Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY NO. SJC-11154

LISA KLAIRMONT and MICHAEL FREEMAN, M.D., as Administrators of the Estate of JACOB SAMUEL FREEMEN,
PLAINTIFFS-APPELLEES,

v.

GAINSBORO RESTAURANT, INC. D/B/A OUR HOUSE EAST and HOLLI P. VARA, FRANKLIN E. MELGAR and HENRY D. VARA, III, AS THEY ARE TRUSTEES OF THE 50-58 GAINSBOROUGH STREET REALTY TRUST,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF *AMICI CURIAE*
MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION and
DRI-THE VOICE OF THE DEFENSE BAR

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SUFFOLK COUNTY

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF THE *AMICI*

Amici The Massachusetts Defense Lawyers Association ("MassDLA") and DRI – The Voice of the Defense Bar ("DRI")(collectively "*Amici*") are organizations comprised primarily of attorneys involved in the defense of civil cases. MassDLA is a voluntary, non-profit, state-wide professional association of trial lawyers who defend corporations, individuals and insurance companies in civil lawsuits. Members of the MassDLA do not include attorneys who, for the most part, represent claimants in personal injury litigation. The purpose of the MassDLA is to improve the administration of justice, legal education, and professional standards and to promote collegiality and civility among all members of the bar. As an association of civil defense lawyers, the MassDLA has a direct interest in the issues of public importance that affect MassDLA members and their clients.

DRI is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this

commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. The Amici believe that this is such a case and that their perspective can assist the Court in resolving these issues.

Amici are concerned that the Superior Court's decision, if affirmed, would result in a broad and unwarranted expansion of the scope of the Massachusetts Consumer Protection Act, G.L. c. 93A, by: allowing a recovery for wrongful death or personal injury claims caused by Building Code violations without requiring a nexus with the defendants' business or profit-making activities; effectively holding that Building Code violations are per se violations of G.L. c. 93A because the Building Code falls within the scope of Attorney General Regulation 940 C.M.R. § 3.16(3); and improperly intruding upon

the right of a civil defendant to a trial by jury and the protection generally afforded by the *res judicata* doctrine. Accordingly, the *Amici* wish to contribute their considerable perspective and experience in the defense of civil cases to assist the Court in resolving the important public policy issues that are raised in this appeal.

STATEMENT OF THE ISSUE

I. Whether the Superior Court erred by finding a G.L. c. 93A violation based solely on willful and knowing violations of the Building Code in the absence of any nexus between the Building Code violations and the defendants' profit-making activities of selling food and alcohol.

II. Whether this Court should clarify that a Building Code violation does not constitute a per se violation of G.L. c. 93A because the Building Code does not fall within the scope of 940 C.M.R. § 3.16(3).

III. Whether the Superior Court was bound by the jury's finding of no causation on plaintiffs' wrongful death claim in ruling on plaintiffs' c. 93A claim.[1]

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[1] The MassDLA and DRI also join the arguments of the appellants and other amicus in support of reversal of

STATEMENT OF THE CASE

The *Amici* adopt by reference the Statement of the Case and Statement of Facts of the Defendants-Appellants.

SUMMARY OF ARGUMENT

The mere presence of Building Code violations at a defendant's business establishment lacks the nexus to trade or commerce necessary for a recovery under G.L. c. 93A. *See infra* at 11.

A recovery under G.L. c. 93A requires the misconduct to occur in a business context, which requires the misconduct to have an entrepreneurial, commercial or business purpose. *See infra* at 12.

In this case, the Superior Court concluded that this claim occurred within a business context solely because the defendants owned and operated the bar, and Jacob was a patron at the bar, when the accident occurred. These facts are insufficient to place this claim within a business context. See infra at 14.

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the Superior Court judgment on the grounds that the Wrongful Death Act, G.L. c. 229, § 2, is the exclusive remedy for wrongful death damages and preempts a recovery of such damages under G.L. c. 93A. Because that issue was fully briefed by the appellants and other amicus, MassDLA and DRI have elected to focus on the other arguments set forth herein.

There is no evidence that the presence of Building Code violations at the bar were the result of the defendants' motivation for financial gain, as opposed to a mere failure to comply with a legislative mandate. *See infra* at 15.

There is no direct nexus here between the defendants' profit-making activity of selling food and alcohol, and the obligation to comply with the Building Code. *See infra* at 15.

The absence of a direct nexus between the alleged Building Code violations and the defendants' profit-making activity of selling food and alcohol makes this case readily distinguishable from the types of cases in which a G.L. c. 93A violations have been based on other statutory or regulatory. *See infra* at 15.

The mere fact that the defendants had to comply with the Building Code to lawfully engage in the business of operating a bar is not a sufficient nexus to the defendants' profit-making activity to satisfy the trade-or-commerce requirement of G.L. c. 93A. *See infra* at 16.

Allowing the plaintiffs to assert a G.L. c. 93A claim here without the requisite nexus to the defendants' profit-making activity would substantially

broaden the scope of G.L. c. 93A to include any simple tort claim against a business. *See infra* at 17.

The Superior Court's assertion that the G.L. c. 93A violation was based on a willful or intentional disregard of the Building Code for twenty years goes merely to the degree of the alleged misconduct but does nothing to establish that the misconduct had the profit-making motivation necessary to satisfy the trade-or-commerce requirement. *See infra* at 18.

The Court should clarify that a Building Code violation is not a per se violation of G.L. c. 93A and, contrary to the reasoning of the Superior Court, the Building Code does not fall within the scope of 940 C.M.R. § 3.16(3), which transforms the violation of any statute or regulation that falls within its scope into a per se violation of G.L. c. 93A. *See infra* at 19.

Although the Superior Court stated that most Building Code violations would not constitute a per se violation of G.L. c. 93A, by holding that the Building Code falls within the scope of 940 C.M.R. § 3.16(3), the Superior Court's decision necessarily transforms any violation of the Building Code, however minor,

into a per se violation of G.L. c. 93A. *See infra* at 20.

Although this case lacks the requisite nexus to trade or commerce to support a G.L. c. 93A violation, the Amici contend that if the Court were to affirm the G.L. c. 93A violation it should, at least, clarify that a violation of the Building Code is not a per se violation of G.L. c. 93A and the Building Code does not fall within the scope of § 3.16(3). *See infra* at 22.

A trial court sitting as a fact finder in a case presenting common law and c. 93A claims arising out of the same facts is bound to follow the jury's findings with respect to common factual issues — here, whether defendants' conduct was the cause of plaintiffs' harm. This result is compelled by the jury trial right of the Massachusetts Constitution, as well as principles of issue preclusion and sound judicial process. *See infra* at 28.

Massachusetts courts have long recognized the central role of juries as fact finders in our judicial system. There is no decision of this Court that says that a c. 93A court may contradict the jury's findings. Indeed, there is no Massachusetts appellate

decision involving a jury finding of fact that negates an essential element of the plaintiff's theory under c. 93A. Decisions from other jurisdictions overwhelmingly hold that a judge sitting as factfinder must follow the jury's verdict on factual issues common to jury and non-jury claims. *See infra* at 37.

ARGUMENT

I. The mere presence of Building Code violations at a defendant's business establishment lacks the nexus to trade or commerce necessary for a recovery under G.L. c. 93A

General Laws c. 93A prohibits "unfair or deceptive practices in the conduct of any trade or commerce." G.L. c. 93A, § 2(a). The statute applies "to those acts or practices which are perpetrated in a business context." *Lantner v. Carson*, 374 Mass. 606, 608, 612 (1978). To satisfy this requirement, the misconduct must have "an entrepreneurial, commercial or business purpose," in that it serves the "actor's financial benefit or gain." *McGonagle v. Home Depot, U.S.A., Inc.*, 75 Mass.App.Ct. 593, 599-600 (2009) *citing Darviris v. Petros*, 442 Mass. 274, 278-281 (2004). Otherwise stated, the misconduct must be "motivated by business or personal reasons." *Feeney v. Dell, Inc.*, 454 Mass. 192, 212 (2009). Conduct

performed as a statutory duty will not have the character of business or personal motivation and will not be actionable under G.L. c. 93A. *McGonagle*, 75 Mass.App.Ct. at 600 *citing Feeney*, 454 Mass. at 212-213. Whether an actor is engaged in trade or commerce is a conclusion of law that is subject to independent judicial review by this Court. *Peabody N.E., Inc. v. Town of Marshfield*, 426 Mass. 436, 439 n. 4 (1998).

In applying this standard, this Court in *Darviris* held that a patient's claim against a physician for negligent failure to obtain informed consent was not actionable under G.L. c. 93A because the negligent provision of medical care, without more, does not concern the entrepreneurial or business aspect of the practice of medicine. 442 Mass. at 280. The Court acknowledged that a G.L. c. 93A claim might have been asserted if there had been evidence to suggest that the physician selected the medical procedure in question solely for his financial benefit. *Id.*

In *Feeney,* this Court held that the claims of a class of consumers against Dell Computer for improperly collecting sales tax on an optional service contract in connection with the sale of computers did not involve "trade or commerce" and, therefore, was

not actionable under G.L. c. 93A. 454 Mass. at 212-214. Notably, the Court reasoned that even though the alleged misconduct involved for-profit sales transactions, this was not sufficient to satisfy the trade-or-commerce requirement of G.L. c. 93A. *Id*. at 212. The Court reasoned that the plaintiffs' claims were not based on the sales transactions as a whole, but a "particular component" of the transactions, the allegedly improper collection of sales tax. *Id*. Chapter 93A did not apply because Dell did not keep the tax revenue for its own enrichment, but passed it along to the Commonwealth. *Id*. Thus, the Court held that dismissal of the plaintiffs' Complaint was warranted because the misconduct was not motivated by any profit motivation or Dell's business reasons, but to comply with a legislative mandate. *Id*. at 213. The Court's reasoning here was similar to its acknowledgement in *Darviris* that the patient's claim against the physician might have been actionable under G.L. c. 93A if there had been evidence that the physician selected the medical procedure in question solely for his financial benefit.

In this case, the Superior Court concluded that this claim occurred within a business context solely

because the defendants owned and operated the bar, and Jacob was a patron at the bar, when the accident occurred. These facts are clearly insufficient to place this claim within a business context under this Court's reasoning in *Darviris* and *Feeney*.

Darviris and *Feeney* demonstrate that the "trade or commerce" requirement of G.L. c. 93A is not satisfied merely because the misconduct occurred in connection with a for-profit sales transaction, or the provision of a professional service. Similarly here, it is not sufficient that Jacob's accident occurred simply because he was a patron at the defendants' business establishment. Just as the Court in *Feeney* looked beyond the sales transaction as a whole and focused on the specific tax collection violation at issue, the Court here must look beyond the mere fact that Jacob was a patron at the bar and focus on whether the Building Code violations at issue are causally related to an entrepreneurial, commercial or business purpose. 454 Mass. at 212. As in *Darviris* and *Feeney*, there is no evidence here that the defendants' alleged misconduct –- the failure to comply with the Building Code -- was motivated by financial gain.

Indeed, there is no direct nexus here between the defendants' profit-making activity of selling food and alcohol, and the obligation to comply with the Building Code. Whether Jacob purchased any food or alcohol at the bar was immaterial to the plaintiffs' G.L. c. 93A claim. The defendants' obligation to comply with the Building Code was not undertaken for financial gain, but to comply with a statutory duty and, therefore, does not have the character of business motivation to be actionable under G.L. c. 93A. *Id.* at 212-213.

The absence of a nexus between the alleged Building Code violations and the defendants' profit-making activity of selling food and alcohol makes this case readily distinguishable from the various types of cases in which G.L. c. 93A violations have been based on other statutory or regulatory violations. *See e.g., Maillet v. ATF-Davidson Co.*, 407 Mass. 185 (1990)(product manufacturer's breach of implied warranty of merchantability can give rise to a violation of G.L. c. 93A); *Whelihan v. Markowski*, 37 Mass.App.Ct. 209 (1994)(professional property manager liable under G.L. c. 93A for breaching Building Code and Sanitary Code); *Lemrise v. Koska*, 1996 WL 496961

(Mass. Super. Ct. 1996)(building contractor violated G.L. c. 93A for constructing home that violated Building Code). In each of these cases there was a direct nexus between the defendant's profit-making activity –- whether it was selling a product, leasing premises, or constructing a home -- and the regulatory or statutory violation supporting the G.L. c. 93A claim. In contrast here, there is no direct nexus between the defendants' profit-making activity of selling food and alcohol, and the Building Code violations at the defendants' premises.

In a broad sense, it might be argued that the Building Code violations here did occur in a business context since the defendants had to comply with the Building Code in order to lawfully engage in the business of operating a bar. However, this would be no more of a causal connection to the defendants' profit making activities of selling food and alcohol than Dell's obligation in *Feeney* to collect sales tax in order to engage in the business of selling computers, which this Court held was insufficient to support a claim under G.L. c. 93A. 454 Mass. at 212-213.

Accordingly, the plaintiffs have not established the business context necessary for a recovery under G.L. c. 93A. As such, the defendants' conduct may very well have been unlawful, but it would not fall within the business context regulated by G.L. c. 93A. *See Mechanics National Bank of Worcester v. Killeen*, 377 Mass. 100, 109 (1979).

Allowing the plaintiffs to assert a G.L. c. 93A claim here would substantially broaden the scope of G.L. c. 93A liability. It would bring within the scope of G.L. c. 93A any simple tort case against a business. This would clearly deviate from the purpose of the statute, which was specifically intended to level the unequal bargaining power between consumers and businesses in the marketplace. *Id.* at 112. The consumer protection statute was not intended to simply enhance a plaintiff's tort remedies where the defendant happens to be a business.

A. The Superior Court's finding that the Building Code violations were knowing and willful does not satisfy the trade-or-commerce requirement

The Superior Court's assertion that the G.L. c. 93A violation was not based on mere violations of the Building Code, but the defendants' willful or

intentional disregard of the Building Code for twenty years, does nothing to satisfy the trade-or-commerce requirement. The deliberate or willful nature of the defendants' conduct merely goes to the degree of their alleged culpability, and potentially to whether the conduct was unfair or deceptive. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983)(after concluding that misconduct arose within a business context, the court separately evaluated whether the misconduct was knowing and willful); *Atkinson v. Rosenthal*, 33 Mass.App.Ct. 219, 225-226 (1992)("deliberate" conduct alone does not give rise to a G.L. c. 93A violation). The degree of the defendants' alleged culpability does nothing to establish that the misconduct had the profit-making motivation necessary to satisfy the trade-or-commerce requirement. *See Killeen*, 377 Mass. 109 (whether G.L. c. 93A has been violated does not turn on whether conduct was otherwise unlawful but by analyzing the effect of the conduct on the public or the consumer). Indeed, the Wrongful Death Act was fully equipped to address the degree of the defendants' alleged culpability by affording different remedies for negligent conduct versus willful, wanton or reckless

conduct. G.L. c. 229, § 2. However, whether the misconduct was negligent or willful does nothing to place it within the business context necessary for a recovery under G.L. c. 93A.

II. The Court Should Clarify that a Building Code Violation is Not a Per Se Violation of G.L. c. 93A and, Contrary to the Reasoning of the Superior Court, the Building Code Does Not Fall Within the Scope of 940 C.M.R. § 3.16(3)

The Superior Court, in its decision, properly recognized that not every Building Code violation, indeed very few, would constitute violations of G.L. c. 93A. Nevertheless, in support of finding a G.L. c. 93A violation here, the Superior Court relied, in part, on its conclusion that the Building Code falls within the ambit of Attorney General Regulation 940 C.M.R. 3.16(3), which provides:

> an act or practice is a violation of M.G.L. c. 93A § 2 if, ... (3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare, promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection.

940 C.M.R. § 3.16(3). The Superior Court reasoned that the Building Code falls within the ambit of § 3.16(3) because it is a regulation meant for the protection of the public's health, safety, or welfare,

and intended to provide protection for the consumers of this Commonwealth. This reasoning, although it was not likely intended by the Superior Court, would necessarily transform every violation of the Building Code into a per se violation of G.L. c. 93A.

Section 3.16(3) effectively provides that where a regulation or law falls within its scope, any violation of that regulation or law constitutes a per se violation of G.L. c. 93. The effect of § 3.16(3), therefore, is to give rise to per se violations of G.L. c. 93A without requiring an independent determination that the elements of unfairness or deception in trade or commerce, normally required for a recovery under G.L. c. 93A, have been satisfied.

By holding that the Building Code falls within the scope of § 3.16(3), the Superior Court decided the issue that the Appeals Court expressly did not reach in *Brunelle v. W.E. Aubuchon Co., Inc.*, 60 Mass.App.Ct. 626, 627 (2004). In *Brunelle*, an elderly plaintiff sought a recovery for personal injuries sustained after she tripped on a piece of metallic molding projecting into an aisle at the defendant's hardware store. The trial court found that the condition of the molding violated the Building Code,

but the violation did not involve the elements of unfairness or deception necessary for a recovery under G.L. c. 93A. On appeal, the plaintiff argued, as the Superior Court found in this case, that the Building Code is meant for the protection of the public's health, safety, and welfare, and therefore, by virtue of § 3.16(3) any Building Code Violation, no matter how minor, is a per se violation of G.L. c. 93A. The Appeals Court, however, determined that it did not need to reach the plaintiff's argument, because the condition of the molding at the defendant's premises did not violate the Building Code.

In contrast here, the Superior Court held that the Building Code was violated and that the Building Code falls within the scope of § 3.16(3). Thus, the Superior Court concluded that the "defendants' Building Code violations were per se deceptive and unfair acts or practices" in violation of G.L. c. 93A. Notwithstanding this reasoning, the Superior Court specifically stated that most Building Code violations would not violate G.L. c. 93A because they would lack the unfairness and deceptiveness present in this case. The Superior Court reasoned that it found G.L. c. 93A violations here not because of mere violations of the

Building Code, but "willful and knowing violations of the Building Code spanning more than twenty years." Although the Superior Court attempted to ground its decision on an independent determination of unfairness and deceptiveness in this case, by holding that the Building Code falls within the scope of § 3.16(3), the Superior Court created a legal framework under which a violation of the Building Code is a per se violation of G.L. c. 93A regardless of the Superior Court's independent determination of unfairness and deceptiveness in this particular case.

As argued elsewhere, the *Amici* do not agree that the facts of this case warrant a recovery under G.L. c. 93A because there is no nexus between the Building Code violations and trade or commerce. Nevertheless, the *Amici* acknowledge, in principle, that a Building Code violation could give rise to a violation of G.L. c. 93A, not because of the application of § 3.16(3), but where an independent determination has been made that the Building Code violation satisfies the elements of unfairness or deception in trade or commerce. *See, e.g., Whelihan v. Markowski*, 37 Mass.App.Ct. 209 (1994)(professional building manager liable for laceration injury to tenant under G.L.

c. 93A for installing nonsafety glass in apartment door in violation of Building Code and State Sanitary Code). In the present case, while the *Amici* do not believe that a G.L. c. 93A violation should have been found, they respectfully contend that the Court should, at a minimum, clarify that a Building Code violation is not a per se violation of G.L. c. 93A and the Superior Court erred by concluding that the Building Code falls within the scope of § 3.16(3).

If affirmed, the Superior Court's conclusion that the Building Code falls within the scope of § 3.16(3) would result in an unwarranted expansion of the scope of G.L. c. 93A liability. Despite the broad language of § 3.16(3), it has been well settled that not every violation of a Massachusetts statute or regulation automatically constitutes a violation of G.L. c. 93A. *See Darviris*, 442 Mass. at 281-284*; Reiter Oldsmobile, Inc. v. General Motors Corporation*, 378 Mass. 707, 710-11 (1979). Otherwise, "chapter 93A would immediately become the preeminent law of the Commonwealth, replacing all other forms of civil liability." *Dow v. Lifeline Ambulance Service, Inc.*, 1996 WL 1186916 (Mass.Super. 1996)(Cowin, J.). Unless narrowly construed, "the Attorney General's Regulation

would siphon into the province of c. 93A a bottomless reservoir of ulterior public health, safety, and welfare infractions regulated by separate programs of the police power." *McGonagle*, 75 Mass.App.Ct. 601. Noting a potential problem with the breadth of the language in § 3.16(3), this Court in *Darviris* specifically questioned the facial validity of § 3.16(3) by observing that its language could be interpreted to include a violation of any statute in the Commonwealth. 442 Mass. at 282 n. 9 *citing Goodridge v. Department of Pub. Health*, 440 Mass. 309, 322 (2003) *quoting Opinion of the Justices*, 341 Mass. 760, 785 (1960). The Superior Court's conclusion here that the Building Code falls within the scope of § 3.16(3) would result in precisely the type of unwarranted expansion of G.L. c. 93A liability that this Court has cautioned against.

If affirmed, the Superior Court's reasoning would, for example, expand the scope of G.L. c. 93A liability to any simple slip and fall case occurring at a business in which a plaintiff's injury could be causally related to a Building Code violation. Once these factual determinations were made, a trial court judge would have no discretion but to find that G.L.

c. 93A has been violated. And liability would be imposed under G.L. c. 93A without regard to: (1) how minimal the violation, (2) whether the defendant was negligent, (3) whether the violation constituted unfair or deceptive conduct, and (4) whether the violation had any connection to the defendant's business activity. This construction of G.L. c. 93A would clearly run afoul of this Court's well-established principle that not every unlawful act automatically violates G.L. c. 93A. *Killeen*, 377 Mass. at 109. This legal standard would also have no connection with the purpose of G.L. c. 93A, which is to level the unequal bargaining power between consumers and businesses in the marketplace. *Id.* at 112.

Indeed, construing the Building Code to fall within the scope of § 3.16(3) is contrary to the language of § 3.16(3), which only applies to statutes, regulations or laws intended for the protection of consumers. *McGonagle*, 75 Mass.App.Ct. at 601. While the Building Code is expressly intended to promote public safety, health, and welfare from hazards associated with building construction, see 780 C.M.R. § 101, the Building Code is not directed at "consumer

protection." *See Mahoney v. Baldwin*, 27 Mass.App.Ct. 778, 778-779 (1989). In *Mahoney*, the Appeals Court held that a tenant's claim under G.L. c. 186, § 19 for a landlord's failure to correct an unsafe condition was not a "law intended for the protection of consumers" and, therefore, not subject to the four-year limitation period for consumer-protection claims under G.L. c. 260, § 5A. *Id.* The court reasoned that while some of the purposes of consumer legislation might be incidentally or indirectly furthered by G.L. c. 186, § 19, the law did not have the protection of consumers as its intended and primary goal. *Id*. at 781. Similarly, in *Swenson v. Yellow Transportation, Inc.*, 317 F.Supp.2d 51, 55 (2004), the United States District Court for the District of Massachusetts held that a Federal Motor Carrier Safety Regulation, C.F.R. § 392.6, and a Massachusetts statute, G.L. c. 90, § 17, which are intended to prevent speeding -- while aimed at promoting public safety -- do not speak specifically in terms of protecting consumers and, therefore, do not fall within the scope of § 3.16(3). While the Building Code may incidentally advance some of the purposes of G.L. c. 93A, it does not have the protection of consumers as its intended and primary

goal. *Mahoney*, 27 Mass.App.Ct. at 781. Consequently, the Building Code does not fall within the scope of § 3.16(3) and, therefore, it cannot transform a violation of the Building Code into a per se violation of G.L. c. 93A.

Alternatively, to the extent that § 3.16(3) could be construed to impose G.L. c. 93A liability without regard to whether the statute's requirements of unfairness or deception in trade or commerce have been satisfied, the regulation would violate the basic principle of administrative law that a regulation cannot expand the boundaries of its enabling statute. *McGonagle*, 75 Mass.App.Ct. at 601. Therefore, in the event that § 3.16(3) can be construed to impose G.L. c. 93A liability beyond the scope of the statute, the regulation should be considered facially invalid.

III. The Superior Court was bound by the jury's finding of no causation on plaintiffs' wrongful death claim in ruling on plaintiffs' c. 93A claim.

A. Fact issues common to jury and non-jury claims must be submitted to the jury first and the jury's findings are binding in the resolution of the non-jury claims.

The Superior Court was bound by the jury's verdict of no causation on plaintiffs' wrongful death claim in ruling on the causation element of

plaintiffs' c. 93A claim. As the Superior Court recognized, causation is an absolutely necessary element of any c. 93A claim. The Superior Court itself recognized this in citing to *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 850 (1983) for the principle that, "[w]hat the plaintiff must show is a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception." Since the 1983 decision in *International Fid.*, Massachusetts appellate courts have reiterated many times that the plaintiff in any 93A claim must establish the element of causation. *E.g., Casavant v. Norwegian Cruise Line, Ltd*., 460 Mass. 500, 503 (2011) ("To warrant an award of damages under G.L. c. 93A, there must be a causal connection between the seller's deceptive act and the buyer's loss."; *Herman v. Admit One Ticket Agency LLC*, 454 Mass. 611, 615-16 (2009) ("A party alleging a violation of G.L. c. 93A, § 9(1), must establish ... a causal connection between the injury suffered and the defendant's unfair or deceptive method, act or practice.") Since the jury held in its verdict on the wrongful death claim, on the very same evidence that was before the Superior Court on the c. 93A claim, that there was no

causation, the court erred as a matter of law in not entering judgment for defendants on plaintiffs' c. 93A claim.

The Superior Court was bound by the jury verdict for several reasons. First, that result is compelled by this Court's reasoning in *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220 (1994), which in turn adopted the reasoning of the U.S. Supreme Court's landmark decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). *Beacon Theatres* held that where jury and non-jury claims in a case present the same factual issue, the Seventh Amendment's jury trial right requires that the issue must be decided by the jury first. *See id.* at 510-11. *Dalis* reached the same result under the Massachusetts Constitution. As this Court observed:

> We agree with the Supreme Court that where there are legal and equitable claims present in the same case, the trial court will "have to use its discretion in deciding whether the legal or equitable cause should be tried first. Because the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial" (footnote omitted). Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959). Under State law, as in the Federal system, "only [in] the most imperative circumstances ... can the

> right to a jury trial of legal issues be lost through prior determination of equitable claims." *Id.* at 510-511.

418 Mass. at 227.

Importantly for present purposes, the rationale of *Beacon Theatres* was that if the non-jury claims were decided first, the court's factual findings could collaterally estop the jury:

> [D]etermination of the issue ... by the judge might operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim.

359 U.S. at 504 (internal quotation omitted). To avoid this result, the *Beacon Theatres* Court ruled that common law claims must be tried to the jury first.

> This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which ... we cannot now anticipate, can the right to a jury trial of **legal issues** be lost through prior determination of equitable claims.

Id. at 510-11 (emphasis added; footnote omitted).

Critically, the reasoning of the *Beacon Theatres* Court dictates not only that the common law claims be tried to the jury first, but that the jury's findings be binding in any subsequent proceeding before the court. The Court's references to "collateral estoppel"

reflect its conclusion that the common fact issue would be decided only once, and would be binding in both common law and equitable claims. Moreover, the Court's statement regarding a "right to a jury trial of legal **issues**" (i.e., fact issues controlling the common law claims) confirms its conclusion that the jury, not the judge, would resolve the common issues. *See id.* at 511 (emphasis added); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 334 (1979).

This Court's decision in *Dalis* interpreting the Massachusetts jury trial right under Article 15, employs the same reasoning as *Beacon Theatres*, and indeed quotes the above passage. *See* 418 Mass. at 227. *Dalis* thus compels the conclusion that the Superior Court was bound to follow the jury's finding of no causation. The Superior Court's contradictory finding in its c. 93A ruling, on the same factual issue and evidence, effectively nullified the jury's verdict in violation of defendants' constitutional jury trial right on the wrongful death claim.

The same result is compelled by established principles of issue preclusion. It is black letter law that the final resolution of a factual issue in a case is binding, and not subject to re-litigation between

the same parties. *See Alba v. Raytheon Co.*, 441 Mass. 836, 841 (2004). This rule seeks to promote consistency and finality in resolving disputes and to avoid unseemly collateral attempts at a "do-over." *See id.*; *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 449 (1982); *see also Johnston v. Arbitrium (Cayman Islands) Handels AG*, 198 F.3d 342, 348 (2d Cir. 1999). Such unseemliness is most acute where, as here, the inconsistent finding involves the same issue and the same parties based on the same body of evidence. *Specialized Technology Resources, Inc. v. JPS Elastomerics Corp.*, 80 Mass. App. Ct. 841, 851-52 (2011) (Grainger, J., concurring)("... if these claims had been brought sequentially, a determination that secrets had, or had not, been stolen would enjoy the protection of collateral estoppel on the second attempt. Under this statutory construct, however, a court can freely engage in cognitive dissonance, otherwise prohibited, simply by issuing contradictory findings simultaneously. As has been observed in another context, this poses 'a query of the type that intrigues the legal mind but is a source of bafflement and some impatience to the average layman.'")

This Court also should reject the process employed by the Superior Court in this case because it is inconsistent with sound judicial policy. The trial judge sitting as a fact finder in a c. 93A case should not adopt factual findings that directly contradict those of a jury in the same case. This Court has supervisory powers with respect to the procedures employed at the trial level. That there is no jury right generally in a c. 93A case does not control how a court should respond where the elements of a common law or statutory claim also form the basis for the specific c. 93A claim presented by the plaintiff. Here, plaintiffs literally obtained a "second bite at the apple" – same facts, different fact finder.

Massachusetts courts have long recognized the importance of juries in our justice system. *Dalis*, 418 Mass. at 222 (trial by jury is "the sacred method for resolving factual disputes ... because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the judicial eye") (internal quotation omitted). Jury findings should not be nullified just because a judge views the evidence differently. The power of a trial court to reject a jury verdict is limited to those circumstances in

which the standards for the grant of a judgment notwithstanding the verdict or a new trial are met. They have not been met in this case where the trial judge denied JNOV and plaintiffs did not even request a new trial.

B. The decisions in other jurisdictions overwhelmingly conclude that a judge ruling on a claim submitted to the court is bound by the jury's prior finding on the same factual issue.

Decisions in other jurisdiction overwhelmingly hold that where a jury has decided an issue of fact and that same issue arises in a non-jury claim in the same case, the court is bound by the jury's finding. The rulings of these other courts are extraordinarily consistent, including every Federal court of appeals,[2] and multiple State supreme courts.[3]

The reasoning of these courts encompasses each of the principles addressed above. Many begin with the

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[2] *See, e.g.*, *Ag Servs. of Am., Inc. v. Nielsen*, 231 F.3d 726, 730-31 (10th Cir. 2000); *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 382-83 (1st Cir. 1998); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 432 (2d Cir. 1995); *Ward v. Tex. Employment Comm'n*, 823 F.2d 907, 908-09 (5th Cir. 1987); *Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987).

[3] *See, e.g.*, *Avery v. Whatley*, 670 A.2d 922, 926 (Me. 1996); *Onvoy, Inc. v. Allete, Inc.*, 736 N.W.2d 611, 616-17 (Minn. 2007)(citing cases); *Wood v. Wood*, 693 A.2d 673, 675 (Vt. 1997).

holding in *Beacon Theatres*, and conclude, based on a constitutional right to trial by jury, that the court is bound by the factual findings of the jury on any common factual issue. Notably, the argument accepted in these cases is **not** that there was a jury right on the claims tried to the court (usually equitable claims), but only that the jury right required the court to follow the jury's findings on common issues of fact.

For example, in *Ag Services of America, Inc. v. Nielsen*, 231 F.3d 726, 728, 730-31 (10th Cir. 2000), the Tenth Circuit held that a trial judge ruling on equitable claims of "partnership by estoppel," "piercing the corporate veil" and unjust enrichment was required to follow the jury's verdict previously reached on common factual issues raised by the common law claims. The Supreme Court of Minnesota in *Onvoy, Inc. v. Allete, Inc.,* 736 N.W.2d 611, 617 (Minn. 2007), reached the same conclusion, reasoning as follows:

> Making a jury's factual findings that are common to claims of law and claims for equitable relief binding on the district court not only helps protect the right to a jury trial by ensuring that proper weight is given to jury findings by the district court, but it also prevents inconsistent

> decisions between claims at law and claims for equitable relief, thus maintaining the integrity of the judiciary.

The First Circuit has adopted this rule as well. In *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 382-83 (1st Cir. 1998), the court concluded that "it has become common, in this circuit as in others, to say that the judge is normally bound by earlier jury findings in the same case on common issues." *See also id.* at 383 ("The rule is beneficial in minimizing inconsistencies ... . And the rule has a further benefit insofar as it avoids giving one side, but not the other, two bites at the **same** apple. ...") (emphasis in original).

Notably, in *Troy* the First Circuit distinguished its prior decision in *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049 (1st Cir. 1985). *See Troy*, 141 F.3d at 383 n.3. *Wallace* had addressed the problem of inconsistent findings between judge and jury in the context of a c. 93A case, and can be read to suggest that a c. 93A judge is not bound by a jury's prior findings in Federal court. *See* 780 F.2d at 1063-67. In *Troy*, however, the First Circuit suggested that the issues in *Wallace* were not identical. *See Troy*, 141 F.3d at 383 n.3. The court

thus left "for another day" "the problem" of whether the judge would be bound if the issues were, as they are here, identical. *See id.*

C. No Massachusetts case holds that a trial court may disregard a jury's finding under the circumstances here.

This Court has never decided before the issue presented here. The case of *Nei v. Burley*, 388 Mass. 307, 315 (1983) only holds that there is no general right to trial by jury in a c. 93A claim. *Nei* simply does not answer the question posed here: where a c. 93A violation is predicated upon the same factual allegations that have previously been resolved by a jury, are the jury's findings binding on the court? The fact that plaintiffs' c. 93A claim was based upon the same evidence as their wrongful death claim is important, because it distinguishes cases where the judge's c. 93A findings may have been based upon a different legal standard than the issue presented to the jury. Here, the Superior Court's finding of c. 93A liability necessarily included its finding of causation, which directly contradicts the jury's finding of no causation. If this jury's verdict had been credited, the Superior Court could not have found

the causal element necessary to establish a c. 93A violation.

Not only is there no controlling authority from this Court, but many other related decisions of the Appeals Court are distinguishable. None involve a jury finding that negates an essential element of the c.93A claim as presented. In *Chamberlayne School v. Banker*, 30 Mass. App. Ct. 346, 353-54 (1991), for example, the judge awarded damages on the c. 93A claim that were greater than the damages found by the jury on the common law claim. This Court affirmed, but only after noting "the broader scope and more flexible guidelines of c. 93A." *Id.* at 354-55. In other words, the damages issue decided by the trial court was not the same as the damages issue presented to the jury. Similarly, in *Wyler v. Bonnell Motors, Inc.*, 35 Mass. App. Ct. 563, 563-54, 568 (1993), this Court affirmed the trial court's award of damages under c. 93A in an amount different from the jury verdict only after observing that the c. 93A issues were "sufficiently distinct." No other appellate decision is closer than *Chamberlayne* or *Wyler* to the facts here. While some Appeals Court decisions suggest that a judge may make findings "inconsistent" with a jury, those statements

frequently are dicta, or involve situations where the issue presented to the court was not the same as the issue the jury had previously decided. *See generally Guity v. Commerce Ins. Co.*, 36 Mass. App. Ct. 339 (1994). None of them involve the procedural circumstances presented here, and statements that the judge may make "inconsistent" findings should not be followed here.

CONCLUSION

For the foregoing reasons, the Amici, The Massachusetts Defense Lawyers Association and DRI – The Voice of the Defense Bar, respectfully ask that the judgment entered against the defendants be reversed and that judgment enter in their favor, and for such other relief as the Court deems just and proper.

Respectfully submitted,

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I, Michael D. Riseberg, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R.A.P. 16(1)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(f) (reproduction of statutes, rules, and regulations); Mass. R.A.P. 16(h) (lengths of briefs): Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief upon counsel by depositing copies in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service on May 11, 2012, addressed to the following:

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