



Margaret Holman-Jensen (left) and Alice A. Buffington of Zamler, Mellen & Shiffman, P.C. represented Reed Avram in his asbestos case against McMaster-Carr Supply Co.

Verdicts & Settlements Plus

Asbestosis case victory for plaintiffs

Jury agrees defendant should have known of dangers in the 1960s

By Carol Lundberg

Avram v. McMaster-Carr Supply Co. would have been a typical asbestos injury case. It would have probably settled, quickly and for a low amount, if not for defense counsel's desire to take it to trial, said plaintiff lawyer Margaret Holman-Jensen.

Instead, the case turned out to be a win for clients with asbestosis.

"This case was about more than just Reed Avram," she said. Rather, it was about whether a jury would conclude that clients with asbestosis are deserving of non-compensable damages, Hol-

man-Jensen said. And it was about the credibility of her expert witnesses.

Asbestos cases are in "a world until itself," she said. And within that world is the particularly difficult area of representing clients with asbestosis, which Holman-Jensen, partner at Southfield-based Zamler, Mellen & Shiffman, P.C., calls a subtle and non-malignant disease, despite its sometimes devastating symptoms.

Avram worked as a pipefitter at the Ford Rouge plant in Detroit between 1964 and 1972. Prior to that, he had some asbestos exposure in the Navy, and afterward at General Motors where he worked as a pipefitter, Holman-Jensen said.

Today, at age 71, he's been suffering with asbestosis for several years, Holman-Jensen said. Asbestosis is non-malignant, and is

caused by significant exposure to asbestos. It can take between 20 and 40 years to develop.

Avram has developed scarring in his lungs, and due to the scarring, his lungs have lost their elasticity, Holman-Jensen said.

"That makes it difficult to breathe, and it's getting progressively worse," she said.

Because it's a subtle disease that takes decades to develop, asbestosis cases can be challenging, she acknowledged. Adding to the difficulty, many patients, like Avram, are aging when they develop symptoms and some symptoms — like fatigue — are sometimes associated with aging.

And some patients, including Avram, have had lifestyle issues such as smoking or being overweight, which make it difficult to single out the symptoms directly

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related to asbestosis.

Further, many people who develop asbestos-related illnesses have a stoic character that doesn't lend itself to fully describing all their symptoms, Holman-Jensen said.

"Mr. Avram worked around blast furnaces and coke ovens his whole career. These are not light manufacturing settings, where they're making steel," she said. "You have to be pretty heavy duty to work where they make steel. He's just not a complainer."

A rare jury trial

So Avram's lawyers called upon Avram's wife to testify at the trial.

"That was important because sometimes the spouse is a better observer of the injury," Holman-Jensen said.

She said the defense's strategy was to try to discredit plaintiff's witnesses.

It's unusual for an asbestos case to get to trial at all, Holman-Jensen said, adding that the last one she can remember was in 1999. And it's almost unheard of for an asbestosis case to get to a jury trial.

"This was the first one to go all the way through to a verdict in Michigan since 1992," she said. "That's what tort reform has done to these cases."

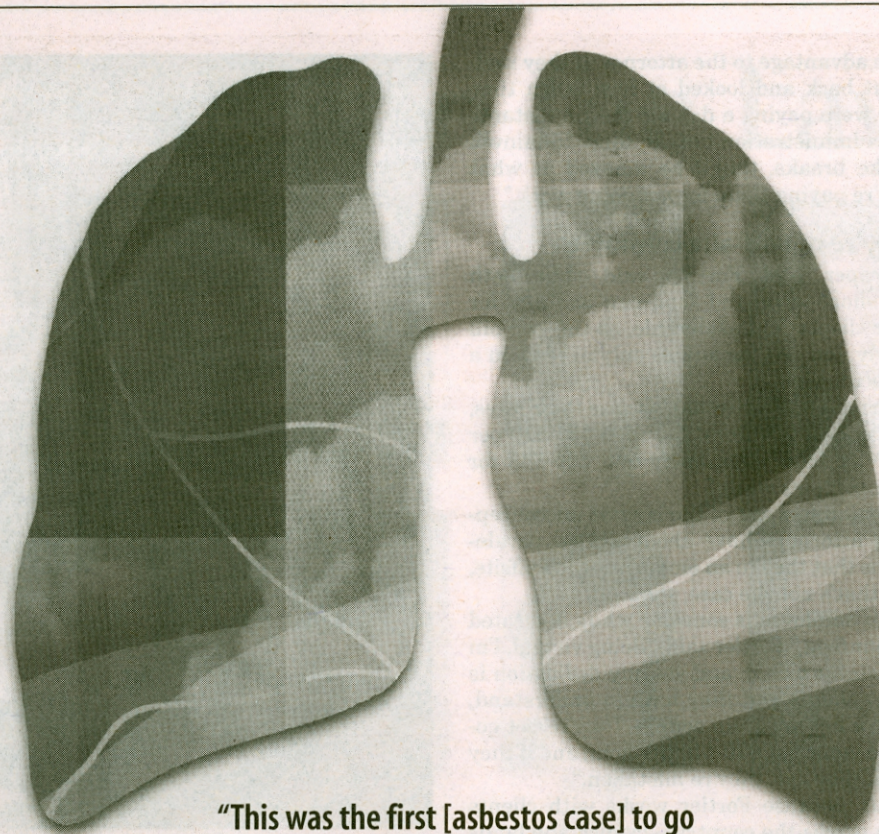
Because so many workers are exposed at multiple job sites, in a typical case, plaintiffs are grouped together for the purposes of discovery, and you sue 80-100 defendants, Holman-Jensen said.

During the course of the case, about half of the defendants will be dropped for a variety of reasons. They could be bankrupt. It could be that they were not a source of significant exposure. In the end, it's typical to settle with about half of the original defendants, Holman-Jensen said.

In this case, there were originally some 90 defendants, plus a number of companies that are now bankrupt.

But lawyers for Illinois-based McMaster-Carr said they wanted to take the case to trial.

"The judge told plaintiff lawyers and defense lawyers to make lists of the cases they'd be willing to put in front of a jury," Holman-Jensen said. "And he made it clear



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— Margaret Holman-Jensen, Zamler, Mellen & Shiffman, P.C.

that he wanted a case where the injury was non-malignant."

Avram's case was on both lists, and was chosen by the judge at random.

"The manufacturers and suppliers never warned workers," Holman-Jensen said. "This company had at least constructive knowledge of asbestos since 1968."

In 1968, the company's product catalog claimed its research department had reviewed and selected the 30 best books on industrial operations. One of them was called "Dangerous Properties of Industrial Materials," Holman-Jensen said.

Holman-Jensen's son went to the University of Michigan library and checked out the book, which described the dangers of asbestos.

The defendant sold a variety of asbestos products, but in this case it was asbestos blankets and asbestos tape.

Credibility contest

In addition to Avram's wife, Holman-Jensen and co-sponsor Alice A. Buffington called expert witness Southfield physician Dr. Jeffrey Parker, who is a board-certified pulmonologist and is certified in internal medicine.

Parker examined Avram and took a health history on him. He took chest film and performed breathing tests, and as a result, he determined Avram had asbestosis, Holman-Jensen said.

She called lay witnesses, including two men who worked at the Rouge plant. One was

a supervisor in a blast furnace area, and he didn't remember Avram by name, but when he saw him, he recognized him as the pipefitter who used to regularly work in that area.

The other witness was a supervisor in a coke oven room, who didn't remember Avram at all, but testified to frequent orders for blankets from McMaster-Carr.

The defense tried to discredit the physician's testimony, calling on another medical expert who said that the changes on the chest X-ray could be attributed to fat or muscle or broken ribs.

And even if Avram had an injury, and it was asbestos-related, the defense argued that there is no way to single out McMaster-Carr, as there were as many as 100 companies that could have exposed Avram to asbestos.

"It came down to being a credibility contest," Holman-Jensen said. "There was no single factor. It was the gestalt of it. The jury looked at everything."

In the end, seven of the nine jurors answered that they believed Avram has asbestosis. All nine of them found that he had plural disease; they unanimously found that he had injury.

They found that the defendant should have known the dangers between 1964 and 1972, and that McMaster-Carr was negligent in selling the product.

The jury agreed there were two non-party defendants who also were responsible.

"The kicker here, and that's the \$60,000 — or \$600,000 question — was, 'What percent of fault is attributable to defendant McMaster-Carr?'" Holman-Jensen said. "The jury said 50 percent."

The total damages were \$60,000 for past non-economic damages, and \$300,000 for future pain and suffering for a life expectancy of 15 years. The jury also awarded \$60,000 per year for three years for lost earning capacity. McMaster-Carr is responsible for half of the total. Defense counsel did not return calls for comment.

A Verdicts & Settlements report of *Avram v. McMaster-Carr Supply Co.* can be found on page 5 of this issue and on our Web site, www.milawyersweekly.com

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.