

1 of 12

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September 11, 1991

Stuart Calwell, Esquire,  
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405 Capitol Street, Suite 908  
Charleston, West Virginia 25321

VIA TELEFAX  
(304) 344-3684

Re: Adkins, et al v. Monsanto Company

Dear Stuart:

I am writing to track on the present status of the discovery materials in this matter involved in the Greenpeace motion for an order modifying the Court's prior protective order.

About the time you informed me that the Court was expected to lift the protective order the same day (see your attached correspondence), I had a minor tiff with Greenpeace and had no communications with them for several months. I assumed that you had sent the materials directly to Pat Costner of Greenpeace and that was the reason I hadn't heard from you again.

Greenpeace and I recently mended our fences and I learned from Pat Costner that she had never received the discovery materials and assumed I had them.

Recently, it became urgent to obtain the materials because one of the Monsanto researchers has filed a libel action against the editor of an environmental newsletter. See attached article from Corporate Crime Reporter. I am also advised that Monsanto has filed a similar lawsuit in Australia.

Do you have any record of whether the materials ever went out, and if so, to whom? Or could you copy them again? Greenpeace would be happy to pay copying costs.

I don't know if you still have any interest in dioxin issues, but I'd enjoy visiting with you at the citizen's dioxin conference on September 21-22 in Chapel Hill, N.C., if you can attend. I enclose regis-

Stuart Calwell  
September 11, 1991  
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tration materials. It looks to be one of the more important events in dioxin history.

Except for Friday of this week, I'm going to be traveling until September 25, and my office will be closed from September 20-24. If you have time for a quick phone call or fax before September 20, I'd appreciate it.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paul E. Merrell".

PAUL E. MERRELL

PEM: pem

cc: P. Costner

enc.

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October 24, 1990

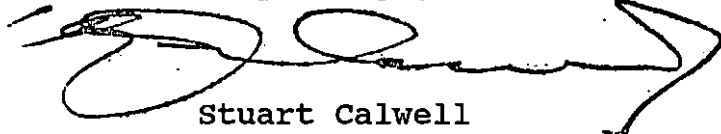
Paul E. Merrell  
ALDER HILL ASSOCIATES  
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Tidewater, Oregon 97390

Re: Adkins, et als vs. Monsanto Company

Dear Paul:

Enclosed for your information is a copy of ORDER MODIFYING PROTECTIVE ORDER in the Monsanto case which will be entered today. If you have any questions regarding this matter, please give me a call.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Stuart Calwell', with a long horizontal flourish extending to the right.

Stuart Calwell

SCjks  
Enclosure

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# CORPORATE CRIME REPORTER

## JOURNALIST REPORTING ON DIOXIN STUDIES SUED FOR LIBEL BY SCIENTIST. CRITICS SAY SUIT IS MEANT TO INTIMIDATE

The long-running battle over the carcinogenic effects of the chemical dioxin intensified last month when a retired Monsanto Co. scientist filed a libel suit against a journalist who has written extensively on the controversial chemical. The dispute centers on Monsanto dioxin studies that are now the subject of an investigation by the Environmental Protection Agency's Office of Criminal Investigations.

William R. Gaffey, a former scientist and epidemiologist for Monsanto, last month sued Dr. Peter Montague, a journalist and director of the Washington, D.C.-based Environmental Research Foundation, for libel because of an article Montague wrote in the March 7, 1990 issue of *Rachel's Hazardous Waste News*. Gaffey also sued Montague's organization.

In interviews this week, Montague and others who have been critical of the Monsanto dioxin studies condemned the lawsuits, charging that the suit is an attempt at intimidating and silencing criticism of the dioxin studies.

But Gaffey and his attorney, Neal C. Stout, dismissed the charges of intimidation, saying that Gaffey's reputation suffered because of Montague's article, which they said accused Gaffey personally of fraud.

"I believe that this is a clear attempt at a SLAPP suit," Montague said last week. SLAPPs, or Strategic Lawsuits Against Public Participation, are lawsuits filed by individuals or institutions with the intent of squelching opposition. "It's a clear attempt to intimidate me and deny my First Amendment rights," Montague said.

Gaffey denied working in conjunction with any corporation. Donna Vandiver, a Monsanto spokesperson, said the company had no comment on Gaffey's lawsuit. "We stand by the validity of our study," she said.

Gaffey also denied that he sued to undercut criticism of his study. Upon reading Montague's article, "I saw that Dr. Montague had accused me personally of fraud," Gaffey said. "I decided that for a number of reasons I simply could not let that go without a response."

Gaffey's libel suit centers on two paragraphs of Montague's article. In the article, Montague wrote in one sentence that Judith A. Zack and Gaffey conducted a study of workers who had been exposed to the

dioxin-contaminated herbicide 2,4,5-T, by comparing the health of the exposed workers to a group of unexposed workers. Montague then quoted allegations made in court documents in a class action lawsuit against Monsanto.

Montague wrote, "According to court documents attached to the EPA [U.S. Environmental Protection Agency] memo, 'Zack and Gaffey deliberately and knowingly omitted 5 deaths from the exposed group and took four workers who had been exposed and put these workers in the unexposed group, serving, of course, to decrease the death rate in the exposed group and increase the death rate in the unexposed group.'" In the next paragraph, Montague referred to the Zack/Gaffey study as "fraudulent," citing as his source the same court documents.

Cate Jenkins, an EPA scientist who authored the memo referred to in Montague's article, said she believed that Zack and Gaffey "deliberately and knowingly" used the false data in their study. "If I thought there was no intent, I wouldn't have brought it to the attention of the National Enforcement Investigations Center [of EPA's Office of Criminal Investigations]," she said. Similar to Montague's article, Jenkins' memo discusses the "fraud allegedly committed by Monsanto in conducting its 'research' on its workers exposed to dioxins."

Two Monsanto studies and another study by the German chemical firm BASF -- which environmentalists also allege to be deceptive in its findings -- are the basis for EPA regulations governing dioxin. The two Monsanto studies looked at workers from a chemical factory in Nitro, West Virginia, where in 1949 an explosion occurred that exposed many workers to the dioxin-contaminated herbicide 2,4,5-T.

The first study, called the Zack-Suskind study, looked at the cancer rates of the workers acutely exposed to the chemical during the Nitro plant explosion. The Zack-Gaffey study was intended to look at the long-term chronic effects of dioxin exposure, according to Gaffey.

Scientists have complained of errors in both studies. One of the key criticisms of the Zack-Gaffey study, for example, is that the company scientists included in their unexposed control group four workers who were exposed to high levels of the chemical in the 1949 accident. Those same workers -- identified by their birth dates, starting day of employment at the plant and their health records -- were included in the Zack-Suskind

(See DIOXIN, page three)

**(DIOXIN, from page one)**

study as exposed to dioxin. These four workers died of cancer.

"I never compared the people in the two studies," Gaffey said. "There are two different ways of looking at [dioxin] exposure. One view is to say that [a] high-level, short-acute burst of exposure is a different phenomena than a long-term low-level exposure. If you believe that, then you would try to study the two separately.

"Another view is that exposure is exposure no matter what, in which case you would say that a person is exposed whether he is exposed acutely or chronically or both," Gaffey said the two Monsanto studies incorporated the first view, while those criticizing the studies take the second view. "There's no reason why somebody taking the second view of exposure couldn't do a different analysis entirely," he said.

The Monsanto studies are the substance behind the Veteran Administration's denial of compensation for many injuries tied to Agent Orange exposure, and the legal defense of many corporations being sued by employees and citizens for dioxin exposure.

How the debate over the carcinogenicity of dioxin is resolved will determine the outcome of many lawsuits across the country, and many corporations face large damage awards if the Monsanto studies are proven to be fraudulent. Dioxin is an important issue in well-known pending trials in Times Beach and Love Canal, and in growing numbers of other cases around the country. In February of this year, a Mississippi jury awarded \$1 million in punitive damages against Georgia Pacific for alleged dioxin contamination -- a case which prompted other residents to sue the company. And this summer a Missouri jury awarded \$1.5 million to the family of a truck driver who allegedly died because his workplace was contaminated with dioxin.

Other journalists and scientists have published criticisms of the Zack-Gaffey study similar to those made in the quotation in Montague's article. In an article in the *Journal of Pesticide Reform*, for example, author Sam Van Strum and attorney Paul Merrill attribute a similar statement to a Monsanto official.

They write, "Dr. George Roush, Medical Director of Monsanto, admitted under extensive cross examination that the conclusions of both the 1983 and 1984 studies were 'incorrect,' confirming that Zack and Gaffey ... had knowingly omitted five deaths from the exposed study group and had further reclassified four exposed workers as unexposed, in order to equalize the death rates in the exposed and unexposed workers. The

exposed workers, Dr. Roush admitted, had 18 cancer deaths instead of the 9 deaths reported by Monsanto, an over-all cancer death rate 65 percent higher than the normal population rate." Merrill and Van Strum then go on to quote from the same court documents Montague quoted.

"I don't believe that is an accurate reflection of what is in the transcript," Gaffey said of Van Strum and Merrill's article. "There were some people in the first study who were exposed to the [1949 Nitro] accident and in their subsequent employment did not work in an [dioxin] exposed job. Those turned out to be unexposed by the definition of the second study," Gaffey said the workers included in the exposed group for the study were selected by their work assignments.

"If Roush's testimony is accurate about [Zack and Gaffey] deliberately moving people from one group to another, knowing that they had been reclassified from the first study, I'd call it fraud because that's what needs to be explained in an epidemiological study," Merrill said. "There's just about everything there [in Roush's testimony] but the confession."

Neil Stout, Gaffey's attorney, said Dr. Roush "would certainly not say that the study is fraudulent."

Asked why his article publishing the study didn't note that some of the workers in the unexposed group were exposed to dioxin in the 1949 accident, Gaffey responded, "All we did in the second study was to give the definition of exposure. That definition came from work history records, and they contained no indication if that person had been exposed" in the accident.

Van Strum said, "The workers were chosen [for the Zack/Gaffey study] not on the basis of any health criteria, but simply by some strange selection method based on employment records that furthermore excluded the very years when the exposure would probably have been highest at Nitro, between 1948-1955." Gaffey said employment records prior to 1955 weren't used because personnel records prior to that year were incomplete.

"Either the study's fraudulent, or the guy's absolutely incompetent as an epidemiologist," Morrill charged. "Either they didn't do a literature research before they began, or they should have known that they didn't have any unexposed control [group]."

The EPA's Jenkins said there were errors in both Monsanto studies. "The manner in which they are trying to defend themselves is with sloppiness, but wherever they said sloppiness occurred, it was always showing no effect [of dioxin exposure]. The mistakes should fall on both sides of the fence," Jenkins added,

"My assessment is that there was fraudulent intent."

Asked about Gaffey's libel suit against Montague, Jenkins said, "It's an attempt at a SLAPP suit and [shows] the arrogance of a scientist to think somebody is going to be intimidated by something like this." Jenkins suggested that the libel action will serve Montague's interest by drawing the dioxin debate into the public forum. "If Peter Montague is smart, he will drag it on and it will cost Gaffey not only embarrassment, but [attorney's] fees," she said.

Stout said that Gaffey attempted to resolve the dispute in "several communications before bringing the lawsuit and it could have been settled." Gaffey added that he wrote to Montague seeking a retraction, but Montague refused, "so I sued him."

Montague said, however, that he responded to Gaffey's letter with his own letter inquiring of the exact words Gaffey found objectionable. Montague said Gaffey didn't respond to his letter, but that he subsequently received a letter from Gaffey's attorney telling him to send \$150 for Gaffey's attorney's fees, after which a letter would be sent saying exactly what words Gaffey wanted retracted.

"I felt as if I were being blackmailed, so I wrote him a letter in which I spelled out exactly what my understanding was of his study, and I explained precisely to him why I believed he had knowingly mislead the readers of the study," Montague said. "And I explained to him that because I believed he had knowingly mislead the readers of his study I could not retract any words I had written about his study."

Montague said he then didn't hear from Gaffey for a year, when he received a court summons. It was in the summons that he finally learned of the exact words in his article that Gaffey disputed, Montague said. "I have looked into this matter very carefully and I believe the words that I printed were true and were based on true facts and therefore I cannot retract them."

Attorneys involved in the case hold different views on whether a libel suit can be filed for a quote attributed to a court document. Neil Stout, Gaffey's attorney, said, "It's really black-letter law that repeating a statement from a privileged document, which if it were not privileged, would itself be libel is libelous. A re-publisher of a false and libelous statement is responsible for his own libel even though he got the statement somewhere else. . . . The idea is that you don't want someone to publish a statement that is defamatory in a privileged context and then quote it at will without liability."

Rex Carr, the attorney whose appellate court brief was quoted by Montague, called Stout's interpretation

"absolute nonsense." Carr said, "A statement from a court document is absolutely privileged. . . . A reporter can quote with freedom from liability from any document filed in a court action."

Stout said that reporters can quote from lawsuits as long it is presented fairly, preferably quoting from both parties involved in the litigation. "That obviously wasn't the purpose of Montague's article," he said. "The purpose of Montague's article was to accuse certain scientists of publishing fraudulent data."

Others said that regardless of whether a libel suit can be filed, if the case does go to trial, Montague will have no problem proving the quoted statement is, in fact, true. "The language that Peter [Montague] is being sued over is totally defensible," Merrill said. "It's clearly factually true." Carr said the statement can be proven "if one has the same access to witnesses and underlying data" that he had in his case.

[Carr represents a group of plaintiffs who sued Monsanto for damages allegedly suffered from a spill of chemicals in the town of Sturgeon, Missouri. In the case, *Kemner et al v. Monsanto Co.*, the jury awarded the plaintiffs one dollar in compensatory damages and \$16.25 million in punitive damages. In a 2-1 decision, an Illinois appellate court overturned the award, reasoning that the one dollar in compensatory damages was insufficient to uphold the punitive damages award. Carr has recently filed an appeal with the Illinois Supreme Court.]

Gaffey said he is paying his own legal fees. "I discussed this once with an attorney from Monsanto and he advised me that I let this whole thing drop," he said. Gaffey is being represented by Stout and Joseph G. Nassif of the Missouri firm of Coburn, Croft & Putzell. Nassif was one of Monsanto's attorneys in the *Kemner* case, and, according to the *Mariindale-Hubbell Law Directory*, Monsanto Co. is one of the firm's clients.

Asked if Gaffey intended to sue other journalists or scientists who have alleged the Monsanto studies were fraudulent, Stout said, "We have the option, of course, to sue other defendants later, which is possible. In fact, there are some other people that I've already suggested as possible defendants. We'll make up our mind whether to go after other people as time goes on."

But Gaffey responded to the same question somewhat differently, "Since I am using my own money, there is a limit to how many people I can take on at one time. . . . I'm not doing anything beyond the suit that has been filed against Dr. Montague. I have given the matter [of adding new defendants to the suit] no thought at all."

Montague, who has been a journalist for 36 years and has never been sued before, said he intends to countersue. "We are putting together a team of attorneys, scientists and private investigators who are eager to help in my defense because this is a clear matter of principle -- my First Amendment rights," Montague said.