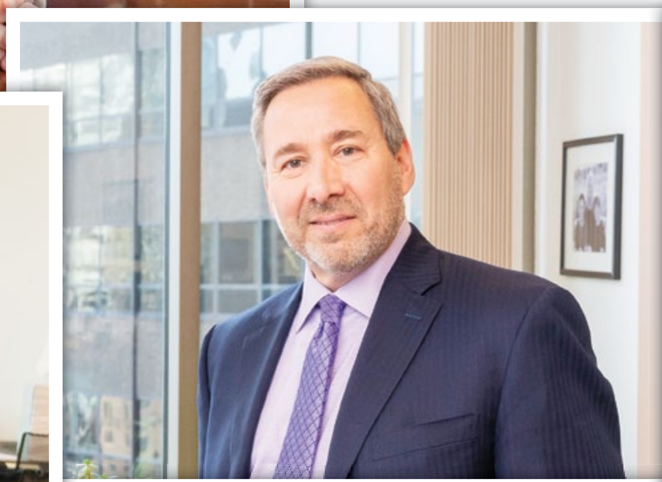
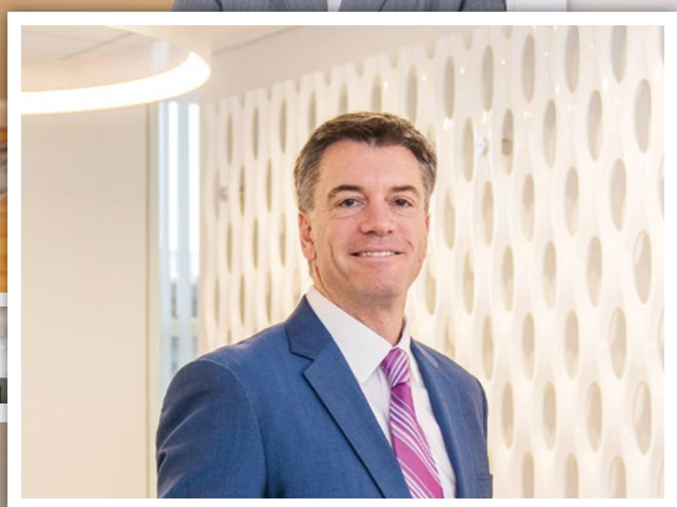
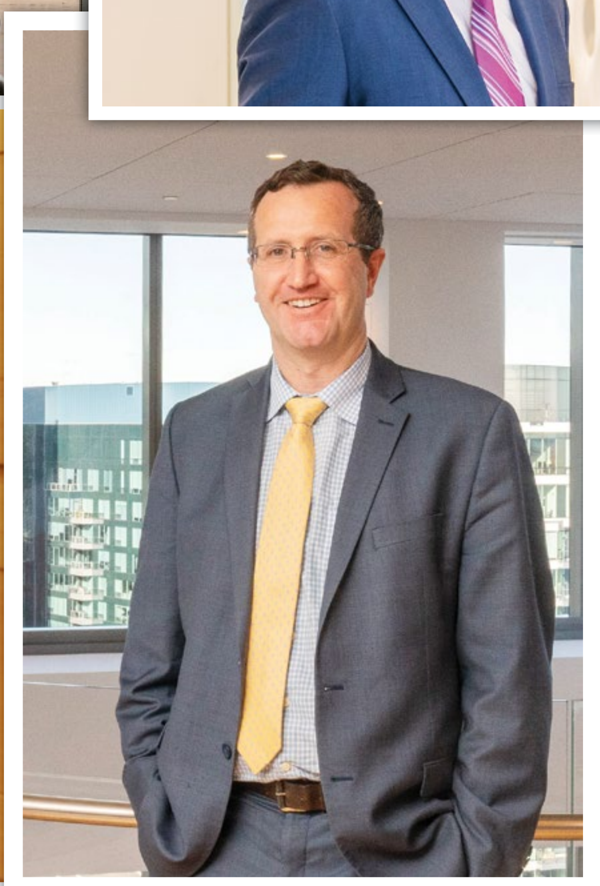
LAWYERS OF THE YEAR

MASSACHUSETTS LAWYERS WEEKLY
2018







EDMUND A. ALLCOCK

Marcus, Errico, Emmer & Brooks

When trustees of the Cambridge Point condominium complex asked Edmund A. Allcock to take over a pending lawsuit against the developer, alleging shoddy construction that resulted in water leaks and mold infiltration, the Braintree attorney jumped at the opportunity.

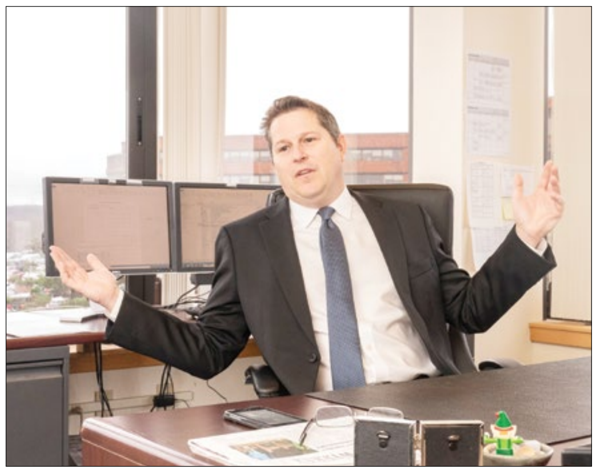
That's because he had been waiting years for a chance to challenge a type of provision in the trust's bylaws — one he labels a "poison pill" — that was blocking the case from being heard.

The provision in question, which condo developers commonly include in association bylaws to shield themselves from liability for poor construction and other types of malfeasance, required trustees to obtain written consent from 80 percent of unit owners before initiating any litigation over common areas and facilities. The developer, as is often the case, owned at least 20 percent of the units, making it impossible for trustees to meet that requirement.

Allcock had fought a similar bylaw in Land Court more than a decade earlier. The case settled without a conclusive decision, but he always believed such provisions were unenforceable. Still, when he took the Cambridge Point case, all indications were that the Supreme Judicial Court would enforce the provision as written.

But in January 2018, the SJC, in *Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC, et al.*, struck down the provision on public policy grounds. Allcock, who had appeared before the SJC on several prior cases, considers this one to be uniquely memorable because of the impact it will have for condo associations going forward and because of the nature of the argument itself.

"We spend a lot of time in appellate courts distinguishing case law and interpreting statutory construction," he says. "But to be able to get a court to say, 'Yes, we see what's written there, but it's just not fair,' is not an easy thing to get a high court to do. It's rare that you get a chance to argue that something's not fair."



Photos by Merrill Shea

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What's the broader significance of this decision?

These provisions have become commonplace … and they undermine an association's ability to sue a developer, whether for construction defects or some other malfeasance like financial improprieties. It could be anything, and it's intended to be a mechanism to effectively prevent condo associations from being able to sue a developer who's done something wrong. This decision impacts every condo association in Massachusetts.

What was the biggest challenge you faced in the case?

The most challenging aspect of the case — and I didn't overcome it — was trying to get the SJC to say these provisions are in all respects void. … I wanted them to say this provision violated the express litigation power conferred upon association boards without any unit owner voting requirement, and that any attempt to require an 80 percent vote would violate the [condominium] statute. They didn't go that far. They said based on the fact that in this case the association couldn't possibly have obtained 80 percent approval, the provision was void for public policy reasons.

What would you consider to be the most important factor behind the result?

The fact that there was absolutely no possibility that the owners could achieve the 80-percent threshold. Even more disturbing in this case is that the client was up against the statutes of limitations and repose. So I think the court saw that and said, "Geez, if we don't provide some relief here, it gives developers a roadmap." You hold onto 20 percent of the units, if you can hold onto them for however long the statutes run, and you can effectively prevent yourself from being sued — even if you've knowingly constructed a defective building or knowingly misappropriated condo funds.

Some might call this ruling an overreach. After all, the bylaws are available to anyone and buyers who don't like the clause are free to look elsewhere, aren't they?

The answer to that is that condo bylaws are not something negotiable. The owner doesn't have an opportunity to say, "I'd like you to change §1(o) of the bylaws." It's not going to happen, and quite frankly it's not something a buyer is going to be looking at. It doesn't relate to being able to have pets or hanging up laundry or prohibitions on smoking. It relates to board operations, and an owner's got to be super sophisticated to think, "Maybe one day I'll get on the board and a legal issue will need to be pursued and we can't pursue it unless we get an 80-percent vote, which will be pretty difficult."

How would you respond to assertions that a ruling like this could empower cliques of influential condo trustees waging costly, self-serving battles with developers at the expense of other unit owners? Some might say that litigation bylaws like this keep trustees in check.

That's a great question. The court asked me this question and I said the funny thing about condo living is that it's probably the purest form of democracy. If you don't like what the board is doing, owners in almost every set of condominium documents I've ever seen have the ability to remove or impeach existing board members with a 51-percent vote. … If an association has a tyrant on the board, in my experience, the political method is usually the method used to resolve that. Throw all the bums out.

This ruling seems to address only common-area defect claims against developers, which means it's still potentially a prohibitive barrier for trusts to take legal action in other contexts. So why is it a big deal?

It's not that often that a condominium association will engage in litigation with a third party. Sometimes you can have a neighbor or sometimes you can be involved in litigation with a contractor the association hired to fix the building 20 years after it was built and they did a poor job. But those are rare. Typically it's a developer issue, and there's a specific exclusion for suits against owners, which quite frankly is probably the majority of suits condominium associations bring.

— Eric T. Berkman

"To be able to get a court to say, 'Yes, we see what's written there, but it's just not fair,' is not an easy thing to get a high court to do."

RUSSELL BECK

Beck, Reed, Riden

Photos by Merrill Shea

Back in 2008, the Supreme Judicial Court ruled that a forfeiture provision in a law firm's partnership agreement did not constitute a noncompete clause to which lawyers couldn't be bound under the state's ethical rules.

Boston attorney Russell Beck mentioned *Pierce, et al. v. Morrison Mahoney LLP* to a friend, state Rep. Lori Ehrlich, offering her the benefit of his expertise if she were ever asked about the case or noncompete agreements in general.

Little did Beck know that he was opening the door to a decade-long odyssey, one that would culminate in 2018 with the Legislature passing a noncompete reform bill and adopting the Uniform Trade Secrets Act with some modifications.

Beck is the first to acknowledge that the legislation is not perfect. But just the fact that a compromise was reached given the wide spectrum of views on noncompetes is a minor miracle, he says.

The days ahead are expected to bring litigation that will help color in the lines of the new law, along with perhaps some technical fixes on Beacon Hill. However, since Oct. 1, employees have been benefiting from the requirement that they be given notice that they will be asked to sign a noncompete, while low-wage and young workers who never should have been bound by noncompetes no longer need to worry about such restrictions.

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How did proposed noncompete legislation in Massachusetts evolve over the years?

I don't think anybody thought it would be a good idea to strengthen noncompetes in Massachusetts. So, we were looking at a ban somewhere between doing away with them entirely and just tweaking them a bit and making them a little more fair.

There were things that were very easy. Nobody really had a problem with banning the use of noncompetes for low-wage earners; it was just a question of how you define low-wage earner. No one had a problem with requiring advance notice of a noncompete; it was a question of how do you define how much advance notice.

The real battleground was the issue of consideration. Do you have to pay something beyond just giving somebody a job in exchange for the noncompete, and if so, what do you have to give them?

One camp wanted what's been called "garden leave," basically paying the person during the time that they're not working, and the other camp wanted existing law, which is "give them a job; that's consideration."

Ultimately, they reached a compromise that said "garden leave or something else."

Some think that lack of definition is a major flaw in the law. What do you think of that criticism?

It's a bit of a tempest in a teapot. Garden leave is one option; the other option is basically anything that the parties can agree on, and there's no definition around whether it can be a peppercorn, as they say, or whether it has to be something material.

I don't think the courts are going to spend a lot of time analyzing what the level of consideration was, though I do think that they're going to expect something more than a peppercorn.

Those who pushed for a stronger ban on noncompetes cite such a ban as the reason Silicon Valley left Massachusetts' tech corridor in the dust. What do you think of that argument?

I don't subscribe to that theory. I think there are a lot of differences between Massachusetts and California.

The reality is there are a lot of factors why Silicon Valley went the way it did, and why Route 128 went the way it did. Take as an example Digital Equipment Corporation, DEC, which had eschewed any sort of personal computer, and so DEC is no longer. Had DEC gone the IBM route, we might see something else on Route 128.

I am sure [California's noncompete ban] had some impact. But it also had unintended consequences. California has more trade secrets litigation than any other state in the country. Trade secrets litigation is an alternative to relying on noncompetes to protect trade secrets, and it's much more expensive litigation, it's much more time-consuming litigation, and it's much more unpredictable litigation.

Your work on noncompetes led you to the White House in 2016. How did that come about?

This all started with the U.S. Treasury Department looking at the impact of noncompetes on the economy. They had relied on a number of things that I had written, some work that I had done, among many other people.

That then led to the White House doing a subsequent report, going more in depth. They reached out to me in connection with that. When they finished their report, they then wanted to pull together a meeting of experts in the field and interested parties and have a small group meeting at the White House to talk about what the policy ought to be.

It was a long meeting that ultimately resulted in a call to action that the White House issued, which suggested some changes states ought to consider with regard to their noncompete laws. A number of states have followed the White House's lead.

Since the law went into effect Oct. 1, what do we know about what's happening in the real world?

It's so early. Some companies have replaced their agreements with new agreements; many others have just left the old ones, and they're just turning to new agreements moving forward.

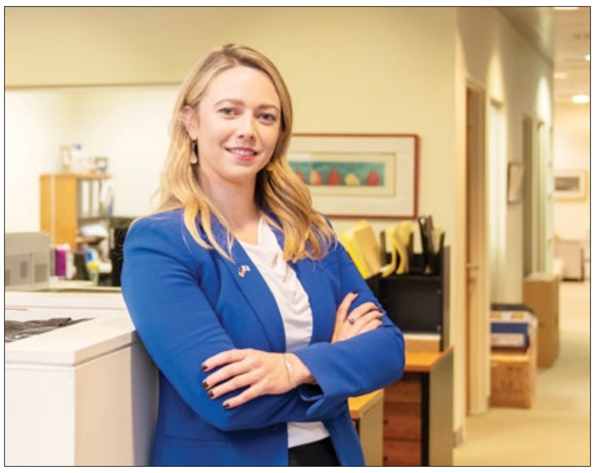
On the litigation side of things, a lot of people are pointing to the legislation and using the policies in the legislation as reasons why a pre-existing noncompete shouldn't be enforced. I have not seen a court bite on that so far.

— Kris Olson

"I don't think the courts are going to spend a lot of time analyzing what the level of consideration was, though I do think that they're going to expect something more than a peppercorn."

ALLYSON N. HAMMERSTEDT

Brigham and Women's Faulkner Hospital



Photos by Merrill Shea

In her very first oral argument before the Supreme Judicial Court, Allyson N. Hammerstedt was faced with a targeted and narrow issue: whether a plaintiff seeking to appeal a medical malpractice tribunal determination can satisfy the statutory requirements by posting a surety bond.

Pursuant to G.L.c. 231, §60B, every med-mal plaintiff in the commonwealth must first present his or her case to a three-member tribunal. If the tribunal finds for the defendant, a plaintiff may pursue the claim through the usual judicial process only after filing a bond "in the amount of $6,000 in the aggregate secured by cash or its equivalent."

In Hammerstedt's case, Doroteo Polanco sued Andras Sandor and two other defendants alleging a complication following gastric bypass surgery. The med-mal tribunal concluded there was not evidence "sufficient to raise a legitimate question of liability for judicial inquiry."

Seeking to pursue his claim in court, Polanco filed a surety bond in the amount of $120.

On behalf of Sandor, Hammerstedt filed a motion to strike the surety bond. Superior Court Judge Maynard M. Kirpalani granted the motion to strike but also — "with some good foresight, as we needed clarification on the issue," Hammerstedt notes — reported his ruling to the Appeals Court.

The SJC then transferred the case on its own initiative.

Leveraging her years of med-mal experience at the Cambridge firm Foster & Eldridge, Hammerstedt convinced the SJC to affirm the trial court ruling and hold that the surety bond was insufficient to satisfy the statutory requirements.

"[A] $6,000 surety bond that cost a plaintiff $120 is certainly not equivalent to $6,000 because it does little to accomplish the Legislature's objective," the SJC wrote in *Polanco v. Sandor*. "Allowing a plaintiff to proceed on something quite less than $6,000 effectively ignores the deterrence intent of the statute."

Hammerstedt, who recently shifted directions by going in-house as a senior risk manager at Brigham and Women's Faulkner Hospital, hopes the SJC decision guides both the plaintiffs' and defense bars in handling med-mal tribunal appeals going forward.

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How common was it for plaintiffs to post a surety bond?

I would say it was a 50-50 split between surety bonds and cash bonds. We typically filed a motion to strike the surety bond in our cases, and judges in the Superior Court have gone both ways in the past, either striking the bond or allowing the plaintiff to proceed. It certainly wasn't unusual, and once the plaintiffs' bar realized that sometimes they could get through by posting just a fraction of the cost required by the statute, it became even more common. Obviously, it's much more financially attractive to post $120 up front rather than $6,000.

What is the harm in allowing plaintiffs to post a surety bond?

If you read through the statute, the goal is not to be punitive. Instead, the goal is to deter frivolous claims. If the SJC allowed a $120 surety bond, it would negate the purpose of the statute. Had the court ruled in favor of posting the surety bond, it really would allow additional frivolous lawsuits to get through, which would have been a waste of court resources and prejudicial to caregivers in the commonwealth, who are busy providing conscientious care to their patients.

How do you respond to critics of the decision that it closes the courtroom doors to poor or indigent plaintiffs?

Those that have been critical of the decision don't recognize that plaintiffs still have the option to file a motion for indigency in the event they are not able to post the $6,000 bond or equivalent.

That has always been an option since the statute was enacted, and I've seen judges rule on those motions many times when a plaintiff is not able for financial reasons to post the bond. A plaintiff does have to show good cause, and a defendant can oppose the motion, which is heard by the Superior Court. This is important because plaintiffs who may not have the resources still have a way to move their cases forward.

What was the experience like arguing before the SJC?

I knew I always wanted to get the chance to argue before the court, but I didn't know I would get the chance this early in my legal career. I spent a lot of time preparing, particularly because this was such a narrow issue and something the SJC hadn't addressed, so I felt the need to educate the court about what the experience has been like in Superior Court and remind [the justices] what the purpose of the statute is.

I went through my argument a number of times, spoke with colleagues who have been through the process before, and even argued the case at the dinner table with my partner, who is outside the legal field, which provided me with a different perspective.

It was a really wonderful experience, albeit daunting. I walked out of court that day not knowing which way they were going to rule.

What happened on remand after the SJC affirmed the Superior Court ruling?

The plaintiff did not ultimately follow the court's instructions to file a cash bond or the equivalent. We filed a motion for final judgment, and that remains pending. Hopefully the case will be resolved soon.

— Correy E. Stephenson

"Had the court ruled in favor of posting the surety bond, it really would allow additional frivolous lawsuits to get through, which would have been a waste of court resources and prejudicial to caregivers in the commonwealth."

JAMES P. LAMANNA

City of Lynn Solicitor's Office

In March 2008, fourth-grader Matthew Mumbauer was pushed down a stairwell by a boy who had been bullying him, leaving him permanently paralyzed. His family sued the city, alleging that school personnel knew Matthew was a target of pervasive bullying and took inadequate steps to address it. In fact, school officials had placed Matthew in class with the bully and forced them to line up together at the start of the school day.

First Assistant City Solicitor James P. Lamanna, who defended the suit, says he was hit hard by the allegations. A lifelong Lynn resident, he's the son of Lynn public school teachers and a parent himself. And the facts of the case were so tragic.

But Lamanna recognized that the Massachusetts Tort Claims Act, which bars negligence actions against cities and towns that aren't the "original cause" of the harm, favored the city.

So Lamanna, who says he has evidence that the incident didn't actually occur on school grounds and that school authorities had taken strong steps against bullying, made a strategic decision to accept the facts as alleged and seek dismissal under the MTCA.

A Superior Court judge granted his motion, and in February 2018, the Supreme Judicial Court affirmed, confirming that public entities are shielded from liability for intentional harm caused by others.

"In this case, I believed I had the law on my side," Lamanna says, noting that Mumbauer ultimately obtained a settlement against the bully and his family. "If there was any doubt in my mind that this didn't happen at school or that the educators had reason to know about [the bullying] and did nothing, it would be a much more difficult case to handle."

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Photos by Merrill Shea

Why is this decision important?

In [*Brum v. Town of Dartmouth*], the original case on this issue, the SJC unanimously held that [the MTCA] provided protection to municipalities and that they couldn't be expected to safeguard every student or citizen absent specific promises of protection. Just as [Justice Roderick L.] Ireland in *Brum* urged the Legislature to correct the statutory language, which he believed amounted to an injustice, he believed the outcome was mandated by the language. Since that time, the Legislature has chosen not to amend the language. But given the limited resources of cities and towns, to be expected to protect against all harm caused by the violent or tortious acts of a third party would bankrupt municipalities and place an unfair burden on school administrators.

What was the most challenging aspect of the case for you?

I had to admit on the summary judgment record that this incident occurred precisely as alleged. Had we lost at the summary judgment level, I was confident [we could show] that the incident didn't happen in school and that no educator had any knowledge of the alleged bullying of the plaintiff. But as counsel for the city I had to argue that the educators knew about this to the point that they may be responsible for the incident but the language of the statute exempted the municipality from liability. …We were unable to present evidence that would have absolved the principal and educators of any liability because it would have created an issue of material fact and summary judgment would have been denied.

Schools act in loco parentis and are responsible for protecting the well-being of children placed in their care. Here, the school arguably failed to adequately protect Matthew Mumbauer. Why shouldn't it be held accountable?

Given all the hats educators wear over the course of the day, to demand they see into the future and prevent any potential violent or tortious acts committed by any non-city actor is a tremendous burden to be placed on any educator or municipal employee who's obligated under the [state constitution] to provide public education to our students.

What was the key factor behind the result you achieved?

The fact that Justice Ireland in *Brum* urged the Legislature to change the law and the Legislature chose not to do so. I argued that it can only be supposed that the legislative intent was to keep the *Brum* holding intact and provide municipalities that level of protection despite the fact that that lower courts have gone around the language by expanding the definition of "original cause."

Some might describe this decision as lessening schools' incentive to take bullying seriously. How would you respond to such criticism?

While civil penalties against a municipality didn't occur in this matter, every educator must be mindful of their obligations as mandatory reporters, whether it's physical or sexual abuse, and they can be criminally liable themselves if they don't act appropriately and their inaction causes harm to a student. Their professional license can be pulled if they don't follow mandatory reporting. I would suggest that may be more appropriate in an individual case where a teacher or administrator or police officer missed the warning signs and didn't report the incidents they're obligated to.

If parents and students can't hold a school district legally accountable in a case like this, what recourse should they have — particularly when there's a catastrophic, permanent injury and, though that may not be the case here, the perpetrator is judgment proof?

Absent evidence that the municipality caused or had inadequate procedures to deal with bullying, I don't believe the law should be interpreted in such a way that the municipality is responsible for the unauthorized actions of non-employees for the sole purpose of ensuring a pocket to make someone whole.

Would you support amending the Massachusetts Tort Claims Act to enable public entities to face negligence liability for actions of third parties in the limited context of victims placed directly in the public entity's care?

I would not advocate for such a change absent evidence that a municipality failed to properly train employees in protocols that should occur upon reports of bullying in a school. But in this case there were no allegations in the complaint that the city failed to adopt proper protocols.

— Eric T. Berkman

> "If there was any doubt in my mind that the educators had reason to know about [the bullying] and did nothing, it would be a much more difficult case to handle."

ALLISON A. MACLELLAN

MacLellan Law Firm

To say that 2018 was a banner year for Allison A. MacLellan would not be an overstatement.

Last May, a Suffolk County jury awarded her client, Gessy Toussaint, $3 million in compensatory damages and $25 million in punitive damages against employer Brigham and Women's Hospital based on Toussaint's claim of retaliation.

Dorchester solo MacLellan then asked for $440,000 in statutory fees. While Superior Court Judge Christine M. Roach cut the requested hourly rate (from $600 an hour to $550), Roach issued a remarkable order praising MacLellan's efforts in the case, giving her "significant credit for her ability to marshal the evidence, in both affirmative and defensive modes, to persuade the jury to arrive at this result."

MacLellan's 2018 success began with her representation of Nirva Berthold in 2013. Like Toussaint, Berthold was a Haitian-American nurse at Brigham and Women's Hospital. Berthold claimed that she had been turned down for a promotion based on her race. When Toussaint stood up for Berthold in the face of a doctor's verbal abuse, she alleged she was subjected to discrimination and retaliation.

Their cases were joined through discovery and pre-trial motions, but just a few weeks before trial, the court severed Toussaint's claim to go first before jurors, in part because it required a mini medical malpractice case on the nursing standard of care.

After two and a half weeks of trial, the jury spent several days deliberating before returning the $28 million verdict for Toussaint on her retaliation claim, but siding with the hospital on the discrimination charge.

MacLellan — nervous during the first day of deliberations — began to relax by late in the second day.

"Anything can happen, but it was more likely they were talking about money than debating liability at that point," she says.

Toussaint cried "tears of joy" when the verdict was returned, MacLellan recalls.

"She's 70 years old and trial is a grueling process," she says. "She felt vindicated."

As did MacLellan when Judge Roach issued her order on attorneys' fees, which rejected the hospital's argument that the amount exceeded prevailing rates, and that the total should be docked for work performed on Berthold's behalf and for claims that were unsuccessful or dropped. The order went on to note that the sole practitioner was significantly outnumbered by the defense team.

Though Toussaint's case remains in post-trial motions, the docket in Berthold's case reflects there was an order of dismissal entered after the action was reported settled.

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The jury sided with the employer on Toussaint's discrimination claim but found for the plaintiff on retaliation. Were you surprised at the split verdict?

Losing on discrimination and winning on retaliation is not unusual in these cases. For a discrimination claim, you have to prove state of mind and why the person did what they did. Rarely will someone say, "I'm a racist!" So we have to rely on circumstantial evidence and it is a more difficult claim to prove.

Retaliation in this case was not difficult to prove because of the timeline. Gessy was a nurse for more than 20 years and worked at Brigham and Women's for over a decade with no problem. Then, all of a sudden, she started getting papered up, one thing after another.

Photos by Merrill Shea

Was it a risk to ask the jury for such a large verdict?

I had asked the jurors for $25 million, and I knew it was a lot of money [to ask] for anybody. But I felt that the case was worth it and [the hospital's] treatment of her warranted it. Brigham and Women's makes $6.3 billion per year. The whole point of punitive damages is to get their attention. If you fine them $100,000, that is not enough to get their attention; that's just the cost of doing business. I was grateful to the jury for getting everybody's attention — to send a message that this won't be tolerated.

In her award of attorneys' fees, Judge Roach said you faced a "virtual barrage of opposition." Was this a David and Goliath-type of situation?

It absolutely felt like David and Goliath. When Berthold first came to me, she said she had shopped around for attorneys and was turned down because people refused to go up against such a big organization.

I was absolutely, definitely outnumbered and outgunned, but it just made me double down on my resolve and work harder. If you dig in and have the passion for the case, that comes through to the jury.

What was your reaction to Judge Roach's award of attorneys' fees?

It wasn't so much about the actual amount she awarded — although I'm really grateful for that. What touched me was that she recognized and commended my work. It is rare that you get that kind of recognition for the hard work you put into a case, and for the judge to write an order like that was very gratifying.

Trial is a moving, breathing thing that involves a ton of work, and doing it all on my own was an extreme challenge. I've done trials on my own before, but this was the most intense because of the breadth of information. I also really liked that she recognized that it is the skill and experience of the attorney and what was involved with the case itself, not the physical address or the size of the law firm.

What is the takeaway from this case?

The verdict proves that you shouldn't be intimidated by what seems to be an overwhelming opposition. Believe in what you are doing, believe in yourself, fight through it, and let the chips fall where they may.

— Correy E. Stephenson

"I was absolutely, definitely outnumbered and outgunned, but it just made me double down on my resolve and work harder."

KEVIN P. MARTIN

Goodwin

A hot-button issue like imposing a special tax on the rich poses a serious risk of exacerbating partisan differences.

So credit Boston attorney Kevin P. Martin for seeing the wisdom of charting a bipartisan course when convincing the Supreme Judicial Court to keep "the millionaire tax" off the November 2018 ballot.

The SJC in its 5-2 decision in *Anderson v. Attorney General* held that AG Maura Healey should not have certified a ballot question asking voters to decide whether to amend the existing flat tax rate mandated by the state constitution in order to impose a 4 percent additional tax on incomes in excess of $1 million.

In *Anderson*, Martin represented the leaders of five business and tax reform groups in arguing that Petition No. 15-17 ran afoul of the ballot initiative process set forth in Article 48 of the Amendments to the Massachusetts Constitution.

Article 48 limits initiative petitions to "related" or "mutually dependent" subjects. Martin convinced the court that the ballot initiative impermissibly combined separate subjects by first imposing the graduated income tax and then limiting the spending of the revenue to two areas, education and transportation.

The co-chair of Goodwin's appellate litigation group led a bipartisan team in *Anderson*. Martin is a former law clerk for a conservative icon, the late Supreme Court Justice Antonin Scalia. The two Goodwin associates who joined him on the case clerked for progressive stalwarts — David J. Zimmer for Supreme Court Justice Elena Kagan, and Joshua J. Bone for Justice Ruth Bader Ginsburg.

Martin says the diverse viewpoints proved to be one of the team's strengths.

"Because we had people from across the political spectrum from very different justices, we were always checking ourselves to make sure that we weren't making arguments that would appeal to only one side of the political or judicial spectrum," he says.

Photos by Merrill Shea

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Was this one of those cases in which your personal beliefs aligned with your clients' interests?

No, not really. This case involved issues very specific to Massachusetts. My view of the initiative process which is available under the Massachusetts Constitution is that it should be exercised carefully by the people in such a way that issues that do require careful consideration by the Legislature are left to the Legislature.

The millionaire tax initiative was setting a tax level in the constitution. It was saying in the constitution where the money had to go. As a result, if after careful consideration the Legislature felt the tax should be something different or the money should go somewhere else, their hands would be tied.

We had people who were supporting the lawsuit who, generally speaking, are on the liberal side of the political spectrum. They actually support a graduated income tax. But looking at the way this particular tax would be imposed and the restrictions on where the money would be spent, they said this is the wrong way to go.

Justice Scalia was viewed as a "strict constructionist." Do you believe the arguments that you made with respect to the millionaire tax initiative would have resonated with him?

Yes. We made one argument that required going back to the history of Article 48 to see exactly what the delegates to the Constitutional Convention [of 1917-1918], who came up with the initiative process, thought they were authorizing. When we went back to see what was actually being contemplated by the delegates, it was absolutely clear that they thought fundamental financial decisions would be left with the Legislature. At the time, they were considerably concerned with money being allocated through the initiative process, so they put in a particular prohibition in Article 48 that there could be no specific appropriations through the initiative process.

But the convention delegates did not include language in Article 48 specifically prohibiting tax increases or decreases, right?

When you actually look at the debates and what [the delegates] thought they were doing, it was clear they would have been equally opposed to any initiative that sets tax rates in the constitution where they can't be affected by the Legislature.

Does *Anderson v. Attorney General* establish important limits to the Massachusetts ballot initiative process?

Ultimately, the way [the SJC] framed the decision reaffirms the principles that had been recognized in earlier cases, which is that you can't cobble together unrelated subject matters in the hopes that, by putting together enough disparate pieces, you get a winning coalition.

Massachusetts voters five times voted against a graduated income tax. Clearly, the thought [by the proponents] here was that, if the money were targeted to two particular purposes, then that would be enough to get the graduated income tax over the hump this time. The court correctly said you're not allowed to do that. People must be allowed to vote on important public policy interests one at a time.

Was any thought given to the policy argument that a millionaire tax would make Massachusetts a less friendly environment for the entrepreneurs and successful business people who provide jobs?

Certainly, that concern was driving many members of the coalition who supported the lawsuit. At the end of the day, however, the lawsuit and the arguments we framed were non-partisan arguments.

What was the one argument you thought you needed to win in order to convince a majority of the court?

We did not want this lawsuit to be viewed as a partisan lawsuit over lower taxes. It was very important to us that the court understand that our arguments go both ways, that [passage of the petition] would prevent a tax cut just as much as a tax increase. The principle of how these decisions get made is an important principle and one worth protecting.

— Pat Murphy

"We did not want this lawsuit to be viewed as a partisan lawsuit over lower taxes. It was very important to us that the court understand that our arguments go both ways."

JENNIFER A. RIKOSKI

Ropes & Gray

Photos by Merrill Shea

When Jennifer A. Rikoski first saw the news coverage of migrant parents and children being separated at the Mexican border last spring as part of the Trump administration's "zero tolerance" border-enforcement policy, she was horrified.

She immediately jumped on a plane to Texas to see how she could help. The idea wasn't totally crazy. Rikoski is an employee benefits lawyer, but she's maintained a pro bono immigration practice for more than a decade. In fact, she helped the Iraqi translator for then-Marine, now-U.S. Rep. Seth Moulton secure asylum in 2006, and she was part of the team of attorneys that showed up at Logan International Airport last winter to fight the administration's Muslim travel ban.

Upon arrival in Texas, Rikoski showed up at the federal courthouse where she recognized an attorney she had seen interviewed on CNN the day before and who was spearheading efforts to reunite separated families. Rikoski walked up to him, said she was with Ropes & Gray in Boston, and asked what she could do.

"His eyes got huge," Rikoski recalls. "He said, 'I went to Yale and know a lot of people who ended up there. How many cases can you handle?'"

Rikoski's response: "I don't know, but I'm happy to start taking them."

At that moment, the Ropes & Gray Border Initiative was born. Rikoski mobilized a team of more than 100 attorneys and dozens of paralegals, staff and support members from 10 offices. For seven weeks last summer, Rikoski's team took on dozens and dozens of clients, fighting to reunite separated parents and children and helping them work through the asylum process.

In total, 75 parents and children were reunited with the team's help. Some have returned home while others are in different stages of immigration proceedings. But as of the fall, all were out of detention facilities.

"I understood that not all of them would have a path toward staying," Rikoski says. "But the unfairness of the process deeply troubled me. And I felt that, as lawyers, we could bring order and decency to how these people were treated."

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What was the most challenging aspect of putting together and overseeing the Ropes & Gray Border Initiative, and how did you handle it?

On any immigration case where there's a humanitarian component, the hardest part is hearing stories of what's happened in their home countries. Everything from a 14-year-old girl being kidnapped and becoming a sex slave to the head of a gang, to people being kidnapped. … [In this instance,] I knew that for so many of these parents my presence there and my colleagues' presence finally would give them some semblance of hope that they would see their children again.

What obstacles did the Trump administration put in your path in terms of reuniting families?

The government kept moving people in the middle of the night between detention facilities. We'd show up one day, meet with a client, and plan to meet with her again the next day. Then we'd show up and she wouldn't on be on the list anymore, and it would take some time to find out she had been moved out of state or within the state to another detention facility.

And one of the hardest things was figuring out where the children were during the first few weeks. We addressed this through persistence. Finding a person within the government willing to share information and having a constant stream of Ropes lawyers on the ground who could show up at an official's office and say, "I'm trying to find this person. She's a client; she's been moved. Can you please help me locate her so we can continue our representation?"

How did you get attorneys who focus on other areas of the law up to speed so they could effectively handle "credible fear hearings" and other unique aspects of the immigration process?

I was very careful to choose a team of people with immigration experience, most of whom were Spanish-speaking. We also made it very clear they were entrepreneurs, helping us write the book on how to represent these families. We told them, "You are going to be working on same document that I am, laying out all the instructions on how to represent these families." They wrote the unofficial guide and asked colleagues to update as they learned new things and asked them to continue to update every week.

What was it like emotionally to be in the middle of this crisis?

I've never had a poker face in my immigration cases, and if I have a client who cries, I cry, too. I can't help it. But at the end of the day, it ends up being an effective way to build trust. … When I walked out of the detention facilities that first week, I remember commenting to a colleague that I'd never seen so many grown men cry in my life. All the dads, one after another, they lost it while talking to me.

Some people insist that, as harsh as it seems, family separation is a necessary means of deterring unauthorized border crossings. How would you respond?

It's cruel. We as a country are better than that. The trauma that we have inflicted on people who are already traumatized because of things that have happened in Honduras and El Salvador and elsewhere in Central America — to think that we the people, the U.S., have done that to them is so heartbreaking to me.

And no, I don't think it's an effective deterrent. If, as a policy matter, we would like to stem the flow of people crossing our southern border, there are so many ways other than separating parents from children.

What would be a better way to maintain secure borders in a manner that still upholds American values?

I'm not a policymaker, but I would say there are laws and we should be following the laws. The recent announcement that we wouldn't allow people to seek asylum at the southern borders except at an official border crossing is in violation of federal law and various international conventions the U.S. has signed onto.

— Eric T. Berkman

"I knew [our] presence there … would give [parents] some semblance of hope that they would see their children again."

RACHAEL S. ROLLINS

Suffolk County District Attorney

Rachael S. Rollins is a competitor through and through.

She played lacrosse in high school and college. More recently, she survived a battle with breast cancer. It's part of her nature to get right back up after being knocked down.

So Rollins wasn't about to shy away from the challenge of beating the Democratic establishment's hand-picked candidate to be the next Suffolk County district attorney.

On Sept. 4, Rollins prevailed over Assistant District Attorney Greg Henning and three other candidates to win the Democratic primary. Rollins topped the field with nearly 40 percent of the vote.

DA Daniel F. Conley had chosen Henning to be his successor when Conley announced last year that he would be stepping down for a job in private practice. By beating the presumptive favorite, Rollins scored an historic upset.

"I was surprised by the margin of victory, but I was not surprised by the victory," she says.

Rollins had an easier time in the Nov. 6 general election, overcoming independent Michael P. Maloney by garnering more than 80 percent of the vote.

Rollins is the latest in a string of criminal justice reform candidates across the country to become the top prosecutor in a major metropolitan market. She promises to reshape the Suffolk County DA's Office to better reflect the diverse communities it represents.

One reform she is intent on implementing is having prosecutors in her office typically decline to prosecute 15 minor offenses, including trespassing, shoplifting and simple drug possession. According to Rollins, the focus should be on treatment and rehabilitation for minor, nonviolent offenses, with prosecutorial resources focused on serious, violent crimes.

Photos by Merrill Shea

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How big of an upset was it for you to win the primary over DA Conley's hand-picked successor?

The overwhelming majority of people believed that the person Dan selected and the police had backed would cruise very comfortably to victory. Obviously, I disagreed with that because I put myself forward and ran. I'm 47, so as somebody who's a little bit older, I thought through and planned what I wanted this [campaign] to look like and then set out to do it.

In addition to defying the political odds, you're a breast cancer survivor. Do you view yourself as a competitor, an overcomer?

Yes. I'm an athlete by nature. I was fortunate enough to receive a scholarship to go to college. Sports has been a wonderful teacher. It has opened up many doors and taught me incredible life lessons that I still use to this day. I'm proud to say that on virtually every team I've ever played on, I've been selected the captain.

Certainly, having survived breast cancer, there's not a lot that I look at and say, "I can't do this."

Since you were running for office in a blue state and a heavily blue metropolitan area, did you see winning the primary as pretty much game, set and match?

Yes, to a certain extent it was like a "one and done" basketball tournament. I had to make it past the primary. We had four other strong candidates. But in fact, what happened after I won is lots of people woke up on September 5 and asked, "Who is this Rachael Rollins?" The progressive platform that I had been speaking about for months prior to the primary, no one was listening because they were sure DA Conley's and the Boston police's candidate was going to win.

[People began to ask about my plan] for this list of 15 crimes that, instead of arresting and incarcerating, we're going to slow the process down and see what services these individuals need and how we can hold them "accountable" without incarceration. Because it's not cost-effective and it's not working. We have a 67 percent recidivism rate. We're criminalizing mental illness, addiction and poverty. I had to defend that much more vigorously [in the general election] than I had prior to the primary.

The conventional wisdom was that the "progressive" candidates would split the vote amongst themselves in the primary, paving the way to victory for Henning, the establishment choice. Did you have that concern?

It was not just the progressive vote. They also said the black vote would be split between me, [state Rep.] Evandro [Carvalho] and [former prosecutor] Linda [Champion]. I told my team to stop getting distracted, just work. At the end of the day, I had to believe that the voters in Suffolk County wanted the most qualified person in the position.

What are the reforms you intend on giving priority to as you take office?

The most obvious is my list of 15 crimes that we're going to try to decriminalize. Also, I don't think enough attention has been placed on some of our "cold" cases. I've met with many leaders of the survivor community that are incredibly frustrated over the number of unsolved homicides. Overwhelmingly they are in communities of color. It's not just the lack of closure. On the one hand, they feel over-policed and over-prosecuted. On the other hand, they feel invisible because their homicides aren't solved at nearly the same rate that white homicides are solved.

It's been said that you don't like being labeled the "first woman of color" in becoming Suffolk County DA. Is that true? If so, why?

It's more nuanced than that. I was accused by The Globe and others of race-baiting because I speak about race. But then they referred to me as the "first woman of color" to be the Suffolk County DA. What I said back to The Globe and others is that I am the first woman in the history of Suffolk County to ever be the DA; not woman of color — woman. I am the first woman of color to ever be a [county] DA in the commonwealth of Massachusetts.

There's a distinction there. You don't get to call me a race-baiter and then put my race into something. I'm the most qualified person for the job, period. I'm going to work as hard as I can to make sure we're successful ending this era of mass incarceration and of penalizing people who are struggling with social issues.

— Pat Murphy

"[H]aving survived breast cancer, there's not a lot that I look at and say, 'I can't do this.'"

BENJAMIN R. NOVOTNY & ADAM R. SATIN

Lubin & Meyer

BENJAMIN R. NOVOTNY (LEFT) AND ADAM R. SATIN Photos by Merrill Shea

For Andrea and Timothy Larkin, it should have been the happiest time of their lives. Instead, within hours of giving birth to their first child, Andrea suffered a rupture of a "venous varix," essentially an aneurysm, in her brain, forever altering their lives.

A few years earlier, the varix had been detected through an MRI at Massachusetts General Hospital. Her primary care doctor, an employee of defendant Dedham Medical Associates, was informed of its existence. But that doctor failed to note the varix on Andrea's "problem list," and thus her obstetricians were unaware of a condition that likely would have led them to counsel her to deliver the baby by Cesarean section.

A former elementary school teacher, exercise class instructor and marathon runner, Andrea has been left paralyzed and requires around-the-clock care.

The Larkins sued Dedham Medical Associates, and after a two-week trial in 2015, a jury awarded them $35.4 million.

In post-trial motions and then in a petition to the Appeals Court, Dedham Medical Associates challenged the trial judge's ruling not to allow it to amend its pleadings to invoke as an affirmative defense G.L.c. 231, §85K, the state's charitable liability cap, which could have reduced the judgment to a mere $20,000.

However, the Appeals Court ruled that the charitable liability cap is an affirmative defense that must be pleaded. The court rejected the appeal, preserving the efforts of Adam R. Satin and Benjamin R. Novotny and others at Boston law firm Lubin & Meyer to ensure that Andrea Larkin will be taken care of for the rest of her life.

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Ben, you tried this case with your colleague Karen A. Zahka. How did you obtain the initial verdict?

BN: The benefit is always having unbelievable clients. [Andrea Larkin] was awesome — master's degree, fifth-grade teacher, yoga-Pilates instructor. Perfect health is always a good place to start in a malpractice case.

The best part of the whole trial was when, three hours [into deliberations], the jury asked for a calculator. That was my fondest moment of the whole trial.

But then the issue of the charitable cap comes up late in the game.

BN: They asked us to stipulate to that early on, and we ignored the request, which actually helped in the appeal part because it showed the judge and the court that we weren't agreeing to waive that as an issue.

The defendant produced a state certificate attesting to its nonprofit status. Why is that not dispositive of its entitlement to the charitable cap?

AS: It's only a piece of evidence of a defense that they have an entitlement to. When Ben said they tried to get us to agree to it "early on," he's talking about early on in the trial. So it's years and years while this case has been litigated and discovery is over.

There are elements that are factual in nature that you have to prove in order to make out that affirmative defense. We didn't have the opportunity — because they didn't plead it — to develop our counter evidence to that.

Adam's name appeared in the tragic story in Boston Globe Magazine about Laura Levis, who died of an asthma attack outside Somerville Hospital, in the context of having to inform her husband that there was no way around the $100,000 damages cap. Have these laws outlived their usefulness?

AS: [Though] that's a different liability cap — one is for governmental employee immunity, and the other is for charitable immunity — in the end it's the same thing. That body of law really comes from just an outdated, unfair common law that then was put into statutory form. You used to not be able to sue the king. The way the law ultimately progressed was the Legislature said, "OK, you can sue the king but not for much."

We just don't feel that the way [modern] organizations run, and the revenues that they generate certainly, call for that kind of overbroad protection without any commonsense sort of escape hatch for the truly tragic cases.

Your adversaries wrote to Lawyers Weekly, taking issue with your contention that their failure to plead the cap was something other than an inadvertent oversight. Do you wish to modify your comments?

BN: I think it's a tough argument for them to make when they pleaded eight other affirmative defenses. How can they just say, "We left out No. 9"? Did you leave out No. 10?

They are experienced trial lawyers; they've been in dozens and dozens and dozens of cases. If they wanted to plead it, they would have pleaded it.

AS: In addition, the trial record doesn't really have anything about why this wasn't pled. You didn't get an affidavit from some employee saying, "I was told to do this and I forgot to put it in and it was missed." You didn't get an affidavit from the lawyer saying, "We reviewed the defenses and knew we had to do this, but it got cut and pasted wrong," or something.

What has happened since the Appeals Court's decision?

AS: At some point, we were able to settle with the doctor in the case but not Dedham Medical Associates. In addition, we filed yet another piece of litigation against the insurance company for a number of violations of Chapter 93A.

Ultimately, what we ended up having was a high-low agreement on the outcome of the appeal. If we won, we would collect $38.6 million. Everyone wanted everything wrapped up. The case had taken years and years to that point. So, in the end, we got [$5 million] more than what the judgment would have entitled us to and spared the client needing to litigate the 93A claims.

How is the Larkin family doing?

BN: They are so salt of the earth. [The settlement] hasn't changed their day-to-day lives. He still goes to work. He still takes care of his daughter. And nothing's going to change what Andrea's going through; she's going to be paralyzed for the rest of her life. But it's given them peace of mind knowing, no matter what happens to them, she'll be taken care of for the rest of her life.

— Kris Olson

"The best part of the whole trial was when, three hours [into deliberations], the jury asked for a calculator."

MICHAEL C. SHEPARD

Shepard Law

Photos by Merrill Shea

As if winning a $43.1 million verdict against the country's second-largest cigarette maker weren't enough, Michael C. Shepard also can take credit for having led the first legal team to take on both tobacco and asbestos defendants simultaneously.

The Oct. 12 verdict was the culmination of a three-year case the Boston lawyer calls "a true David and Goliath" battle against two tobacco companies and five manufacturers of asbestos-containing brakes.

The David in the story was Louis Summerlin, diagnosed with lung cancer in 2015 after decades of smoking menthol cigarettes and years of working as a brake mechanic.

Summerlin died soon after the case began, but Shepard's team pressed on through a protracted and expensive fight on behalf of his widow, Joanna Summerlin.

Key to the case, according to Shepard, were documents made public under the 1998 Tobacco Master Settlement Agreement between 46 states and the country's four largest tobacco companies.

"Internal documents showed how they could manipulate to the hundredth of a milligram how much nicotine went into each cigarette," he says. "And that they were designed with menthol, which the companies understood made it easier to initiate and sustain addiction."

Four asbestos defendants, larger companies whose internal communications Shepard says showed their own awareness of their products' hazards, settled before trial.

After a five-week trial with the remaining defendants, a Suffolk Superior Court jury returned the judgment, including $30 million in punitive damages, against R.J. Reynolds Tobacco Co.

Defendants Philip Morris, whose cigarettes the decedent didn't smoke until the 1980s, and smaller brake manufacturer Hampden Automotive Sales Corp. were found not responsible for Louis Summerlin's cancer.

"I think the jury decided the smoking our client did in the early stages was the overwhelming cause" of his disease," Shepard says.

With a Chapter 93A claim still pending, he expects final judgment in *Summerlin v. Philip Morris, et al.* to be entered in January.

Shepard was joined in what he calls "a true team effort" by his colleagues Michael J. McCann and Erika A. O'Donnell; and co-lead counsel Jerry H. Block, Bobby Ellis and Amber R. Long, of Levy Konigsberg in New York.

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Why did you choose to combine the tobacco and asbestos claims in one trial?

Traditionally, we've tried the asbestos and tobacco cases separately. We decided to try these together because in a lung cancer case, unlike a mesothelioma case, the defense of smoking was something that tobacco companies would always raise, and it became the "empty chair defense." They would blame the plaintiff's smoking as opposed to a maybe decades-long occupational asbestos history. In a mesothelioma case it doesn't matter, because smoking doesn't play any role in causing mesothelioma.

You have two gentlemen who can have almost identical exposure histories to the same amount of asbestos and yet one gets mesothelioma and has a viable cause of action against the asbestos companies, but the other gets lung cancer and the companies tend to get off the hook because they blame his tobacco use. We decided to take away the empty chair by putting tobacco in that chair.

You argued that the tobacco and the asbestos had a synergistic effect in causing your client's disease. How did you try to prove that?

That was a challenging part of the case, because there's good science out there on the synergistic effect between tobacco and asbestos exposure, but you can get caught in the weeds in trying to explain that to the jury. In simple terms, we're trying to convey to the jury that you don't just take the risks from asbestos and tobacco and add them together. They work in such a way that one plus one is greater than two.

It gets difficult because the science doesn't agree on whether it's a multiplicative or super-additive synergism, and once we start getting into terms like that, the jurors' eyes start glazing over. I don't know how well we were able to do it, but we did the best we could.

Are there unique challenges in jury selection in a case like this?

Yes, there are. It was interesting because now that we're allowed voir dire in Massachusetts, we thought we would have a better shot of seating a jury that wouldn't come in with biases about smoking or about asbestos exposure.

Not every judge implements voir dire the same way, and our voir dire was very limited. But what we found was we were able to at least get some information about tobacco histories of some of the jurors — about who had tried to quit and what their views were on whether tobacco was addictive or whether a person was able to quit. That was important because we wanted people to be able to listen to the facts specific to our client and hopefully be fair and impartial with those facts as opposed to their own experiences.

Do you expect R.J. Reynolds to appeal? If so, what do you expect to be the basis of the appeal?

Absolutely. I think that they're going to have a difficult time trying to convince an appellate court that something was done wrong at this trial, because we followed like a Bible the SJC's very detailed opinion in *Evans [v. Lorillard Tobacco Company]* on how to try a tobacco case, on what evidence is permissible, on jury instructions, and what claims can and can't be brought.

When it came to how certain evidence was handled, whether certain evidence could come in, or what the jury was to be charged with, the *Evans* case really controlled. I expect that R.J. Reynolds is going to have a difficult time telling the SJC that they got the *Evans* case wrong.

How has the landscape for tobacco litigation changed in the 20 years since the Master Settlement Agreement?

What you're finding is firms like ours are more willing to take on the cases. Now that we have all the documents, we know exactly what the tobacco companies knew and when, and we can counter a lot of the defenses that they've used over all these years that blamed the smoker.

The internal documents put the lie to that defense, and now it's just a matter of having the resources and time to put these cases together. The defense has gone from just blaming the plaintiff to making it very, very expensive to try these cases. That's why you don't see so many of them, because it's a tremendous investment of time and money to put these cases on.

— Matthew Cove

"The defense has gone from just blaming the plaintiff to making it very, very expensive to try these cases. That's why you don't see so many of them, because it's a tremendous investment of time and money to put these cases on."

EMILY E. SMITH-LEE

SLN Law

Photos by Merrill Shea

Some in the legal profession may have been surprised by the Supreme Judicial Court's landmark decision in *Rafferty v. Merck & Co.* in 2018, imposing a duty on the manufacturers of brand-name drugs to warn consumers of the risk of their drugs' generic counterparts.

But Sharon lawyer Emily E. Smith-Lee knew from the start that she had a significant legal issue on her hands when she began representing Brian Rafferty in 2012.

In August 2010, a doctor prescribed Finasteride — originally sold by Merck under the name Proscar — to treat Rafferty's enlarged prostate. Shortly after he began taking the generic form of the drug, Rafferty began to experience side effects that only worsened when he weaned himself off it.

Rafferty was eventually diagnosed with hypogonadism and androgen deficiency, for which his treatment may continue indefinitely.

The generic form of the drug Rafferty took bore a warning label identical to Merck's label for Proscar.

Pursuant to the 1984 Hatch-Waxman amendments to the Food, Drug and Cosmetic Act, the manufacturer of a brand-name drug is solely responsible for ensuring that the warning label is adequate and accurately reflects the latest information about possible side effects. The manufacturer of a generic drug merely needs to ensure that its label mirrors that of its brand-name counterpart.

In 2013, Smith-Lee filed suit on Rafferty's behalf against his doctor and Merck, asserting claims of negligence for failure to warn and a violation of G.L.c. 93A, §9. A trial court judge granted Merck's motion to dismiss, and the SJC transferred the case from the Appeals Court on its own motion.

With a fair amount of pharmaceutical defense under her belt, Smith-Lee was well aware of the challenges in facing off against a company such as Merck.

"Sometimes you encounter an interesting and problematic piece of the law in the middle of the case, but we knew from the beginning what freight train was coming down the tracks," she says.

That train stopped for Smith-Lee and her client when the SJC agreed that Rafferty and other generic drug consumers should have some form of legal recourse against brand-name manufacturers.

By adopting the minority rule — recognized by only a handful of other jurisdictions — the court held that companies like Merck can be liable under a common-law recklessness claim if they intentionally fail to update a label despite knowing or having reason to know of any unreasonable risk of death or grave bodily injury.

For Smith-Lee, the victory was the logical outcome.

"Sometimes you believe you are right and hear the other side and adjust your lens a little bit," she says. "In this case, there was just no way I could get my head around the idea that under our tort law, no remedy exists for 80 percent of the people taking a drug."

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How did you approach the case, knowing you had a big issue on your hands?

We very intentionally did not bring a product liability claim and instead solely alleged a negligent failure to warn. Facing a growing tidal wave of decisions favoring the manufacturers in this category in federal court, we spent two years fighting the battle about remanding the case to state court after Merck removed it. We understood it was important that the state courts decide this issue.

What was the oral argument before the SJC like?

The stakes seemed so much higher and it felt like a higher level of gravity. There were quite a few amicus briefs submitted by industry-friendly organizations and just us on the plaintiff side.

But I knew things were going to be OK when 30 to 40 seconds into Merck's argument, Chief Justice [Ralph D.] Gants stopped their attorney and said, "Imagine if the facts were different and you manufactured a drug called thalidomide … ."

Did you have mixed feelings about the SJC ruling, since the justices closed the door on a failure to warn case but allowed common-law recklessness claims for plaintiffs?

Very little mixed feelings, as I am extremely proud of our work and the result. In the end, they split the baby to a certain extent. Although the opinion does not allow ordinary negligence, it still makes us one of three jurisdictions that does recognize some path to accountability for generic drug users. Things happen in steps, and I would take the result we got any day of the week.

Is it unfair to place the burden to warn consumers of generics on the makers of brand-name drugs?

Understand that all of the major pharmaceutical players are in both markets, with brand-name drugs and generic lines. There is not some community of generic drugmakers separate from brand-name makers. For every one instance of a brand-name manufacturer paying liability for another company, they will receive the same windfall with regard to one of their generics.

And yes, it is fair because [the brand-name manufacturers] are the only ones who can fix [the labels].

Though the SJC affirmed dismissal under Chapter 93A, the justices did so with leave to amend based on their ruling. What is the status of the case now?

We will be dismissing the case after reaching a confidential resolution. Somebody else can test the SJC position. I expect plaintiffs' lawyers are taking a hard look at their cases to see if they fit within the goalposts of the decision, and we will see [another case] the next time there is a clear, knowing failure to warn by a brand-name drugmaker.

Or I suppose it is up to the manufacturers, who could just start providing adequate warnings and then we wouldn't see any more cases.

— Correy E. Stephenson

"There was just no way I could get my head around the idea that under our tort law, no remedy exists for 80 percent of the people taking a drug."

Leaders in the Law

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