

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

3 FRANCES E. KEMNER, et al.)
4 Plaintiff,)
5 vs.) No. 80-L-970
6 MONSANTO COMPANY,)
7 Defendant.)

8 Before the HON. RICHARD P. GOLDENHERSH, Judge
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11 REPORT OF PROCEEDINGS

12 JURY TRIAL

13 April 7, 1986
14
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16 APPEARANCES:

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

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

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22
23 MARSHA SCHNIPPER
24 Official Court Reporter

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

8
9 * * * * *

10 (At this time the following proceedings were had in
11 chambers out of the hearing of the jury.).

12 THE COURT: Okay. I gather Dr. Suskind is not here.

13 MR. HEINEMAN: That's right, sir. He is not here.

14 THE COURT: Okay. Do you have anything further that
15 you want to add to or say about this or do you have anything
16 you wish to say?

17 MR. CARR: See if they have anything to say first,
18 Judge.

19 MR. HEINEMAN: No, Judge, I guess --

20 THE COURT: By this I'm referring to what was-- I
21 ought to clear that up for the record, what was hand
22 delivered to me on Saturday night, which is a cover letter
23 from Mr. Heineman and affidavit from a Richard Vilter, a
24 letter from Dr. Vilter and his curriculum vitae.

1 MR. HEINEMAN: I really don't have anything further
2 to say except that we'll advise the Court, we're going to
3 keep track of the situation with Dr. Vilter, and we'll advise
4 the Court as soon as he clears the witness for return.

5 THE COURT: All right. Let me close this so we
6 don't get all that interference. Okay.

7 MR. CARR: Your Honor, we have a few things to say
8 about this development if the Court wishes.

9 THE COURT: Oh, yes, sure.

10 MR. CARR: The situation as we see it is one that
11 has been created by Monsanto for the primary purpose of
12 protecting their defense in this case, not for the purpose of
13 protecting this witness. The cross-examination, as the Court
14 can see, has literally destroyed their defense that the
15 problems that you have associated with dioxin go away after a
16 couple of years and has destroyed their defense that if you
17 don't have chloracne you're not going to have any problems.

18 As it became apparent to this witness and to
19 Monsanto that their defense was and had been destroyed by
20 this witness under cross-examination the desperation of
21 Monsanto to get this witness off the stand and prepare him
22 for redirect examination in the hope that they could
23 reconstruct their defense became apparent. The biggest
24 problem with this witness is that he's such a fraud that he

1 cannot remember what he said from one moment to the next. As
2 the Court is aware, if you're not telling the truth in a
3 situation, you have to -- you're bound then to try to
4 remember the difference versions that you've given at
5 different times. He simply in this cross-examination was
6 impaled upon his own prior contradictory statements in the
7 federal court, in his articles, in his direct testimony and
8 finally on several occasions in his -- in the testimony of
9 cross-examination.

10 This man was under no more physical stress than
11 anybody. This man showed absolutely no signs of stress. The
12 -- constantly during a recess he was smiling and affable.
13 Matter of fact in the last recess in the afternoon Friday he
14 shortly before we -- after the Court left the courtroom, but
15 before he left the courtroom he was whistling and aria from
16 one of Puccini's operas, certainly not an indication -- he'd
17 constantly chat with the court reporters before he left and
18 showed absolutely no signs of any stress.

19 The plan as we see it was developed by the
20 attorneys for Monsanto, and they presented it to us Friday
21 afternoon. Mr. Craven and Mr. Nassif came to meet me in the
22 hallway, and nobody else, just the three of us there at the
23 time. Mr. Nassif first asked, are you close to being
24 finished with your cross-examination, and he said, I'd like

1 to have a straight answer, if I could get it from you, Mr.
2 Carr, and I replied to him that I was not close to being
3 finished in view of this witness' attitude under
4 cross-examination. He then said, well, would you agree to
5 allow him to -- agree to a -- to the man being removed from
6 the stand if we gave you a certificate from a doctor that
7 cross-examination would be stressful on a man that has a
8 heart condition. I replied I would not so agree.

9 Now, as far as I know, they had not yet talked to
10 Dr. Vilter about this man's condition. They simply laying a
11 groundwork for talking to Dr. Vilter. The Court will note
12 the affidavit furnished by Dr. Vilter was obviously prepared
13 before they even knew his name, because there is a blank in
14 there and -- for a doctor's name, and the affidavit itself is
15 in general terms. It is obvious-- contains information that
16 counsel knew the quote " the undersigned is informed and
17 believes the fact to be that Dr. Suskind has been on the
18 witness stand since February 10th, 1986 with certain days
19 omitted, but has been under cross-examination for 20 court
20 days.

21 It seems clear to me that it is something that was
22 prepared and submitted to the doctor for his signature rather
23 than something that the doctor prepared. It is obviously
24 language of an attorney who's dictated the affidavit. In

1 addition, the Court will recall the prediction that this was
2 going to come was made in chambers by Mr. Craven when he
3 asked this Court whether or not if we got the Court a
4 certificate that his continuation on the witness stand under
5 these circumstances without a break can be dangerous and
6 injurious to his health, is the Court still going to persist
7 in this ruling, and then asked do we -- also predicted there
8 that they weren't going to bring the man to court Monday
9 morning by saying do we offend against the affidavit if we
10 bring him back here on Monday morning when we are giving you
11 the affidavit. He says, I don't know why we would have to do
12 that if the affidavit is as strong as I think it can be.

13 Again, as far as I know, no conversation with Dr.
14 Vilter had taken place, and this was simply a creation of
15 theirs to get the man -- I have probably if this witness were
16 to answer the questions as an ordinary witness would answer
17 it, my examination of him, my cross-examination of him could
18 be completed easily within two days. Now, they've got a
19 long, long redirect if they're going to try to repair the
20 problems. The only way they can repair the problems is to get
21 this man privy to his testimony by -- within a few days all
22 of the transcripts of his cross-examination will be available
23 to him, and they can give these transcripts to him and ask
24 him to learn what he said at different times in the

1 cross-examination in order to make his testimony complete so
2 that they can get him ready for cross-examination.

3 Now, if you take the doctor's certificate at face
4 value and his --

5 THE COURT: Are you talking about the letter?

6 MR. CARR: The letter and the affidavit at face
7 value, the only thing that has come up is that he says this
8 man is under stress and continuing court -- present court
9 testimony will be dangerous to his health. Well, if that is
10 true today, that will be true tomorrow, that will be true a
11 month from now. If we -- if this man is going to be
12 cross-examined, if he's going to be redirected, and
13 recrossed, so if they are -- if there's any significance to
14 this statement is that Dr. Suskind has somehow or other been
15 damaged by this court case and he should not be under any
16 circumstances continue. If that's their position, then I
17 think the Court could strike those portions of the direct
18 examination that we haven't had the opportunity to cross on
19 and have the jury instructed to disregard those portions if
20 that's appropriate and not allow the witness to come back for
21 any other redirect testimony, or this Court could bring,
22 could require the doctor to be brought here with his records
23 so that we can see whether or not this blood pressure of 150
24 over 90 has any real significance as far as health is

1 concerned. Mr. Siegfried advises me that his blood pressure
2 is frequently 150 over 90 and that it's not preventing him
3 from appearing in Court and conducting the obvious hard work
4 of day in, day out court attendance for a period of two
5 years. I'd like to examine this doctor and look at his
6 records as to whether or not how often in the past he had had
7 7 to 8 premature cardiac contractions per minute. For all I
8 know from this letter, this is a normal state of his and that
9 will not change with rest. The statement that he has of
10 course, tremor in his outstretched hands, again as far as I
11 know, that has no significance. He is irritable and
12 obviously under severe stress. Two days of rest could have
13 or should have taken care of that.

14 Judge, the-- to me the presenting the court with a
15 fait accompli having asked the Court for an advisory ruling
16 in advance that if they gave you a certificate that they
17 apparently knew they could get without ever having talked to
18 Dr. Vilter, and it's not unusual for one doctor at a hospital
19 where the other doctor has been on the staff for a number of
20 years, it wouldn't be difficult for Dr. Suskind to go to Dr.
21 Vilter or for Mr. Heineman to go Dr. Vilter or anyone else to
22 go to Dr. Vilter, would you give us a certificate or would
23 you give us a statement that this man can't continue
24 presently, and I -- I would like to cross-examine that doctor

1 and look at his records to see whether or not this witness
2 has been so damaged by this court case that he can't continue
3 as a witness.

4 I think this is an act of contempt towards the
5 Court asking you in advance for an advisory opinion and then
6 presenting you with a fait accompli on Monday morning. Now,
7 I'm sure Dr. Suskind is not in the hospital. I'm sure Dr.
8 Suskind is either at his office or flying off to a conference
9 somewhere or home doing what he wants to do. There's -- the
10 man that was here Friday afternoon was not a sick man. He
11 was not a man that showed any signs or indications of bad
12 health, stress, or any problems of any sort other than the
13 fact he couldn't keep his stories straight, and I think this
14 Court ought to require Dr. Vilter to come here tomorrow and
15 support this hearsay document of his that Dr. Suskind can't
16 continue, or I think the Court should make a ruling that in
17 view of the doctor's statements that Dr. Suskind will not be
18 allowed to return to testify, because there's no -- he's not
19 going to get any younger, the fact that he's 72 years of age,
20 he is certainly not going to get younger, and -- or I think
21 the Court could -- could levy a fine of a \$100,000 a day
22 until Dr. Suskind presents himself.

23 If they had in mind, if they were in good faith
24 here, they would have had Dr. Suskind here this morning with

1 the doctor's certificate and saying, Judge, now this
2 certificate tells you that this witness is unable to
3 continue. We would like for you to take this certificate at
4 face value and allow us not to continue with Dr. Suskind on
5 the stand. But -- and the Court in effect ordered them to
6 have -- by refusing to give an advisory opinion on this
7 certificate Friday, the Court said, did say be here Monday
8 morning and ready to go. We'll look at that certificate when
9 it comes in. The Court isn't given an opportunity now to rule
10 that Dr. Suskind, that this certificate is inadequate or that
11 it is adequate. The Court is given an accomplished fact.
12 The witness is not here, and we're not going to continue
13 without him, and we're not going to have him here Wednesday,
14 and we, Monsanto, have decided what this Court should do
15 about the matter, this Court should proceed without Dr.
16 Suskind. That's Monsanto ruling.

17 And, Your Honor, those are the various thoughts
18 that the plaintiffs have about this situation. Summing it
19 up, we think this is part of a well thought plan on the part
20 of Monsanto to give them time to prepare this witness for
21 further cross-examination and redirect examination. There's
22 nothing new that's come up with this witness over the
23 weekend, nothing different than what he was here Friday, and
24 this Court should not allow this to take place.

1 THE COURT: I don't know who's replying for the
2 defendant, but do either of you, any one of you have a reply
3 or anything you wish to say?

4 MR. CRAVEN: Judge, first for the record I was -- I
5 was in the hall when Mr. Nassif and Mr. Carr had their
6 conversation, and my recollection of the conversation is
7 somewhat different than Mr. Carr's, but let me just talk in
8 terms of --

9 MR. CARR: Let's put on the record were you say
10 it's different. Please put on the record where it's
11 different.

12 MR. CRAVEN: I recall no conversation from Mr.
13 Nassif to you with reference to a doctor's certificate.

14 MR. CARR: Well, ask Mr. Nassif about that.

15 MR. NASSIF: I don't recall any reference to a
16 doctor's certificate at all. I did mention that the guy has
17 a heart condition, but I didn't say anything, Rex, about any
18 doctor's certificate.

19 MR. CARR: You mentioned if a doctor said that the
20 cross examination was going to be injurious to his health
21 would that be sufficient, Rex, that's exactly what you said.

22 MR. NASSIF: I don't-- The way you stated it
23 initially was you said if I had a doctor's certificate
24 regarding his heart condition and I don't remember saying

1 anything about getting a doctor's certificate regarding his
2 heart condition, and I don't recall anything about a doctor's
3 certificate.

4 MR. CARR: Do you recall the doctor's -- statement
5 if a doctor says it's injurious to his health, you don't
6 recall that?

7 MR. NASSIF: I may-- I don't recall that either yes
8 or no. I remember nothing about a doctor's certificate.

9 MR. CARR: Okay. If you don't remember--

10 MR. NASSIF: I don't remember anything about a
11 certificate.

12 MR. CARR: I didn't ask you that.

13 MR. CRAVEN: I have no recollection of that matter
14 either. As a matter of fact, my recollection is that there
15 was none. But nonetheless the -- first, characterizing this
16 as hearsay is inappropriate. This is clearly an affidavit of
17 an examining physician.

18 Now, let's talk in terms of-- Mr. Carr is again
19 suggesting that we are part of a conspiracy and we are not
20 being professional, and we're not representing things to the
21 Court accurately and honestly. The fact of the matter is
22 when we made this motion, we begged this Court to let this
23 witness go off the stand, because we knew that this witness
24 was in serious physical condition and under stress. Mr. Carr

1 volunteered his diagnosis and said there wasn't anything
2 wrong with the witness. It was at that point that I said to
3 the Court that I wasn't impressed with Mr. Carr's diagnosis.
4 I thought that -- I said would the court adhere to its view
5 if we gave you medical information that would confirm our
6 obvious observation of this witness and our talking to him
7 and to his wife, who's been here with him and watching him
8 and talking with him, and you said you would not give an
9 advisory opinion, you would look at whatever we brought, and
10 you would make your decision upon the basis of that.
11 Thereafter, Dr. Suskind went back to Cincinnati, Dr. Suskind
12 was examined by his doctor, his doctor has signed an
13 affidavit, his doctor has signed a written report, and those
14 matters are -- we got back to this Court as soon as we
15 possibly could, and as a matter of fact, I thought remarkably
16 fast considering that the -- that the examination was on
17 Saturday and we get it back to your house Saturday night. We
18 tried to afford the Court as much time as possible, and then
19 for Mr. Carr to suggest that we submit to the Court a fait
20 accompli, what can we do?

21 We knew Dr. Suskind was not well. We knew Dr.
22 Suskind was under considerable stress. We knew that Mr. Carr
23 was abusing this witness beyond redemption. We knew that he
24 was extending the cross-examination by making the witness

1 spend hours reading exhibits, saying it says that, doesn't
2 it, it says that, doesn't it. We knew that we had a very
3 serious problem, and then when his doctor comes back with
4 this kind of a report, we can't compel the witness to come
5 here contrary to the advice of his doctor, contrary to the
6 advice of his lawyer, and clearly there has to be some
7 respect to the input of the treating physician. Noone should
8 be put into that kind of a position when there is a specific
9 statement here that at least until he gets over this
10 situation further continuing with this kind of
11 cross-examination not might be, not could be, because Mr.
12 Carr and Dr. Suskind discussed those terms for days, but this
13 one says will be dangerous to his health.

14 That's where we are. We're not trying to be in
15 contempt of this Court. We're not trying to direct the
16 programming of this case. We're telling you that we have a
17 witness who is ill. Now, this is not unprecedented in this
18 trial that a person who gets ill is excused and comes back.
19 Mr. Wilson had a problem with a knee. His testimony was
20 interrupted, and the ultimate result was it was interrupted
21 for some time until he came back. So far as I know, Mr. Carr
22 didn't consider that was part of a conspiracy. I don't know
23 whether he did or not, but he finds conspiracies very easily,
24 and he's loose with his allegation of designating people as

1 conspirators, and I regret that he's willing to do that, but,
2 Judge, these are just the facts just as they are.

3 MR. NASSIF: Judge, I'd like to comment about the
4 reason we asked Mr. Carr, the reason I approached Mr. Carr on
5 Friday to ask him if he was close to finishing was because I
6 had been getting for at least two weeks serious pressure from
7 his wife about how much longer was it going to be, and Mr.
8 Carr has never objected to us interrupting our examination,
9 and I -- she had been asking me and advising me about Dr.
10 Suskind and how concerned she was and about the fact that he
11 had not been sleeping, and he had never -- he didn't rest on
12 weekends when he left the trial, and she told me she was
13 seriously concerned about him, and I went to Mr. Carr because
14 I knew, I suspected that he was close to finishing his
15 examination. I may be absolutely wrong, but I suspected, and
16 I felt that if I could go to her and say he's only got a
17 couple more days of cross and that we could then interrupt
18 our redirect to give him a break and then bring him back in
19 the event that Mr. Carr following our redirect wanted to keep
20 him on and when Mr. Carr indicated to me that he was not
21 close to finishing -- I didn't ask him how much longer he
22 had-- as he stated on the record I asked him if he was close
23 to finishing and when he indicated that he wasn't close to
24 finishing, that's when we approached the Court, and that's

1 what led up to what Mr. Craven has already commented on.

2 THE COURT: Do you have anything you wish to say?

3 MR. CARR: Nothing really, Judge, other than both
4 Mr. Nassif and Craven are in serious error when they say they
5 did not ask me whether or not it would make a difference if a
6 doctor said that this cross-examination was stressful on him
7 and is bad for a man with a heart condition, because that is
8 exactly what was said, and there would have been no reason to
9 continue the conversation beyond simply the asking whether or
10 not I was close to being finished if there wasn't another
11 position that they intended to take, and they did take that
12 position with me, and they said at that time they would
13 present it to the Judge, to the Court, this situation of his
14 being injurious to his health if he continues because of the
15 stress, and I replied to them, present it, if you will, and
16 the Court will rule on it, but I won't agree to it on those
17 grounds. There's no question but what that occurred, and
18 there's no question I have not charged Monsanto with a
19 conspiracy, because you can't really conspire with your own--
20 I suppose you can conspire with your own attorneys, but this
21 is an action on the part of Monsanto, and there are no other
22 party conspirators to it. I have not accused them of being
23 conspiracy. I've accused them of using this as a
24 circumstance whereby they will have time to get this witness

1 rehabilitated and get him ready for redirect as counsel could
2 discern.

3 I am close to the points that I wish to establish
4 on cross-examination. The only thing that might make my
5 cross-examination go beyond two days would be the
6 recalcitrance of the witness, and I wasn't about to commit
7 myself to a given period of time in view of his track record,
8 because I think it would go beyond two days. We took a whole
9 morning to establish the meaning of a word, and then he'd
10 back off of it in the afternoon, but the Court has heard all
11 that. Now, I think -- neither counsel have suggested to the
12 Court, have stated to the Court that they did not know in
13 advance that they were going to get this certificate without
14 ever having talked to the doctor. I charged them with
15 knowing that they were going to get such a certificate
16 without ever having talked to the doctor and neither said
17 that they had not talked to this or that they had talked to
18 the doctor before they presented it to the court Friday
19 afternoon. They apparently are -- they have the ability of
20 prevision and they knew in advance that the doctor was going
21 to supply the affidavit that they suggested they could
22 furnish to the Court on Saturday. To me that clearly means
23 that they advised the doctor what they wanted, and the doctor
24 complied.

1 MR. CRAVEN: You know, Judge, I don't know how you
2 cope with someone who's so reckless in his charges except to
3 suggest that he shouldn't do it. We came into this Court and
4 made the presentation that Dr. Suskind was not well, and we
5 did that in absolute good faith, and frankly I was very
6 disappointed, if not shocked that those circumstances and
7 those representations by counsel wouldn't be sufficient to
8 interrupt this cross-examination so that this witness could
9 recoup. It was only when the Court, much to our
10 disappointment and surprise said no, that I then sought to
11 pursue it further by suggesting that we were so certain of
12 our own opinion as to his condition that would the Court be
13 of the same mind if we got an affidavit or a report from a
14 doctor, and you said you would not give an advisory opinion,
15 you would look at whatever we got and to send it to your
16 house. Now, that's exactly --

17 THE COURT: I said I was available, you people knew
18 where we were.

19 MR. CRAVEN: We complied with that, but for Mr. Carr
20 to say that this is choreographed is just again a very eager
21 willingness on his part to indict people for doing what in
22 their best judgment has to be done in order to protect the
23 health of a witness, and I regret that Rex persists in that
24 kind of thing, and it's -- I don't know why he does. I don't

1 -- I wouldn't think that he thinks he needs that kind of an
2 advantage, but he apparently does.

3 MR. HEINEMAN: I might say one thing, Your Honor.
4 I'm not going to dispute Mr. Carr's arrogant appraisal of his
5 effect on this witness' testimony by cross-examination. I
6 obviously disagree with it. I can tell the Court that my
7 outline for redirect examination and preparation for
8 re-examination was complete up to the point of this witness'
9 testimony. I don't need any time to prepare him for redirect
10 examination.

11 The second aspect is none of the lawyers for
12 Monsanto in this room have spoken with Dr. Vilter, have never
13 met the man, have not spoken with him in person or on the
14 telephone, and as Rex pointed out, we didn't even know the
15 man's name, so to suggest that this is--

16 THE COURT: Have you talked to Dr. Suskind's
17 attorney?

18 MR. HEINEMAN: He called me on Saturday.

19 MR. CARR: Your Honor --

20 THE COURT: Had you talked to him before then?

21 MR. HEINEMAN: Who, Faller?

22 THE COURT: Yeah, Faller.

23 MR. HEINEMAN: Not about this.

24 THE COURT: He was the one, if I remember correctly,

1 and correct me if I'm wrong, but I think he's also the one
2 who indicated and it was made part of the record that he
3 indicated that Dr. Suskind would not voluntarily be turning
4 over the raw data as far as his various studies when that
5 production motion came up for argument before this Court
6 sometime ago, is that correct? I think I have heard that
7 name before.

8 MR. HEINEMAN: Yes, I told the Court -- well --

9 THE COURT: Is that correct, is he the one?

10 MR. HEINEMAN: Faller is an attorney for the
11 University of Cincinnati.

12 THE COURT: Right.

13 MR. HEINEMAN: He's an attorney for Dr. Suskind.

14 THE COURT: Okay. I thought that was the same
15 person.

16 MR. HEINEMAN: He's the guy that has represented
17 Suskind in connection with, I think, the affidavit that Mr.
18 Carr used as an exhibit that was filed in Nitro. Do you
19 remember that?

20 THE COURT: Yeah, I remember that.

21 MR. HEINEMAN: He's represented him in Madison
22 County, and I don't recall if he's ever appeared here.

23 THE COURT: He hasn't appeared here. I was just
24 trying to tie up that name.

1 MR. HEINEMAN: That's the name.

2 THE COURT: I think he might have appeared in front
3 of Judge Kinder up there.

4 MR. HEINEMAN: Yes.

5 THE COURT: On the other cases.

6 MR. HEINEMAN: I have not discussed this matter with
7 Faller until he called me on Saturday after Dr. Suskind had
8 seen the physician.

9 MR. CARR: Your Honor, I'd like also to point out
10 that Mr. Heineman very carefully used the words that none of
11 the attorneys for Monsanto in this room talked to Dr. Vilter.

12 MR. HEINEMAN: Well, I will extend that to anybody,
13 none of Monsanto's attorneys, period.

14 MR. CARR: Nor talked to any doctor about a man
15 with a heart condition and the possibility that
16 cross-examination might be stressful on him?

17 MR. NASSIF: None of us talked to any doctors. We
18 had not talked to a doctor, and that includes in house
19 Monsanto counsel, about this until he was examined by Dr.
20 Vilter.

21 MR. HEINEMAN: Mrs. Suskind is a nurse.

22 MR. NASSIF: She was the one --

23 MR. HEINEMAN: Dr. Suskind is a physician, Mrs.
24 Suskind, I think, is the one that told Jim about the man

1 having a heart condition.

2 MR. CRAVEN: She has been just distraught at this,
3 and when's it going to get over, when's it going to get
4 over. I stayed at the same hotel where they have been, and I
5 have dinner with them, I talked with them, and this -- it was
6 clear that this man was under stress, and I say stayed at the
7 same hotel on the times that I stay down here.

8 THE COURT: I understand that.

9 MR. CRAVEN: For instance, when I came down here
10 Thursday, and I spent Thursday night at the hotel, and,
11 Judge, there's no question that this man is under tremendous
12 stress and has a physical condition, and why in the world Rex
13 wants to indict the doctor and by his attitude, I guess,
14 thinks that we're now lying to the Court by saying we didn't
15 talk with the doctor, nobody talked with the doctor, but he
16 rejects that in his clairvoyance and says that we're liars, I
17 guess that's what he's suggesting. It isn't true.

18 THE COURT: Okay. Do you have anything further to
19 say?

20 MR. CARR: No, Your Honor I have nothing further to
21 say.

22 THE COURT: I have, obviously I received this
23 Saturday night when we got back from someplace, fairly early
24 in the evening it was at my house, and I assume you got it on

1 Saturday night, too?

2 MR. CARR: Yes, somewhere nine or ten o'clock.

3 THE COURT: So I have read it and considered it, and
4 I've got some serious question about what's been submitted,
5 and I'm not taking this matter lightly. It's -- I've
6 reviewed this document, as I said I would, and I don't think
7 that -- I think that this affidavit and the report that the
8 -- that this doctor has made, Dr. Vilter, is a completely
9 inadequate basis for Monsanto to take the position -- not
10 take the position -- well, take the position and to more
11 seriously take the actions that it did. It's basically an
12 opinion without a basis given on it, without facts, without a
13 history. It's obvious that one who's under cross-examination
14 is going to be under some stress. As I stated before and I
15 don't really want to repeat in all the detail what I did on
16 Friday, what I said on Friday, that this is stress which is
17 under the doctor's control. I'm sure that it is stressful
18 for a witness to sit in court day after day and deliberately
19 violate court orders and admonitions and court rules that
20 have been explained to him piecemeal by the Court and
21 completely by counsel as to proper actions and procedure in a
22 courtroom, and his evasion of those court rules, and those
23 are factors of stress that are under the doctor's control.

24 I have reviewed this affidavit, I know the contents

1 of it, I have reviewed the report, I know the contents of
2 that, and it's not an adequate basis for excusing what is
3 apparently a deliberate violation of this Court's order. I
4 have not decided what I'm going to do about it. I wanted to
5 hear what you gentlemen had to say, and I have heard that. I
6 think there are a number of options that are open to this
7 Court, and I want to think about it and reread my notes on
8 what all you gentlemen have said, and if you would excuse me
9 for a little while, I will tell you what I'm going to do or
10 tell you when I'm going to tell you what I'm going to do.
11 Thank you, gentlemen.

12 (At this time a short recess was taken.)

13 (At this time the following proceedings were had in
14 chambers out of the hearing of the jury.)

15 THE COURT: Okay, gentlemen. I have decided to do
16 the following on this matter. I think that the suggestion
17 about further examination of this is warranted under the
18 circumstances. I think it's warranted under two bases.
19 First of all, as I've indicated, I'm not satisfied with
20 what's been submitted to this Court so far as a basis for
21 changing this Court's decision, and secondly, I think that an
22 element of how this Court should view what I stated earlier
23 was an apparent violation, I think that relevant to that is a
24 question of the underlying basis for the actions that

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1 Monsanto and counsel for Monsanto have taken and that also
2 would warrant, since I think it's available, further
3 investigation so this Court can determine how to treat the
4 actions.

5 The affidavit and report that have been filed, the
6 affidavit actually indicates that Dr. Suskind has been Dr.
7 Vilter's patient for 15 years, a bit more, whatever, over 15
8 years, and I also note from examination of Dr. Vilter's
9 curriculum vitae that they are colleagues, that they both
10 have had longstanding University of Cincinnati connections.
11 I am ordering that both Dr. Vilter and Dr. Suskind be here
12 tomorrow morning at 9:30. I am ordering that they bring with
13 them all medical records concerning Dr. Suskind from Dr.
14 Vilter in his personal dealings with Dr. Suskind as a patient
15 and any other University of Cincinnati records of any of
16 their other doctors, their departments, of the hospital, of
17 the medical school, whatever, whatever other records there
18 are for -- as far as Dr. Suskind's health and conditions, and
19 I want copies of those records made immediately upon the two
20 doctors' arrival in St. Louis and those copies presented to
21 Mr. Carr, so that there is an adequate opportunity to review
22 and prepare for examination of this matter tomorrow morning,
23 and I think that this matter should be taken up tomorrow
24 morning. I have motions scheduled between 9 and 9:30. At

1 approximately 9:30 I will be ready to proceed on this. I
2 think that it should be done for the reasons that I stated.
3 I think that we should revolve this tomorrow, and I will so
4 govern the hearing so that it is if everything still remains
5 contested and it's decided that a hearing is needed.

6 If I decide that the basis is not adequate, we'll
7 resume Dr. Suskind's testimony on Wednesday. If I decide that
8 it is adequate, we ought to know that tomorrow so that both
9 parties can prepare for Dr. Cugell on Wednesday as you've
10 indicated, Mr. Heineman, that you've already made
11 arrangements for Dr. Cugell to resume his testimony on
12 Wednesday. So I -- this is what I'm ordering at this time,
13 and I will be prepared to proceed on this matter tomorrow
14 morning at 9:30 after I'm done with my regularly scheduled
15 motions. We will obviously proceed in the courtroom and not
16 back here since we've got some witnesses.

17 MR. CRAVEN: Judge, I would like to, if I may, ask
18 some questions at the risk of having Mr. Carr use them in the
19 future. Mr. -- Dr. Vilter is not our employee, he is not our
20 doctor, he is not subject to subpoena, and I've never talked
21 to him. I don't know anything about him. How -- how can we
22 comply if he says I --

23 THE COURT: Well, Dr. Vilter has been Dr. Suskind's
24 treating doctor apparently for fifteen plus years, he's been

1 a colleague of his for whatever number of years the
 2 curriculum vitae indicates, he's shown his ability to move
 3 promptly in this matter as the papers that have been filed
 4 with the Court and as what you've related in proceedings back
 5 here have indicated, and I don't think under the
 6 circumstances that's it's an unreasonable request.

7 MR. CRAVEN: But, Judge --

8 THE COURT: No, no, let me finish, let me finish. I
 9 think under the circumstances that it's reasonable to assume
 10 that under the circumstances he would be available and would
 11 be willing to come out here and back up what he's stated.
 12 Excuse me. I don't think that that's an unreasonable
 13 proposition in view of what has transpired so far with Dr.
 14 Vilter in this matter.

15 MR. CRAVEN: I don't know, and I want the record to
 16 show that I'm saying I don't know, I do not know this man. I
 17 don't know of very many physicians who wouldn't have a full
 18 schedule on Tuesday.

19 THE COURT: Well, if you look at Dr. Vilter's date
 20 of birth, Dr. Vilter is 75 years old. I would tend to doubt
 21 whether his schedule is as full as some of his colleagues on
 22 the University of Cincinnati staff who are substantially
 23 younger.

24 MR. CRAVEN: We will obviously transmit this Court's

1 request to the doctor. We cannot represent to the Court,
2 however, that he will comply. That's all I'm trying to say.

3 THE COURT: I understand that. I understand that.

4 MR. CRAVEN: Now, I think we have another question,
5 and we need some guidance. Counsel for Dr. Suskind have
6 indicated rather emphatically that he thought this could kill
7 him. Are you ordering us to compel him to come back if his
8 doctor and his lawyer say that to us?

9 THE COURT: I am ordering you to bring him back
10 here.

11 MR. CRAVEN: Even if they say --

12 THE COURT: Look, look, look, look, look. I know
13 what's been represented Friday, I know what's represented
14 here. I've reviewed it, I have examined it -- no, let me
15 finish -- I know what the contents are. I am not in the
16 habit nor do I think I'm really permitted to give advisory
17 opinions. On the basis of what's been told to me so far, on
18 the basis of the examination of these documents, on the basis
19 of having seen Dr. Suskind literally every part of the Court
20 proceedings for every day of the Court proceedings, I am
21 ordering you to produce him.

22 I am not going to respond to a hypothetical that
23 says if they say this, will you do that. I'm just not going
24 to do it and that's basically what you're asking me to do.

1 I've told you what I want done. I think that this is a
2 reasonable request and a reasonable procedure to resolve the
3 two intertwined questions that are before this Court at the
4 time, and that's how I want to proceed on it.

5 MR. CRAVEN: I think it's appropriate that we advise
6 the Court, Mr. Heineman has advised me that he did have a
7 conversation with Mr. Faller, and Mr. Faller was very
8 disturbed about Dr. Suskind's condition, and I don't know
9 that he had a conversation with reference to coming back here
10 on Tuesday, but Mr. Faller said that he was apprehensive that
11 resuming this testimony could kill him. Now, that's already
12 happened. Now, I'm not asking for an advisory opinion, but
13 I'm suggesting that we may be confronted with just that
14 assertion by his counsel and his doctor that says bringing
15 him back there now could kill him. Now, if this Court is --
16 I understand it you're saying bring him back without any
17 advisory opinions on -- under the circumstances.

18 THE COURT: That's right. I'm telling you to bring
19 him back.

20 MR. CRAVEN: Well --

21 THE COURT: I am indeed. And I do not give advisory
22 opinions. Do you have any questions, Mr. Carr.

23 MR. CARR: No, Judge, I understand.

24 THE COURT: Okay. I'll see you tomorrow morning at

1 9:30.

2 MR. CRAVEN: Judge, I think maybe we -- there's one
3 other thing.

4 THE COURT: Oh, I'm sorry, I thought you were
5 finished.

6 MR. CRAVEN: Well, I'm just trying to cover the
7 bases. I've never been in a procedure like this. We
8 ordinarily have some precedent to guide us. If we are advised
9 that Dr. Vilter won't come or-- I'm not trying to get an
10 advisory opinion, but there are a whole group of other
11 scenarios that may or may not develop, I don't know. We have
12 to have some kind of communication machinery to transmit to
13 the Court problems that may develop, and apparently -- and
14 one of the things we must have to consider is an emergency
15 motion to supersede this Order if we can't comply. Now, I'm
16 talking about emergency motions, I suppose, to some justice
17 of the Supreme Court. I don't know what else to do. But if
18 it develops that compliance is an impossibility, what are we
19 supposed to do?

20 THE COURT: You're to be here tomorrow morning at
21 9:30 and advise me as to what has happened in full and be
22 ready for questions as to me and possibly by Mr. Carr as to
23 what you're advising me of.

24 MR. CRAVEN: May we have a copy of this transcript

1 today? Well, Judge, we obviously have to go on this, but
2 there are a couple of things that are hanging, and we would
3 like to talk about if the Court is disposed to do so.

4 THE COURT: What things that are hanging?

5 MR. CRAVEN: Assuming for a moment Dr. Cugell is
6 coming here Wednesday, this Court, as you know, entered an
7 order in limine on the 3rd of February, 1986, and we went up
8 on supervisory order on that, and the Supreme Court was
9 unable to agree by reason of a three to three division. I
10 gather there's nothing to be gained by rehashing the motion
11 in limine, but we would move to vacate the order in limine
12 and obviously need to know the ruling for purposes of the
13 testimony when it's resumed with Dr. Cugell.

14 THE COURT: Well, see, now that's another reason why
15 taking care of these matters preparatory to Dr. Cugell if Dr.
16 Cugell will be testifying Wednesday is the reason why this
17 needs to be done tomorrow.

18 MR. CRAVEN: That's why I'm raising it now. Then
19 there's the additional thing, and that is the matter of Mrs.
20 Melton. Your Honor indicated that you would consider the
21 affidavit of Mr. Musgrave and Mr. Heineman --

22 THE COURT: I said I would read anything that you
23 gentlemen file.

24 MR. CRAVEN: I want to advise you now that we will

1 be submitting to you or bringing over this afternoon a motion
2 to reconsider that order, together with affidavits from them.

3 THE COURT: Fine.

4 MR. CRAVEN: That clearly state that they had no
5 telephone conversation with the Court with reference to Mrs.
6 Melton desiring to continue on the jury, and we clearly have
7 a record where Mr. Carr has said that he did have that
8 information. First he said he got it from the bailiff. Then
9 he said he got it--

10 MR. CARR: No, that's not true.

11 MR. CRAVEN: Then he said he got it from somebody
12 in the hall--

13 MR. CARR: That isn't true. You're misstating the
14 record. I first said in the court that I got it from the
15 Judge.

16 MR. CRAVEN: You know, I restrain myself and let you
17 finish.

18 MR. CARR: Well, go ahead.

19 MR. CRAVEN: First he said he got it from the
20 bailiff, then he said he got it from somebody in the hall,
21 then he said he got it from the Court, and then he said the
22 Court told him in a telephone conversation, so he knew more
23 about Mrs. Melton than we did when he made the judgment to --
24 he wanted to go ahead with the trial, and then he acquiesced

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

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I, MARSHA SCHNIPPER, certify the foregoing to be a true and accurate transcript of the testimony and proceedings in the above-entitled cause.

Dated this ____ day of April, 1986.

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

9 Dated this ____ day of April, 1986.

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12 _____
13 RICHARD P. GOLDENHERSH, JUDGE
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