

Litigators of the Week: The Weil Team that Turned the Tide for J&J

By Jenna Greene
October 19, 2018

Lit Daily: What were the plaintiff's primary allegations?

Allison Brown: In this case, the plaintiffs, Mr. and Mrs. Henry, sued J&J, alleging that Mrs. Henry's mesothelioma was caused by her use of Johnson & Johnson's baby powder, which plaintiffs claimed was contaminated with asbestos. The Henrys were represented by Chris Swett and Nate Finch of Motley Rice, and Dennis Geier and Jared Placitella of Cohen, Placitella & Roth.

How critical was the outcome of your case as a bellwether to J&J? Did you feel a lot of pressure?

Brown: This was an important case for us and for J&J. The plaintiffs' bar has invested a ton of money and effort into this litigation and there are thousands of these cases pending around the country—including a large number in New Jersey state court.

Unfortunately, despite the complete lack of science to support plaintiffs' claims, recently plaintiffs have won a number of these cases before juries, many of them with large damage awards. We knew a win here was important to help turn the tide in this litigation.

In preparing your case, how closely did you look at the previous trials? Were there some helpful lessons?

Diane Sullivan: Some good lawyers have tried the previous cases and there was a lot to learn from. We definitely looked closely at what folks have done in the past and tried to incorporate those themes



Left to right: Weil Gotshal's Diane Sullivan and Allison Brown.

we thought made the most common sense. We also benefited from some outstanding depositions of plaintiffs' experts that lawyers who came before us had taken.

That said, we had some strong views about how this case should be tried and what evidence was important to focus on versus what evidence was just not playing well with previous juries. With the support of a terrific client, we were able to implement our own strategy and advance those issues we thought were most important.

Why do you think you were able to achieve a different outcome? What were some of the key elements or themes of your presentation?

Sullivan: We approached this case with an emphasis on two things: fraud and common sense. From the very start of the case, we hit hard on our theme that this case was a fraud perpetrated by plaintiffs' lawyers for money.

We argued that the plaintiffs' lawyers were choosing to mislead the jury by cherry picking documents and misrepresenting evidence. Every chance we got, we emphasized the fraud and how far plaintiffs were from meeting their burden of proof—how their evidence that Mrs. Henry was exposed to baby powder with trace asbestos contamination was severely lacking.

We asked the jurors to use their common sense, arguing things like if baby powder really had asbestos in it, then why is mesothelioma in women so rare and why have the rates remained steady for decades, despite changes in baby powder usage? Why had the FDA, NIOSH and premier independent experts at prestigious schools such as Princeton, Harvard, MIT and others consistently found no asbestos in J&J baby powder? Why is there no scientific study showing baby powder causes mesothelioma? And why has no government authority concluded that baby powder causes mesothelioma?

At the end of the day, the jurors held plaintiffs to their burden and found that they did not have the evidence to support their claims.

What was a high point or notable moment during the trial?

Sullivan: Alli's cross of plaintiffs' key specific causation expert and the subsequent juror questions were definitely a high point. Thanks to some good case-specific facts and a lot of hard work by a number of folks on our team, we were able to show some real evidence of the fraud we had been arguing.

During Alli's cross, this expert made a number of critical admissions, including that portions of his expert report were cut and pasted from a letter written by the plaintiffs' lawyers, that the critical "positive testing" on which he was relying was actually not even conducted until months after he issued his opinion, and that although he was a pathologist, he had not been given the key pathology to review for the presence of asbestos.

Following this cross, a juror submitted a question that said something like "you're a pathologist who didn't review the pathology—why are you here?" It was a pretty good day.

The jury only deliberated for 30 minutes before delivering a unanimous defense verdict. What did you make of that?

Brown: We thought it was a mistake. We had just gotten back to the trial site when we got the call that the jury had reached a verdict. The verdict form was 15 pages. We knew they couldn't have gotten through the whole thing in less than a half an hour. So as we walked back over to the court, we convinced ourselves that it was a mistake—that they really only had a question and had not actually reached a verdict.

We were obviously pleasantly surprised. This jury heard our themes loud and clear and answered no to the first question on the verdict sheet—plaintiffs had not proven that Mrs. Henry was exposed to asbestos from baby powder. I think the extraordinarily quick verdict is a reflection of how plaintiffs' claims just didn't add up and if you use your common sense it doesn't take long to figure that out.

Diane, you've played the role of "stopper" before when it comes to mass tort cases in New Jersey. How did some of your past experiences inform your work on this case?

Sullivan: So I have been fortunate enough to have tried some big cases in jurisdictions across the country. But I grew up in New Jersey and many pharmaceutical companies are headquartered here or have cases here. I won three cases for Merck in the Vioxx mass tort litigation, including the first defense jury verdict—all secured in Atlantic City—a then-leading judicial "hellhole" according to the American Tort Reform Association. I was also able to secure, in New Jersey, the first defense jury verdict for Astra Zeneca in their Seroquel mass tort litigation.

This one for J&J was special because I was back in the courthouse where I grew up trying cases over 30 years ago, back in the county where I grew up and graduated public high school, and I was trying it with my friend and longtime colleague. Alli is one of the very best young trial lawyers in the country and it was fun to do this one together and watch her dismantle plaintiffs' key expert.

Certainly I was familiar with the themes and arguments that resonate with New Jersey juries. In fact, for Jersey cases, I test run my arguments with family and close longtime New Jersey friends—they have no problem telling me when stuff sounds like BS or when it works. And this case was kind of personal—I had family members who had worked at J&J; I worked there too for three summers in college and the picture the plaintiffs' lawyers were painting of J&J had no resemblance to the truth.

Tell us a bit about how you two split the duties during this trial and your history of working together.

Sullivan: I came across Alli when she was a junior associate. I didn't know her, but read a deposition she had done where she absolutely took out a plaintiff's witness. From then on, I made sure I had her on my most important cases. Over the years, Alli has made me look a lot better than I am with her masterful depositions, strategy decisions and work at trial. She now leads her own trials and cases so

it was great to have her with me again on this one.

Brown: Everything I know about trial work, I learned from Diane. I first met Diane almost 15 years ago, when Diane had just won the first Vioxx case and I quickly became her biggest fan. Over the years Diane has given me countless opportunities—always with her one signature piece of advice—“don't mess it up.”

Trying this case with her in J&J's backyard and so close to home was extra special. We couldn't have done it without the heroic efforts of our trial team: associates Jed Winer, Emily Pincow, Alexis Kellert, Jack Nolan, Rachel Farnsworth, Marihug Cedeño, and Sara Lonks, and paralegals Lamia Sampson, Roy Gilchrist, and Michelle Esposito.

Do you think it makes a difference in terms of being effective advocates that you're not just colleagues, but also friends?

Brown: Of course. We have a ton of fun working together and we have each other's back. I think our genuine friendship is something that is not lost on the jury. Juries pay attention to everything and they like seeing people who get along and seem to be enjoying what they do.

We're not faking it in front of the jury and I think that comes across. Plus if we weren't such good friends, who would tell Diane she has to stop using outdated pop culture references in her closings?