

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

4 FRANCES E. KEMNER, et al,)

5 Plaintiffs,)

6 vs.)

NO. 80-L-970

7 MONSANTO COMPANY,)

8 Defendant.)

9 Before the HON. RICHARD P. GOLDENHERSH, Judge

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12 REPORT OF PROCEEDINGS

13 IN CHAMBERS CONFERENCE

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17 APPEARANCES:

18 MR. REX CARR, Attorney at Law
19 On Behalf of the Plaintiffs.

20 MR. KENNETH R. HEINEMAN & MR. JOSEPH NASSIF,
21 Attorneys at Law
22 On Behalf of the Defendant.

23 MARSHA SCHNIPPER
24 Official Court Reporter

1 BE IT REMEMBERED AND CERTIFIED that heretofore, on
2 to-wit: Thursday, June 20, 1985, being one of the regular
3 judicial days of this Court, the matter as hereinbefore set
4 forth came on for hearing before the HON. RICHARD P. GOLDENHERSH,
5 Circuit Judge in and for the Twentieth Judicial Circuit, State
6 of Illinois, St. Clair County Building, Belleville, Illinois,
7 St. Clair County, Illinois, and the following was had of
8 record, to-wit:

9 * * * * *

10 THE COURT: All right. I have been advised that the
11 stay has been lifted.

12 MR. CARR: That's what I was told. We haven't
13 received it in writing, but the clerk said that yesterday
14 afternoon.

15 THE COURT: So as you know, we had planned on adjourning
16 Friday afternoon for vacation, and we won't be back til July
17 8th, and I would note on the record that this is Thursday,
18 and as you all know, but has not been put on the record,
19 we have one juror who is in the hospital for an operation,
20 who intends to be back on the 8th.

21 MR. CARR: On the 8th of July?

22 THE COURT: On the 8th of July. So under the
23 circumstances we will stand adjourned as far as the jury
24 is concerned until July 8th.

1 MR. HEINEMAN: Are you going to have any opportunity
2 to monitor her situation in the event, for example, that she
3 doesn't feel well enough or something to start right away?

4 THE COURT: Yes. I'll have an opportunity to do
5 that, and I'll try to do that.

6 MR. HEINEMAN: And to let us know?

7 THE COURT: Right.

8 MR. CARR: It won't do any good to let me know.
9 I'm going to be in Hawaii, not around here.

10 THE COURT: I'm not going to be around here either,
11 but I will be back the Sunday before, and so -- cause I'm
12 going to take off.

13 MR. HEINEMAN: Well, I am, too. I was just
14 wondering before we all assembled up here Monday morning
15 cranked up and ready to go, if she's not feeling well --

16 THE COURT: I hope -- I hope to check it on Sunday.

17 MR. HEINEMAN: And then you can let everybody know.

18 THE COURT: Right. I've got everyone's number,
19 and Marlene has got all the juror's numbers so we could do
20 something like that, but I'm not going to have a chance to
21 check before then.

22 MR. CARR: Judge, will the jury be notified? You
23 just told them that we were on temporary recess?

24 THE COURT: I told them we were on temporary recess.

1 and I told them that, you know, that we had -- I didn't know
2 how long the recess would go and so that they would have
3 some date in mind, I told them about the July 8th unless they
4 were called otherwise.

5 MR. CARR: Don't you think they ought to be told
6 that we're definitely -- cause I don't know whether this will
7 get in the newspaper anyway -- don't you think they ought to
8 be told --

9 THE COURT: Yes, they will.

10 MR. CARR: -- that we'll definitely be back in trial
11 on the 8th?

12 THE COURT: They will be. They will be.

13 MR. CARR: So they won't be wondering themselves.

14 THE COURT: Now, where do we stand on discovery?
15 What's still outstanding, what's to be done?

16 MR. NASSIF: We have some tracings from Suskind
17 that were requested, and I use the word tracings --

18 MR. CARR: More than that. I think we may have --
19 I think we may have had -- I don't think we had the tracings,
20 and we weren't asking for the tracings, although we'll take
21 them if they're produceable. What we wanted was the report
22 and analysis and the standards used in analyzing those EMGs
23 and those nerve conduction studies, because all we've got --

24 MR. NASSIF: Okay. I think that material is

1 included within this material, and I'll check on that, but that--

2 MR. HEINEMAN: Come again? You want the standards
3 and what?

4 MR. CARR: We want -- well, Joe knows what we want.

5 MR. NASSIF: Yes, I think I've got a copy of the
6 Order. I think I've got a copy of the Order in my briefcase,
7 but we have some material from Suskind, and I am to ask you
8 if you're going to be here tomorrow so that if we deliver this
9 material, we can deliver it in the presence of you and Mr.
10 Carr as we did before consistent with the request from Dr.
11 Suskind.

12 THE COURT: I will be here from approximately 10
13 to 11, and then I am gone, so catch me closer to 10.

14 MR. CARR: You're planning on delivering those
15 then tomorrow?

16 MR. NASSIF: Yes, we're planning on doing that.

17 THE COURT: Same as before?

18 MR. NASSIF: Yes, same way, same thing to sign.

19 THE COURT: You know, with the understanding that
20 I'm just saying that I saw this delivered.

21 MR. NASSIF: Right.

22 THE COURT: Same type of thing.

23 MR. NASSIF: Same type of thing, I mean, it's the
24 exact same form, I think.

1 THE COURT: Good, good. The last one was fine.
2 Okay. Make it closer to 10 if you would, because I want to
3 get out of here as soon as I can.

4 MR. NASSIF: Okay. We have a few more -- I say a
5 few more, I mean a very few more, a couple of in camera documents
6 that we want to give to you.

7 THE COURT: Can you get them to me ~~7~~ when can you
8 get them to me?

9 MR. NASSIF: I don't think we can get them to you --
10 I don't think we could probably get them to you. We're going
11 to have to write. One of them is about a three-page document
12 written by a lawyer pertaining to this litigation, and that's
13 going to require, you know, explanation to you and then -- it's
14 not typical of other things that we've gotten to you, so I
15 don't think we could probably get it to you next week, but
16 you're going to be gone --

17 THE COURT: I'm going to be gone anyway, so you
18 might as well bring it Monday morning.

19 MR. NASSIF: Okay. I'll do that.

20 THE COURT: It's not going to do you any good--

21 MR. NASSIF: It doesn't pertain to Roush or anything
22 like that.

23 THE COURT: As a matter of fact, why don't you just
24 drop it off on my desk, you know, when you do have it ready,

1 cause I'll try to get in here early on the 8th and take a look
2 at it. You know, drop it off that Friday before or something
3 like that.

4 MR. NASSIF: We have -- I have some board minutes
5 that Rex and I were going to sit down and look at, but we
6 had sort of decided we were going to try to work that out
7 without getting you involved in it.

8 THE COURT: Fine.

9 MR. NASSIF: And then to the best of my knowledge
10 with the incamera and with the Suskind material, we have about,
11 I don't know, Rex, 15 pieces of paper we're going to deliver
12 to you today, some penta documents. Sheila's stamping them
13 right now. That's all I know about, Judge.

14 MR. CARR: There's a lot more outstanding. There's
15 all the testimony of your experts in Nitro that we have not
16 been given.

17 MR. NASSIF: Okay.

18 MR. CARR: All -- a lot of that -- none of that
19 Suskind testimony, none of the testimony of Waldman, Wallace,
20 or Point, Waldman and Point, none of your -- I think we got--
21 I'm not sure, but I believe we got the testimony of one Doss,
22 we got the testimony of Doss, I think, from Nitro, but I'm
23 not sure. There was one expert witness whose testimony we got.

24 MR. NASSIF: Okay. I'll check into that.

1 MR. CARR: I mean, we have all kinds of, I presume,
2 depositions that you have of these expert witnesses, transcripts
3 from other cases that we have not received from you that we've
4 asked for a long time ago and you were ordered to produce a
5 long time ago, and we, of course, don't have an Affidavit that--
6 from Honey or from Heineman or both that production has been
7 completed and production hasn't been completed until we get
8 this other material.

9 MR. NASSIF: The expert material?

10 MR. CARR: Sure.

11 MR. NASSIF: Okay. I'll check on the expert material,
12 Judge. I hadn't checked on it before I came in this morning.
13 I'm not the one who was gathering that information together,
14 but I'll check on that and inform Mr. Carr of that today. I'll
15 have somebody call and let him know the status of that.

16 THE COURT: Fine. Okay. Anything else on discovery?

17 MR. CARR: That's all I can think of right now,
18 Judge. I've not gone through my production. I've been busy
19 writing motions and briefs filing in the Supreme Court.

20 THE COURT: Okay. Now, the last time or close to
21 the last time we got together on one of these it was mentioned
22 that you were in the process of preparing a reply to Mr. Carr's
23 motion on holding the question of sanctions as far as discovery
24 in abeyance and proposing your own sanctions for abuse of discovery.

1 When is that due? When can that be done? It was -- Judge
2 Craven said that it would be forthcoming after you submitted
3 all the material on the contempt question, and of course, that
4 is on time, and I'm working on that, but when is this other
5 one, when can you get it to me?

6 MR. NASSIF: I talked with Judge Craven about that
7 point yesterday, your Honor, to-- because he is the one preparing
8 that information, and he has been working on some briefs
9 through the Supreme Court recently in response to Mr. Carr's
10 motion for a supervisory order. In addition, he has the
11 deadline to get our Petition for Leave to Appeal filed, which
12 he is working on on the forum question, and I think that's due
13 the second week of July, and he has asked if I would instruct
14 you that --

15 MR. HEINEMAN: Want to put that the other way
16 around?

17 MR. NASSIF: He has instructed me to ask you, I'm
18 sorry. I apologize.

19 THE COURT: That's okay. I knew what you were
20 saying.

21 MR. NASSIF: He has instructed me to ask you that
22 it will probably be a little delay after we file our Petition
23 for Leave to Appeal, because he had scheduled a vacation to
24 visit his daughter in Alaska immediately after the Petition for

1 Leave to Appeal, so with the Court's indulgence, we'd like to
2 file it sometime late in the month of July if that would be
3 all right.

4 THE COURT: Fine.

5 MR. CARR: What Petition for Leave to Appeal have
6 we got outstanding now?

7 MR. NASSIF: We have to file our brief.

8 MR. CARR: Oh, brief, you mean. I'm sorry.

9 MR. NASSIF: Pardon me. It's not a Petition, it's
10 our brief.

11 THE COURT: Yes, the Petition's been granted.
12 You have to file the brief.

13 MR. NASSIF: So he has asked that I beg your
14 indulgence until sometime late in July.

15 THE COURT: Fine. No problem at all. I just --
16 I didn't know when. It had been mentioned and nothing else
17 had been said past that. That's fine. No problem at all.
18 And then, you know, then of course you'll want to reply to
19 that, I assume, on both points.

20 MR. CARR: Presumably, yes, Judge.

21 THE COURT: Okay. The next and I think the last
22 outstanding thing that we've got is sometime ago there was a
23 motion filed by Monsanto for leave to identify and call
24 additional expert witnesses, which is somewhat self-explanatory.

1 Do you have anything more to add to that?

2 MR. HEINEMAN: I don't know, Judge. It's been
3 so long since I've read it, I think -- I don't know if I have
4 anything to add to it. I guess not.

5 MR. CARR: I can respond to that. I meant to --
6 unless we have -- we haven't responded to that?

7 THE COURT: No.

8 MR. CARR: Either orally or in writing, have we?

9 THE COURT: No. You had asked if you could just
10 take some time to look at it.

11 MR. CARR: With regard to the additional witnesses
12 is concerned, I haven't had a chance to check the parameters
13 of your Order on limiting expert witnesses, but subject to
14 my belief, it's my belief that your Order limited experts only
15 on the issue of toxicity, and these experts are not being
16 tendered for that purpose, if my memory serves me right, the
17 toxicity of dioxin, so the only one I would object to would
18 be the calling of Dr. Ellefson, and I wasn't -- there are
19 cases and there are rules that where a witness has testified
20 by deposition and been fully examined and cross examined, you
21 may not call that witness and ask him questions that could
22 have been asked on that at the time of the evidence deposition.
23 That's repetition, and for that reason we will object to the
24 calling of Dr. Ellefson. The motion, as I recall, said that--

1 THE COURT: I've got a copy of the motion if both
2 of you would like to look at it.

3 MR. CARR: And I've got a copy, too. It was for
4 the purpose of --

5 MR. HEINEMAN: Your Honor, when you said, when you
6 asked if we wanted to add to it, are you talking about any
7 witnesses other than these?

8 THE COURT: No, if you wanted to add any argument.

9 MR. HEINEMAN: Any argument?

10 THE COURT: Anything to say about it. That's all.

11 MR. CARR: Yes. They say they want to have Ellefson
12 testify in rebuttal to testimony by Dr. Carnow concerning the
13 significance of various levels of porphyrins in the urine and
14 certain findings on porphyrin tests performed by Dr. Ellefson.
15 Dr. Ellefson has already been interrogated about the urinary
16 porphyrin tests and it also says to quote "to clarify the
17 testimony read to the jury from his evidence deposition" end
18 of quote. That's clearly improper. The time to clarify testimony
19 is in the deposition, either on redirect or recross, and we
20 don't have the right to call a live witness in. There are
21 cases on that, Judge, and I didn't bring them with me, that
22 says it's clearly improper to call a witness live to testify
23 as to anything that was already testified to in the evidence
24 deposition, and for that reason that is the only one at this

1 time that I would object to. Now, when they call a particular
2 witness at a particular point in time, there may be reasons to
3 object to that witness at that time, but just based upon what
4 they've given us now I can't make any other advance objection except
5 to Dr. Ellefson at this point in time.

6 THE COURT: Do you have anything further you want
7 to add?

8 MR. HEINEMAN: Well, your Honor, the -- as Mr.
9 Carr and the Court knows, there was a great deal of Dr.
10 Ellefson's testimony in deposition which was excluded by the
11 Court based upon the manner in which the question was asked
12 or various other rulings. There was a great deal that was
13 excluded by the Court, and there's a lot of the explanation,
14 a lot of the statements made by Dr. Ellefson in his deposition
15 which have not been read to this jury, which this jury has
16 not heard. We would seek to inquire of the witness in a way
17 which would not be objectionable as to some of those matters
18 which this Court has previously excluded based upon the manner
19 in which the testimony was elicited in the deposition, and
20 that's part of what we want to do with this witness.

21 MR. CARR: That goes to my, to the very point. You
22 can't get two bites at the same dog. If they didn't ask the
23 question properly in the proper frame at the time of the
24 evidence deposition, that's like saying okay, all this testimony,

1 objection is sustained during -- in live witnesses in Court
2 and then you bring them back a week later, hey, I learned how
3 to ask that question and I want to call this witness to ask
4 him the same questions once ruled improper already. It
5 clearly can't be done, and there are cases, and I'll be glad
6 to send -- well, I'm not going to send them right away, you
7 won't be here, but prior to the time Dr. Ellefson is called
8 upon to testify I'll supply to the Court the cases that hold
9 you may not do that which they want to do where the witness
10 has once testified.

11 MR. HEINEMAN: Your Honor, if I may, I have something
12 further.

13 THE COURT; Sure.

14 MR. HEINEMAN: One of the main things, of course,
15 that has occurred in the interim since Dr. Ellefson's deposition
16 was taken has been the testimony of Dr. Carnow at great
17 length in this courtroom on the basis of porphyrins. A lot
18 of that testimony, most of it was not obviously available to
19 us at the time, we didn't know about it at the time--

20 THE COURT: Now, wait a second. Didn't you -- you
21 took days and days and days of Dr. Carnow's deposition, because
22 I remember having some motions about the length -- well, not
23 the length, but the amount of days involved in it. Most of
24 these witnesses are in response to things that Dr. Carnow

1 testified to in either or both sections of his presentation
2 in this courtroom. Wasn't all of that known to you from
3 evidence depositions -- not evidence depositions -- from
4 discovery depositions before Dr. Carnow actually took the
5 stand as far as his position on these matters?

6 MR. HEINEMAN: There was some of his position that
7 was certainly known to us at the time that his deposition was
8 given, your Honor, but I would -- I have not made a catalog
9 of the various things that he has testified to either in
10 addition to what he said in his deposition or has changed what
11 he said in his deposition in this courtroom. We can certainly
12 do that in order to say that there are a lot of different
13 things that Carnow has testified to in court that we would
14 like the opportunity to have Dr. Ellefson clarify in terms of
15 his opinions with respect to porphyrins. Now there's a lot
16 of different things in my own personal belief. I can't catalog
17 them for you as I sit here right now, but I am sure there are.

18 MR. CARR: Judge, on that point Ellefson's deposition,
19 as you know, was taken in January of 1984. All of Dr. Carnow's
20 deposition had been taken and Dr. Ellefson was examined as much
21 as they wanted to examine on his differences with Dr. Carnow.
22 He made his points clear where he differed with Dr. Carnow on
23 the significance of porphyrins. All of that was gone into at
24 length with Dr. Ellefson. They knew exactly Dr. Carnow's

1 position with regard to the significance of porphyrins and the
2 ratios, did not change in court one whip from what he testified
3 to in discovery deposition, and all they want to do is have
4 this second shot at Dr. Ellefson, and it's clearly improper.
5 There's nothing new that they could claim to be surprised by
6 that would justify the recalling of Dr. Ellefson.

7 THE COURT: Let me ask you something else. On the
8 rest of these people who are listed as added witnesses or
9 witnesses in whom areas are to be added, were those areas that
10 they are responding to covered in the discovery depositions
11 of Carnow also?

12 MR. CARR: Yes, they were indeed, your Honor.

13 THE COURT: Well, then I'm throwing this out to a
14 general discussion. Isn't this sort of brought up at an awful
15 late date and in violation of Rule 220 if you're asking to add
16 them now after the discovery depositions were all taken before
17 trial, you had the actual in court testimony on these positions
18 that was done, and then some months after that is done and
19 more than a year after the discovery depositions are taken
20 you've got a request to add a long list of experts as to points
21 that have been known about--

22 MR. CARR: Judge, I didn't address that point, because
23 I couldn't find your Order on the expert witnesses. I looked
24 for it, and I didn't have an opportunity to find what the Court's

1 ruling was under Rule 220 with regard to expert witnesses,
2 and while we've asked for the identification of expert witnesses,
3 again I could not find the -- their response to this. I just
4 saw their response on toxicity and right now I'm at a loss to
5 completely respond to the Court's inquiry.

6 THE COURT: When I first made the Order closing
7 down disclosure of expert witnesses 220 was still before the
8 Supreme Court and hadn't been adopted. It's been that long
9 ago, I'm afraid, so that there was no Order -- I've never
10 entered an Order under 220.

11 MR. CARR: I know though, Judge, that I filed an
12 order -- file a motion asking you to limit not just on toxicity
13 but on all these issues, disability, causation, so forth. I know that
14 I filed such a motion, but I don't have and I couldn't find --
15 maybe you didn't enter a written Order, maybe I have to go
16 back to the transcripts. I know you limited on the issue of
17 toxicity and that they had to disclose the names and curriculum
18 vitae of all these experts, but I'm simply at a loss to respond
19 to the Court, because I don't know what you ruled, and of course,
20 I haven't looked at the significance of Rule 220 in conjunction
21 with that motion, and if the Court is suggesting that we ought
22 to refrain from responding on this issue until I find my papers,
23 we'll admit that our office is in somewhat disarray at this
24 point. I'll be happy to wait and respond after I dig through

1 and find some of these orders.

2 THE COURT: Okay. If you could, because that is
3 something that I've got a question about in my mind.

4 MR. HEINEMAN: Well, I would like to as well, your
5 Honor, because obviously--

6 THE COURT: Sure.

7 MR. HEINEMAN: -- I wasn't aware that this matter
8 was going to come up this morning, and the -- I don't have
9 any recollection of any request to limit expert witnesses
10 other than on toxicity, I don't have any recollection of that
11 at all, so that I think we all ought to look and see what the--
12 what the requests have been and what the orders have been.

13 THE COURT: I'm pretty sure there was a general
14 cut-off time on experts, and I have a recollection as to our
15 arguments about the extent of that Order, but I'll have to
16 check my own records, too.

17 MR. CARR: Well, I have my motion here. Again I
18 don't have the Order -- dated March 16th of '83 asking for
19 them to disclose the names and addresses and identities of
20 all persons, but again I don't have the Order for that, and
21 I have another motion dated November 15th, 1983 asking for
22 the Court to limit the number of experts that may be called
23 in behalf of any party to the issues in this case involving
24 liability, causation, disability and damages and further move

1 to require that the parties to identify their witnesses that
2 they will call upon to testify at trial on or before the 15th
3 of November of 1983. Now, I don't -- I don't have an order
4 to that, but I do know that I filed a motion that I --

5 THE COURT: We'll have to -- I'll have to look.

6 MR. CARR: March of '83 and -- well, 13th of
7 October, 1983 is when the motion was served.

8 THE COURT: That might have been one that was
9 resolved when we just had a conference in what's now the
10 jury room.

11 MR. CARR: Well, I'll have to go to that. We have
12 a transcript on that.

13 THE COURT: Okay. Yes, we do. It was all on the
14 record.

15 MR. CARR: I know I filed the motions, and I just
16 don't remember any order except the one limiting the number
17 of witnesses on toxicity, on the toxicity issue.

18 THE COURT: And I'm pretty sure there was an Order,
19 and I'll have to find it, too, with the general end date for
20 disclosure of experts, and I have some questions as to Rule 220
21 on this matter, too, so we'll -- I'll hold up any decision.

22 MR. CARR: Just hold up everything, including our
23 comments on it then until we do have a chance to find these
24 Orders and look at Rule 220. Certainly don't want to be in

1 violation of any Supreme Court rules. We've been up at the
2 Supreme Court now several times.

3 (At this time this was all the proceedings had
4 on this matter. Court adjourned.)

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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)

4 I, MARSHA SCHNIPPER, one of the Official Court
5 Reporters in and for the Twentieth Judicial Circuit of the
6 State of Illinois, and the Official Court Reporter who
7 reported the proceedings had at the hearing of Frances E.
8 Kemner, et al., vs. Monsanto Company, No. 80-L-970, on the
9 20th day of June, 1985, do hereby certify that the
10 above and foregoing is a true and correct transcript of the
11 proceedings had at said hearing, which proceedings were
12 reported by me in shorthand and by me correctly transcribed.

13 Dated this 1st day of July, 1985.

14
15 Marsha Schnipper
16 Official Court Reporter
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1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF ST. CLAIR)
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5 I, RICHARD P. GOLDENHERSH, Circuit Judge in and for
6 the Twentieth Judicial Circuit of the State of Illinois,
7 and the sole presiding Judge in the aforesaid cause on the
8 20th day of June, 1985, do hereby certify that I have examined
9 the aforesaid transcript of the proceedings and further
10 certify that the same is a true and correct transcript of
11 said proceedings had in said cause.

12 Dated this _____ day of July, 1985.

13 
14 CIRCUIT JUDGE
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