MASSACHUSETTS
LAWYERS WEEKLY
www.masslawyersweekly.com
January 19, 2015

LAWYERS OF THE YEAR 2014

• HERBERT L. HOLTZ •

Holtz & Reed

PHOTO BY MERRILL SHEA

Few feats are more professionally satisfying than winning a case that others declared "unwinnable."

But being able to break new legal ground may be something lawyers treasure even more.

Boston's Herbert L. Holtz tasted victory in both respects in 2014.

In May, Holtz successfully defended Massachusetts General Hospital and its parent company, Partners HealthCare, in a seven-figure gender discrimination suit brought by orthopedic surgeon Nina Shervin. The doctor contended that hospital leadership had wrongfully placed her on probation during her residency and later refused to offer her a full-time position because she complained about bias.

A federal jury rejected Shervin's discrimination and retaliation claims after a six-week trial in which Holtz argued that Shervin was a promising doctor who had failed because of performance issues.

Jack Connors, former Partners HealthCare chairman of the board, recalls that people thought the case could not be won.

"Not only did [Holtz] make our case, but he blew some pretty impressive holes in their case," Connors says.

Holtz topped the *Shervin* win last August when he convinced Superior Court Judge Jeffrey A. Locke to recognize a new exception to the privacy restrictions of the Health Insurance Portability and Accountability Act. The exception allows health care providers to respond publicly when a patient complains to the media about the adequacy of the care he received.

Holtz notched that win in a high-profile battle between his client, Steward Health Care, and The Boston Globe.

In looking back on the cases, Holtz emphasizes the critical contributions of the teams of lawyers that worked with him.

• • •

Q. *What were your biggest challenges in the* Shervin *case?*

A. My biggest challenge was humanizing very fine people who were otherwise made out [by the plaintiff's counsel] to be the boogiemen. I had to manage these individuals' personal concerns and risks. For example, they subpoenaed Jack Connors. He was called onto the witness stand to provide what the plaintiff believed were party admissions. They weren't; they were hearsay stuff, water-cooler gossip. When you have someone like the chairman of the board who's called in for that purpose, it is a high-wire act for the lawyer to both defend and protect him and manage your way through those shoals to the other side where you are simply getting competent evidence by first-hand witnesses.

Q. *Does the* Shervin *case have any significance beyond the resolution of the dispute between the parties?*

A. There was a macro import to the case. Always overlaying the case was the fact that these employment cases have been ratcheted up to a bigger and bigger economic model. Recent cases that have been successfully brought by these particular plaintiffs' lawyers were all seven figures. There was a huge sea change post-*Shervin*. The tide needed to be turned. *Shervin* turned it because an employer decided to stand its ground, withstood six weeks of a federal trial, and got a jury to come back and say, "There's no there there."

Q. *While* Shervin *was an employment discrimination case and the* Steward Health Care *case involved your client's attempt to view materials a Boston Globe reporter had gathered for a series on the state's mental health system, do you see any similarities in the two actions?*

A. Both cases were about fairness. In *Shervin*, you wanted fair treatment for the chiefs at Mass. General, the chairman of the board of Partners HealthCare, and all the doctors who are trying to serve patients. In *Steward Health Care*, you had a hospital system that treated a patient and the patient is selectively disclosing some medical information [to a newspaper reporter] and withholding other information. All you want is fairness.

Q. *Did you realize when you took the* Steward Health Care *case that you would need to craft new law?*

A. I knew it was going to be tricky. I knew that I did not want to bring a case with a whiff of prior restraint. And I knew that HIPAA is a wickedly complicated regulatory scheme. But I also knew that HIPAA is a procedural regulation and that it does not create privileges. That's the big misconception about HIPAA. There are exceptions to the overarching [privacy] protections provided by it. I had a gut feeling that there might be an exception I might be able to exploit, but I had no idea that there was no law whatsoever on the proposition that I was urging the court to support. In the end, it was perfectly sensible, and it goes to fairness. A patient should not be able to use HIPAA as a sword.

"There was a huge sea change post-*Shervin*. The tide needed to be turned."

Q. *How do you answer critics who say the* Steward Health Care *ruling will chill the willingness of patients to discuss their care with journalists?*

A. What we're really talking about in all these cases is the safety of patients and the efficient delivery of health care. In this case, we had a highly vulnerable population, people suffering from all forms of mental illness. To the contrary, if The Globe was allowed to go forward on an incomplete record based on selective disclosures slanted against the [state's] largest health care provider for mental illness, where would the chill set in? The chill would set in with those people who might otherwise not go to Steward Health Care because they had seen an incomplete, slanted, distorted recitation of what Steward does. Steward does good work. The Globe should have wanted a complete record. Our interests were aligned. We wanted to comment.

— Pat Murphy