

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

FRANCES E. KEMNER, et al.,

Plaintiffs,

v.

MONSANTO COMPANY,

Defendant.

CAUSE NO. 80-L-970

REPORT OF PROCEEDINGS

Before the HONORABLE RICHARD P. GOLDENHERSH.

June 4, 1985

APPEARANCES:

MR. REX CARR, Attorney at Law, and
MR. JEROME SEIGFREID, Attorney at Law,
On behalf of the Plaintiffs;

MR. KENNETH HEINEMAN, Attorney at Law,
MR. RICHARD CORNFELD, Attorney at Law,
MR. JOSEPH NASSIF, Attorney at Law,
MR. JAMES CRAVEN, Attorney at Law, and
MR. BRUCE RYDER, Attorney at Law,
On behalf of the Defendant.

PATRICIA A. GANDY, CSR, RPR

Official Court Reporter

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

6
7 (The following proceedings were held in chambers.)

8 MR. CARR: Your Honor, I called the Clerk of the Court and Jim
9 Craven's oral advice was confirmed. She said there was an Order entered in
10 the case allowing the Petition for Leave to Appeal and consolidating that
11 case with the gag order case, and the rule that fits this situation that says
12 that the proceedings are stayed, while the rule was designed for pretrial
13 and preliminary matters, technically it applies here, and I don't think we
14 have any option but to comply with the rule until we have an opportunity to
15 ask the Court for relief from the effect of that rule. That's what the
16 Plaintiff proposes to do immediately, because I think they have to be under
17 misapprehension or have not considered the full ramifications of their order,
18 and so we will immediately take steps in the Supreme Court to get relief from
19 the effect of this rule and Order. And I would suggest that we recess this
20 trial until such time as the Court rules on the motion of the Petition,
21 whatever it might be that we file. But I would expect that they would give
22 us fairly rapid action sometime within a week or so I would expect they could
23 act upon it.

24 THE COURT: Okay. Mr. Heineman, have you--do you have anything you

1 want to say?

2 MR. HEINEMAN: Your Honor, only that we would certainly agree with
3 the position of the Plaintiffs that the rule apparently applies to this
4 situation and requires an automatic stay of the trial pending resolution of
5 the Petition for Leave to Appeal in the Appellate Court that's hearing it, and
6 I think it should be stayed.

7 THE COURT: Okay, I agree. I've read the rule and I think the
8 language is unambiguous and I think that it is automatically stayed until
9 further order of the Court either on special relief or resolution of the
10 Petition before the Supreme Court. Under the circumstances, I think this
11 is stayed. The jury, of course, is waiting. I will get them in the jury box
12 and explain to them that due to some matters we have to suspend testimony
13 for a while. They will be notified when to come back.

14 MR. CARR: Just for the record, we haven't received an official
15 notification of this Order, and we could proceed today until the Court does
16 get official notice, but I see no point in doing that under the circumstances
17 since we do have knowledge of it.

18 THE COURT: Yes, we all have actual knowledge of it, and I don't
19 think it would be appropriate to proceed. This jury has obviously been
20 advised of times when we have been back here on matters that have to be
21 outside of their presence. They are aware that they exist and that they are
22 ongoing. I would just explain that due to some matters outside of their
23 presence we have to suspend this for a while and we will notify them when
24 to come back. We've got their telephone numbers and their addresses. That

1 shouldn't be any problem. So do you gentlemen want to be there when I tell
2 the jury, or do you have any preference one way or the other?

3 MR. HEINEMAN: I think I'd just like to see the looks on their
4 faces.

5 MR. CARR: They shouldn't be told anything other than that there
6 is to be a recess.

7 THE COURT: Just what I just said. So, whatever you want to do--

8 MR. NASSIF: I don't want to be there.

9 MR. HEINEMAN: I just thought they would have such an amazed look
10 on their face, but I don't really care, Judge, it doesn't matter to me.

11 MR. CARR: It doesn't matter.

12 THE COURT: I will go back in the jury room with the court reporter
13 and we will just leave it at that.

14 MR. HEINEMAN: One question. I was just wondering if there is any
15 kind of time, if we have any idea how long a period of time we are talking
16 about.

17 THE COURT: I have no idea.

18 MR. CARR: That's up to the Court. As far as the Motion is concerned,
19 I would expect we would get fairly rapid action on that within a week or
20 two at the most. As far as the Petition for Leave to Appeal is concerned,
21 that could be weeks, months, indefinitely.

22 THE COURT: There is no way of telling.

23 MR. NASSIF: I raised the question with the Court as to whether
24 or not this suspends not only the trial but any ongoing—we've got some

1 in camera materials that the Judge is looking at, we've got some medical
2 information that we are collecting on the 1984 study, and I asked the Court
3 to clarify whether this action suspends everything.

4 MR. CORNFELD: Discovery--

5 MR. NASSIF: Discovery as well, until we get back in session.

6 THE COURT: That's why we got everybody back here to talk about
7 that.

8 MR. CORNFELD: I think in the Clark case it did. When we were in
9 the Clark case, isn't that what happened when the Appellate Court agreed to
10 hear an appeal on some issue, I can't recall, I think that suspended all
11 discovery.

12 MR. CARR: The rule says all proceedings are stayed. I see no
13 ambiguity about that.

14 MR. NASSIF: All proceedings. Thank you.

15 THE COURT: That will be my feeling, too.

16 (At this time, the in chambers conference adjourned
17 and the following proceedings were held between Court
18 and jurors only in the jury room.)

19 THE COURT: Okay, ladies and gentlemen, as you know there are
20 a number of things that by court rule and statute in cases have to be done
21 outside the presence of the jury, and you've heard that explanation a number
22 of times. Due to one of those matters outside the presence, we are going
23 to be suspending testimony for a little while and we will notify you by
24 telephone when to come back. I can't give you a definite time or date, but

1 we will do that as soon as we can. The admonishments that I regularly give
2 you apply during this break also. You are not to discuss this matter among
3 yourselves, with anyone outside the jury panel, or form any opinions or
4 conclusions yet about the matters on trial. You are also not to read,
5 listen to, or watch anything about this case in particular or the subject
6 matter in general in any of the media, print or electronic. Marlene will
7 notify you as soon as you are to come back and we will make sure we get in
8 touch with all of you. You've all given Marlene your current telephone
9 number, addresses, all that. Double check with her to make sure that she has
10 them all and we will let you know as soon as we can resume. Thank you for
11 your patience and we will see you soon.

(At 4:10 p.m., the following proceedings were held in chambers between Court and counsel.)

MR. CARR: If you are ready, your Honor, I would be happy to put our position on the record.

THE COURT: And you might as well address this special appearance, too.

MR. CARR: Of course my position is the same with regard to the special appearance or the action of this Court to take, should take from this point on. This morning the Court granted us a few minutes recess to allow us to gather our thoughts as to what position we should take in view of the news that Judge Craven gave us and which I confirmed by a call to the Clerk of the Supreme Court. I was told at that time that the Petition for Leave to Appeal had been granted in the case in the Appellate Court, that it was consolidated with the gag order petition, and more than that, that the Plaintiffs' motions for costs had also been consolidated and would be decided with the case.

At that time, I did not have my file in front of me, and at that time I quite frankly had forgotten the gist and substance of the Appellate Court Order, and I didn't have the Monsanto's Petition for Leave to Appeal in front of me, and I prematurely gave a view as to the effect of the Court's action that I believe now to be incorrect. The Petition for Leave to Appeal that was granted was filed by Monsanto under Supreme Court Rule 315, and Rule 315, which takes the Appellate Court's Order and is to determine the correctness of the Appellate Court's Order, and of course Rule 315 provides

1 that Petition may be granted for matters that may appear to be in conflict
2 with other jurisdictions or where decisions need to be clarified or matters
3 are important or where the Court feels that supervision is needed, and a
4 number of reasons under Rule 315. But the Order, the opinion that was
5 filed in the Appellate Court deals with only jurisdiction of the Appellate
6 Court to consider the Petition that had been filed by Monsanto under Rule
7 306. The Appellate Court held that it simply did not have jurisdiction to
8 entertain Monsanto's Petition under Rule 306, and because it was untimely,
9 and that the filing of that Petition was incapable of vesting that Court with
10 jurisdiction to consider the merits of the Petition.

11 Now, it is that Order in which the Appellate Court held that it
12 did not have jurisdiction from which the Monsanto Defendant filed its
13 appearance in the Supreme Court under Rule 315. The Court has granted the
14 Petition under Rule 315 and has now taken the Appellate Court's Order for
15 consideration. So, there is a long line of cases that hold that the
16 Supreme Court will decide only those questions that have been considered by
17 the Appellate Court. And in this instance, the Appellate Court has decided
18 whether it does or doesn't have jurisdiction. So the granting of the--and
19 Rule 306 is applicable to Appellate Courts. It is not applicable, there is
20 nothing in its Order in Rule 306, that suggests it applies to petitions
21 granted by the Supreme Court. The Supreme Court has the innate capacity to
22 enter a stay order if it wishes a stay order to be entered, and obviously
23 it need not make a rule that would govern its own inherent power. If it
24 wanted to stay these proceedings under Rule 315, it could have done so, but

1 it didn't do so. So now, the Supreme Court has this Appellate Court Order
2 in front of it. It can do without prejudging what the Court means by
3 granting the Petition, because that would take--it would have to be psychic
4 to know why they granted the Petition for Leave to Appeal under Rule 315.
5 The Court knows that it may affirm the Appellate Court, that is, it may decide
6 that the Appellate Court was right in saying that it lacked jurisdiction, in
7 which case this trial will continue and should continue. It can decide that
8 the Appellate Court was wrong in saying that it lacked jurisdiction and could
9 say to the Appellate Court, "You do indeed have jurisdiction, and so please
10 consider--", stronger language is used in the pleas, but "You are instructed
11 to consider the merits of the 306 Petition presented to you by the Defendant,"
12 in which case in the event that that's the Order that the Supreme Court
13 makes, this trial of course would continue. Now, when it gets back to the
14 Appellate Court, the Appellate Court can make one of two decisions. If it's
15 ordered to consider the Petition on its merits, it can decide, number one,
16 after having considered the Petition on its merits, it should deny the Petition.

17 Now, in that event, this trial should continue and it's only the
18 granting of the Petition under 306 that requires these proceedings to be
19 stayed or to abate.

20 And in those three circumstances that I posed, this trial should
21 continue. It is only after the Supreme Court decides that it's not going to
22 affirm the Appellate Court, decides that it's going to reverse the Appellate
23 Court and remand it to the Appellate Court, and then after that remandment
24 if the Appellate Court then decides that on the merits it should grant

1 Petition 306, then in that event would this trial abate.

2 Well, those are a lot of contingencies that have not yet occurred,
3 and I feel that they will not occur and certainly we have absolutely no
4 way of knowing unless this Court or counsel are psychic which way the Court
5 is going to ultimately decide this question. Now, if this Court stops this
6 trial today pending an ultimate determination by the Supreme Court, then it
7 may be the same thing as declaring a mistrial, because we don't know when the
8 Supreme Court will decide the merits of the Petition. It may decide next
9 October that the Appellate Court should be affirmed, and then for us to
10 pick up our jurors and start trial again--it may decide next December that
11 the Appellate Court should be reversed and send it back to the Appellate
12 Court for a decision on the merits of the Petition. In that event, this
13 trial should have continued. If it does that, then the Appellate Court may
14 next summer decide that the merits of the Petition, that it should be denied
15 on its merits, in which event this trial should have continued. And for us
16 to pick up this case then months and months down the road with the Court to
17 stay the case now is equivalent to granting a mistrial, because jurors may
18 get different jobs, they may move to different localities. This Court
19 doesn't have the right to order these jurors--I almost said defendants--they
20 might well be, order these jurors to stop and hold their life in a position
21 of abeyance until our various courts decide what to do with this case. All
22 we have to do is lose four jurors and it would be easy by October or November
23 for jurors to take positions that might make it inequitable to require them
24 to come back, or impossible for them to come back. I think we're fortunate

1 that we've kept them together this long. So, your Honor, it's our position
2 that this case should continue to trial, as it is, that we should undertake
3 to try it again tomorrow; that this Court does have jurisdiction because the
4 granting of the Petition under Rule 315 is not equivalent to taking jurisdiction
5 from this Court. What jurisdiction it's taking is from the Appellate Court,
6 and until a Petition under Rule 306 has been granted, this Court has full
7 and complete jurisdiction and should proceed.

8 Now, the Defendants, if they, I had suggested this morning that we
9 would file a Motion in the Supreme Court to clarify this issue, this problem.
10 But in reading the Appellate Court decision and the rules that apply, we
11 would be presenting a nonissue to the Court. If my appraisal of the Court's
12 action is correct, and I think it is, then we have nothing to clarify, that
13 the Court's action is proper and we can proceed. But on the other hand, if
14 the Defendant believes that they are entitled to a stay, they have the right
15 to file a Motion for Supervisory Order once this Court says that it will
16 continue this case, this trial, then the Defendants have all the ammunition
17 or precedent or order that they need to file a Motion to Stay in the Supreme
18 Court, and the Supreme Court can then decide, can then tell us whether or not
19 my interpretation of its action is incorrect. And they will not be harmed
20 by that position if they want to file a Motion to Stay or a Motion for
21 Supervisory Order in the Supreme Court. The Court should bear in mind that
22 a Petition on the merits of forum non conveniencce was denied, Petition for
23 Leave to Appeal was denied by the Appellate Court, and in December of 1983
24 was denied by the Supreme Court, the very self-same Petition for Leave to

1 Appeal in forum non convenience was denied by the Supreme Court in December,
2 1983, and if you are trying to speculate as to what--and the Supreme Court
3 knew at that time that this case was going to start trial shortly after
4 the first of the year. They had been apprised of that fact at that time,
5 and they as a matter of fact entered a short stay order while they made
6 some determinations, and then they said we should go ahead. I believe that
7 the Supreme Court has granted the Petition that it's presently granted in
8 order to delineate the Appellate Court's jurisdiction in questions of this
9 sort, and that it will have nothing to do with the ultimate merits of the
10 forum non convenience issue, because that Court has already decided that
11 it's not going to decide that issue until some later date.

12 THE COURT: Judge Craven?

13 MR. CRAVEN: First, I would like the record to reflect that we are
14 here under a special, limited appearance which we have filed.

15 THE COURT: You have indeed. That's why I asked Plaintiff to
16 address that along with his argument.

17 MR. CRAVEN: And that special, limited appearance addresses the
18 question of the jurisdiction of this Court, and I would like the assurance of
19 this Court that we are proceeding to discuss jurisdiction only and under that
20 limited appearance, because we do seriously contest the jurisdiction of this
21 Court at this stage.

22 THE COURT: You may address whatever you wish. You're given the
23 opportunity to address jurisdiction only if you wish or the Motion the
24 Plaintiff has filed. You may proceed how you wish.

1 MR. CRAVEN: The Motion that the Plaintiff has filed--

2 THE COURT: Well, you heard the oral Motion that he just made.

3 MR. CRAVEN: --to resume the trial, that relates to jurisdiction.

4 THE COURT: So go right ahead.

5 MR. CRAVEN: Let me make several observations, and it may be helpful
6 to talk in terms of some rules and some cases. First, Rule 301 says any
7 appeal is but a continuation of the trial court proceedings. Two, Rule 366,
8 unlike Mr. Carr's notion as to how the Supreme Court is limited, incidentally,
9 in a very good opinion by Mr. Justice Goldenhersh notes that once the
10 jurisdiction of the Supreme Court attaches, it will decide issues that may
11 have been decided in the Appellate or even the trial court or may not have
12 been, but it will go ahead and decide any issue. And in that particular case,
13 that related to a question of damages that had not been passed upon by either
14 Court, and yet the Supreme Court resolved the issue based upon the record.

15 This morning the Illinois Supreme Court granted a Petition for
16 Leave to Appeal to review the question of forum and to review the question
17 of the validity of this Court's gag order issued in I think April of 1984.
18 Then, on the Court's own Motion, it consolidated those two cases. It's
19 obviously aware of this proceeding, and it's obviously aware of its own
20 rules. And Mr. Carr was more right this morning than he is this afternoon.
21 The Supreme Court exercised its jurisdiction to say in substance, "We're
22 going to examine this question of jurisdiction and we're going to look at the
23 question of forum non convenience, and we're going to look at the gag order."
24 The question of the Supreme Court looking at the Appellate Court's

1 jurisdiction under Rule 306 is just simply a non sequitur, and the reason
2 for it is Rule 306 is a Petition for Leave to Appeal to the Appellate Court.
3 What Mr. Carr is asking this Court to believe is that if the Appellate Court
4 decides to look at the issue of forum or venue or any of the other two or
5 three things enumerated in Rule 306, that that operates as a stay of the
6 trial court proceedings. But if the Supreme Court decides to look at those
7 issues, it doesn't operate as a stay. That is imputing to the Supreme Court
8 a form of judicial administration that just almost is laughable. When the
9 Supreme Court is going to look at an issue of forum or venue or custody of
10 unemancipated minor children or whatever, I think that's the three or four
11 issues in 306, that stays the proceedings. And the reason for its staying
12 the proceedings is how silly would it be to have an ongoing trial in this
13 Court involving unestimatable expenses to this county and to these parties
14 when the Court itself is going to determine whether this is the proper forum
15 for the trial. Now, this morning this Court stayed all proceedings in this
16 case, including discovery and everything else. Based upon the agreement of
17 the parties as to the meaning of the Supreme Court's Order, this Court is now
18 without jurisdiction to do anything about its own Order. You can't vacate
19 that Order because you don't have the power in the sense of jurisdiction to
20 vacate that Order, because the Supreme Court by its mandate, and we are having
21 a certified copy come down here, is noticing this Court that this subject
22 matter is in that Court, and the filing of that Notice of Appeal by that
23 Court divests this Court of jurisdiction. That is so fundamental that I am
24 surprised that Rex would argue otherwise.

1 Now, it's true you get into the Supreme Court under Rule 315, but
2 you get into the Supreme Court by Rule 315 to look at 306. And the Supreme
3 Court expressly adopted Rule 306 in order to do away with supervisory orders
4 and mandamus and certain instances, and less frequently used, writs of
5 prohibition. Historical notes to Rule 306 tell us that. Now, Judge, we are
6 here under a limited appearance. Mr. Carr this morning told this Court that
7 this Court was without jurisdiction and that there was no question about it that
8 these proceedings are stayed. And he said that he would quickly get off
9 to the Supreme Court something to get some clarification. That's his
10 privilege. There is absolutely no proscription against that, and he can file
11 whatever he wants to in the Supreme Court. We will take whatever action
12 is deemed appropriate upon the basis of what he files. But this proceeding
13 is by everything that's clear and undebatable, these proceedings are stayed
14 and stayed until such time as the Supreme Court resolves it.

15 Now, for Mr. Carr to suggest that the Supreme Court doesn't
16 understand its own rules is simply a question that I would want to argue
17 very delicately in the Supreme Court. I just don't believe that they are
18 prepared to say they don't understand their own rules. Now, your Honor
19 must be familiar with Judge Underwood's opinion in Espinoza, and in Espinoza
20 he said very clearly that the denial of leave to appeal is of no significance.
21 Remember that? That was when we were dealing with the issue of forum. So
22 Mr. Carr's notion that the Supreme Court has once denied leave to appeal in
23 this case is of any significance flies in the express language of the
24 unanimous court in Espinoza, I think it was unanimous. And secondly, the mere

1 fact that the Court has endured the progress of this trial for as long as it
2 has doesn't mean that it can't look at the question of forum. I haven't
3 counted, but I don't know how many cases have been decided upon the issue of
4 forum, from which this case is not distinguishable. And the Court has finally
5 decided, hey, it's going to look at it.

6 Now, there's even an additional thing. The Court consolidated the
7 First Amendment gag order case with this forum case. So this forum case now
8 has attached to it a Federal question involving the First Amendment and the
9 validity of the gag order. Now, it would confound the history of any
10 jurisprudence that I know of that relates to jurisdiction to say that a
11 court in St. Clair County in the State of Illinois can proceed with a trial
12 when the Supreme Court said it's going to look at the question of whether the
13 trial is properly there. Now, if we say to you, your Honor, you have no
14 jurisdiction, you cannot as a matter of judicial power order a resumption of
15 this trial unless the Supreme Court orders that you can do so. And if
16 Mr. Carr wants that kind of relief, he is welcome to file whatever he wants
17 to in the Supreme Court. But until he does so, he should not invite this
18 Court to ignore the mandate of the Illinois State Supreme Court when it
19 granted the Petition for Leave to Appeal.

20 Now, why would it grant leave to appeal? I agree, I don't know.
21 Rex doesn't know. That's irrelevant. It's granted it. And it's going to
22 look at the question that's involved here as is this case in the proper forum.
23 Now, once before in this litigation involving this same Sturgeon spill we
24 had a very similar situation at the Appellate Court level. We granted—we

1 filed a Petition for Leave to Appeal, and I believe the issue was venue,
2 in the Clark case, Madison County, Paul Pratt, which by the way is an
3 interesting experience. But in any event, the Appellate Court granted our
4 Petition for Leave to Appeal and somehow, some way, on its own Motion and
5 without any intervening act by the parties, vacated its Order. We went into
6 the Supreme Court and said that divests us of constitutional rights that are
7 given by the rules that deprive us of due process, that deprive us of equal
8 protection, and how come you did it, anyway? And the Supreme Court said,
9 yeah, how come you did do it, any way? We will take the case and we will
10 look at the issue. And we also had another question involved, and the Lowe
11 case was filed and Mr. Pratt decided that he was tired of the wars and
12 retired, and we stipulated to an Order in the Supreme Court to pitch the
13 Clark case out of Illinois and into Missouri.

14 But I'm saying to your Honor that the action that Mr. Carr is asking
15 this Court to take would be exactly the same kind of thing that the Appellate
16 Court, Fifth District took in the Clark case and would be equally effective
17 to deprive us of the same rights and privileges.

18 Now, if this trial is to resume, it has to resume under an Order
19 from the Supreme Court. And if there is to be such an Order, that means the
20 Supreme Court is going to change its rules. And if the Court is to change
21 its rules, Mr. Carr has the burden of seeking such a change, and that burden
22 does not fall upon us, nor will we accept it.

23 Now there is no reason, nothing has changed since this morning.
24 And Mr. Carr was right then, he is wrong now. And this Court has no

1 jurisdiction of these parties or this subject matter, and the question
2 reposes in the bosom of the Supreme Court.

3 THE COURT: For the record, what exactly is the wording of the
4 Order the Supreme Court entered this morning, because I have not seen a
5 copy of it.

6 MR. CRAVEN: I have not seen a copy of it. I called Julie, the
7 clerk, and she is sending to Coburn Croft's Belleville office by Federal
8 Express a certified copy of the Order. But I had it read to me over the
9 phone, and to the extent that I think I am accurate, because I was dubious.
10 I was on my way to St. Louis and I stopped at a telephone booth and called,
11 because I knew today was the day they deny leave to appeal, as the expression
12 goes, around the Supreme Court building, and the clerk read it to me. And
13 it said in Kemner v. Monsanto the gag order case, Petition for Leave to
14 Appeal is allowed. And Kemner v. Monsanto in the forum non convenience
15 case, with the appropriate numbers, Petition for Leave to Appeal is allowed.

16 MR. CARR: It did not say in the Petition forum non convenience
17 case, it gave the numbers. It said in this numbered case Petition for Leave
18 to Appeal is allowed.

19 MR. CRAVEN: In Kemner v. Monsanto and Kemner v. Monsanto, Petition
20 for Leave to Appeal allowed, Petition for Leave to Appeal allowed, I think
21 it said on the Court's own motion, but I'm not sure of that.

22 MR. CARR: What it said, it also said that it consolidated those
23 two cases and significantly as well it said it is going to take with the
24 case our Motion for Costs.

1 THE COURT: So it consolidated everything?

2 MR. CRAVEN: That's right. And it is just so clear that the Court
3 is going to look at everything, that for this Court to proceed in the face
4 of that, would, I think, be a form of defiance, frankly, candidly, a form of
5 defiance of a superior court. And I know of no precedent for that. And I
6 don't want to not say that, because I think that's what it is. And I just--
7 Judge, once before Mr. Carr stood up and asked you to impose a million dollar
8 fine on Monsanto. He's receded from that and he knows now it was wrong.
9 But he invited you to do that--

10 MR. CARR: Stop a moment. I don't know any such thing, but we are
11 not arguing that Motion now. And I thought you were through and you were
12 going to give me an opportunity to reply.

13 MR. CRAVEN: I assume I can finish and I shall, and you will have
14 your opportunity to reply, and that is appropriate argument. And I think
15 it's wrong, it's clearly wrong by the cases. Now he's asking the Court to
16 make an equally serious and I think historic error. And I think it's my
17 job, not only as an advocate but as an officer of this Court to say we better
18 stop this whole proceedings, and if he wants to get clarification, if he
19 wants to get resumption of this trial legally, then he knows how to do it,
20 and the resource is there for him to do it. But to invite this Court into
21 this error rather than have him go up and ask the Supreme Court, hey, can we
22 resume, I just can't express how wrong that is. And we are here saying we
23 don't want to participate in that and we want to stop that.

24 THE COURT: Okay, Mr. Carr.

1 MR. CARR: As Mr. Craven is suggesting that I have the ability to
2 give this Court jurisdiction or to take jurisdiction from this Court, obviously
3 my actions this morning neither divested this Court of jurisdiction that it
4 had, nor can any action that I take give this Court jurisdiction. It either
5 has jurisdiction or it hasn't, notwithstanding whatever counsel might say or
6 do. The question for this Court to decide is what is the effect of a Rule 315
7 Order. Now, I will represent to the Court there is no case anywhere in the
8 State of Illinois, not from the beginning of time to now, that a Petition
9 granted under Rule 315 operates as a stay of proceeding or divests the trial
10 court from jurisdiction that it has by other laws. And we have researched
11 the law at great length as to whether or not there is such a case, and there
12 isn't a case. Counsel Craven readily agrees that he doesn't know what the
13 Supreme Court is going to do, nor does he know why the Supreme Court granted
14 their Petition. If the Supreme Court granted their Petition for the purpose
15 of affirming the trial court in saying the trial court did not have
16 jurisdiction, then what the Supreme Court is saying is that this Court properly
17 stayed in trial while the Appellate Court decided that Petition, and that we
18 are properly in trial now. Unless counsel is divining what the Supreme
19 Court is thinking, if the Supreme Court as I suggested reverses the Appellate
20 Court and says you do have jurisdiction, now take this Petition and decide it
21 based upon what we have said in other cases. Look at the Petition on the
22 merits and decide whether or not the trial court was correct in its judgment
23 and ignore the fact that it was untimely filed. And again, as I have said
24 before, that could indeed be what the Supreme Court says. And we are not

1 without precedent in this matter. In the case of Mesa v. Chicago Northwestern,
2 there was a Petition on forum non convenience, intrastate this time. And a
3 Motion was filed in the Appellate Court under Rule 306 after the trial court
4 had denied Defendant's Motion to Dismiss, just as here, the Court denied
5 the Motion to Dismiss on forum non convenience. The Appellate Court denied
6 the Petition for Leave to Appeal and the Supreme Court there also as here
7 granted the Petition for Leave to Appeal.

8 Now, it had before it at that time all the facts that it needed
9 to decide whether or not the forum non convenience motion should be granted
10 or should be denied. What it said at that time, "The trial court in the
11 instant case is now in a better position to consider and weigh the relevant
12 factors we articulated in taking its decision on the forum non convenience
13 motion. We therefore as an exercise of our supervisory authority remand
14 this case to the Circuit Court of Madison County for consideration of the
15 Defendant's Motion in accord with our decision in Torres. Supervisory Order
16 entered." Now, Judge, they did not decide the Petition forum non convenience
17 on the merits. They sent it back to a lower court to consider that Petition,
18 that Motion on the merits and then make a decision and ultimately appeal,
19 and that's exactly what you, just as the Supreme Court in the Mesa case, did
20 not decide on the merits and say that the Petition forum non convenience was
21 improperly denied, but said it sent it back to that lower Court. Just as
22 the Supreme Court can be here saying, and again I say unless somebody can
23 read their minds, unless they have talked to the Court and knows on what
24 basis they granted the Petition can be saying Appellate Court, look at the

1 merits again and make another decision. There are no cases that hold
2 anywhere that this case, that this Court is divest of jurisdiction by
3 granting of a 315 Motion.

4 Now, it is not a Notice of Appeal they are talking about, and I
5 am not suggesting that the Supreme Court does not understand its own rules,
6 as counsel suggests. What I am saying now is that I did not understand the
7 Supreme Court's rules this morning when I took the position that there was
8 a stay, and the only reason that I didn't understand the Supreme Court rule
9 is because I wasn't aware of the fact that they filed their Petition under
10 Rule 315 asking that the Appellate Court be reversed, and that's the only
11 reason I said that which I said, and the Rule 306 is a rule for the Appellate
12 Court. It's not a rule for the Supreme Court. Rule 315 is the rule for the
13 Supreme Court, and there isn't any case. If counsel means what they say,
14 and I don't believe they do, that they are not going to take any further
15 action, then that's well and good. We will proceed, and they don't have to
16 go to the Supreme Court and ask for a Motion to Stay. And, your Honor, in
17 trying to divine what the Supreme Court might do or might not do, why didn't
18 they deny our Motion for Costs out of hand? We filed a Motion because the
19 Appellate Court denied our Motion for Costs, just gave us the filing fee,
20 but we said we should be entitled to more since this issue has been to the
21 Supreme Court, to Supreme and Appellate Courts a number of times, but they
22 took our Motion with the case. Now, if they thought that they were going
23 to grant the Petition forum non convenience, if they had already prejudged
24 the case as counsel has suggested that they have, then they should have

1 denied, and they would have denied our Motion for Costs out of hand. What
2 they did is they announced they don't know how they are going to decide.
3 They are going to look at the jurisdictional question and decide that and
4 that maybe all that they look at. They may never address the merits of the
5 Petition forum non convenience. And this Court would be working a grievous
6 harm, well, this Court would be in effect second guessing the Supreme Court
7 and saying, "I know that the Supreme Court is going to decide the Petition
8 forum non convenience, and it is going to decide the Petition forum non
9 convenience against the Plaintiffs." And there is no indication of that.
10 And the Supreme Court is capable, if it wanted this matter to be stayed it
11 knows what its rule says, contrary to my friend, Jim, it indeed does know
12 what its rule says. It knows that there is no provision for stay under
13 Rule 315. It knows that Rule 306 applies to Petitions filed in the Appellate
14 Court, that does not apply to Petitions filed in the Supreme Court. And
15 on that, your Honor, we rest our position that grievous harm would be done
16 us if you withdraw your clear jurisdiction in this matter.

17 THE COURT: Okay, now, gentlemen--

18 MR. CRAVEN: Your Honor, may I be heard on something?

19 THE COURT: Briefly.

20 MR. CRAVEN: Mr. Carr in rebuttal made reference to the Mesa
21 case, and of course that wasn't really within the scope of my remarks. So
22 if I may, I'd like to discuss the Mesa case.

23 THE COURT: Do you want it?

24 MR. CRAVEN: I'm familiar with it. The Mesa case involves the

1 question of intrastate forum non convenience. The Torres case was a
2 historic opinion by the Illinois Supreme Court announcing for the first time
3 in Illinois that there was a doctrine of intrastate forum non convenience.
4 Before that time the law was there wasn't any such animal. And when the
5 Mesa trial court was presented with a Motion, it quite properly said, "We
6 don't have those animals in Illinois." And intervening, the Supreme Court
7 announces Torres and the Mesa case works its way up and the Supreme Court
8 said, "Hey, the trial court didn't have the advantage of the Torres opinion
9 and the Torres standards." So now it's appropriate for that court to
10 consider it in the light of the announced new, historically new, never
11 before, Torres doctrine. That's all the Mesa case says. And for Mr. Carr
12 to suggest that that is the meaning, that the Supreme Court won't decide an
13 issue that hasn't been decided in the lower court, isn't quite cricket.
14 And I think we're playing cricket, and that just shouldn't be. Now, that's
15 the Mesa case, has zero, zip relevance to this case. The only way it could
16 get in the Supreme Court is by Rule 315. There are several ways to get in
17 the Appellate Court, 307, 308, 304, 306, but the Supreme Court is at the
18 top of the heap and the only way to get there is 315. And Rule 301 says
19 if the whole thing, you know, the hip bone is connected to the thigh bone
20 and the thigh bone is connected to the whole thing, and that's clearly
21 an integrated court system, and that's where we are. Now, this case pends
22 in the Illinois Supreme Court and it cannot concurrently pend anyplace else.

23 THE COURT: Mr. Carr, do you have any reply?

24 MR. CARR: No, your Honor. I think I said what needs to be said.

1 THE COURT: Both of you are basically arguing different aspects
2 of the same question. And I specifically asked what you knew of the wording
3 of the Order entered by the Supreme Court. There is no way that I want to
4 appear to be, and I am not actually wishing to be in any way in defiance of
5 the Supreme Court or the Appellate Court or any superior court. I feel
6 that for this Court to take any action such as requested by Plaintiff
7 without further clarification or direction from the Supreme Court would be
8 a mistake. I think that it should not be done. And I think that if you
9 wish, obviously you wish to pursue this matter further and I would suggest
10 that you do have a direction as to stay by the Supreme Court for clarification,
11 or however it needs to be worded. But both of you presented well-reasoned,
12 cogent arguments, all of them within the realm of possibility. And I am
13 in the position where not only do I have to, but I want to do the Supreme
14 Court's bidding, and I am not sure what that is. So I think that under
15 the circumstances we will stay in a position of--we will remain in a position
16 of stay until the Supreme Court directs this Court as to what it wishes it
17 to do.

18 MR. CRAVEN: Thank you, Judge.

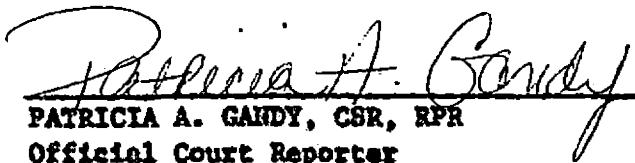
19 MR. CARR: Thank you, your Honor.

20 (At this time, the in chambers conference adjourned.)
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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)
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7 I, Patricia A. Gandy, CSR, RPR, Official Court Reporter in and
8 for the Twentieth Judicial Circuit, and the Official Court Reporter who
9 transcribed the above-styled cause had on June 4, 1985, do hereby certify
10 that the foregoing transcript of proceedings is a true, correct and complete
11 transcript of the proceedings had on said date.

12 DATED this 4th day of June, 1985.
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16 PATRICIA A. GANDY, CSR, RPR
17 Official Court Reporter
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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)
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7 I, RICHARD P. GOLDENHERSH, Circuit Judge in and for the Twentieth
8 Judicial Circuit, hereby certify that the above is a true and correct
9 transcript of the proceedings had in the case captioned: FRANCES E. KEMNER,
10 et al., v. MONSANTO COMPANY, Cause No. 80-L-970, heard on June 4, 1983.

11 DATED this 4th day of June, 1983.
12

13 ENTER:
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15 _____
16 RICHARD P. GOLDENHERSH, Circuit Judge
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