

SETTING THE STAGE: PREPARING OPENINGS AND CLOSINGS TO A JURY

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE TORTS SECTION
OF THE DELAWARE STATE BAR ASSOCIATION

WEDNESDAY, OCTOBER 26, 2022 | 1:00 P.M. – 3:00 P.M.

2.0 Hours CLE credits for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

According to research, the most influential parts of a trial in the eyes of jurors are the opening and closing statements. This seminar picks the brains of exceptional lawyers and focused on the best practices and technological aids to make your statements stand out.

PRESENTERS

Nancy Chrissinger Cobb, Esquire
Cobb & Logullo

Sarah B. Cole, Esquire
Marshall Dennehey Warner
Coleman & Goggin

Gary S. Nitsche, Esquire
Nitsche & Fredricks, LLC

Rachel D. Allen, Esquire
Nitsche & Fredricks, LLC

Visit <https://www.dsba.org/event/setting-the-stage-preparing-openings-and-closings-to-a-jury/> for all the DSBA CLE seminar policies.

Presenters

Nancy Chrissinger Cobb, Esquire
Cobb & Logullo

Sarah B. Cole, Esquire
Marshall Dennehey Warner Coleman & Goggin

Gary S. Nitsche, Esquire
Nitsche & Fredricks, LLC

Rachel D. Allen, Esquire
Nitsche & Fredricks, LLC

SARAH B. COLE

SHAREHOLDER



AREAS OF PRACTICE

Social Services & Human Services Liability
General Liability
Automobile Liability
Fraud/Special Investigation

CONTACT INFO

(302) 552-4364
sbcole@mdwgc.com

Nemours Building, 1007 N. Orange St.
Suite 600, P.O. Box 8888
Wilmington, DE 19801

ADMISSIONS

Delaware
2005

U.S. District Court for the District
of Delaware

EDUCATION

University of Maryland School of
Law (J.D., 2005)

Bryn Mawr College (B.A., 2001)

HONORS & AWARDS

The Best Lawyers in America®,
Litigation - Insurance
2023

ASSOCIATIONS & MEMBERSHIPS

Delaware State Bar Association

YEAR JOINED

2014

OVERVIEW

Sarah is a member of the Casualty Department where she focuses her practice in the areas of general commercial liability, including premises liability and residential group home liability.

For the past decade, Sarah has defended hundreds of clients in the defense of personal injury litigation in the Delaware courts, with many cases tried successfully to verdict. In addition, she has defended clients in insurance coverage disputes as well as property damage litigation.

As a member of the Fraud/Special Investigative Unit (SIU) Litigation Practice Group, Sarah continues to develop her skills litigating and investigating claims of insurance fraud. She also has experience handling PIP disputes throughout the state of Delaware on behalf of our clients.

Sarah graduated from Bryn Mawr College in 2001 with a Bachelor of Arts in Political Science. She received her *juris doctorate* from the University of Maryland in 2005. During law school, Sarah was an intern with the Delaware Court of Chancery. After graduation, Sarah served as a law clerk to the Honorable Arlene Minus Coppadge and the Honorable Robert B. Coonin.

After her clerkship, Sarah went into private practice at a civil defense litigation firm where she successfully defended individuals and businesses in many jury trials in the Delaware Superior Court.

Sarah is active with local animal welfare organizations in Delaware, including the Delaware Humane Association and Faithful Friends Animal Society.

THOUGHT LEADERSHIP

Marshall Dennehey Announces 2019 Shareholder Class and Special Counsel Promotions

January 2, 2019

Marshall Dennehey Warner Coleman & Goggin is pleased to announce that 13 associates and two special counsel have been elevated to shareholder. Additionally, the firm has promoted four associates to the position of special counsel.

[Read More](#)

Comparing Apples to Oranges

Wilmington

Automobile Liability

September 1, 2014

By Sarah B. Cole, Esq.* Key Points: Defense Digest, Vol. 20, No. 3, September 2014

CLASSES/SEMINARS TAUGHT

New Jersey Contractual Indemnity and Additional Insured Issues, Zurich Insurance, April 2015

RESULTS

Marshall Dennehey Attorneys Successfully Argue Before the Delaware Supreme Court.

General Liability

May 11, 2018

Following oral argument heard *en banc*, the Delaware Supreme Court issued an opinion upholding the application of the Continuing Storm Doctrine, resulting in the affirmation of the lower court's decision to grant summary judgment to our client.

SIGNIFICANT REPRESENTATIVE MATTERS

Defense verdict in Delaware Superior Court in a personal injury lawsuit arising out of a slip and fall at a commercial shopping center where liability and significant damages were in dispute.

Successful defense of a residential group home in relation to personal injury claims resulting in efficient and well-informed settlement of all claims prior to the filing of suit.

Defense verdict in Delaware Superior Court in a personal injury lawsuit arising out of a motor vehicle accident. Damages and liability were in dispute. The strategic defense theory presented at trial resulted in the jury awarding a sum that was vastly below the plaintiff's pre-trial demand. Thereafter, the defense successfully argued in opposition to motions for additur and for a new trial.

Defended a first-party lawsuit for underinsured motorist coverage before a jury in Delaware Superior Court. Received a defense verdict when the jury awarded damages that equated to less than what the plaintiff received from the underlying tortfeasor. Thereafter, the defense successfully argued in opposition to motions for additur and for a new trial.

Defended a hotel owner in a premises liability claim brought in Delaware Superior Court with alleged damages approaching nearly \$1 million. Through the course of discovery, it was demonstrated that the hotel owner had significant defenses to the plaintiff's claims. Settled the case for a fraction of the original demand.

Defense verdict in Delaware Superior Court in a personal injury lawsuit arising out of a motor vehicle accident. After extensive expert and lay witness testimony, the jury found in favor of the defense on liability. Thereafter, the defense successfully argued in opposition to motions for additur and for a new trial. Jury's verdict upheld in both Delaware Superior Court and the Delaware Supreme Court.

Effective Opening Statements and Closing Arguments

1) What is an Opening Statement and a Closing Argument?

- How are they different?
- What are the goals of each?

2) Communicate your theme.

- How do you identify the themes for your case?
- What are the best ways to communicate those themes?

3) Establish credibility.

- How do you establish credibility before the evidence is presented?
- What are ways you can demonstrate your credibility?
- How do you avoid over-promising on the evidence?

4) Tackle any unfavorable facts head-on.

- Does it help to address unfavorable facts in your opening? Why or why not?
- How do you avoid making the opposing side's case while still addressing unfavorable facts?

5) Offering a road map.

- How do you structure your opening?
- How do you craft an effective roadmap?

6) Connecting with jurors.

- What are some effective ways to connect with jurors? What are ineffective ways?
- How do you dress for success?

-How do you present yourself to the jury? Walking, standing, reading, pointing, and use of demonstratives or power points.

7) Write your closing before the trial starts (and then change it after the evidence is presented).

-Writing a good closing before trial helps you identify the strengths of your case in advance.

-What should a closing argument address?

-Be willing and prepared to change your closing in order to address the evidence and arguments presented at trial.

-Write the closing the opposing attorney would give and then write your closing.

8) Help the jury understand the evidence.

-Evidence can be convoluted and complicated. How do you overcome that in your closing?

-Trials can be long. Remind the jury about specific key evidence.

-How to address an expert's testimony in your closing?

Amanda L. Mitchell, Individually and
as the Administratrix of the
Estate of Herbert L. Mitchell, deceased,
Stacie L. Mitchell and Sara A. Mitchell
v.

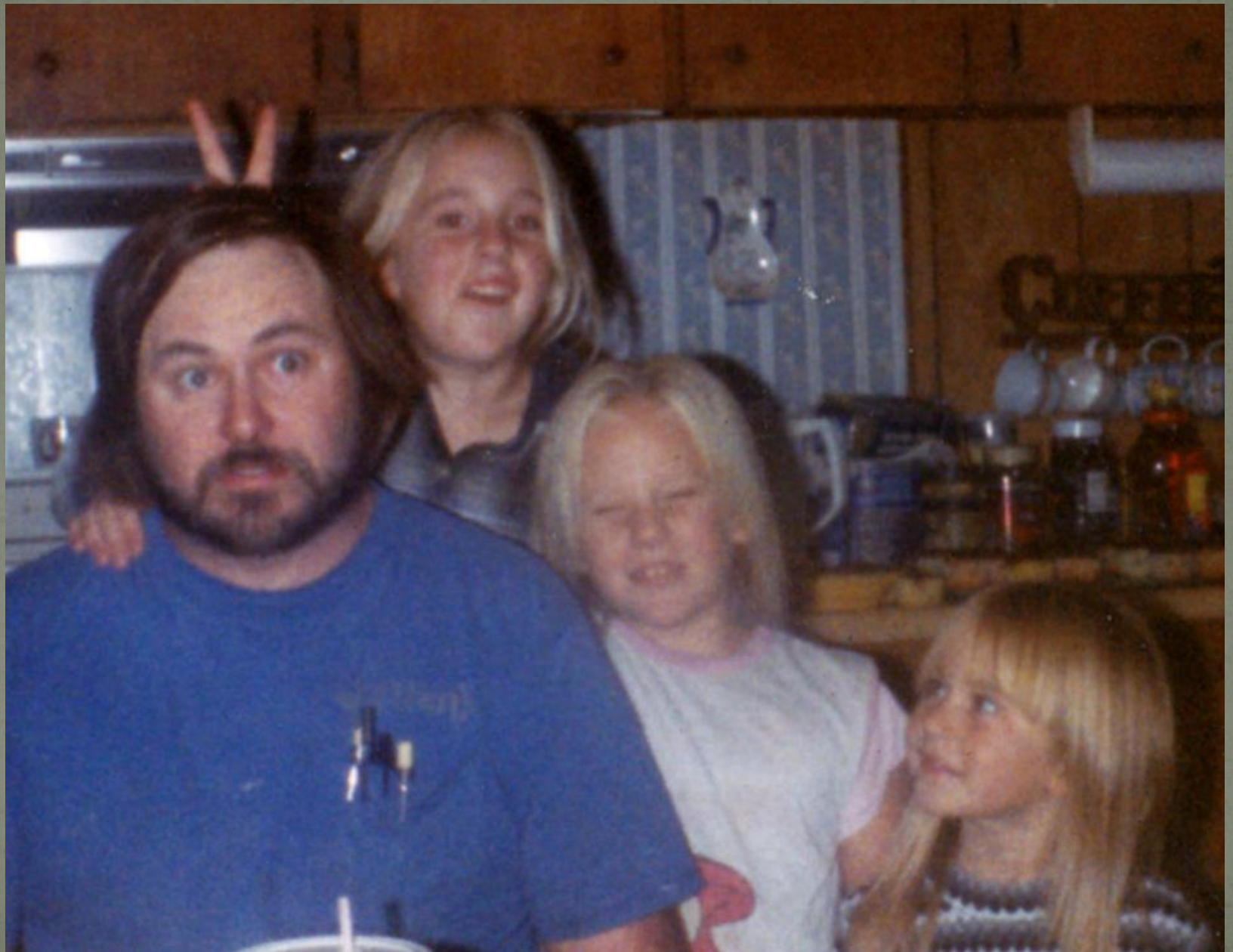
Allen Family Foods, Inc.

C.A. N10C-06-005 CEB





PowerPoint003







Overview

- On June 4, 2008, Herbert Mitchell, an employee of Allen's Hatchery, became engulfed by at least 20 tons of soy meal
- He was entrapped and suffocated to death
- Herb had a wife and 3 daughters, ages 18, 16, and 14

Major Safety Rule Violations

- Defendant Foods had no policies or procedures for bin cleaning, or for engulfment entrapment emergency actions
- Defendant Foods had no OSHA compliant training in grain engulfment or entrapment
- Basic safety principals and methods in these areas were not followed, ignored, or not funded

Evidence of Safety Violations

- OSHA – long standing basic safety mandates
- Defendant Foods violated ALL of these safety rules:
 - **29 CFR 1910.147(c)(4)(i):** Procedures were not developed. Documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:
 - Defendant did not develop clear and specific maintenance and servicing procedures of Silo “B”. The stored energy created by the build up of soybean meal on the internal silo walls suddenly released and flowed out a 3’x3’ opening, engulfing an employee resulting in a fatality.

Evidence of Safety Violations

- **29 CFR 1910.147(c)(7)(i)(A):** Each authorized employee(s) did not receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control:
 - Defendant did not ensure that employees were properly trained in the recognition of hazardous energy sources. Employees were permitted to perform maintenance on Silo “B” while exposed to a hazardous energy source created by a build up of soybean meal on the interior walls of the silo.

Evidence of Safety Violations

- **29 CFR 1910.272 (e)(1):** The Defendant did not provide training to employees at least annually and when changes in job assignments would expose them to new hazards in the grain handling facilities:
 - Defendant did not ensure that employees who were exposed to a new hazard in the grain handling facility were trained on how to remove the soybean meal safely, this resulted in an sudden release of energy engulfing an employee, resulting in a fatality.

Evidence of Safety Violations

- **29 CFR 1910.272 (e)(1)((ii):** Current employees and new employees prior to starting work in the grain handling facility were not trained in the specific procedures and safety practices applicable to their job tasks including but not limited to cleaning procedures for grinding equipment, clearing procedures for choked legs, housekeeping procedures, hot work procedures, preventative maintenance procedures, and lockout/tagout procedures:
 - Defendant did not develop specific procedures for the removal or control of a hazardous energy source prior to starting to work at Silo “B”. The lack of procedures and training, resulted in the soybean meal in the silo to flow out of the access cover which was removed, engulfing an employee resulting in a fatality.

Additional Evidence of Safety Concerns with Silo B

- Summer of 2004
 - The planning, funding and construction start
 - Silo B is constructed to store materials in order to increase production
 - Mill employees requested installation of silo platforms at access doors for safety reasons
 - John VanGinhoven gives a written request to R. Douglas Bradford asking that platforms be installed on the silos

Mitchell Family 2004

- Herb was married and a hard worker
- Spent time with his wife, the girls, and their animals
- Herb was a father, friend, and a teacher of countless things to his daughters
- Amanda is 14, Stacie is 12, and Sara is 10

Ongoing Safety Concerns

- 2005-2008
 - Allen's Hatchery personnel had an annual maintenance wish list that included installing platforms at the silo doors
 - The platforms were never installed, nor funded
 - These requests were made by Allen's Hatchery employees and management for safety reasons as confirmed by multiple employees
 - These written requests were made annually, every year from 2005 to Herb's death in 2008

Ongoing Safety Concerns

- 2005-2008
 - The requests were not funded
 - Silo B Laidig manuals were never followed, nor were they complied with in terms of safety restrictions
 - There was safety coordinator turnover

Mitchell Family

- 2005-2008
 - Herb worked 6 days a week, sometimes 7 days, 60 to 70 hours a week
 - He spent his non-working time with his wife and daughters, teaching them, raising them, loving them; stressing good morals and the importance of education
 - Amanda, Stacie, and Sara were students at Sussex Central High School
 - They were happy, healthy, and dreaming of going to college
 - They enjoyed time with their dad being outside, laughing and being a family
 - The raised many animals on their property; cows, hogs, and chickens



May to June 2008

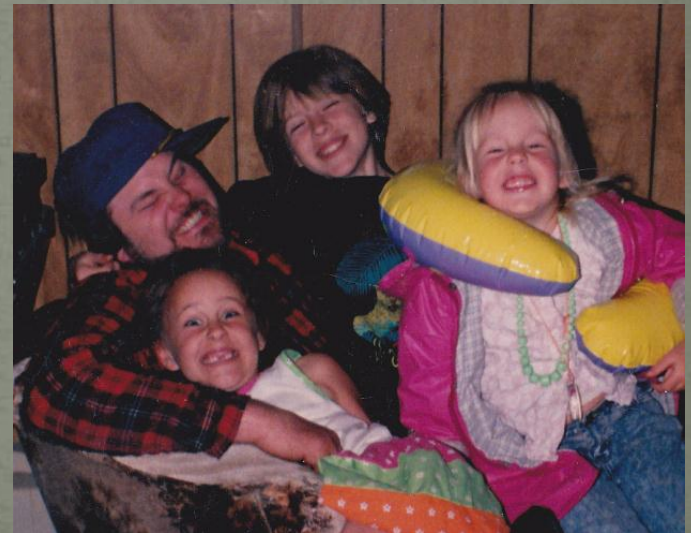
- Silo B appears clogged, material won't flow out
- Have no OSHA mandated policies or procedures, use air lances to try to break up the clogged meal
 - This goes on for nearly 2 weeks
- There is management pressure to get the bin unclogged

May to June 2008

- Herb Mitchell was told to take the silo door off to help try to unclog the meal
 - This went on for several days
- At 2:20pm on June 4, 2008, as Herb was told to put the access door back on, with no silo platforms, no OSHA mandated policies or procedures in place, no outside contractor with the proper equipment to help, and years of basic safety concerns, the meal breaks free and engulfs him
- Herb suffocated to death at age 46

Herbert Mitchell

- Husband
- Father of 3 daughters
- He was a big encouragement to his girls
 - “Give it your all whether you are working as a ditch digger or whether you are the President”
- His daughters will tell you he was just a good all-around person and he would do anything for anyone



Herbert Mitchell

- Received excellent reviews as an employee
- Worked at Allen's Hatchery since 1987
- 2005 – Took the job at the Delmar Mill(part of Allen's Hatchery) to better support his three daughters
- Did maintenance work as an employee of Allen's Hatchery, often working 7 days a week and more than 10 hours per day
- Worked 60+ hour weeks for most of his 3 ½ years with Allen's Hatchery at the Delmar Mill
- Was doing what he was told to do on June 4, 2008

Defendant Foods - 2008

- Self-described industry leader and global exporter of poultry products
 - 3,000 employees in 3 states
- Company Structure:
 - All safety coordinators worked for and were hired by Defendant Foods
 - No safety personnel worked for Allen's Hatchery, Inc.
 - Safety training policies and procedures that existed were created, organized, implemented, and supervised by the safety department of Defendant Foods

June 04, 2008

- On this day, Herb was performing his maintenance duties by preparing to unclog a silo containing soy meal



June 04, 2008



- Herb was in a forklift safety cage near the access door of Silo B, when the soy meal broke free and began pouring out of the open silo hatch

June 04, 2008

- He was buried under the soy meal for about 2 ½ hours until his body was recovered



June 04, 2008



June 04, 2008

- About 55 firefighters and 15 civilians dug through the soybean meal, some using a construction excavator, to recover Herb's body





Accident Investigation Report by Defendant Foods Safety Coordinators

- 3-4 weeks prior to incident problem with grain flow from Silo B was discovered
- Root cause:
 - Lack of an effective bin cleaning procedure (this was OSHA mandated)
 - Lack of work platform at entry access door to provide an area of refuge

Robert Creamer - Safety Coordinator – Defendant Foods

- There was no training safety courses in silo entrapment, grain engulfment or entrapment
- Outside vendor, Mole Master, was not called to unclog bin since not cost effective
- Hatchery employees were performing these tasks since Defendant Foods has no policy or procedures in place and cause of incident was the lack of an effective bin cleaning procedure
- Safety did not have a major presence at the Mill
- Defendant Foods' decision not to have safety personnel at the Delmar Mill was a business decision

[Pg. 84]

John VanGinhoven –Maintenance Supervisor – Allen's Hatchery

- Safety Shortcomings
 - No safety department at Delmar Mill when Herb Mitchell died
 - They had no policies nor procedures about what to do when bin clogged
 - Had taken silo doors off; use air lances to unclog bins
 - There was no engulfment or emergency entrapment plan
 - Defendant Foods' safety department did not have a major presence at the Delmar Mill and that concerned him

Raymond Bradford – Mill Manager – Allen's Hatchery for Delmar Mill

- Prior to Herb Mitchell's death, he requested outside contractor to come on site and clean out bin, request was refused
- This request was made 2 weeks before Herb Mitchell's death
- The estimate for the outside contractor was approximately \$32,000.00 and upper management did not approve the request
- Confirmed a maintenance wish list existed that included silo platforms that were not funded

Defendant Foods' Minimalistic Approach to Safety per Professor William E. Field

- Lacked a trained safety coordinator to comply with state and federal workplace safety regulations
- Lacked documented safety procedures that required safe work practices
- Accepted hazardous solutions that saved money, but increased risk
- Lacked emergency action plans

Safety - Fatal Flaws

- Never had any real training in silo engulfment, entrapment dangers, nor any real training in grain engulfment or entrapment
- Had no bin cleaning policies or procedures
- Had no emergency action plan pertaining to engulfment or entrapment issues
- Had no safety meetings regarding silo inspection, silo cleaning
- Safety people never heard of grain entrapment database
- Proper training on bin cleanout policies and procedures would have reduced risks or dangers to employees

Dr. Richard Parish's Conclusions

- Defendant Foods had no OSHA mandated safety program that required a bin cleaning procedure
- Defendant Foods had no one physically located at the Delmar Mill responsible for safety
- Defendant Foods did not provide OSHA mandated annual training when employees were exposed to new hazards in grain handling
- Defendant Foods did not provide OSHA mandated training in hazardous energy sources

Dr. Richard Parish's Conclusions

- Herbert Mitchell was placed in a dangerous position with no means of escape such as a platform or scaffolding despite repeated requests for such platforms prior to his death
- An outside contractor who had the equipment, experience and training was not called due to costs concerns
- There was a lack of coordination of safety at Defendant Foods

Dr. William E. Field's Conclusions

- **Conclusions as to Liability**
 - Mr. Mitchell was knowingly placed in an extremely hazardous position that provided little or no escape if grain dislodged and began to flow from the access door
 - Opening an access door on a silo containing free flowing material is extremely dangerous and warned against in literature and safety resources of storage facility and equipment manufacturer

Medical Examiner – Cause of Death

- Herbert Mitchell was pronounced dead at 5:00 PM after 2 ½ hours of being buried under tons of soy meal
- Asphyxia due to occlusion of the nose and mouth
- Immobilization of the chest and abdomen by external pressure

Dr. Donald Jason – Forensic Pathologist

- Death due to suffocation from being buried in soy bean meal
- Had a period of conscious pain and suffering for at least 2 minutes
- Herb experienced severe terror while buried and covered by soy bean meal
- Herb developed air hunger, anxiety, panic, headache, and chest pain due to lack of oxygen to his brain from suffocation until he lost consciousness

Plaintiffs' Damages and Losses

- Conscious pain and suffering – SUFFOCATION
- Wrongful death
- Mental anguish
 - Amanda Mitchell
 - Stacie Mitchell
 - Sara Mitchell
- Loss of contributions of support
- Loss of Parental and Household Services
- Funeral Expenses

Amanda L. Mitchell, Individually and
as the Administratrix of the
Estate of Herbert L. Mitchell, deceased,
Stacie L. Mitchell and Sara A. Mitchell
v.

Allen Family Foods, Inc.

C.A. N10C-06-005 JOH



Overview

- On June 4, 2008, Herbert Mitchell, an employee of Allen's Hatchery, became engulfed by at least 20 tons of soy meal
- He was entrapped and suffocated to death
- Herb had a wife and 3 daughters, ages 18, 16, and 14

Evidence of Safety Violations

- OSHA – long standing basic safety mandates
- Defendant Foods violated ALL of these safety rules:
 - **29 CFR 1910.147(c)(4)(i):** Procedures were not developed. Documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section:
 - Defendant did not develop clear and specific maintenance and servicing procedures of Silo “B”. The stored energy created by the build up of soybean meal on the internal silo walls suddenly released and flowed out a 3’x3’ opening, engulfing an employee resulting in a fatality.

Evidence of Safety Violations

- **29 CFR 1910.147(c)(7)(i)(A):** Each authorized employee(s) did not receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control:
 - Defendant did not ensure that employees were properly trained in the recognition of hazardous energy sources. Employees were permitted to perform maintenance on Silo “B” while exposed to a hazardous energy source created by a build up of soybean meal on the interior walls of the silo.

Evidence of Safety Violations

- **29 CFR 1910.272 (e)(1):** The Defendant did not provide training to employees at least annually and when changes in job assignments would expose them to new hazards in the grain handling facilities:
 - Defendant did not ensure that employees who were exposed to a new hazard in the grain handling facility were trained on how to remove the soybean meal safely, this resulted in an sudden release of energy engulfing an employee, resulting in a fatality.

Evidence of Safety Violations

- **29 CFR 1910.272 (e)(1)((ii):** Current employees and new employees prior to starting work in the grain handling facility were not trained in the specific procedures and safety practices applicable to their job tasks including but not limited to cleaning procedures for grinding equipment, clearing procedures for choked legs, housekeeping procedures, hot work procedures, preventative maintenance procedures, and lockout/tagout procedures:
 - Defendant did not develop specific procedures for the removal or control of a hazardous energy source prior to starting to work at Silo “B”. The lack of procedures and training, resulted in the soybean meal in the silo to flow out of the access cover which was removed, engulfing an employee resulting in a fatality.

Negligent Performance of Undertaking Policy/Procedure Development & Training

- It was Defendant Foods' duty to undertake the development of safety policies and procedures for bin cleaning and working near hazardous energy sources;
- Evidence shows that Defendant Foods admittedly failed to exercise reasonable care in creating bin cleaning procedures concerning the control of potentially hazardous energy;
- Evidence shows that Defendant Foods admittedly failed to properly train Hatchery employees in hazard recognition and safety practices.

Dr. William Field

- The OSHA grain standard is universally adopted and compliance is mandatory in all commercial grain entities;
- Policies and procedures must be developed and records kept;
- Right to refuse hazardous tasks and the right to call OSHA must be communicated to employees;
- Training is required and materials must be written, communicated and accessible;
- Herb Mitchell got minimalistic training - Defendant Foods' safety interaction at the Delmar Mill was minimal;
- Safety Dept. wasn't interested in engulfment/entrapment hazards;
- If proper policies, procedures and training were in place, we "would not be sitting here".

Dr. William Field

- Herb Mitchell was directed to be in a unsafe circumstance;
- Safety people were oblivious to the potential for this problem to occur;
- Safety coordinators did not have training in this area - it was widely available in the industry. Field trained neighboring farm;
- Defendant Foods had the ability to write an OSHA compliant bin and cleaning procedure, it was just never done - *Herb Mitchell's death was completely preventable*;
- Defendant Foods' Safety Dept. never read or understood the OSHA grain standard;
- Defendant put finance above Mr. Mitchell's life and that is reckless.

Dr. Richard Parish

- OSHA standards for grain handling facilities:
 - Minimum standards are well known in the industry;
 - Required the creation of bin cleaning policies and procedures;
 - Required those policies and procedures to be in writing with training and implementation.
- Defendant Foods had no policies procedures as mandated by OSHA;
- Defendant Foods was negligent, had a duty, failed their duty, and their failure of that duty caused Mr. Mitchell's death;
- OSHA violations were serious;
- If policies, procedures and training had been in place this incident would not have occurred.

Dr. Richard Parish

- Policies, procedures and training should have been implemented when the silo was placed in operation;
- Defendant Foods' Safety Dept. did not recognize or acknowledge hazards;
- Defendant Foods' Safety Dept. did not have much of a presence at the Delmar Mill – Mill was a safety “step child”;
- Proper policies and procedures did not cost any money;
- Defendant Foods failed every step of the way – they had a safety duty, breached that duty, and caused Mitchell's death;
- The failure to have a bin cleaning procedure is reckless.

Robert Creamer:

Defendant Foods' Safety Coordinator

- Foods had NO written emergency entrapment plan;
- Confirmed Foods' confined space policy did not apply;
- Any Capital Expense Requests over 5K had to be approved by Foods;
- Defendant Foods didn't necessarily do what OSHA required – did what was best for Foods;
- Foods' lack of onsite safety personnel at Mill “was a business decision”;
- Foods Safety Dept. should read safety portions of manuals for new equipment at the time it is installed, yet does not know why no one read the Laidig manual for Silo B in 2004/2005;
- No need for VanGinhoven to contact Safety, he was authorized as a mill manager to OK having the silo door removed;
- Hatchery employees DID NOT violate any written policies.

Robert Creamer:

Foods Safety Coordinator

- The Mill does not get as much safety attention as the processing plants;
- Leading up to and at the time of the accident – a “relationship was still being developed” between Foods’ Safety Dept. and the Delmar Mill;
 - *There was high Safety Coordinator turnover and re-structuring*
- Lack of documentation of Delmar Mill site inspections by Foods’ Safety Department.

Lack of Safety Presence

- William Field: interaction between Foods' Safety Dept. and hatchery facility was *“fairly minimal”* and *“when safety folks visited the hatchery they often did not do walk-arounds or do actual site inspections”*;
- Richard Parish: Foods' Safety Dept. *“had not established a position of trust and confidence so that the Mill people would come to them”*;
- Robert Creamer: *“a relationship was still being developed”* between Foods' Safety Dept. and Mill employees.

What Defendant Told You at Beginning of Trial

- Although there was no written bin cleaning procedure before the accident, the sole change after the accident was a requirement that the access doors not be removed.
- Were you told Mill employees never cleaned bins?

Defendant Foods' Post-Accident Changes in Policies & Procedures:

- BUT - According to Foods' Bin Cleaning Procedure, eight changes were necessary:
 - Bin cleaning procedure is WRITTEN;
 - Implementation of training for the new procedure;
 - Required use of million candle watt handheld light;
 - Required use of bin drills;
 - Installation of fluorescent tape on lower access doors;
 - Installation of platforms at access doors;
 - If entry into bin is needed, approved contractor MUST be contacted;
 - Implementation of Bin Entry Checklist –posted outside all access doors.
- WHY WAS ALL THIS DONE IF HATCHERY NEVER CLEANS BINS?

June 04, 2008



June 04, 2008

- Herb was buried under the soy meal for about 2 ½ hours until his body was recovered



John VanGinhoven

- Foods' Safety Dept. tried to shift their responsibilities onto him in an attempt to lighten their load;
- Foods' Safety Dept. did not have a major presence at the Delmar Mill;
- VanGinhoven explained to Paula Gray that his job was only maintenance and he did not want safety responsibilities because he was NOT trained;
- Had a bin cleaning procedure or checklist been in place on June 4, 2008, VanGinhoven *would have followed it*.

Richard Parker

- Defendant Foods' Safety came to the Mill once every couple months;
- He called an outside contractor for a quote on bin cleaning 2 weeks before the accident;
 - Received no response from Defendant Foods to his request for contractor
- Platforms were installed on the silo after Herb's death, despite the requests being on the Mill "wish list" every year since silo was built;
- Defendant Foods' Safety Dept. never told him that OSHA required a written bin cleaning procedure;
- Why wait until someone passes away before bringing in an outside contractor to clean the bin? It took somebody's life to get it done.

Raymond Douglas Bradford

- Confirms he spoke to Richard Parker prior to this accident to get a quote on an outside contractor to clean the bin;
- He wanted platforms on the silo for safety;
- Felt Defendant Foods' Safety Dept. was not very involved at the Mill;
- Defendant Foods' Safety Dept. never told him that OSHA required a written bin cleaning procedure;
- Believes VanGinhoven would have followed one had there been one in place.

James Burtelle

- Admitted that it was perfectly permissible to remove the door and use the lance without violating confined space;
- He had taken the doors off and done bin cleaning at least 50 times previously;
- He lowered Mitchell before any meal came out of the silo.
- If Mill employees never cleaned bins, why did he create a shield?
- If Mill employees never cleaned bins, why did they have and use air lances?

Jackie Black:

Defendant Foods' Safety Coordinator

- Confirmed there was NO bin cleaning procedure in place prior to this accident;
- After the accident, says he learned from an OSHA representative that a bin cleaning procedure was required.
- Confirmed there was NO indication in Defendant Foods' incident report that a lack of a permit to enter the bin was a cause of the incident, and no indication that confined space policy had been violated.

Paula Gray:

Defendant Foods' Safety Coordinator

- Claims Safety Coordinator transitioning was not turn over;
- Claims no bin cleaning procedures in place because Hatchery does not clean bins;
- Yet admitted NO policies or procedures in place concerning the Hatchery having outside contractors come in to clean the bins;
- Admitted NO engulfment policy or procedures in place *outside* of confined spaces;
- Admitted there is NO mention of violation of confined space program in their own incident report.

Groundless, Baseless Defense

- No written policy that Hatchery did not do bin cleaning.
- No OSHA violation for confined space policy.
- No mention of confined space policy in ANY investigative report, violation letter, or e-mail in the 5 years since Herb Mitchell died.
- Defendant never asked either of Plaintiffs' experts if there was a confined space entry violation.
- Gray admitted NO retraining on confined space safety after this incident despite its occurrence.
- NO Hatchery employee has ever been disciplined for violating the confined space policy in connection with this accident.

Superseding Cause:

Legal Concepts

- If Defendant Foods' negligence was a proximate cause of Herbert Mitchell's death, there cannot be any superseding cause.
- The intervening act must be the sole or only proximate cause of the injury.
- The intervening act must not have been anticipated nor reasonably foreseen.
- The intervening act must be considered highly extraordinary or was extraordinarily negligent.
- The intervening act must cause a different harm than the harm caused by the original negligent act.

Defendant Argument: Superseding Cause

- This argument is false. FACTS:
 - There were NO OSHA violations against the Hatchery regarding confined space entry.
 - All admitted OSHA violations pertain to Defendant Foods' conduct or lack of conduct.
 - NO body parts broke the plane of the silo door. No where in Defendant's confined space training does it say an instrument (such as the air lance) constitutes breaking a plane.
 - Defendant makes no mention of this supposed violation in its own incident report.
 - Since Defendant lacked a bin cleaning policy/procedure, how can Hatchery have acted with extraordinary negligence?
 - Foods left bin cleaning safety to chance and now claims superseding negligence when the chance to which it was left resulted in injury.
 - Foods has NO expert testimony to support its empty claims.

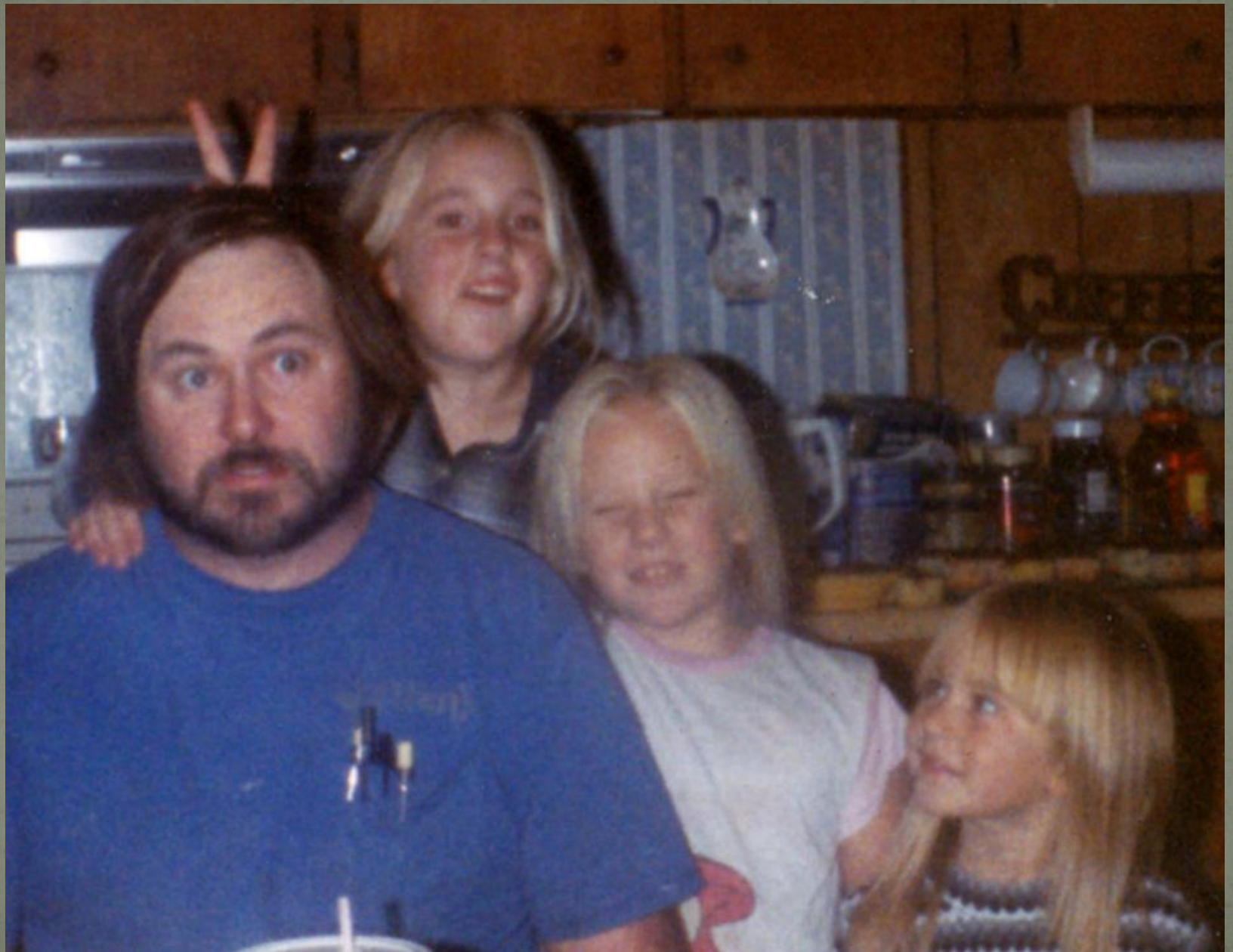
Dr. Donald Jason – Forensic Pathologist

- Death due to suffocation from being buried in soy bean meal
- Had a period of conscious pain and suffering for at least 2 minutes
- Herb experienced severe terror while buried and covered by soy bean meal
- Herb developed air hunger, anxiety, panic, headache, and chest pain due to lack of oxygen to his brain from suffocation until he lost consciousness

Dr. Richard Callery:

Medical Examiner – Cause of Death

- Herbert Mitchell was pronounced dead at 5:00 PM after 2 ½ hours of being buried under tons of soy meal
- Asphyxia due to occlusion of the nose and mouth
- Immobilization of the chest and abdomen by external pressure



Amanda Mitchell

- Age 18 at the time of her father's death.
- Amanda had a close relationship with her dad. She looked to him for guidance, and saw him as a non-judgmental ear that she could talk to about anything.
- She was at work the day of the accident and got a text to come home.
- Fell to the ground outside and started crying when she heard the news.
- Following the death of her mother, Amanda had to assume all parenting responsibilities for her youngest sister and become her legal guardian.
- Had to take on the burden of paying a mortgage at a young age.
- Had to plan her mother's funeral without her father's guidance or support.



Stacie Schuler (Mitchell)

- Age 16 at the time of her father's death.
- Stacie had a warm, loving relationship with Herb. They laughed together a lot, and he taught her the importance of hard work.
- Herb was the only one who could braid her thick hair – he used to braid thick rope when he was little.
- She remembers Herb helping her rebuild a rocket from his childhood for her science project.
- Stacie misses his smile, infectious laugh, and his smell.
- Stacie thinks her mom would have seen a doctor sooner if Herb was still alive when she got sick.
- Herb never got to meet Stacie's husband. She had no one to give her away at her wedding, and had to light a candle for Herb instead of having a father/daughter dance.



Sara Mitchell

- Age 14 at the time of her father's death.
- Herb was the family's rock and the glue that held them together.
- Remembers her dad teaching her how to take care of the farm animals, going over her spelling lists with her, and taking the family to the State Fair.
- Sara did not get to have her father at her high school graduation. She misses him telling her he's proud of her.
- She treasures the love he showed and his unconditional patience.
- Her dad wasn't around to teach her the things he taught her sisters.
- Had to endure her mother's death without her father's presence.
- Didn't have her father's guidance and strength after mom died.
- Sara feels broken, and is still numb from the loss of her father.



Plaintiffs' Damages and Losses

- Conscious pain and suffering – SUFFOCATION
- Wrongful death
- Mental anguish
 - Amanda Mitchell
 - Stacie Mitchell
 - Sara Mitchell
- Loss of contributions of support
- Loss of Parental and Household Services
- Funeral Expenses