Provider No.1225 Course No.

PREFERRED EDUCATION PROVIDER

Metro West Building Officials Meeting

BUILDING OFFICIALS ASSOCIATION

January 11, 2022
Location: ZOOM
Meeting Start Time 9:00 AM
This month's presentation will be:
A Roundtable Discussion on Topic's:

Attorney Peter McGlynn of Bernkopf Goodman

will discuss the case and the potential ramifications for homeowners who purchase an existing home that was renovated by an unscrupulous seller/builder who renovated without building permits and whose renovations were structurally unsound and dangerous.

Plaintiff Ted Sullivan

will discuss his experiences and advocacy to address building codes and lack of DPL enforcement with his local MA Representative & Senator, MA Attorney General's Office and his insurance company (which will only insure homes and condos that meet local building codes)

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT
SJC 12934

Peter B. McGlynn
Peter McGlynn is the Managing Director of Bernkopf Goodman LLP's Litigation Group in Boston, MA. He focuses his practice on construction, bankruptcy, surety, and commercial litigation. He has tried to verdict over 150 cases on a wide array of commercial, construction, surety and bankruptcy disputes. In particular, Mr. McGlynn has represented clients on disputes involving construction defects on a nuclear power plant, disputes arising out of an electric cooperative bankruptcy, RICO claims against the officers of a defunct corporation, partnership disputes on a $3 billion development, claims arising out of failed construction contracts and a multi-million dollar land damage case against an oil company in federal court in North Dakota. Mr. McGlynn has lectured on litigation, construction, bankruptcy and surety law before the Boston Society of Civil Engineers, the Engineering Societies of New England, the Massachusetts Bar Association, Massachusetts Continuing Legal Education, the Northeast Construction Expo., the Construction Super Conference, the National Academy of Forensic Engineers, the Associated General Contractors of America, ALI/ABA, Lorman Education Services, the American Bankruptcy Institute, the New England Construction & Real Estate Risk Management Conference, Northeastern University and the University of Wisconsin. Mr. McGlynn was selected for inclusion in Best Lawyers in America, is listed in Best's Directory of Insurance Attorneys and is certified as a business bankruptcy lawyer by the American Board of Certification. Mr. McGlynn received his BA degree from the University of Massachusetts – Amherst and his JD degree from Suffolk University.

GENERAL DISCUSSION (round table)

Robert Berger is inviting you to a scheduled Zoom meeting.
Topic: Metro-West January 11, 2022 Meeting Zoom Meeting
Time: Jan 11, 2022 09:00 AM Eastern Time (US and Canada)

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Any Questions Please Call
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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12934

CONSTANCE M. SULLIVAN AND EDWARD T. SULLIVAN, JR.

Plaintiff/Appellees/Cross-Appellants

v.

FIVE ACRES REALTY TRUST, GIUSEPPE GAGLIARDI, ROSALIE GAGLIARDI, AND MARIA GAGLIARDI, INDIVIDUALLY AND AS TRUSTEES OF FIVE ACRES REALTY TRUST, AND J.F. CONTRACTING CO., INC.,

Defendants/Appellants/Cross-Appellees

MOTION FOR RECONSIDERATION OR MODIFICATION OF DECISION

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I. INTRODUCTION

The jury's verdict must be affirmed. The Court's decision was inconsistent with the trial evidence concerning the defendants' "trade or commerce" conduct and "builder-vendor" status, it improperly applied the applicable standard of review, and it engaged in impermissible factfinding.

II. ARGUMENT

A. Chapter 93A

Lantner v. Carson, 374 Mass. 606, 607–608 (1978) held that G.L. c. 93A was inapplicable "where the transaction is strictly private . . . , and is in no way undertaken in the ordinary course of . . . business." Pointing to *Lantner*, *Begelfer* explained that "[c. 93A] did not reach strictly private transactions such as the isolated sale of a private home," and established a factor test to determine if a transaction occurred in a "business context." *Begelfer v Najarian*, 381 Mass. 177, 190 (Mass. 1980). "Whether the parties are acting in a business context . . . is a question of fact[.]" *Jepson v. Country Vill. Mgmt., Inc.*, No. 04–P–1705, 2006 WL 1627911, at *3 (Mass. App. Ct. June 13, 2006) (internal quotations omitted).

The Court was required to "view the evidence in the light most favorable to the Plaintiff," and the verdict must be "upheld if it may be determined that anywhere in the evidence, from whatever source derived, any combination of circumstances . . . from which a reasonable inference could be drawn in favor of

the plaintiff." *Sullivan v. Five Acres Realty Tr.*, No. SJC-12934, 2020 WL 8837439, at *3 (internal quotations and citations omitted).

The lower court judge instructed the jury on the c. 93A claim that: "[t]he sale of a private residence can satisfy the trade or commerce requirement if the sellers are real estate professionals or the sale was part of a larger real estate business." RAVII/1638.[1] The jury could have reasonably inferred that the Dover sale was part of the defendants' real estate business (RAVII/796-798), which accounted for over 50% of the defendants' gross income and a majority of their wealth. RAVIII/130-169. The Dover renovations enhanced the property value (RAVII/208-209, 706), which the defendants used to leverage the purchase of the Weston property, then deducted Dover's mortgage interest payments from their rental income on the Weston property. RAVII/796-798, 991-992, 1042; RAVIII/145. The evidence was that the defendants were operating in a "business context."

1. <u>Nature of the Transaction</u>

The Court held that that the Dover transaction was private, but provided no explanation why. The jury heard evidence that the Dover sale was not strictly a private, isolated sale: (1) it was the sixth property purchased; (2) the defendants admitted the Dover sale was part of their "rental business" (RAVII/796-798),

[1] The defendants did not appeal the jury instructions.

buying, renovating properties, leveraging their equity to acquire other properties including Weston, and selling or renting them on a 10-12 year cycle spanning 40+ years (RAVII/525, 664, 770, 1511-1514); (3) the defendants refinanced their properties to expand their "rental business" to create wealth (RAVII/691, 694, 698-699, 796-798, 910-911); and (4) the defendants performed and oversaw Dover's renovations, using J.F.'s equipment to perform renovations. RAVII/515-516, 663-664, 667-680, 706-708, 742-745.

2. <u>The Parties' Character</u>

This Court said the defendants were not real estate professionals, but provided no explanation why they were not. *Sullivan*, *supra*, at *4. The jury heard that the defendants were real estate professionals and their 40+ year business plan and tax returns corroborate this. RAVIII/130-169; RAVII/796-798. The lower court judge instructed the jury that "[t]he sale of a private residence can satisfy the trade or commerce requirement if the sellers are real estate professionals *or* the sale was part of a larger real estate business." RAVII/1638 (emphasis added). The jury concluded that the defendants willfully violated c. 93A. RAV/41-42.

Nei v. Burley, 388 Mass. 307, 317–318 (1983) held that c. 93A was inapplicable where "[n]either seller devoted any appreciable . . . time to the real estate[,]" yet, pointed out that "[the sellers] c[a]me manifestly closer to the 'trade or business' line than the defendants in *Lantner*."

Unlike *Nei*, the jury here heard that the Galgiardis spent appreciable time on their "rental business." RAVII/796-798. The defendants admitted that they didn't deem it feasible to rent Dover due to its size and remoteness. RAVII/941-943.

The defendants also played a significant role in the Dover sale. The jury heard that: (1) Mr. Gagliardi had been in construction business for over 50 years and held a construction supervisor license (RAVII/507, 518); (2) the defendants planned and performed the renovation work on Dover (RAVII/711, 741, 921); (3) the defendants' "business plan [was] to purchase, renovate, and either rent or sell residential properties" (*Sullivan*, *supra*, at *3 n.8); and (4) the defendants worked with realtors on marketing material and highlighted the illegal renovations to the Sullivans. RAVII/922-923, 954-958.

3. <u>Activities Engaged in by Parties</u>

This Court held that the defendants' actions in connection with the Dover sale were "customary when selling a private residence." *Sullivan*, *supra*, at *4. The jury was not presented with any evidence as to what was "customary" when selling a private residence. Due to the absence of such evidence and because the evidence had to be viewed in the light most favorable to the Sullivans, the Court's finding of what constitutes "customary" was impermissible.

Regardless, the defendants' involvement with the Dover sale was different from what might be considered "customary." The jury heard evidence

demonstrating the defendants' involvement in the renovation and sale of Dover, their active oversight over the renovations, and their use of J.F. furnished equipment. The jury also heard that the Dover renovations were illegal and created dangerous, structural issues. RAVII/744, 792-793, 263-265, 307, 1165-1168. The defendants also highlighted their renovations to the Sullivans. RAVII/954-958.

4. <u>Past Similar Transactions</u>

The Court also held that the defendants "had not engaged in similar transactions in the past . . . ." *Sullivan*, *supra*, at *4. Caselaw provides no guidance as to how similar a "similar transaction" has to be under *Begelfer*. The jury was permitted to reasonably infer, as this Court found, the defendants "engaged in a business plan to purchase, renovate, and either rent or sell residential properties." *Id.* at *3 n.8. The jury could also have reasonably inferred that purchasing, renovating, leveraging, and selling Dover was similar to the defendants' past transactions in which they purchased, renovated, rented, sold, and leveraged their properties to acquire additional properties and to create wealth. RAVII/691, 694, 698-699, 902-904, 910-911. The jury could also have reasonably inferred that the defendants considered renting Dover instead of selling it.

5. <u>Was Transaction Motivated by Business or Personal Reasons</u>

The Court held that the Dover transaction was strictly a private sale of a home, and that the defendants' "business endeavors [were] somewhat tangentially

related to the transaction at issue." *Sullivan*, *supra*, at *4. However, as this Court acknowledged in footnote 8, the jury could have reasonably inferred that the Dover sale *was* motivated for business reasons as part of the defendants' "business plan." *Id.* at *3 n.8. The jury also heard that the defendants (1) refinanced 39 Eddy St. to purchase 33/35 Eddy St. (RAVII/902-904), (2) refinanced 33 Eddy St. to purchase 45 Eddy St. (RAVII/691), (3) refinanced 39/45 Eddy St. to purchase the Dover property (RAVII/910-911), and (4) refinanced Dover to purchase Weston (RAVII/694, 698-699), and could have reasonably inferred that the Dover sale was intertwined with the defendants' contracting and real estate businesses. *See Sullivan*, *supra*, at *3 n.8.

The jury also heard that the defendants decided not to rent Dover due to its size and remote location (RAVII/941-944) and spent 3-4 years completing the Dover property renovations (RAVII/708, 713); the completion date is unknown because Mrs. Gagliardi shredded the renovation documents. RAVII/933-934. The jury could have reasonably inferred that the renovations were completed less than one year prior to the sale and were undertaken as part of the defendants' rental business conducted in a 10–12-year cycle over 40+ years. *Sullivan*, *supra*, at *3 n.8; RAVII/691, 694, 698-699, 770, 902-904, 910-911.

6. Whether Participants Played Active Part in Transaction

The Court found that the defendants' involvement in the Dover sale was "customary." *Sullivan*, *supra*, at *4. However, the defendants failed to offer any evidence at trial as to what a "customary" level of involvement was. As discussed *supra*, the jury heard that the defendants didn't play a "minor role" in the transaction like the defendant in *Nei*. 388 Mass. at 318. Unlike the defendants in *Nei* who only reserved for themselves acceptance and rejection of offers (*id.*), the defendants here personally marketed renovations to the Sullivans (RAVII/954-958) and designed, oversaw, and performed the illegal and unsafe renovation work using J.F.'s equipment. RAVII/259, 711, 741, 911-912, 921.

B. Implied Warranty of Habitability

In 2018, Chief Justice Gants authored the opinion holding that:

> In order to effectuate [Massachusetts'] public policy [strongly favoring the habitability of homes], we have consistently recognized the rights of individuals to obtain legal redress when their homes fail to meet minimum standards. These rights—whether grounded in the implied warranty of habitability or in the building code as enforced through G.L. c. 93A—are so vital . . . they cannot be waived.

Trustees of Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 478 Mass. 697, 707 (2018).

This Court didn't address the reasons underlying its refusal to extend the implied warranty to existing home renovations nor did it address the important

public policy behind the implied warranty — to allow "individuals to obtain legal redress when their homes fail to meet minimum standards." *Id.* at 707. This Court also failed to address whether the implied warranty of habitability applied to a renovated home. Dover had severe structural deficiencies and "fail[ed] to meet minimum standards" due to the defendants' illegal renovations. *Id.*

The Sullivans purchased an objectively uninhabitable home, and the defendants — especially Mr. Gagliardi as holder of construction supervisor and home improvement contractor licenses — were in the best position to prevent latent, unsafe, and illegal construction. RAVII/263-265, 307, 520-522

"The existence of a material breach [of the implied warranty of habitability] is a question of fact to be determined in the circumstances of each case." *Bos. Hous. Auth. v. Hemingway*, 363 Mass. 184, 200 (1973). The lower court judge "adopt[ed] the public policy language . . . set out in *Albrecht* and *Kosanovich*" and instructed the jury accordingly. RAVII/1511-1512, 1631-1635; *see Albrecht v. Clifford*, 436 Mass. 706, 710 (2002) (public policy behind implied warranty of habitability); *Kosanovich v. 80 Worcester St. Assocs., LLC*, 2014 Mass. App. Div. 93, 97 (2014) (extending implied warranty to renovated condominium).

The Court held that the defendants were not builder-vendors because they did not build Dover. Yet, the jury could have reasonably inferred that the defendants were builder-vendors for reasons discussed *supra*. The defendants

carried out the renovations themselves, supervised the contractors who performed some of the work, made the decision not to apply for building permits, and admitted that the purpose of Dover's and their other properties' renovations was to generate wealth. RAVII/709-716, 756-757, 991-992.

III. CONCLUSION

The facts in this case present compelling reasons why c. 93A and the implied warranty of habitability should have protected the Sullivans and been extended to renovations performed by the defendants to effectuate, in the words of Chief Justice Gants, the "rights of individuals to obtain legal redress when their homes fail to meet minimum standards." *Cambridge Point, LLC*, *supra*, at 707. The Sullivans respectfully request that this Court reconsider its opinion, affirm the jury's verdict, and grant such other relief that is proper and just.

Respectfully submitted,
/s/ Peter B. McGlynn

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IV. CERTIFICATION

Pursuant to Mass R.A.P. 16(k), the undersigned hereby certifies that this motion complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). The undersigned hereby further certifies that compliance with the applicable length limit of 10 pages or 2,000 words contained in Mass. R.A.P. 27 was achieved by using Times New Roman 14-point font with less than 2,000 words.

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V. PROOF OF SERVICE

In accordance with Mass. R. App. 13(e), the undersigned hereby certifies that the foregoing Motion for Reconsideration or Modification of Decision of the Plaintiffs/Appellees/Cross-Appellants, Constance M. Sullivan and Edward T. Sullivan, Jr., in the case of *Constance M. Sullivan and Edward T. Sullivan, Jr v. Five Acres Realty Trust, Giuseppe Gagliardi, Rosalie Gagliardi and Maria Gagliardi*, SJC-12934, has been served on counsel for the Defendants/Appellants/ Cross-Appellees, Joel Lewin, Esq., Hinckley Allen & Snyder, 28 State Street, Boston, MA 02109, via email at jlewin@haslaw.com and by operation of the Court's electronic service system as of this 26th day of March, 2021.

/s/ Peter B. McGlynn

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SJC-12934

CONSTANCE M. SULLIVAN & another[1] vs. FIVE ACRES REALTY TRUST & others.[2]

Norfolk. November 4, 2020. – March 12, 2020.

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

Real Property, Sale. Damages, Breach of implied warranty of habitability, Consumer protection case. Consumer Protection Act, Trade or commerce, Unfair or deceptive act, Damages, Attorney's fees. Fraud. Contract, Sale of real estate, Misrepresentation. Practice, Civil, Consumer protection case, Directed verdict, Judgment notwithstanding verdict, Summary judgment, Attorney's fees, Costs.

Civil action commenced in the Superior Court Department on September 5, 2014.

A motion for summary judgment was heard by William F. Sullivan, J.; the case was tried before Mark A. Hallal, J., and posttrial motions were heard by him.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

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[1] Edward T. Sullivan, Jr.

[2] Giuseppe Gagliardi, Rosalie Gagliardi, and Maria D. Gagliardi, individually and as trustees of the Five Acres Realty Trust; and J.F. Contracting Co., Inc.

Joel Lewin for the defendants.
Peter B. McGlynn for the plaintiffs.
Deborah Schrieber, for American Society of Trial Consultants, Inc., amicus curiae, submitted a brief.

CYPHER, J. In 2013, the plaintiffs, Constance M. Sullivan and Edward T. Sullivan, Jr., purchased a piece of real property in Dover (Dover property) from defendants Giuseppe, Rosalie, and Maria Gagliardi,[3] as trustees of the Five Acres Realty Trust.[4] The plaintiffs thereafter discovered various defects in the Dover property and commenced this action in 2014 against Giuseppe, Rosalie, their daughter Maria, Five Acres Realty Trust, and J.F. Contracting Co., Inc. (J.F. Contracting), a masonry contracting business owned by Giuseppe.[5] The plaintiffs alleged breach of the implied warranty of habitability, fraud and misrepresentation, defective and deficient renovation work, and violations of the Massachusetts consumer protection act, G. L. c. 93A. A judge in the Superior Court (motion judge) granted the defendants' motion for summary judgment on the fraud and misrepresentation and the defective and deficient renovation

[3] Because the defendants share the same last name, we refer to them by their first names.

[4] The property was owned by the Five Acres Realty Trust, of which Giuseppe, Rosalie, and Maria Gagliardi are the trustees and beneficiaries.

[5] The plaintiffs sued the Gagliardis in their individual capacities and in their capacities as trustees.

work claims. After trial, the jury found in favor of the plaintiffs on the warranty of habitability and the G. L. c. 93A claims, awarding the plaintiffs $250,000 on the warranty of habitability claim and $211,153.38 on the c. 93A claim.[6]

The defendants appeal from the trial judge's denial of their motions for directed verdict or judgment notwithstanding the verdict, and for a new trial or to alter or amend the damages. The plaintiffs appeal from the motion judge's grant of summary judgment in favor of the defendants on the fraud and misrepresentation claim and the from the trial judge's denial of an award of jury consultant fees under G. L. c. 93A. We conclude that the motion for directed verdict or the motion for judgment notwithstanding the verdict should have been allowed on the G. L. c. 93A and the warranty of habitability claims, the motion judge properly granted summary judgment in favor of the defendants on the fraud and misrepresentation claim, and jury consultant fees are not recoverable under G. L. c. 93A. Because we vacate the awards of damages on the G. L. c. 93A and warranty of habitability claims, we need not reach the arguments related to those awards.[7]

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[6] The jury awarded double damages against Rosalie and Giuseppe, individually, on the G. L. c. 93A claim.

[7] We acknowledge the amicus brief submitted by the American Society of Trial Consultants, Inc.

Background. 1. The Gagliardis. Giuseppe was a licensed construction supervisor who owned J.F. Contracting, which he started in 1985. J.F. Contracting performed primarily residential construction. Rosalie managed the books for J.F. Contracting and for the apartment rentals she and Giuseppe operated.

Rosalie and Giuseppe had a history of purchasing, renovating, refinancing, and renting properties. In 1974, they purchased their first property, which during the 1980s and 1990s they renovated and converted to a two-family property. They mortgaged the first property and used the proceeds to purchase a second property, into which they moved after living at the first property for about twelve years. They have rented out the first property since moving from it. They also renovated and converted the second property to a duplex apartment and received rental income from it until they sold it to their daughter in 2004. In 1988, Rosalie and Giuseppe refinanced the second property and used the proceeds to purchase a third property, which they renovated and have since rented out. In 1997, they used proceeds obtained from refinancing the second property to purchase a commercial property.

In 2002, they purchased the Dover property with proceeds from refinancing the first and third properties. At that point they had lived at the second property for about fifteen years.

In 2009, they purchased a property in Weston with proceeds from mortgaging the Dover property. They rented out the Weston property for several years, until they eventually moved in after selling the Dover property.

2. Renovation work. The Dover property was built in 1986. Rosalie and Giuseppe, through the trust, were the sixth purchasers of the home, in 2002. Before selling the Dover property to the plaintiffs, Rosalie and Giuseppe lived there for eleven years. During that time, Rosalie and Giuseppe completed several renovations to the home for which they did not obtain building permits or certificates of occupancy. The work included renovating and enlarging the kitchen, transforming a screened-in porch into a "Tuscan-style room," and installing a brick pizza oven. Giuseppe completed some of the renovation work himself, and contractors completed the other work. The renovation work began in 2006 and took three to four years to complete; however, the exact completion date is unknown because Rosalie shredded the renovation documents.

3. Plaintiffs' purchase of Dover property. Rosalie and Giuseppe listed the Dover property for sale in 2011. In 2012, the plaintiffs conducted a preclosing inspection of the Dover property, during which Rosalie and Giuseppe showed the plaintiffs the renovations to the property. When showing the plaintiffs the work in person, Rosalie and Giuseppe did not

disclose that the renovations never were inspected or approved for occupancy.

The plaintiffs purchased the Dover property in 2013, and thereafter discovered structural and other deficiencies relating to the home, such as that the ceilings in the kitchen and Tuscan-style room were in danger of collapsing, and that the defendants had never obtained required permits and certificates of occupancy for the home. The plaintiffs were informed that it would be more cost effective to raze the Tuscan-style room and rebuild it, which could cost approximately $211,000.

4. Prior proceedings. After discovering the defects, the plaintiffs contacted the Gagliardis' real estate broker to learn who performed the renovation work, but Rosalie and Giuseppe refused to provide the requested information.

In 2014, the plaintiffs sent the defendants a demand letter pursuant to G. L. c. 93A, § 9. The defendants did not identify the individuals who performed the renovation work, and the defendants stated in response to the demand letter that they did not perform renovations that would affect the home's structural integrity, nor did they know of any building code violations. The defendants also claimed in their response that a factual and legal investigation into the plaintiffs' allegations had been undertaken, but they later admitted that they never investigated

the property. The defendants did not respond with a settlement offer.

The plaintiffs thereafter commenced this action, alleging breach of the implied warranty of habitability, fraud and misrepresentation, defective and deficient renovation work, and violations of G. L. c. 93A. The defendants moved for summary judgment on all claims, which the plaintiffs opposed. The motion judge granted summary judgment in favor of the defendants on the fraud and misrepresentation claim and the defective and deficient renovation work claim.

Following a trial, the jury found in favor of the plaintiffs on the implied warranty of habitability and the G. L. c. 93A claims. On both claims the jury awarded damages jointly and severally against Giuseppe and Rosalie, individually, and Giuseppe, Rosalie, and Maria as trustees of Five Acres Realty Trust. Damages on the implied warranty of habitability claim were $250,000, plus statutory and prejudgment interest, and damages on the c. 93A claim were $211,153.38, plus statutory and prejudgment interest. The jury also awarded double damages against Rosalie and Giuseppe, individually, in the amount of $211,153.38, as the jury found that the defendants acted willfully and knowingly and that the response to the c. 93A demand letter was made in bad faith. The plaintiffs moved for attorney's fees and costs pursuant to G. L. c. 93A, § 9 (4), and

the trial judge awarded $425,727.76 in attorney's fees and $35,222.19 in costs, but he denied recovery for costs associated with a jury consultant used by the plaintiffs.

The defendants had moved for a directed verdict on both claims at the close of the plaintiffs' case and again at the close of all the evidence, and the trial judge denied both motions. The defendants also moved for judgment notwithstanding the verdict on both claims and filed a motion for a new trial or, in the alternative, for remittitur or to alter or amend the judgment with respect to damages. The plaintiffs opposed the motions and moved to alter or amend the judgment, which the defendants opposed. The trial judge denied all motions. The parties filed timely notices of appeal, and the case now is before us on transfer from the Appeals Court on our own motion.

Discussion. 1. Motions for directed verdict and judgment notwithstanding verdict. In reviewing a denial of a defendant's motion for a directed verdict or for judgment notwithstanding the verdict, we view the evidence in the light most favorable to the plaintiff. Miga v. Holyoke, 398 Mass. 343, 348 & n.6 (1986). "The verdict will be upheld if it may be determined that 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'"

McAvoy v. Shufrin, 401 Mass. 593, 596 (1988), quoting Miga, supra at 348.

a. Chapter 93A. The defendants argue that the evidence was insufficient to establish that the sale of the property took place in the course of trade or commerce. We agree.

General Laws c. 93A, § 2 (a), prohibits unfair or deceptive acts or practices "in the conduct of any trade or commerce." The statute is intended to apply to individuals acting in a business context and is therefore not applicable "where the transaction is strictly private in nature, and is in no way undertaken in the ordinary course of a trade or business." Lantner v. Carson, 374 Mass. 606, 607-608, 611 (1978). The statute does not apply to "strictly private transactions such as the isolated sale of a private home." Begelfer v. Najarian, 381 Mass. 177, 190 (1980), citing Lantner, supra. Therefore, the threshold issue we must address is whether the defendants were acting in a business context. Factors relevant to whether the defendants' participation in the transaction took place in a "business context" are the nature of the transaction, the character of the parties, the activities engaged in by the parties, whether the transaction was motivated by business or personal reasons, whether similar transactions have been undertaken in the past, and whether the participant played an

active role in the transaction. Begelfer, supra at 190-191, citing Lantner, supra at 611.

Relying on the factors delineated in Begelfer, the plaintiffs argue that the defendants were acting in a business context.[8] The plaintiffs support their argument by relying on Rosalie and Giuseppe's practice of acquiring a property, making renovations to it, refinancing to acquire additional property, and then moving from the property. They further argue that Rosalie and Giuseppe were acting in a business context because of their involvement in the construction business and J.F. Contracting's connection to the Dover property, in part through the property being the company's legal place of business and Rosalie's maintenance of the company's books there. In addition, the plaintiffs note that Rosalie maintained the books and records for the Gagliardi's real estate holdings at the Dover property, and that Rosalie and Giuseppe actively participated in the sale, and the plaintiffs surmise that Rosalie and Giuseppe sold the Dover property to generate wealth.

[8] The defendants contend that we should look only to the Begelfer factors if "there is evidence that the ownership and subsequent sale of a home is part of a business plan to buy and resell homes for a profit." The defendants do not support this argument with relevant authorities, and either way, viewing the evidence in the light most favorable to the plaintiffs, Uno Restaurants, Inc., 441 Mass. at 382, there was evidence to support that the defendants were engaged in a business plan to purchase, renovate, and either rent or sell residential properties.

The plaintiffs' contention that Rosalie and Giuseppe's purchase, leveraging of equity, renovation, and sale of the property -- particularly when considering previous similar transactions engaged in by Rosalie and Giuseppe -- brings this transaction into the "business context" is perhaps their strongest argument, but it is ultimately unpersuasive in the circumstances of this case.

Despite the above practices, the sale at issue was a strictly private transaction and was not subject to c. 93A. See Lantner, 374 Mass. at 607-608, 611. Applying the Begelfer factors to the present circumstances, the nature of the transaction was private, the parties were not real estate professionals, and the defendants had not engaged in similar transactions in the past, arguably except for the sale of a home in 2004 to their daughter. The primary reason the plaintiffs' argument is unavailing is because the Dover property was Rosalie and Giuseppe's residence for about a decade. This is in stark contrast to "flipping" a house, where a seller purchases a property, renovates it, and may incidentally live at the property during the period before they are able to sell the property, but where it is evident from the circumstances that it was not intended as a long term residence.

In addition, the existence of J.F. Contracting vehicles being stored on occasion or Rosalie's keeping of the books for

J.F. Contracting and their real estate endeavors at the Dover property does not alter our conclusion. Regardless of the level of "business" those actions constituted, they are separate from the transaction at issue. Here, we are dealing with a private sale of a home, and even though the sellers engaged in various business endeavors somewhat tangentially related to the transaction at issue, this sale was private in nature.

In addition, certain actions taken by Rosalie and Giuseppe, such as their active participation in the sale process and their motivation to sell, were customary when selling a private residence and therefore do not factor toward a conclusion that they were acting in a business context. By assisting with the listing information and by showing the plaintiffs the Dover property, Rosalie and Giuseppe were active participants in the transaction, but this level of participation is customary when selling one's private residence. Moreover, although the plaintiffs contend that Rosalie and Giuseppe's motivation in renovating and selling the Dover property was the same as with their other properties, i.e., to generate wealth, in the context of selling a residential property that has been lived in for about a decade, this factor does not tip the scales toward bringing the transaction out of the private realm. Hoping to make a profit by selling a property that one has lived in for

many years, after making renovations or other improvements, is simply a typical process that many homeowners undertake.

Because the sale was private in nature, and therefore not subject to G. L. c. 93A, the defendants were entitled to a directed verdict or judgment notwithstanding the verdict.

b. Implied warranty of habitability. The defendants argue that the trial judge should have allowed their motion for a directed verdict or judgment notwithstanding the verdict on the implied warranty of habitability claim because the Dover property was not a new home and they are not builder-vendors. We agree that there was insufficient evidence that the defendants were builder-vendors and therefore conclude that the defendants' motion for a directed verdict or judgment notwithstanding the verdict should have been allowed.

The purpose of the implied warranty of habitability that attaches to the sale of new homes by builder-vendors "is to protect a purchaser of a new home from latent defects that create substantial questions of safety and habitability. . . . [A] home that is unsafe because it deviates from fundamental aspects of the applicable building codes, or is structurally unsound, or fails to keep out the elements because of defects of construction, would breach the implied warranty." Albrecht v. Clifford, 436 Mass. 706, 710-711 (2002). "To establish a breach of the implied warranty of habitability a plaintiff [has] to

demonstrate that (1) he [or she] purchased a new house from the defendant-builder-vendor; (2) the house contained a latent defect; (3) the defect manifested itself only after its purchase; (4) the defect was caused by the builder's improper design, material, or workmanship; and (5) the defect created a substantial question of safety or made the house unfit for human habitation." Id. at 711-712. At issue in the present case is whether the first prong has been met.

The evidence was insufficient to show that the defendants were builder-vendors. Although Massachusetts law does not expressly define "builder-vendor," persons considered "builder-vendors" under our implied warranty of habitability jurisprudence have included builders of new residential condominium developments and homes. See Berish v. Bornstein, 437 Mass. 252, 254-255, 262-263 (2002) (defendant constructed condominium development); Albrecht, 436 Mass. at 707-708 (defendant constructed new single-family home). In determining whether a party is a builder-vendor for purposes of the implied warranty of habitability, other jurisdictions have focused on whether the house was "built for the purpose of sale to the public" (quotation omitted), Mobley v. Copeland, 828 S.W.2d 717, 728 (Mo. Ct. App. 1992), and relatedly, whether the sale was commercial in nature, rather than personal or casual, see Mazurek v. Nielsen, 599 P.2d 269, 271 (Colo. Ct. App. 1979);

Mobley, supra at 728-729; Bolkum v. Staab, 133 Vt. 467, 469-470 (1975); Klos v. Gockel, 87 Wash. 2d 567, 570 (1976). These considerations are in line with the actions of the defendants in Berish and Albrecht.

In the present case, it is undisputed that the defendants were not involved in the original construction of the house. In support of their position that Rosalie and Giuseppe are builder-vendors, the plaintiffs point to evidence showing that Giuseppe completed some of the renovation work himself.[9] Giuseppe also hired contractors to complete other portions, such as the installation of the kitchen cabinets, installation of a new gas line, and demolition of walls. However, the mere completion of renovations to one's private residence does not make him or her a builder-vendor. Moreover, the sale of the Dover property was personal in nature. Rosalie and Giuseppe lived in the Dover property for years before beginning renovations and then lived in the property for at least a year before listing it for sale.[10]

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[9] For instance, Giuseppe and his son installed a pizza oven, built a chimney in the Tuscan-style room, installed a portion of the foundation under the Tuscan-style room, and removed floor joists.

[10] Although not present in the case before us, it may be possible for a party to be a builder-vendor even though a newly constructed home has been lived in during the time between the completion of construction and the sale of the home. See, e.g., Klos, 87 Wash. 2d at 570-571, citing Casavant v. Campopiano, 114 R.I. 24 (1974), superseded by statute on other grounds ("sale

The present circumstances stand in stark contrast to a developer building a new home for the express purpose of selling it. See Berish, 437 Mass. at 254-255 (defendant constructed condominium development); Albrecht, 436 Mass. at 707-708. For the foregoing reasons, we conclude that the evidence was insufficient to show that the defendants were builder-vendors, and the defendants therefore were entitled to directed verdicts and judgments in their favor on the implied warranty of habitability claim.[11]

2. Damages. The defendants next argue that the judgment reflects duplication of damages, an unjust windfall for the plaintiffs, and manifest injustice. Further, the defendants contend the damages under G. L. c. 93A should be awarded jointly, rather than severally. Because we determined supra that the defendants' motion for judgment notwithstanding the verdict should have been granted on the c. 93A and warranty of

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must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property"); Casavant, supra at 26 ("That there had been an intervening tenancy [between completion of construction and sale of home] should not, standing alone, deprive the buyer of [implied warranty of habitability] protection").

[11] Because we determine that the defendants were not builder-vendors, and thus the sale of the home was not subject to the warranty of habitability, we need not reach the issue whether the warranty of habitability extends to the sale of a renovated house.

habitability claims, we need not determine these issues, as the award of damages on those claims must be vacated.

3. Fraud and misrepresentation. The plaintiffs argue that the motion judge erred in granting summary judgment in favor of the defendants on the plaintiffs' claim of fraud and misrepresentation. We conclude that the motion judge properly granted summary judgment on this claim.

We review a grant of summary judgment de novo to determine whether there are any genuine issues of material fact. Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). In doing so, we view the evidence in the light most favorable to the nonmoving party. Id.

"[A] plaintiff alleging a claim for deceit (i.e., fraud) must show the defendant (1) made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act on this representation, (4) which the plaintiff justifiably relied on as being true, to her detriment" (citations omitted). Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012). "Deception need not be direct to come within reach of the law. Declarations and conduct calculated to mislead and which in fact do mislead one who is acting reasonably are enough to constitute fraud." Boston Five Cents Sav. Bank v. Brooks, 309 Mass. 52, 55 (1941). In addition, "[f]ragmentary

information may be as misleading . . . as active misrepresentation, and half-truths may be as actionable as whole lies" (citation omitted). Kannavos v. Annino, 356 Mass. 42, 43, 48-49 (1969), and cases cited (intentionally deceptive and fraudulent where defendants marketed property as investment property due to multifamily use when in fact zoning ordinance banned mutlifamily use, and defendants knew purchasers planned to use property for apartments but did not disclose zoning violations). Moreover, "where there is reliance on fraudulent representations or upon statements and action treated as fraudulent, our cases have not barred plaintiffs from recovery merely becuase they 'did not use due diligence . . . [when they] could readily have ascertained from . . . records' what the true facts were. Id. at 49-50, quoting Yorke v. Taylor, 332 Mass. 368, 373 (1955).

The plaintiffs argued in their amended complaint that the defendants represented that renovations were made to the Dover property, but (1) they failed to disclose that they did not apply for building permits, nor did the Dover building department (department) inspect the renovations or issue a certificate of occupancy; (2) they knew or should have known that the kitchen renovations did not comply with the requirements of the department; and (3) they had a duty to disclose the foregoing information to the plaintiffs before the

plaintiffs purchased the property. In addition, the plaintiffs argued in opposition to summary judgment that the during the sale process, the defendants highlighted the renovations. This highlighting included stating in the marketing materials that the Dover property had a "[m]agnificent young gourmet kitchen," and "fantastic Tuscan-style [four] season room with authentic brick oven and grill," and that during the preclosing inspection, Rosalie and Giuseppe verbally emphasized the renovations.

In granting summary judgment in favor of the defendants on this claim, the motion judge reasoned that "[s]ilence does not constitute a basis for claiming fraud and misrepresentation, even where a seller may have knowledge of some weakness in the subject of the sale and fails to disclose it" (citations omitted). See Urman v. South Boston Sav. Bank, 424 Mass. 165, 168 (1997). The motion judge also noted that the plaintiffs had had an inspection of the Dover property before the purchase and that they did not take the inspector's advice to check the municipal records "to ensure that any necessary permits were obtained" for the renovations.

The plaintiffs argue on appeal that the defendants' written and oral representations concerning the renovations rose to the level of fraud, under the theory that "[f]ragmentary information may be as misleading . . . as active misrepresentation, and

half-truths may be as actionable as whole lies" (citation omitted). Kannavos, 356 Mass. at 48.

Although in Kannavos, we held that suggesting that a property was suitable for a particular purpose when that purpose was prohibited was "intentionally deceptive and fraudulent," in the present case the defendants' conduct is closer to "bare nondisclosure." Kannavos, supra at 47, 49. See Swinton v. Whitinsville Sav. Bank, 311 Mass. 677, 677-679 (1942) ("nonliability for bare nondisclosure" where seller knew house had termite infestation at time of sale, which buyer could not readily observe upon inspection, but seller did not inform buyer of infestation). Here, the defendants did not make representations that were intended to cause the plaintiffs to believe something that was untrue. Cf. Maxwell v. Ratcliffe, 356 Mass. 560, 562-563 (1969), citing Kannavos, supra at 42, 46-50 ("Because the question of the dryness of the cellar had been raised expressly, there was special obligation on the brokers to avoid half truths and to make disclosure at least of any facts known to them or with respect to which they had been put on notice"). With regard to the lack of permits and faulty work, the defendants' actions reflect a failure to reveal, see Swinton, supra at 678 ("If this defendant is liable on this declaration every seller is liable who fails to disclose any nonapparent defect known to him in the subject of the sale which

materially reduces its value and which the buyer fails to discover"), rather than "[d]eclarations and conduct calculated to mislead." Boston Five Cents Sav. Bank, 309 Mass. at 55. Accordingly, even viewing the evidence in the light most favorable to the plaintiffs, the defendants were entitled to a judgment as a matter of law on the claim of fraud and misrepresentation.

4. Jury consultant fees. The plaintiffs contend that the trial judge erred in denying fees and costs associated with their jury consultant. In their motion for attorney's fees and costs, the plaintiffs sought to recover $105,000 for jury consultant fees.[12] The trial judge concluded that the requested jury consultant fees were excessive and unreasonable, and that awarding such expenses under G. L. c. 93A was unsupported by Massachusetts authority. Although we need not reach the issue, given our conclusion that the plaintiffs are not entitled to recover under c. 93A, we nevertheless address the matter, as it is an important, unresolved issue that has been fully briefed. See Ferman v. Sturgis Cleaners, Inc., 481 Mass. 488, 491 n.7 (2019). We conclude that jury consultant fees are not recoverable under G. L. c. 93A.

[12] This consisted of a five percent contingent fee of $100,000 and $5,000 in costs.

General Laws c. 93A, § 9 (4), provides that a prevailing plaintiff "shall . . . be awarded reasonable attorney's fees and costs incurred in connection with [the] action." Our cases have clarified the types of costs recoverable under this seemingly broad standard, but this case presents us with the novel issue whether jury consultant fees are recoverable.

The jury consultant provided the plaintiffs with various assistance before and during the trial, including conducting a mock voir dire and jury trial and analyzing data obtained during those exercises; providing the plaintiffs with a report about the jury pool; working with the plaintiffs on voir dire, opening statements, and testimony; and being present in court to assist with jury selection. Although, as the plaintiffs argue, a jury consultant may provide a service that aids attorneys in providing more effective representation, the cost associated with such a consultant is dissimilar to the types of costs contemplated by the Legislature and previously allowed by our courts as recoverable under G. L. c. 93A. Cf. Yorke Mgt. v. Castro, 406 Mass. 17, 19 (1989) (appellate attorney's fees); Linthicum v. Archambault, 379 Mass. 381, 389 (1979), overruled on other grounds by Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp., 418 Mass. 737 (1994) (expert witness fee); O'Connor v. Brophy, 55 Mass. App. Ct. 909, 909 (2002) (costs associated with removal of case). Unlike the services associated with trial

attorney's fees, appellate attorney's fees, expert witness fees, or removal of a case to a different court, a jury consultant provides a luxury service. This luxury service is not one the Legislature intended to be recoverable under c. 93A.

Conclusion. For the foregoing reasons, we conclude that the defendants' motions for a directed verdict or judgment notwithstanding the verdict should have been allowed on the G. L. c. 93A and warranty of habitability claims. The award of damages to the plaintiffs on the c. 93A claim, including the award of attorney's fees and costs, and on the warranty of habitability claim are vacated, and judgment shall enter for the defendants on those claims. The judgments are otherwise affirmed.[13]

So ordered.

[13] The plaintiffs' request for attorney's fees from August 16, 2018, forward and in connection with this appeal is denied.