARVEY: Page 16, at the bottom where he
10 identifies --

11 THE COURT: What page?

12 MR. HARVEY: Page 16 at the bottom, through page
13 17. This ties right in with the follow-up questions that
14 Mr. Carr did not object to on page 18, lines 1 through 20, I
15 believe. This is where Ronald Vaught came in, filled out an
16 employment application, questionnaire. It's an exhibit and
17 the responses that were taken on there are admissions
18 against interest in this lawsuit. All the responses were
19 there was nothing wrong with him.

20 MR. CARR: I don't have any objection to that.
21 Did I object to that?

22 THE COURT: Yes, I think you did.

23 MR. CARR: Let me look at that.

24 MR. HARVEY: It goes all the way over to page 18,

1 line 1 through 20.

2 MR. CARR: I don't think there's anything wrong
3 with that. I don't know why we objected to it.

4 MR. HARVEY: Okay. We'll read that part too.

5 THE COURT: Okay. Do you guys have any objection
6 to anything that's left?

7 MR. NASSIF: Are we all the way?

8 THE COURT: We're through Plaintiffs' objections.

9 MR. HARVEY: Did you object all the way to the end
10 of the deposition?

11 MR. NASSIF: I thought he did, your Honor.

12 THE COURT: I thought he did too.

13 MR. CARR: I did. You're ahead of me. I'm trying
14 to catch up. On page 17 --

15 THE COURT: We're putting back in page 16, line
16 22, all of page 17, 18 lines 1 through 9, and 14 through 20.

17 MR. CARR: How about that business that Robert
18 Vaught, about he knows him. That should go in too,
19 shouldn't it?

20 MR. HARVEY: Yes.

21 MR. NASSIF: Yes.

22 THE COURT: Yes. That probably ought to go in
23 too.

24 MR. CARR: Down to line 11 then goes out then.

1 THE COURT: Yes, from 11 on.

2 MR. NASSIF: Okay, your Honor. Everything else
3 he's objected to, your Honor, are things that we've already
4 argued. We would just ask you to incorporate our arguments.

5 THE COURT: So incorporated. Do you have any
6 other objections on anything that's left?

7 MR. HARVEY: No.

8 THE COURT: Great.

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10 (Court adjourned.)

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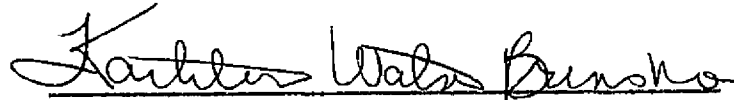
1 STATE OF ILLINOIS)

2 TWENTIETH JUDICIAL CIRCUIT)

3 COUNTY OF ST. CLAIR)

4
5 I, KATHLEEN WATSON BRUNSMANN, one of the Official
6 Court Reporters, do hereby certify that the foregoing
7 transcript is a true and correct copy of said transcript.

8
9 DATED: January 3, 1986.

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12 KATHLEEN WATSON BRUNSMANN, RPR, CSR

13 Official Court Reporter
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1 STATE OF ILLINOIS)
2 TWENTIETH JUDICIAL CIRCUIT)
3 COUNTY OF ST. CLAIR)

5 I, RICHARD P. GOLDENHERSH, CIRCUIT JUDGE, do
6 hereby certify that the foregoing transcript is a true and
7 correct copy of said transcript.

9 DATED: January 3, 1986.

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Michael F. Goldsmith

RICHARD P. GOLDENHERSH, CIRCUIT JUDGE