

Last-Minute Documents Transform Shaky Asbestos Case Into \$34 Million Winner

By Beth Quimby

Randall Bono and William Fahey had never seen anything like it, not in their 38 combined years as lawyers in Illinois and certainly never in their 24 years of asbestos litigation.

Halfway through a 13-day asbestos trial, while Fahey cross-examined a witness, Bono was next door deposing the defendant's paralegal who unexpectedly acknowledged that the company had withheld cartons of crucial documents during discovery.

Without the documents the two lawyers had little direct evidence to present at trial. But the dramatic turn of events led the judge to strike the company's entire defense and enter a default judgment. Without that evidence, the \$34.1 million verdict against Shell Oil Co. — an Illinois record — would have been impossible.

The new evidence was especially crucial since the case was on the cusp of a new wave of asbestos injury suits which seek damages from companies that used asbestos rather than those that manufactured it. (See accompanying box).

The trial, which may lead to criminal charges against the defendant, left Bono and Fahey shaking their heads, wondering if real life had turned into a movie script.

They had hoped to settle the case before it went to trial in May, but the company's offer didn't even cover their expenses, so they were forced to go to trial.

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The Mid-Trial Breakthrough

The plaintiff, James Hutcheson, 64, of Missouri, claimed that he developed lung cancer while working as a roofer at industrial sites. The other companies settled pretrial, leaving Shell's Wood River Refinery as the sole defendant. But Hutcheson had worked at the plant for just three to six weeks a year between 1956 and 1966.

Hutcheson brought his suit in 1994 after developing mesothelioma, a cancer of the lung lining linked to asbestos

exposure. He has lost a lung, his diaphragm, lung linings and heart sac. He has undergone rounds of chemotherapy and radiation and racked up medical bills of more than \$91,000.

Hutcheson was asking for \$75,000 from Shell, but Shell offered only \$35,000.

"They probably knew we were going to have a hard time," says Bono, a former Illinois Circuit Court judge.

He says they had little to go on except that the company "should have known" about the dangers of asbestos.

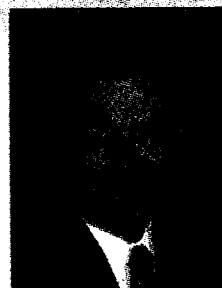
Meanwhile, Shell was ready to argue the company had no knowledge of the health hazards of asbestos when the plaintiff worked at the Wood River refinery. Although defense attorneys refused to comment on the case, Bono says the company was planning to show Hutcheson worked there too briefly to develop his disease.

But just three days before trial, that all changed.

"There is a network of us who do this kind of work, so I was calling around to see if anyone knew about the Shell case," says Bono.

Bono learned that the guru of oil refinery cases — Hershel Hobson of Beaumont, Texas — might know something about the new brand of asbestos case based on premises liability.

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handed them piles of documents that showed Shell was aware of the dangers of asbestos long before they hired Hutcheson.

"We were drooling like [kids] in a Toys 'R Us store," says Bono.

The documents included a deposition from a Shell industrial hygienist, who said Shell knew of the dangers of

asbestos by the early 1950s. The documents also included a 1945 report on the health dangers of asbestos by a Shell Wood River Refinery Co. chemist. The two lawyers now had what they needed to show Shell was aware of the health consequences well before Hutcheson's work started in 1956.

Instead of going back to Illinois with a suitcase full of clothes, Bono left his wardrobe behind and filled his suitcase

with the documents instead.

Armed with the newly discovered documents, the two lawyers appeared at trial hoping to obtain a motion to strike the defendant's pleadings. Associate Judge Lewis Malott ruled against them. But he did allow them to call the paralegal, who had signed Shell's discovery response.

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Bono rushed to tell Fahey about the new information in the midst of Shell's cross-examination.

"I had never seen anything like this before. I sensed something was wrong while the deposition was going on because Forsh (the defense lawyer), came into the courtroom, packed up his bag and ran down the stairs and got on a plane to Houston," says Fahey.

Judge Malott dismissed the jury Friday. He gave Shell until Monday to explain why they had withheld the documents.

Forsh returned, accompanied by two criminal lawyers.

"He tried to explain away the discrepancy and testified that he fled the courtroom because he was afraid he would be incarcerated," says Fahey.

The judge was not impressed. He not only struck Shell's entire defense but ruled Shell's conduct in withholding the documents was "a deliberate, contumacious and unwarranted disregard of the Court's authority." He reserved a decision on whether to hold the defendants in contempt of court.

So Bono and Fahey presented their case. The judge allowed Shell to cross-examine witnesses only when the jury was absent and to defend itself only during the damages phase of the trial.


The jury of six men and six women deliberated for about five hours. The \$34.1 million award included \$25 million in punitive damages for willful and wanton misconduct and \$9.1 million in compensatory damages.

Fahey says Shell plans to appeal the decision.

Plaintiff's attorney: Randall A. Bono of The Simmons Firm in Wood River, Ill.; William R. Fahey of Cooney and Conway in Chicago.

Defense attorney: B. Stephen Rice of Hays McConn Rice & Pickering in Houston.

The case: Circuit Court of Madison County, Ill., *James Hutcheson v. Shell Wood River Refinery Co.*, No. 99-L-450. Judge Lewis E. Malott. **INUSA**



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The fact that these important legal documents were signed by a paralegal had sent up warning flags for Bono and Fahey.

"Generally the interrogatories are signed by the officer or the director within the corporation," says Bono. "They might as well have grabbed a truck driver to do it." So five days into the trial, as Fahey questioned a witness on the stand, Bono deposed the paralegal next door.

She said she signed Shell's discovery response, knowing it was not accurate, because she was told to do so by her supervisors, including Mark Forsh, a Shell lawyer and member of the defense team.

Then she delivered some stunning news: There were at least 100 more boxes of relevant documents at Shell's corporate headquarters, including many that could be important in similar cases.

Expands Asbestos and Manufacturers

been sued are Ford and General Motors for asbestos-lined brakes and clutches, Campbell Soup and Colgate-Palmolive because employees worked near asbestos-laden machinery, several hospitals and colleges that used asbestos ceiling tiles, and Alcoa because their products allegedly cut into asbestos insulation, the *Journal* reports.

While these suits have generally settled for small amounts, the *Journal* reports that settlement demands have increased significantly this year.