16-P-34 Appeals Court

HYANNIS ANGLERS CLUB, INC., & others[1] vs. HARRIS WARREN COMMERCIAL KITCHENS, LLC[2] (and a consolidated case[3]).

No. 16-P-34.

Barnstable. October 14, 2016. - May 23, 2017.

Present: Vuono, Massing, & Sacks, JJ.

Consumer Protection Act, Unfair or deceptive act, Attorney's fees, Damages. Fraud. Deceit. Damages, Consumer protection case, Deceit.

Civil actions commenced in the Superior Court Department on September 6, 2011, and April 29, 2013.

After consolidation, the case was tried before Christopher J. Muse, J., and a motion for attorney's fees and costs was heard by him.

Stephen Soule & Clyde K. Hanyen, Jr., for Hyannis Anglers Club, Inc., & another.
John J. Lang for Harris Warren Commercial Kitchens, LLC.

[1] Oceans Harbors, LLC, and Certain Underwriters at Lloyd's London.

[2] Doing business as Harris Warren Commercial Kitchen Service.

[3] Harris Warren Commercial Kitchens, LLC vs. Ocean Harbors, LLC.

VUONO, J. Shortly after 5:00 A.M. on August 27, 2010, a fire erupted in the kitchen of a restaurant in Hyannis owned by Oceans Harbors, LLC (Harbors). The blaze originated in a "Pitco Frialator" (fryer),[4] a cooking appliance, which, some twelve hours earlier, had purportedly been repaired by a technician employed by Harris Warren Commercial Kitchens, LLC (Harris), a firm engaged in repairing commercial kitchen equipment. The restaurant operated on the first floor of a two-story building owned by Hyannis Anglers Club, Inc. (Anglers Club). The Anglers Club, Harbors, and their insurer, Certain Underwriters at Lloyd's London (Underwriters), brought this action against Harris seeking damages for the losses caused by the fire and for violations of G. L. c. 93A, §§ 2 and 11.[5]

Following a trial in the Superior Court, a jury found that Harris was negligent, and the plaintiffs were awarded $686,496.44, exclusive of costs and statutory interest.[6] Thereafter, the trial judge, who had reserved for himself the plaintiffs' claim under c. 93A, entered findings, rulings, and

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[4] The fryer is used for deep frying various foods such as potatoes, shrimp, and clams.

[5] Harris, in turn, filed suit against Harbors, seeking contribution on the theory that Harbors was negligent and, as such, liable as a joint tortfeasor. The two actions were consolidated for trial. In response to special questions, a jury found that Harbors was not negligent.

[6] The parties do not challenge the jury's verdict.

an order in which he concluded that Harris had violated c. 93A when its employee, for whom Harris was vicariously liable, disabled a safety switch on the fryer, concealed this fact from Harbors, and falsified the associated work documentation in violation of the Attorney General's rules and regulations regarding repairs and services, 940 Code Mass. Regs. § 3.08(1)(e) (1993). The judge ruled that this deceptive conduct "caused the fire that damaged plaintiffs' businesses and property." However, the judge declined to find, as the plaintiffs alleged, that Harris had wilfully or knowingly violated c. 93A, a ruling that foreclosed an award of multiple damages. Because the plaintiffs prevailed on their c. 93A claim, the judge awarded attorney's fees and costs. The award for one attorney's services was substantially less than the amount sought by the plaintiffs, as the judge computed that award using a contingency fee agreement, rather than the lodestar method.

The parties filed cross appeals from the judgment on the c. 93A claim. The plaintiffs contend that the judge erred in declining to award multiple damages and abused his discretion by declining to award the full amount of attorney's fees they requested. Harris contends that the plaintiffs' complaint did not provide adequate notice of the alleged c. 93A violation and the judge erred by concluding that the conduct of Harris's employee was the proximate cause of the plaintiffs' injuries.

For the reasons that follow, we affirm the judgment in part, reverse it in part, and remand the case for further proceedings.

Background. The trial judge accepted the jury's finding of negligence and the award of damages. Based on the evidence presented at trial and the reasonable inferences therefrom, he found the following subsidiary facts. On August 25, 2010, Harris dispatched its employee, James White, to repair a convection oven at Harbors's restaurant. While White was on site, Harbors's day chef asked him to take a look at the fryer. The fryer had been shutting down while in operation, which caused the cooking oil in the fryer to cool and required the pilot light to be relit.[7] White concluded that the fryer needed a new high limit switch. He ordered that part and an igniter for the convection oven to be delivered overnight to Harris's office.[8] The next day (August 26), White returned to the restaurant with the parts that he had ordered. White installed an igniter in the convection oven, but he did not install the new high limit switch in the fryer. Instead, as the judge found, White left the restaurant without finishing his work "for

[7] The fryer was equipped with a thermostat that regulated the temperature of the cooking oil and a high limit switch that was designed to automatically shut off the fryer in the event that the cooking oil reached a temperature in excess of 450 degrees Fahrenheit.

[8] White had experience working on Pitco fryers and had installed many high limit switches.

his own convenience and personal benefit."[9] Before he left the kitchen, White informed the day chef that repairs had been made to both the oven and the fryer, and White handed the chef a work order. White's work order provided in pertinent part: "Install Hi-Limit + re-wire to unit -- check operating temps OK."[10]

Later that evening, at approximately 9:30 P.M., the fryer overheated and belched smoke. By turning the fryer's control knobs back and forth, Harbors's night chef was able to stop the overheating. The fryer promptly cooled down and remained so until at least 1:30 A.M., when Harbors's manager closed the restaurant and building for the night. The manager checked the fryer before he left the building.[11]

During the early morning of August 27, a fire alarm system in the building triggered an alert to the Hyannis Fire Department, which promptly responded. The fire was ultimately suppressed. Investigators determined that the fryer had malfunctioned and sparked a blaze. Further testing by experts

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[9] At trial, White admitted that he did not install the new high limit switch as indicated in his work order. He explained: "I was very sick that day [August 26] . . . . I was nauseous. I felt like I was going to probably vomit. I figured I better get home and take some medication."

[10] A subsequent invoice dated September 1, 2010, from Harris memorialized the same information and included a $125 charge for the high limit switch. The invoice stated: "Installed hi-limit in Pitco fryer then test run and check temp, ok."

[11] The judge's findings do not refer to this incident but the parties do not dispute its occurrence.

confirmed that the high limit switch on the fryer was not new, and that the fryer's thermostat had been "hanging up" intermittently in a setting that called for more heat to the burners even though the thermostat had reached the set temperature needed to heat the cooking oil. This condition is called a "runaway thermostat." The purpose of the high limit switch is to shut off the fryer if this condition occurs.

The judge expressly found that White had disabled the fryer's high limit switch. That switch had been working before he arrived at the restaurant on August 25, but did not work after White finished his work on the afternoon of August 26. He further found that White failed to disclose that he had disabled the switch, and that he submitted a work order and invoice that he knew falsely stated that he had fixed the fryer by replacing the high limit switch when he had not done so.

The judge concluded White's unfair and deceptive acts violated c. 93A and "led directly to the fire and consequent damages." As the judge explained, White, by his own admissions regarding his failures and untruthfulness, was negligent and "arguably . . . indifferent" toward the consequences of his conduct when he left the job site without finishing his work.[12]

[12] As regards White's testimony, the judge wrote: "The court considered the testimony of Jim White, who although an adverse witness/party, testified candidly, acknowledging the

The judge further ruled that White violated 940 Code Mass. Regs. § 3.08(1)(e) by representing that he had made repairs that were not made. However, the judge rejected the plaintiffs' contention that, in the circumstances, White's conduct amounted to a wilful or knowing violation of c. 93A.[13] Consequently, he did not award multiple damages.

Discussion. 1. Harris's appeal. Harris argues, in essence, that the plaintiffs' complaint did not provide adequate notice and identification of the alleged c. 93A violation. In addition, Harris argues that the c. 93A violation alleged by the plaintiffs was not a proximate cause of the plaintiffs' damages. Both arguments lack merit.

a. Chapter 93A violation. The factual allegations of the complaint provide a detailed description of the deceptive conduct of Harris's employee, White. In particular, the complaint describes White's written work order and invoice (i.e., "Installed hi-limit in Pitco fryer"), which (fairly read) deliberately misrepresented that White had "replaced" the fryer's high limit switch when, in fact, a new switch had not

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failures of his service call, and the untruthfulness of his work order and several statements."

[13] The judge stated that the plaintiffs had "failed to convincingly demonstrate that Jim White was anything more than negligent," and therefore, White's "violations of the Act, especially 940 [Code Mass. Regs. §] 3.08(1)(e), [were not] willful and knowing."

been installed. In addition, the complaint stated that the existing high limit switch was "inoperative." The complaint's factual allegations, as a whole, were incorporated by reference into the plaintiffs' c. 93A claim and, in combination, provided more than fair notice to Harris of the precise nature and totality of the plaintiffs' claim. See Halper v. Demeter, 34 Mass. App. Ct. 299, 301-302 (1993). Harris's suggestion that it was unfairly surprised by the plaintiff's c. 93A claim is implausible on this record. Compare Slaney v. Westwood Auto, Inc., 366 Mass. 688, 702 (1975) (plaintiff "alleged a failure to fulfil warranty obligations . . . and . . . such failure gives rise to a § 9 claim for relief").

In addition, even if we were to deem the complaint insufficient, the c. 93A violation was tried by consent. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Allen v. Allen, 86 Mass. App. Ct. 295, 304 (2014), quoting from Mass.R.Civ.P. 15(b), 365 Mass. 761 (1974).

b. Proximate cause. We are similarly unpersuaded by Harris's claim that there was no causal relationship between White's fraudulent misrepresentation and the fire. See Casavant v. Norwegian Cruise Line Ltd., 460 Mass. 500, 503 (2011) (award of damages under c. 93A requires causal connection between

deceptive act and injury or loss). It suffices to note that the judge found that Harbors's employees relied upon White's false assurances which, in turn, caused them "to act differently than they would have acted . . . with respect to the continued operation of the Pitco Frialator if they had known the truth -- the Pitco Frialator had not been repaired and the high limit switch had been disabled." This finding is not clearly erroneous, as Harris claims. To the contrary, the conclusion that White's conduct -- which indisputably led the kitchen staff to believe that the fryer had been repaired -- directly caused the fire is fully supported by the evidence, which included the chef's testimony that he began to use the fryer immediately after White gave him the invoice and left the premises.[14]

2. Plaintiffs' appeal. a. Wilful or knowing violation of c. 93A. We now turn to the plaintiffs' argument that the judge erred in finding that White's deceptive conduct, imputed to Harris, did not amount to a wilful or knowing violation of G. L. c. 93A, § 2. See G. L. c. 93A, § 11, inserted by St. 1972, c. 614, § 2 ("If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but

[14] Harris argues that because there was testimony suggesting that no one actually read the invoice, White's misrepresentation could not have altered the conduct of Harbors's employees. This contention misses the mark. White unequivocally left the chef and others with the erroneous impression that the fryer had been repaired.

not less than two, times such amount if the court finds that . . . the act or practice was a willful or knowing violation of [§ 2]"). See also Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 673 (1996) ("[O]ur cases have routinely held corporations liable for multiple damages because of the knowing and wilful acts of their agents"); Ramos v. International Fid. Ins. Co., 87 Mass. App. Ct. 604, 610 (2015) ("[L]iability for multiple damages under c. 93A may be imposed upon a principal corporation with no knowledge of its agent's wrongdoing"). The plaintiffs contend that White's actions were, as a matter of law, intentional and deliberate and, as a result, the judge improperly declined to award multiple damages.[15]

In deciding whether the conduct of Harris's employee rose to the level of a wilful and knowing violation of G. L. c. 93A, § 2, our task is limited to reviewing the legal standard applied to the subsidiary facts found by the judge. See Andover Hous. Authy. v. Shkolnik, 443 Mass. 300, 306 (2005). "To what ultimate legal determination those subsidiary facts add up,

[15] Before trial, all of the parties signed a written submission -- titled "Agreed Facts, Statement of the Parties and Agreed Suggestion of Statement of the Case to be Read to the Jury" -- that identified as an issue in the case whether Harris's conduct was wilful or knowing, subject to multiple damages.

however, is a question of law" for our de novo review. Matter of Jane A., 36 Mass. App. Ct. 236, 239 (1994).[16]

As we said more than two decades ago, "[w]e do not read the c. 93A cases as mandating that the multiple damages bonus be automatically imposed for any and all forms of misrepresentation. Rather, it is only when the acts of misrepresentation amount to 'intentional fraud' that the severe sanction is appropriate." VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 623 (1994). We believe that the combined whole of Harris's fraudulent conduct, which is outlined in the judge's subsidiary findings and firmly rooted in the trial evidence, adds up, as a matter of law, to a wilful or knowing violation of § 2. See Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 780 (1986) ("Actions involving fraudulent representations in knowing disregard of the truth encompass culpable, 'willful' behavior under the statute"); McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 714 (1990) ("[A]n intentional fraud can constitute a basis for the multiplication of damages").

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[16] See Simon v. Weymouth Agric. & Industrial Soc., 389 Mass. 146, 148-149 (1983) ("[W]here a judge's ultimate findings are inconsistent with his subsidiary findings, we shall set aside the ultimate findings"); VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 617 n.8 (1994) ("An appellate court may reach its own ultimate conclusions based on a trial judge's findings [of fact] and may set aside a trial judge's ultimate ruling that is inconsistent with the [trial] judge's own subsidiary factual findings").

Here, most (if not all) of the judge's subsidiary findings demonstrate an intentional fraud. Significantly, the judge did not find that White honestly believed his misrepresentations to be true when he made them. Contrast Jeffco Fibres, Inc. v. Dario Diesel Serv., Inc., 13 Mass. App. Ct. 1029, 1031 (1982) (multiple damages not warranted where defendant actually believed his representations). Moreover, White himself unequivocally acknowledged his wrongdoing. He testified that he "didn't put the part in" and assumed that another technician would be sent "back in another day or two" to "actually repair" the fryer. Although White exhibited regret, we cannot reasonably say that his conduct was merely negligent.

Moreover, White's falsified work order was, standing alone, a per se violation of a binding regulation promulgated by the Attorney General, 940 Code Mass. Regs. § 3.08(1)(e) -- "Repairs and Services Including Warranties and Service Contracts" -- which provides in pertinent part that it "shall be an unfair and deceptive act or practice to . . . [r]epresent that repairs have been made when such is not a fact." Apart from this binding regulation, White's deceptive acts plainly had the capacity to deceive Harbors (and its kitchen staff members who were informed by White that the fryer had been repaired and was in proper working condition). As a matter of law, White's deliberate misstatement that a new high limit switch had been installed, a

critical fact that he knew was false, combined with his reckless and unverified assertion that the fryer was in good working condition, amount to an "intentional fraud" which threatened the safety of not only members of the Anglers Club and employees of Harbors, but also those who patronized Harbors's restaurant. As such, a severe sanction was warranted. See VMark Software, Inc. v. EMC Corp., supra. See also Kattar v. Demoulas, 433 Mass. 1, 16 (2000) ("[Chapter] 93A ties liability for multiple damages to the degree of the defendant's culpability"). A knowing violation of c. 93A is established by a showing that the agents or employees of the defendant "knew that the fact they represented to be true was not true." Computer Sys. Engr., Inc. v. Qantel Corp., 571 F. Supp. 1365, 1375 (D. Mass. 1983), aff'd, 740 F.2d 59 (1st Cir. 1984). That is the case here. Accordingly, the case must be remanded for a determination whether double or triple damages are appropriate.

b. Award of attorney's fees. General Laws c. 93A, § 11, provides that "'reasonable attorneys' fees and costs' shall be awarded if a judge finds that a defendant has violated the statute, regardless of the amount in controversy." Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. 411, 427 (2005), quoting from G. L. c. 93A, § 11. Here, there is no dispute that the plaintiffs are entitled to an award of fees and costs. The question is whether those fees are to be determined

by the lodestar method, which focuses on the fair market rate for the time reasonably spent in prosecuting the case, or by a contingency fee agreement between the lawyer and client.

The plaintiffs requested two separate awards of attorney's fees. In addition, the plaintiffs requested $59,199.72 in costs.[17] In support of these requests, the plaintiffs submitted affidavits of counsel, time sheets, and memoranda. The judge reviewed the documentation and, drawing on his own observation of the "demonstrated expertise of each counsel at trial," concluded that the fees and costs were reasonable and awarded $401,134.50 for the services of the attorney who represented Underwriters and $97,487.57 for the services of private counsel retained by Harbors and Anglers Club. Thereafter, following the receipt of Harris's opposition, which alerted the judge to the existence of a contingency fee agreement between Underwriters and its lawyer, the judge reduced Underwriters' award of fees to $270,073, an amount equal to one-third of the total judgment as contemplated by the contingency fee agreement.[18] Underwriters contends that the judge abused his discretion when he based the award of fees on the contingency agreement rather than the lodestar method. We agree.

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[17] This amount is not in dispute.

[18] The award of fees to Harbors and Anglers Club, which was based on the lodestar method, is not challenged by any party.

We review a trial judge's determination of an award of attorney's fees for abuse of discretion. See Brady v. Citizens Union Sav. Bank, 91 Mass. App. Ct. 160, 161 (2017). "The amount of a reasonable attorney's fee, awarded on the basis of statutory authority . . . is largely discretionary with the judge, who is in the best position to determine how much time was reasonably spent on a case, and the fair value of the attorney's services." Siegel v. Berkshire Life Ins. Co., 64 Mass. App. Ct. 698, 704-705 (2005), S.C., 70 Mass. App. Ct. 318 (2007), quoting from Fontaine v. Ebtec Corp., 415 Mass. 309, 324 (1993).

"The award of fees under the statute belongs to the prevailing party, not the attorney, while the extent of the party's obligation to pay his or her attorney is defined by the agreement between them." Siegel v. Berkshire Life Ins. Co., supra at 704. Fees under c. 93A are assessed only in that amount which represents just compensation for the services of counsel in the case viewed as a whole. See Hanner v. Classic Auto Body, Inc., 10 Mass. App. Ct. 121, 123 (1980). Factors that bear on the determination of a reasonable award of fees are "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other

attorneys in the same area, and the amount of awards in similar cases." Twin Fires Inv., LLC v. Morgan Stanley Dean Witter & Co., 445 Mass. at 430, quoting from Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979). Accord Heller v. Silverbranch Constr. Corp., 376 Mass. 621, 629 (1978).

The "lodestar" method is preferred because it produces "generally consistent results from case to case." Fontaine v. Ebtec Corp., supra at 325. The results produced by the lodestar method "should govern unless there are special reasons to depart from them." Stratos v. Department of Pub. Welfare, 387 Mass. 312, 322 (1982). See, e.g., Killeen v. Westban Hotel Venture, LP, 69 Mass. App. Ct. 784, 790 (2007); Brady v. Citizens Union Sav. Bank, supra at 161-162. No such special reasons exist here. While we do not comment on the appropriate amount of the fee, on remand the award of fees should be determined by using the lodestar method.

Conclusion. The case is remanded to the Superior Court for an assessment of multiple damages under G. L. c. 93A, § 11, and a new determination of an award of Underwriters' reasonable attorney's fees using the lodestar method. In all other

respects, the judgment is affirmed.[19]

So ordered.

[19] The plaintiffs have requested and are entitled to appellate attorney's fees and costs. They may submit a petition for fees and costs, with supporting materials, within fourteen days of the date of the rescript of this decision. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004). Harris shall have fourteen days thereafter to respond. See ibid.