NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCReporter@sjc.state.ma.us

SJC-12948

GOVERNO LAW FIRM LLC vs. KENDRA ANN BERGERON & others.[1]

Suffolk. January 6, 2021. - April 9, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Consumer Protection Act, Unfair or deceptive act, Trade secret. Conversion. Practice, Civil, Instructions to jury, Injunctive relief, Interest. Injunction. Judgment, Interest. Interest.

Civil action commenced in the Superior Court Department on December 27, 2016.

The case was tried before Kenneth W. Salinger, J., an amended judgment was entered by him, a motion to deposit funds into court to satisfy a money judgment was considered by him, and a motion to modify a permanent injunction was also considered by him.

The Supreme Judicial Court granted an application for direct appellate review.

Kurt B. Fliegauf for the plaintiff.
Peter F. Carr, II, for the defendants.

---

[1] Jeniffer A.P. Carson, Bryna Rosen Misiura, David A. Goldman, Brendan J. Gaughan, John P. Gardella, and CMBG3 Law LLC.

WENDLANDT, J. Over the course of more than two decades representing clients in asbestos litigation, the plaintiff Governo Law Firm LLC (GLF) systematically created the contents of a research library, a treasure trove of materials amassed from GLF's own matters as well as other sources, that gave it a competitive edge in attracting and providing legal services to clients in this specialized field. GLF also built electronic databases to render the library readily searchable, facilitating retrieval of the information. In the fall of 2016, these proprietary materials were taken by a group of nonequity employees at GLF (attorney defendants) as they prepared to start a new law firm, the defendant CMBG3 Law LLC (CMBG3), in case their planned purchase of GLF proved unfruitful. The attorney defendants took turns secretly downloading the library and databases, as well as GLF's employee handbook, other administrative materials, and client lists, onto high-capacity "thumb drives";[2] the attorneys then surreptitiously removed these materials from GLF's offices. They subsequently made an offer to GLF's sole owner, David Governo, to buy GLF, stating that they would resign if the offer were not accepted that day. Governo rejected the offer that same day and locked the attorney

[2] A "thumb drive" is an electronic data storage device. See United States v. Burdulis, 753 F.3d 255, 258 (1st Cir. 2014).

defendants out of GLF's computer systems. The next day, the attorney defendants opened for business under the previously incorporated CMBG3, where they used the stolen materials and derived profits therefrom.

GLF filed a complaint in the Superior Court asserting claims against its former employees and CMBG3. A jury found some or all of the defendants liable on the claims for conversion, breach of the duty of loyalty, and conspiracy,[3] and none of the defendants liable for unfair or deceptive trade practices in violation of G. L. c. 93A, § 11. The jury awarded GLF $900,000 in damages, calculated based on the defendants' net profits. The judge then issued a permanent injunction enjoining the defendants from using the library and databases, and ordering those materials removed from the defendants' computers.

In GLF's appeal from certain of the judge's instructions at trial, as well as his posttrial rulings, we first address the question whether the attorney defendants, who misappropriated proprietary materials from their employer during their employment, and subsequently used those materials to compete, may be liable for unfair or deceptive trade practices pursuant to G. L. c. 93A, § 11, for actions that were, in part, taken while still employed by GLF. We conclude that that they, and

[3] The jury found CMBG3 liable for conversion and civil conspiracy.

their new firm, may be. Because the judge erroneously instructed the jury that the defendants' preseparation conduct was not relevant to GLF's claim under G. L. c. 93A, § 11, and because GLF has shown that its rights were affected thereby, the matter must be remanded for a new trial on the G. L. c. 93A, § 11, claim. We next address the scope of the permanent injunction. Although the jury found that the defendants were liable for conversion of GLF's proprietary materials, the judge issued a permanent injunction precluding the defendants' use of only a subset of these materials. We conclude that the judge abused his discretion. Finally, we consider GLF's claims with respect to pre- and postjudgment interest. We conclude that prejudgment interest was not required under G. L. c. 231, § 6H, but that GLF is entitled to postjudgment interest.

1. Background. We recite the facts in the light most favorable to GLF. See Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 4, cert. denied, 522 U.S. 1015 (1997).

In 2016, the attorney defendants -- each a nonequity partner at GLF -- were considering acquiring GLF from its sole owner, Governo. GLF was a law firm that specialized in representing insurance companies in asbestos litigation. While the attorney defendants considered a potential purchase, they simultaneously pursued the possibility of starting their own firm, the defendant CMBG3.

In October of 2016, three of the attorney defendants began downloading materials from their GLF computers onto high-capacity thumb drives. The attorney defendants kept the copying secret from Governo, believing that, had he been aware of it, Governo would have prevented the copying.[4] One of the attorney defendants indicated that it would have been to CMBG3's business detriment not to copy the material.

The materials copied included three different types of information: a research library, databases, and administrative files. The research library contained over 100,000 documents relevant to asbestos litigation, including witness interviews, expert reports, and investigative reports, and was known within GLF as the "8500 New Asbestos Folder" (8500 folder). The library was developed by GLF over a period of twenty years, at a cost of more than $100,000.[5] According to testimony by GLF's expert, these materials were "extremely valuable" and provided a competitive advantage to GLF over other law firms within the field of asbestos litigation.

---

[4] At the time the files were copied, no client had agreed to transfer representation to (or was even aware of) the potential new firm.

[5] After each matter was closed, GLF would take whatever materials had been helpful in the litigation and put them in the 8500 folder for potential use as a resource in future cases. Governo collected these materials over the course of his career. Some of the materials also came from attorneys within the asbestos litigation defense bar who had shared them with GLF.

The second category of copied materials, the databases, organized the GLF resources from the 8500 folder and elsewhere into categories, sortable by multiple criteria, such as legal theory or client. One database, for instance, housed all materials related to the state-of-the-art defense as it is used in asbestos litigation.[6] Another database contained literature, historical information, and scientific information concerning talc, a potential cause of mesothelioma.[7] These databases, which, like the research library, were developed at a cost of over $100,000, were, according to GLF's expert, also extremely valuable and provided GLF a competitive advantage. The third category of copied documents, the administrative files, included a manual on office procedures, an employee handbook, marketing materials, and client lists.

Once the materials were downloaded onto the removable electronic devices, the defendants took the devices from GLF's offices. After one of the attorney defendants had removed some

[6] The state-of-the-art defense precludes a manufacturer from being held liable "under an implied warranty of merchantability for failure to warn or provide instructions about risks that were not reasonably foreseeable at the time of sale or could not have been discovered by way of reasonable testing prior to marketing the product." Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 23 (1998).

[7] Mesothelioma is a deadly disease that can be caused by exposure to asbestos. See Stearns v. Metropolitan Life Ins. Co., 481 Mass. 529, 530-531 (2019).

materials himself, he sent a text message to another attorney defendant informing the attorney that she should bring a gym bag when she removed materials, in order not to arouse the suspicions of building security. The attorney defendants then uploaded the copied information onto a laptop computer they had purchased for their new law firm.

The attorney defendants incorporated CMBG3 on November 1, 2016. On November 18, 2016, they "hijack[ed]" the scheduled GLF partners' meeting and offered Governo $1.5 million in cash, plus net profits for some of the attorneys' work performed through the end of the year, to buy GLF.[8] The attorney defendants gave Governo until 5 P.M. that day to respond and told Governo that if he rejected their offer, they would resign in thirty days.

Governo rejected the offer that same day. Two days later, on November 20, 2016, Governo sent an electronic mail message to the attorney defendants asking them to confirm that they had not taken and were not in possession of any GLF data. The attorney defendants did not respond. Governo then secured the attorney defendants' computer login information so they could not access

[8] An outside consultant had valued the firm at around $10 million.

the GLF computer systems.[9] The last day the attorney defendants were employed by GLF was November 20, 2016.

By November 21, 2016, the attorney defendants were officially operating CMBG3. They accessed GLF's materials (now on CMBG3's laptop) to assist in their representation of clients in paid legal work for CMBG3. An analysis of the laptop computer suggested that users of it interacted with tens of thousands of the files.

2. Discussion.[10] a. General Laws c. 93A, § 11. GLF first maintains that the judge provided an erroneous instruction to

[9] Governo allowed at least some of the attorney defendants access through November 29, 2016, in order to transition client work.

[10] The defendants contend, as they did in the Superior Court, that GLF's appeal insofar as it concerns its G. L. c. 93A claim and its claim to prejudgment interest is untimely. On September 27, 2019, the trial judge allowed GLF's motion to find its notice of appeal, filed on September 18, 2019, timely filed. In a civil action, a party has thirty days to file a notice of appeal from "the date of the entry of the judgment . . . or adjudication appealed from." Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019). "[A]bsent special authorization . . . an appellate court will reject attempts to obtain piecemeal review of trial rulings that do not represent final disposition on the merits" (citation omitted). Theisz v. Massachusetts Bay Transp. Auth., 481 Mass. 1012, 1014 (2018). A judgment is not final for purposes of Mass. R. A. P. 4 (a) until all claims against all parties have been resolved. See Jones v. Boykan, 74 Mass. App. Ct. 213, 218 (2009). In this case, GLF's demand for equitable relief was not resolved until September 13, 2019. See Riley v. Kennedy, 553 U.S. 406, 419 (2008) (order resolving liability but leaving unresolved demand for injunctive relief was not final); National Corn Growers Ass'n v. Bergland, 611 F.2d 730, 732-733 (8th Cir. 1980) (judgment not final where it left undetermined issues concerning injunctive relief). At

the jury in connection with GLF's G. L. c. 93A claim. The instruction provided:

> "Conduct is part of trade or commerce, as a general matter, if it takes place in a business context and it's not personal or private in nature. But by law an employee and employer are [not] in trade or commerce with each other for purposes of the statute. That means that [G. L. c.] 93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there. So anything that happened before the 20th of November, 2016, whether it was negotiations, copying of materials, anything else[,] that's all irrelevant for purposes of [the G. L. c. 93A claim]. Instead for this claim the Governo Firm must prove the defendants did something to compete with the Governo Firm after they left that firm that was unfair or deceptive. So given the evidence in this case, the Governo Firm must convince you that the defendant[s] used confidential information or documents belonging to the Governo Firm, to compete against that firm in an [unfair] or deceptive manner and that they did so after their employment at the Governo Firm had [ended]."

GLF asserts that the instruction was erroneous because it precluded the jury from considering a critical aspect of the misconduct of the attorney defendants, that is, their copying and taking GLF's proprietary materials while they were GLF's employees.[11]

---

that time, the judge "finally adjudicat[ed] the rights of the parties affected by the judgment." Mass. R. Civ. P. 54 (a), 365 Mass. 820 (1974). It is clear, as the trial judge found, that GLF's notice of appeal, filed on September 18, 2019, was well within the thirty days provided by Mass. R. A. P. 4 (a) (1).

[11] The defendants mount an additional procedural challenge to GLF's G. L. c. 93A appeal, arguing that GLF did not preserve this issue for appeal. See Mass R. Civ. P. 51 (b), 365 Mass. 816 (1974). To the contrary, GLF timely objected to the G. L. c. 93A instruction, repeatedly bringing to the judge's attention (both prior to and immediately following the jury charge) its

In examining whether an instruction "adequately explain[s] the applicable law," Kelly v. Foxboro Realty Assocs., LLC, 454 Mass. 306, 316 (2009), we consider the "adequacy of the instructions as a whole," Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 (2014). "We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party" (citation omitted). Dos Santos v. Coleta, 465 Mass. 148, 153-154 (2013). "An error in jury instructions is not grounds for setting aside a verdict unless the error was prejudicial -- that is, unless the result might have differed absent the error." Blackstone v. Cashman, 448 Mass. 255, 270 (2007). See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 118-119 (2000).

General Laws c. 93A, § 11, provides,

> "Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property . . . as a result of the use . . . by another person who engages in any trade or commerce of . . . an unfair or deceptive act or practice[12] . . . may . . . bring an action in the [S]uperior [C]ourt . . . ."

---

objections. Indeed, the judge acknowledged GLF's objection and stated the instruction would stand. There can be no doubt that GLF provided the judge with notice of the issue. See Rotkiewicz v. Sadowsky, 431 Mass. 748, 751 (2000); Flood v. Southland Corp., 416 Mass. 62, 66-67 (1993).

[12] "[A] practice or act [is] unfair under G. L. c. 93A, § 2, if it is (1) within the penumbra of a common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to

In order for G. L. c. 93A, § 11, to apply to a given dispute, there must be "a commercial transaction between a person engaged in trade or commerce and another person engaged in trade or commerce, such that they were acting in a 'business context.'" Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2008). See Szalla v. Locke, 421 Mass. 448, 451 (1995); Begelfer v. Najarian, 381 Mass. 177, 190-191 (1980). Thus, purely intra-enterprise disputes fall outside the reach of G. L. c. 93A, § 11. See Linkage Corp., 425 Mass. at 23 n.33. See, e.g., First Enters., Ltd. v. Cooper, 425 Mass. 344, 347-348 (1997) (G. L. c. 93A, § 11, was inapplicable to internal business dispute between parties in same venture); Szalla, supra at 452 (G. L. c. 93A, § 11, was inapplicable to dispute between partners in business venture); Zimmerman v. Bogoff, 402 Mass. 650, 662-663 (1988) (G. L. c. 93A, § 11, was inapplicable to disputes between parties to joint venture and shareholders in close corporation); Riseman v. Orion Research Inc., 394 Mass. 311, 313-314 (1985) (G. L. c. 93A, § 11, was inapplicable to corporate stockholder claims against corporation stemming from

---

competitors or other business people" (citation omitted). Morrison v. Toys "R" Us, Inc., 441 Mass. 451, 457 (2004). Likewise, a practice or act is "deceptive" for purposes of G. L. c. 93A "if it possesses a tendency to deceive" (quotation and citation omitted). Aspinall v. Philip Morris Cos., 442 Mass. 381, 394 (2004).

dispute as to internal corporate governance of corporation). Accordingly, G. L. c. 93A, § 11, does not apply to employer-employee disputes arising out of the employment relationship.[13] See Manning v. Zuckerman, 388 Mass. 8, 13-14 (1983).

Importantly, however, the inapplicability of G. L. c. 93A, § 11, to disputes arising from an employment relationship does not mean that an employee never can be liable to its employer under G. L. c. 93A, § 11. To the contrary, we have recognized that G. L. c. 93A "is a statute of broad impact." Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693 (1975). In carving out certain employment disputes from the otherwise broad reach of G. L. c. 93A, § 11, we have explained that such intracompany disputes are not "marketplace transactions," and instead concern "the ordinarily cooperative circumstances of the employment

[13] Of course, the inapplicability of G. L. c. 93A to disputes arising out of the employment relationship does not preclude application of G. L. c. 93A to CMBG3, which was not GLF's employee. See, e.g., Augat, Inc. v. Aegis, Inc., 409 Mass. 165, 172 (1991) (rejecting "the defendants' suggestion that, because an . . . employee could not be liable to [employer] under G. L. c. 93A," those participating in employee's breach "also may not be liable under G. L. c. 93A"); Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939 (1984) (new company was liable under G. L. c. 93A for former employee's trade secret theft because new company "was never an employee" of plaintiff employer). The challenged jury instruction did not differentiate between the conduct of the attorney defendants and CMBG3, erroneously suggesting that the jury could not consider the preseparation conversion by the attorney defendants when determining whether CMBG3 was liable under G. L. c. 93A, § 11.

relationship between an employee and the organization of which he [or she] is a member." Manning, 388 Mass. at 13. Where an employee misappropriates his or her employer's proprietary materials during the course of employment and then uses the purloined materials in the marketplace, that conduct is not purely an internal matter; rather, it comprises a marketplace transaction that may give rise to a claim under G. L. c. 93A, § 11. See, e.g., Specialized Tech. Resources, Inc. v. JPS Elastomerics Corp., 80 Mass. App. Ct. 841, 847 (2011) (employee who obtained trade secret during course of employment and misappropriated it in violation of confidentiality provision of employment contract was liable under G. L. c. 93A, § 11); Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939-940 (1984) (employee who misappropriated trade secret while employed by plaintiff and then used trade secret to start his own competing business was liable under G. L. c. 93A, § 11).[14] That the individuals were employees at the time of the misappropriation does not shield them from liability under G. L. c. 93A, § 11, where they subsequently used the ill-gotten materials to compete with their now-former employer.

---

[14] Compare Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 162-163 (1996) (former employee's violation of geographic proscription in noncompetition agreement was not subject to claim under G. L. c. 93A, § 11, because claim, which involved no theft of proprietary or confidential information, arose solely from employment relationship).

Here, the judge instructed the jury that G. L. c. 93A did not apply to "anything" the defendants did "while they were still employed" by GLF, and that the copying of GLF's materials, because it occurred prior to the attorney defendants' last day as GLF's employees, was "irrelevant" to the jury's determination of G. L. c. 93A liability. In effect, the jury were instructed to ignore how the attorney defendants obtained GLF's materials in determining whether the subsequent use of those materials was unfair or deceptive. Yet, the G. L. c. 93A, § 11, claim required the jury to consider that the attorney defendants stole GLF's materials in order to determine whether the subsequent use of these materials was unfair or deceptive.[15] See Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839 (1972) (explaining "basic principles of equity" as foundation for rule that employee "may be enjoined from using or disclosing confidential information" entrusted to employee during course of employment [citation omitted]).

---

[15] GLF's theory of liability under G. L. c. 93A, § 11, was not that its former employees could not plan and establish a competing law firm. "[A]t-will employees should be allowed to change employers freely and competition should be encouraged." Augat, Inc., 409 Mass. at 172. Nevertheless, there are "certain limitations on the conduct of an employee who plans to compete with his employer." Id. GLF's theory of liability under G. L. c. 93A, § 11, was that the attorney defendants crossed that line. See Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 839 (1972) (employee may not use or disclose confidential information learned during course of employment).

The erroneous instruction was prejudicial. Had the jury considered the attorney defendants' conduct during their employment -- in particular, their conversion of GLF property[16] -- the jury well might have reached a different result.[17] Had they not been told to disregard this conversion, the jury could have found that the defendants' subsequent use of the converted materials was an unfair or deceptive act, rendering the defendants liable under G. L. c. 93A, § 11. If the jury had done so, GLF would have been entitled to attorney's fees and potentially double or treble damages. See G. L. c. 93A, § 11. The error in the jury instruction thus affected GLF's substantial rights. See Dos Santos, 465 Mass. at 153-154. Because GLF was prejudiced by the error, a new trial on GLF's G. L. c. 93A, § 11, claim is warranted. See Pfeiffer v. Salas, 360 Mass. 93, 101 (1971) (new trial warranted where jury instruction was not sufficiently clear).

---

[16] The jury found that each of the defendants converted GLF property.

[17] Applying the judge's instructions to disregard the attorney defendants' conduct prior to their termination, all that the jury could have considered was the defendants' conduct in maintaining a repository of helpful litigation documents and using those documents to recruit or represent clients, activities which do not fall within any ordinary definition of unfairness.

b. Permanent injunction. The jury found the defendants liable for conversion of GLF's proprietary materials -- the research library, databases, and administrative files. The judge, however, only permanently enjoined the defendants with regard to the research library and the databases, apparently leaving the defendants free to continue their unrestricted access and use of the administrative files.[18] Believing the omission of the administrative files from the scope of the permanent injunction to be inadvertent, GLF moved to modify the injunction. The judge denied the motion, offering no explanation other than to observe that a trial judge has broad discretion to determine the appropriate scope of permanent injunctive relief and that he had entered the permanent injunction he deemed to be appropriate and equitable based on the evidence presented at trial. As GLF contends, this was an abuse of discretion. See LightLab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 194 (2014) (appellate standard of review of scope of permanent injunction is abuse of discretion).

[18] The injunction explicitly excluded files that had been transferred to the defendants or the defendants' clients after November 20, 2016, and any files the defendants had obtained from other sources. GLF correctly concedes that it is not entitled to any client files where the clients requested to transfer their representation to CMBG3. See Mass. R. Prof. C. 1.15A (b), 480 Mass. 1316 (2018) (lawyer must make client's file available to client or former client).

While the scope of equitable relief is within the sound discretion of the trial judge, Commonwealth v. Adams, 416 Mass. 558, 566 (1993), such discretion is not without limit, see Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co., 381 Mass. 1, 10 (1980). Here, without explanation and with no evident basis in the record,[19] the judge allowed the defendants to continue to use GLF's administrative files and thereby improperly permitted them to continue to benefit from their theft. See Restatement (Third) of Unfair Competition § 44 (1995). See also Maxham v. Day, 16 Gray 213, 215 (1860) (common-law remedy of replevin allows owner to recover property that was wrongfully taken).

---

[19] The record supports the jury's finding that GLF was the rightful owner of the administrative files. See Matter of Hilson, 448 Mass. 603, 611 (2007) (conversion requires finding plaintiff owns res). The files included an employee handbook, an office procedures manual, a billing procedures manual, an asbestos litigation procedures manual, marketing materials, training materials for new employees, and GLF's client lists. The office procedures manual and employee handbook were developed "special[y]" for GLF and involved what Governo described as a great deal of effort. The employee handbook was created in consultation with an employment attorney, and GLF made clear when it distributed the handbook that it was GLF's property. Even where the underlying information is not confidential, materials a business creates can be proprietary to that business. See DiAngeles v. Scauzillo, 287 Mass. 291, 297-298 (1934). Further, the administrative file included client lists, comprising over 300 pages and containing names, physical addresses, electronic mail addresses, and telephone numbers for each contact, as well as notes discussing many of the contacts. See New England Overall Co. v. Woltmann, 343 Mass. 69, 77-78 (1961). The record also supports the jury's finding that the defendants converted the administrative files; indeed, two defendants expressly acknowledged having copied these materials.

Accordingly, the exclusion of the administrative files from the scope of the permanent injunction was an abuse of discretion.

c. Prejudgment interest. GLF maintains that the judge erred by vacating the assessment of prejudgment interest; GLF contends that the award of prejudgment interest was mandatory under G. L. c. 231, § 6H, which provides:

> "In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the amount of damages interest thereon . . . from the date of commencement of the action . . . ."

General Laws c. 231, § 6H, is a "catch-all interest provision," see Herrick v. Essex Regional Retirement Bd., 465 Mass. 801, 807 (2013), that "reflects the Legislature's intent that prejudgment interest always be added to an award of compensatory damages," George v. National Water Main Cleaning Co., 477 Mass. 371, 378 (2017). GLF argues that this statute requires the addition of prejudgment interest to all monetary awards including where, as here, the monetary relief does not compensate GLF for its loss and instead is based on a defendant's profits. Our review of this legal issue is de novo. See Anastos v. Sable, 443 Mass. 146, 149 (2004).

In assessing whether G. L. c. 231, § 6H, requires the assessment of prejudgment interest on the disgorgement of the defendants' profits in this case, we are guided by the difference between compensatory damages, on the one hand, and

restitutionary remedies, on the other. Under the common law of torts, at the time of an accident, an injured party accrues a right to be made whole and compensated for injuries wrongfully inflicted by the tortfeasor. See Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 375 (2012). There almost always is a delay, however, between the time of the tortious injury and the resolution of the resulting lawsuit. See id. "As a result of such delay, the plaintiff incurs additional injury, including the depreciation of his [or her] eventual recovery. The award of [prejudgment] interest compensates the [injured party] for this additional injury." (Citations omitted.) Id. See Anastos, 443 Mass. at 155 (prejudgment interest is awarded "so that a person wrongfully deprived of the use of money should be made whole for his [or her] loss" [citation omitted]); Conway v. Electro Switch Corp., 402 Mass. 385, 390 (1988) (prejudgment interest is "awarded to compensate a damaged party for the loss of use or the unlawful detention of money"). Thus, prejudgment interest "ensure[s] that a party is fully compensated for its injuries." Boston Children's Heart Found., Inc. v. Nadal-Ginard, 73 F.3d 429, 442 (1st Cir. 1996).

Not every form of monetary relief, however, is compensatory in nature. A monetary award based on disgorgement of profits, for example, is measured by the defendant's gain, rather than by the plaintiff's loss. Such restitutionary recoveries are not

designed to make the plaintiff whole; as such, they are "distinct from damages, which measures compensation for loss rather than disgorgement of the defendant's gain." See 3 D.B. Dobbs, Law of Remedies § 12.1(1), at 9 (2d ed. 1993). See also Restatement (Third) of Restitution and Unjust Enrichment § 51 (2011) (object of restitution in certain contexts is to eliminate profit from wrongdoing). Thus, in USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 349 (1984), we held that G. L. c. 231, § 6B,[20] does not require the addition of prejudgment interest to a monetary award where the award is based on the defendant's profits. We reasoned that, whereas prejudgment interest is designed to make a plaintiff whole, monetary relief based on a defendant's profits is not. See USM Corp., supra.

Moreover, a restitutionary award based on the defendant's gain can account for the delay between the filing of a cause of action and the eventual recovery by including in the calculation unjust profits earned subsequent to the filing of the complaint. See Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 182 n.21

---

[20] General Laws c. 231, § 6B, provides,

> "In any action in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, or for damage to property, there shall be added by the clerk of court to the amount of damages interest thereon . . . from the date of commencement of the action . . . ."

(1979) (Jet Spray II). Thus, in USM Corp., 392 Mass. at 349, we concluded that, because a monetary award based on disgorgement of the defendant's profits already accounted for the defendant's gain after commencement of the action, unlike a typical tort action where damages accrue at the time of injury, imposing prejudgment interest pursuant to G. L. c. 231, § 6B, on the award of unjustly obtained profits from the commencement of the action would be misplaced.

For the same reasons, prejudgment interest under G. L. c. 231, § 6H, does not apply to the monetary award here. Prejudgment interest applies to awards of compensatory damages because both prejudgment interest and compensatory damages seek to make a plaintiff whole. See Smith, 462 Mass. at 375-376; Fontaine v. Ebtec Corp., 415 Mass. 309, 327 (1993). In the circumstances of this case, however, GLF's recovery was based on the defendants' wrongful gains rather than on GLF's own losses. Accordingly, the jury's award did not seek to make GLF whole. Moreover, the jury award included the defendants' unjust profits gained during the time period that the case was pending. Providing prejudgment interest on the award, which already accounted for the profits during the pendency of the suit, would produce a windfall for GLF. Compare Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 841 (1986) ("The common law was particularly sensitive to the possibility that a liberal

award of prejudgment interest could result in a windfall for plaintiffs amounting, in essence, to an award of punitive damages"). GLF will not be "unfairly deprived of compensation," and the defendants will not be "unjustly enriched," if they are not required to pay prejudgment interest. See Jet Spray II, 377 Mass. at 183-184. Accordingly, the jury's monetary award does not constitute damages within the meaning of G. L. c. 231, § 6H, and an assessment of prejudgment interest was not required.[21]

d. Postjudgment interest. GLF contends that it is entitled to postjudgment interest and that the judge erred in determining that the defendants' deposit of funds with the court satisfied the judgment in full. A decision on a motion to deposit funds is left to the sound discretion of the motion judge, see Commerce Ins. Co. v. Szafarowicz, 483 Mass. 247, 258 (2019) (Szafarwicz); however, we review de novo the judge's

[21] The judge did not abuse his discretion in declining to award prejudgment interest under common-law principles. A nonstatutory award of prejudgment interest depends on a balancing of the equities. See USM Corp., 392 Mass. at 350. Here, the equities weigh against the imposition of prejudgment interest. While prejudgment interest is meant to compensate a party for the delay between the commencement of a lawsuit and the eventual recovery, see Smith, 462 Mass. at 376, in this case the delay effectively was taken into account because GLF was able to argue that the defendants continued to receive unjust profits during the pendency of the litigation. An award of interest thus is not necessary to compensate GLF for the delay between the date when the suit was filed in 2016 and the date that judgment entered in 2019. Accordingly, the judge did not abuse his discretion in declining to award prejudgment interest under common-law principles.

legal conclusion that the defendants' deposit of funds terminated the accrual of postjudgment interest, see Brown v. Office of the Comm'r of Probation, 475 Mass. 675, 677 (2016).

Postjudgment interest serves to compensate the prevailing party for any delay in payment. See Anderson v. National Union Fire Ins. Co. of Pittsburgh PA, 476 Mass. 377, 383 (2017). Postjudgment interest accrues daily, see Trinity Church in Boston v. John Hancock Mut. Life Ins. Co., 405 Mass. 682, 684 (1989), until the judgment is fully satisfied, see City Coal Co. of Springfield v. Noonan, 434 Mass. 709, 717 (2001) (Noonan). In this case, the defendants proposed to deposit $915,937.23 with the court pursuant to Mass. R. Civ. P. 67, 365 Mass. 835 (1974); they were not willing to pay the funds directly to GLF if GLF pursued an appeal and asserted that the deposit would terminate the accrual of all postjudgment interest. The judge allowed the defendants' motion to deposit funds and later clarified that he intended "both that those funds would constitute sufficient post-judgment security and that the payment would satisfy the judgment in full if the judgment is affirmed on appeal." The defendants then deposited $915,937.23 with the court.

Contrary to the judge's determination, defendants may not escape the accrual of postjudgment interest by making an offer to satisfy the judgment conditioned on a party forgoing its

appellate rights. See Szafarwicz, 483 Mass. at 261 ("unlike some other jurisdictions, rule 67 in Massachusetts does not expressly provide for abatement of postjudgment interest when money is deposited with the court"). The second amended judgment awarded GLF $915,937.23; until that judgment is satisfied, postjudgment interest will continue to accrue. See Noonan, 434 Mass. at 717.

3. Conclusion. So much of the judgment as concerns the denial of the claim under G. L. c. 93A, § 11, is vacated and set aside, and the matter is remanded to the Superior Court for a new trial on that claim. The remainder of the judgment, and its exclusion of prejudgment interest, is affirmed.

On remand, the permanent injunction issued on September 13, 2019, shall be modified consistent with this opinion to include the return of the administrative files the defendants copied from GLF, the deletion of those files and any copies from CMBG3's electronic devices, and a certification from the defendants to that effect.

The order that the defendants' deposit of funds with the court satisfies the judgment in full is vacated. Postjudgment interest shall accrue at the statutory rate of twelve percent from the date of entry of the initial judgment on June 18, 2019, until the judgment is paid in full.

So ordered.