COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

DAR –

GOVERNO LAW FIRM LLC,
Appellant,

v.

CMBG3 LAW LLC, JENNIFER A.P. CARSON, BRYNA ROSEN MISIURA, KENDRA ANN BERGERON, DAVID A. GOLDMAN, BRENDAN J. GAUGHAN, AND JOHN P. GARDELLA,
Appellees.

GOVERNO LAW FIRM LLC'S APPLICATION FOR DIRECT APPELLATE REVIEW

REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, appellant Governo Law Firm LLC ("Governo Law Firm") requests that the Supreme Judicial Court grant direct appellate review of this matter. Direct appellate review is appropriate because the questions presented by the appeal include (a) questions of first impression, or novel questions of law, which should be submitted for final determination to the Supreme Judicial Court, and (b) are questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

Specifically, this case squarely presents the following novel issues that are of interest to the public:

(1) Whether an employer may assert a viable Chapter 93A claim against an employee who engaged in unfair business practices (a) while acting outside the scope of her employment, and (b) in direct competition with her employer; and

(2) Whether a prevailing plaintiff is entitled to prejudgment interest pursuant to G.L. c. 231, § 6H when the measure of damages is the defendants' gain rather than the plaintiff's loss.

PRIOR PROCEEDINGS

On December 27, 2016, Governo Law Firm filed a complaint against six of its former employees – attorneys Jeniffer A.P. Carson, Bryna Rosen Misiura, Kendra Ann Bergeron, David A. Goldman, Brendan J. Gaughan, and John P. Gardella (jointly, "Defendant Attorneys") – as well as the Defendant Attorneys' law firm, CMBG3 Law LLC ("CMBG3"). The complaint asserted six claims: (1) conversion, (2) misappropriation of trade secrets, (3) breach of the duty of loyalty, (4) tortious interference with contractual and advantageous relations, (5) civil conspiracy, and (6) unfair or deceptive business practices.

Governo Law Firm alleged that the Defendant Attorneys, while they worked at the firm, secretly copied more than a terabyte of Governo Law Firm's electronic files. Governo Law Firm further alleged that the Defendant Attorneys copied those

files with the intent of using them to compete with Governo Law Firm at their newly created law firm, CMBG3. Governo Law Firm further alleged that after the Defendant Attorneys left its employ on November 20, 2016, they in fact did use Governo Law Firm's files to compete with Governo Law Firm.

Prior to the trial, the lower court decided that it would submit all claims, including the claim for unfair or deceptive business practices (G.L. c. 93A, § 11), to the jury for a binding decision. During the trial, the Court allowed the defendants' motion for directed verdict on Governo Law Firm's tortious interference claim, but left the remaining claims for the jury to decide.

On June 13, 2019, the lower court gave its jury charge. With respect to Governo Law Firm's unfair or deceptive business practices claim, the lower court instructed the jury, in relevant part, as follows:

> Conduct is part trade or commerce, as a general matter, if it takes place in a business context and it's not personal or private in nature. But by law an employee and employer are [not] in trade or commerce with each other for purposes of the statute. This means that Chapter 93A does not apply to anything a defendant did toward the Governo Firm while they were still employed there.
>
> So anything that happened before the 20th of November, 2016, whether it was negotiations, copying of materials, anything[,] that's all irrelevant for purposes of question five for this claim. Instead for this claim the Governo Firm mu[s]t prove the defendants did something to compete with the Governo Firm after they left the firm that was unfair or deceptive.

Governo Law Firm immediately objected to these instructions, and requested that the jury be instructed that it may consider the conversion of Governo Law Firm's files with respect to the Chapter 93A claim. The lower court declined to amend its instructions.

On June 17, 2019, the jury returned its verdict. The jury found that each Defendant Attorney had converted documents, files, or information belonging to Governo Law Firm, that each Defendant Attorney with the exception of Attorney Gardella had conspired to steal electronic databases or files, and that each Defendant Attorney had breached her or his duty of loyalty. The jury found in favor of the defendants on the trade secrets claim. Based on the instructions provided, the jury also found that the defendants did not commit an unfair or deceptive business practice. The jury awarded damages of $900,000.

On June 18, 2019, the lower court entered judgment in the amount of $1,167,362.20 in favor of Governo Law Firm, and against the defendants. The judgment entered included prejudgment interest of $267,082.20, and statutory costs of $280.00.

On June 28, 2019, Governo Law Firm served a motion to amend the judgment to award costs.

On July 9, 2019, the defendants filed an omnibus motion seeking to set aside or modify the jury's verdict. In that motion, the defendants also requested the elimination of prejudgment interest.

On July 29, 2019, the lower court denied most of the defendants' omnibus motion. It allowed the portion of the motion that requested the elimination of prejudgment interest. Pursuant to the partial allowance, on August 2, 2019, the lower court docketed an amended judgment that eliminated prejudgment interest. The amended judgment was in the amount of $900,280.00.

On September 13, 2019, the lower court entered a second amended judgment that added $15,937.23 in costs the lower court allowed, for a total sum of $915,937.23. Governo Law Firm filed its notice of appeal on September 18, 2019.

STATEMENT OF FACTS

Governo Law Firm is a Boston-based law firm that specialized in the defense of asbestos litigation. David Governo, an attorney, is the sole owner of Governo Law Firm. The Defendant Attorneys worked at Governo Law Firm.

Asbestos defense work is extremely competitive. Insurance companies often pay for the costs of defense. They are highly cost-conscious, and regularly decide which law firms to retain based on which work most efficiently.

Asbestos cases often involve alleged exposures that occurred decades prior to filing suit. Different cases often involve the same workplaces where exposures

to asbestos regularly occurred. Different asbestos cases also often involve the same fact and expert witnesses. Documents from one case – even one that resolved twenty years ago – may be helpful, or even prove dispositive, in a later case. For this reason, Attorney Governo collected documents and materials from cases and resources that potentially would be helpful to the defense of asbestos cases.

Attorney Governo began collecting documents, including deposition and trial transcripts, document productions, and scientific articles, in earnest in 1989. These collected materials ultimately were digitized and organized on Governo Law Firm's computer system at a cost to Governo Law Firm that exceeded $100,000. The materials were saved to the Governo Law Firm computer system in a location known as the "8500 New Asbestos Folder." In 2016, the 8500 New Asbestos Folder contained well over 300,000 documents.

Given the volume of documents and the fact that many documents no longer were available (e.g., a deposition transcript, originally recorded on paper, of a since deceased witness taken twenty years ago), it would be impossible to duplicate the 8500 New Asbestos Folder by legitimate means. The materials were highly valuable, and gave the Governo Law Firm a competitive advantage over other firms. They allowed Governo Law Firm to differentiate itself from other firms that did not have such a collection, and thereby win new business.

In addition to the 8500 New Asbestos Folder, Governo Law Firm also developed databases of information for its attorneys to use in the defense of asbestos cases. The databases, among other things, allowed attorneys and paralegals to quickly find helpful materials in the 8500 New Asbestos Folders and to work more efficiently. Governo Law Firm customized these databases over the course of a decade, paying in excess of $100,000 for their development.

It would be impossible to duplicate the databases by legitimate means. The databases were highly valuable, and provided Governo Law Firm with a competitive advantage by enabling attorneys and staff to work efficiently, and allowing the firm to impress potential clients and thereby win new business.

Governo Law Firm also developed extensive administrative materials that were specifically tailored to an asbestos defense practice, including a comprehensive employee handbook, an office procedures manual, an asbestos litigation procedures manual, a billing procedures manual, spreadsheets analyzing prospective clients, firm contacts, and marketing materials. The 8500 New Asbestos Folder, databases, and administrative files hereafter are referred to as the "Governo Law Firm Files."

In 2015 and 2016, Attorney Governo developed a plan to retire from the practice of law and sell Governo Law Firm to the Defendant Attorneys. Attorney

Governo and the Defendant Attorneys attempted over a period of several months to negotiate the terms of a sale, without success.

In July, 2016, during those negotiations, Defendant Carson began to consider a "Plan B," which was to start a competing law firm. In late August of 2016, the Defendant Attorneys registered the domain name CMBG3KB.com, which reflected the firm name under which they intended to operate.[1] In early September, 2016, each Defendant Attorney provided capital to help form their new law firm. At or about that time, they prepared a business plan for the new firm and began looking for office space.

On November 1, 2016, the Defendant Attorneys organized CMBG3 with the Massachusetts Secretary of the Commonwealth. Each Defendant Attorney was an owner of the new law firm. With regard to the prospect of competing with Governo Law Firm, Defendant Bergeron wrote to Defendant Carson that she was "excited at the thought of screwing over [Attorney Governo.]"

Defendant Misiura decided that the Defendant Attorneys should copy the Governo Law Firm Files to have them available at their new law firm. She believed that it would be to the Defendant Attorneys' "business detriment" not to do so. She discussed the idea of copying the files with the other Defendant

[1] CMBG3 reflects the first initial of the last names of each Defendant Attorney. The Defendant Attorneys changed the name from CMG3KB to CMBG3 when an attorney with the last initial "K" decided not to join the new firm.

Attorneys, and all agreed. Each Defendant Attorney then identified specific Governo Law Firm Files that she or he wanted copied.

Throughout October and into November of 2016 Defendants Misiura, Goldman, and Bergeron secretly copied the Governo Law Firm Files. They did so by secretly inserting high capacity USB "thumb drives" into the Governo Law Firm's computer system. When the drive was filled, Defendant Misiura placed it in a purse or bag so Attorney Governo could not see it, and removed it from Governo Law Firm. According to Defendant Carson, Defendants Misiura, Goldman, and Bergeron "copied everything." In total, the Defendant Attorneys copied 1.2 terabytes of data onto thirteen thumb drives.

The Defendant Attorneys downloaded approximately half of the data on the USB thumb drives to a CMBG3 laptop. Just that half of the data consisted of more than 300,000 files and 600 gigabytes of data. If printed, the Microsoft Word and PDF files copied onto the CMBG3 laptop would have consisted of more than 24,000,000 pages.

On Friday, November 18, 2016, after the copying was completed, the Defendant Attorneys gave Attorney Governo an "ultimatum" to agree, by the end of the day, to sell the Governo Law Firm to them for $1.5 MM, or they would resign. They made this offer despite having been previously advised by their business adviser to make a purchase offer in the amount of $7 MM. Attorney

Governo rejected the offer. On Sunday, November 20, 2016, Attorney Governo informed the Defendant Attorneys that they no longer worked at Governo Law Firm. Thereafter, they performed legal work at CMBG3.

The Defendant Attorneys subsequently accessed the Governo Law Firm Files at CMBG3 whenever "necessary," and at a minimum of "hundreds of times" in the course of CMBG3's business to provide legal services for its clients.

ISSUES OF LAW[2]

(1) Whether an employer may assert a viable Chapter 93A claim against an employee who engaged in unfair business practices (a) while acting outside the scope of her employment, and (b) in direct competition with her employer; and

(2) Whether a prevailing plaintiff is entitled to prejudgment interest pursuant to G.L. c. 231, § 6H when the measure of damages is the defendants' gain rather than the plaintiff's loss.

These issues were raised and properly preserved at the lower court. Governo Law Firm immediately objected to the lower court's jury instructions concerning Chapter 93A. Governo Law Firm further opposed the defendants' motion to vacate the award of prejudgment interest.

[2] In addition to the issues listed below, Governo Law Firm on appeal intends to raise several issues it does not believe are questions of first impression or novel questions of law.

ARGUMENT

I. The Lower Court Erroneously Instructed The Jury That The Defendant Attorneys' Conversion Of The Governo Law Firm Files Was "Irrelevant" To Governo Law Firm's Chapter 93A Claim.

The lower court erred when, based on Manning v. Zuckerman, 388 Mass. 8 (1983), it instructed the jury that the Defendant Attorneys, as a matter of law, could not be liable under Chapter 93A for any acts taken while they were Governo Law Firm's employees. This Court in Manning held that claims "*arising out of the employment relationship*" are not actionable under Section 11 of Chapter 93A because, in that "*context,*" neither employer nor employee are engaged in "trade or commerce." See Manning, 388 Mass. at 11, 15 (emphasis added). The Defendant Attorneys' conversion of the Governo Law Firm Files did not "arise out of the employment relationship." Instead, the Defendant Attorneys' conversion of the Governo Law Firm Files occurred in the context of business competition.

To date, no Massachusetts appellate court has decided whether an individual, who has formed a business to compete with her current employer, and who engages in unfair or deceptive business practices for the benefit of that competing business, may be liable pursuant to G.L. c. 93A, § 11. The issue has been considered, but not decided, on two different occasions. First, in Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937 (1984), the Appeals Court assumed that an individual might not be liable under Chapter 93A for unfair or

deceptive business practices he engaged in while an employee. See Peggy Lawton, 18 Mass. App. Ct. at 939. The Appeals Court, however, avoided the need to decide the issue. Id. Instead, the court affirmed the judgment against the individual on the ground that the jury properly could have concluded that he violated Chapter 93A when he used his employer's trade secrets after his employment terminated. Id. Second, in Augat, Inc. v. Aegis, Inc., 409 Mass. 165 (1991), this Court found that, even assuming an employee could not be liable under Chapter 93A for unfair or deceptive business practices, the competing business for which the employee subsequently worked may be liable. See Augat, 409 Mass. at 172. Because the individual employee was not named as a defendant, the Court did not analyze whether the employee could be liable. Id.

Thus no Massachusetts appellate court ever has held, as the lower court instructed the jury, that a defendant employee who engaged in unfair or deceptive business practices that were (1) outside the scope of her employment, and (2) undertaken to compete in business with her employer, as a matter of law is immune from liability pursuant to Chapter 93A. Rather than draw such an indelible line, this Court has held that a more considered approach is required.

"The question of whether a private individual's participation in an isolated transaction takes place in a 'business context' must be determined from the circumstances of each case." Begelfer v. Najarian, 381 Mass. 177, 190-91 (1980).

The court must assess "the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties." Id. at 191. "Other relevant factors are whether similar transactions have been undertaken in the past, whether the transaction is motivated by business or personal reasons . . . , and whether the participant played an active part in the transaction." Id. "A commercial transaction need not occur in the ordinary course of a person's trade or business before liability under G.L. c. 93A will be imposed." Id.

The Begelfer business context test is used to determine "whether the parties were engaged in 'trade or commerce' with each other" for purposes of G.L. c. 93A, § 11. Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 564 (2008). Applying the Begelfer test here, the jury reasonably could have determined that the Defendant Attorneys, when they converted the Governo Law Firm Files, were engaged in "trade or commerce" and thus acting in a "business context" such that the provisions of G.L. c. 93A, § 11 applied.

The "nature of the transaction" is the conversion of the Governo Law Firm Files so that material could be used at the Defendant Attorneys' competing law firm, CMBG3. The "character of the parties involved," in this context, is business competitors. Although the Defendant Attorneys at the time of the conversion were Governo Law Firm employees, their conversion of the Governo Law Firm Files was well outside the scope of their employment. The Defendant Attorneys

converted the Governo Law Firm Files so they would not be at a "business detriment," and to allow CMBG3 to better compete with Governo Law Firm. The "activities engaged in by the parties" was not an ongoing employment relationship that typically is cooperative. Rather, the Defendant Attorneys' conversion of the Governo Law Firm Files was secretive, and directly adverse to Governo Law Firm, as business competitors typically behave.

The "other relevant factors" identified in Begelfer also support a finding that the Defendant Attorneys, when they converted the Governo Law Firm Files, were acting in a business context. The Defendant Attorneys' conversion of the Governo Law Firm Files was part of a larger and ongoing plan to start a competing law firm, including the organization of CMBG3, raising capital, and locating office space. The conversion of the Governo Law Firm Files plainly was "motivated by business" rather than personal reasons, because the Defendant Attorneys admitted that competing without the files would put them at "business detriment." Indeed, the Defendant Attorneys used the Governo Law Firm Files to directly compete with Governo Law Firm at their new firm, CMBG3. Finally, each Defendant Attorney "played an active part" in the conversion, by either physically copying the files, or encouraging their co-conspirators to do so. The lower court erred when it instructed the jury in a manner that precluded the possibility of finding that the

Defendant Attorneys were engaged in trade or commerce when they converted the Governo Law Firm Files.

The Connecticut Supreme Court, in an analogous case, engaged in a similar analysis, and concluded that an employee who acts outside the scope of her employment with the intention of competing against her employer is engaged in "trade or commerce" for purposes of Connecticut's similar Unfair Trade Practices Act. See Larsen Chelsey Realty Co. v. Larsen, 656 A.2d 1009, 1017-19 (Conn. 1995). The court found that because "the acts of which the plaintiff complains involve conduct occurring outside the confines of the employer-employee relationship," the "trade or commerce" requirement of the Connecticut unfair business practices act was satisfied. See id. at 1018-19. The Connecticut Supreme Court's holding is instructive here.

Because the jury reasonably could have concluded that the Defendant Attorneys, when they converted the Governo Law Firm Files for the benefit of CMBG3, were engaged in "trade or commerce," the lower court erred when it instructed the jury that the conversion was "irrelevant" to Governo Law Firm's Chapter 93A claim.

II. Prejudgment Interest Is Mandatory Pursuant To G.L. c. 231, § 6H.

Pursuant to G.L. c. 231, § 6H, where interest is not otherwise provided by law, the clerk is required to add prejudgment interest at the statutory rate of 12%

per annum. Section 6H is a "catch-all interest provision." Herrick v. Essex Reg'l Ret. Bd., 465 Mass. 801, 807 (2013). It reflects "the Legislature's intent that prejudgment interest *always* be added to an award of compensatory damages." George v. Nat'l Water Main Cleaning Co., 477 Mass. 371, 378 (2017) (emphasis added).

The lower court erroneously vacated $267,082.20 of prejudgment interest on the $900,000 in damages found by the jury. In doing so, the lower court relied on Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 182 n.21 (1979) and USM Corp. v. Marson Fastener Corp., 392 Mass. 334, 348-53 (1984), which held that prejudgment interest is not mandatory where the basis for damages is the defendants' gain rather than the plaintiff's loss.

The lower court's reliance on Jet Spray and USM Corp. was in error because those cases pre-dated the effective date of G.L. c. 231, § 6H. The section's provisions apply to all actions commenced on or after March 20, 1984. See Sharpe v. Springfield Bus Terminal, 406 Mass. 62, 66 (1989). Jet Spray was decided on January 26, 1979, and USM Corp. was decided on June 28, 1984. Both cases concerned actions that commenced well-prior to March 20, 1984, and neither case considered whether Section 6H required an award of prejudgment interest.

The United States Court for the District of Massachusetts analyzed the impact of the Legislature's enactment of G.L. c. 231, § 6H, and properly concluded

that the statute effectively overruled the prejudgment interest holding found in Jet Spray and USM Corp. See Mill Pond Assocs., Inc. v. E & B Giftware, Inc., 751 F.Supp. 299, 302 (D. Mass. 1990). The court recognized: "The fact that the Supreme Judicial Court had earlier reasoned that no interest ought be calculated upon damages based on wrongful profits cannot survive the plain meaning of the language used by the Massachusetts Legislature in § 6H." Id. The court further recognized that the Legislature's enactment of G.L. c. 231, § 6H "unequivocally provides" that prejudgment interest must be awarded "[i]n any action in which damages are awarded," and where "interest on such damages is not otherwise provided by law." Id. at 301. The plain language of G.L. c. 231, § 6H, as it did in Mill Pond Associates, "fits this aspect of the case precisely," as damages have been awarded, but interest on such damages has not otherwise been provided by law. See id.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

This case presents important questions concerning the scope of Chapter 93A liability, and whether G.L. c. 231, § 6H provides that a prevailing plaintiff is entitled to prejudgment interest where the measure of damages is the defendants' gain rather than the plaintiff's loss. These questions are, as of yet, unresolved in the Commonwealth. Accordingly, the case is appropriate for direct appellate review under the standards set forth in Mass. R. App. P. 11(a).

Unfortunately it is not uncommon in this Commonwealth for an employee to commit unfair business practices against her employer. There are many reported cases in which an employee has been accused of converting her employer's property, misappropriating her employer's trade secrets, or wrongly soliciting employees to work for a competing business. Sometimes, as in this case, the employee's actions plainly are outside the scope of employment, and undertaken with the specific intent of competing with the employer. Addressing whether Chapter 93A applies to such unfair business practices will clarify the law, and ensure that all lower courts address the issue in a uniform manner. Among other issues, this appeal will allow the Court to address the following:

1. Whether Manning v. Zuckerman, 388 Mass. 8 (1983), imposes an inflexible rule that an employer never, under any circumstances, may assert a Chapter 93A claim against an employee, even if the employee engaged in unfair business practices while acting outside the scope of employment and with the intent to compete. See Manning, 388 Mass. at 13-14.

2. Whether the holding in Manning is limited to Chapter 93A claims "arising out of the employment relationship" as it states, or is broader and also applies to claims arising outside of the employment relationship. See id. at 15.

3. Whether the business context test set forth in Begelfer v. Najarian, 381 Mass. 177 (1980), which, pursuant to Milliken & Co. v. Duro Textiles, LLC,

451 Mass. 547 (2008), is used to determine whether parties are engaged in "trade or commerce" for purposes of G.L. c. 93A, applies to all Chapter 93A claims, or applies to all Chapter 93A claims with the sole exception of those involving an employer/employee relationship.

4. Whether, if Chapter 93A may apply to a claim by an employer against an employee, the scope and limits of such a claim.

The prejudgment interest issue Governo Law Firm raises in this application also warrants this Court's direct attention. The Court should clarify the impact of the Legislature's enactment of G.L. c. 231, § 6H, particularly as it relates to its earlier Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159 (1979), and USM Corp. v. Marson Fastener Corp., 392 Mass. 334 (1984) decisions, which held that pre-judgment interest is not mandatory where the basis for damages is the defendants' gain rather than the plaintiff's loss. See Jet Spray, 377 Mass. at 182 n.21; USM Corp., 392 Mass. at 348-53. A judge in the United States District Court for Massachusetts has expressly held that the enactment of G.L. c. 231, § 6H "legislatively overruled" the prejudgment interest analysis in Jet Spray and USM Corp., but the lower court in this case disagreed. See Mill Pond Assocs., 751 F.Supp. at 301. Because the trial courts are in disagreement as to the effect of G.L. c. 231, § 6H, this Court should decide the issue.

CONCLUSION

For the foregoing reasons, the plaintiff-appellant Governo Law Firm respectfully requests that its application for direct appellate review be granted.

Respectfully submitted,

GOVERNO LAW FIRM LLC
By its attorneys,

/s/ Kurt B. Fliegauf .

Dated: April 8, 2020

James F. Kavanaugh, Jr. (BBO# 262360)
Kurt B. Fliegauf (BBO# 564329)
Alexis P. Theriault (BBO# 682271)
CONN KAVANAUGH ROSENTHAL PEISCH & FORD, LLP
One Federal Street, 15th Floor
Boston, MA 02110
(617) 482-8200
jkavanaugh@connkavanaugh.com
kfliegauf@connkavanaugh.com
atheriault@connkavanaugh.com

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

Governo Law Firm hereby certifies that this application for direct appellate review complies with the rules of court that pertain to the filing of briefs, including, but not limited to Rule 16(a)(13), Rule 20, and Rule 21. Pursuant to Mass. R. App. P. 11(b) the argument section must consist of no more than 2,000 words in a proportional font. The font used in this application is Times New

Roman size 14 pt. font. The number of words in the argument section is 1,600, as determined by the word count function in Microsoft Word, version 14.0.7237.5000 (32-bit), part of Microsoft Office Professional Plus 2010.

/s/ Alexis P. Theriault (BBO# 682271)

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(d), I hereby certify, under the penalties of perjury, that on this date of April 8, 2020, I have made service of a copy of Governo Law Firm LLC's Application for Direct Appellate Review, upon the attorney of record for each party, or if the party has no attorney then I made service to the self-represented party by email and through operation of www.eFileMA.com.

/s/ Alexis P. Theriault (BBO# 682271)

2438401.1 04368.003

APPENDIX TO APPLICATION FOR DIRECT APPELLATE REVIEW

Skip to main content

1684CV03949 Governo Law Firm LLC vs. CMBG3 Law LLC

- Case Type
- Business Litigation
- Case Status
- Open
- File Date
- 12/27/2016
- DCM Track:
- B - Special Track (BLS)
- Initiating Action:
- Proprietary Information or Trade Secrets
- Status Date:
- 08/02/2019
- Case Judge:
-
- Next Event:
-

All Information | Party | Judgment | Subsequent Action/Subject | Event | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/27/2016	Attorney appearance On this date Kurt Baran Fliegauf, Esq. added for Plaintiff Governo Law Firm LLC		
12/27/2016	Complaint (Business)	1	
12/27/2016	Civil action cover sheet filed.	2	
12/27/2016	Demand for jury trial entered.		
12/27/2016	Governo Law Firm LLC's MOTION for appointment of Special Process Server. ALLOWED (Endorsed 12/28/16)	3	
12/27/2016	Plaintiff(s) Governo Law Firm LLC's Motion for a Preliminary Injunction	4	
12/27/2016	Governo Law Firm LLC's Memorandum in support of Plaintiff's Motion for Preliminary Injunction	5	
12/27/2016	Plaintiff(s) Governo Law Firm LLC's MOTION for Short Order of Notice ALLOWED Applies To: Governo Law Firm LLC (Plaintiff)	6	
12/28/2016	Attorney appearance On this date Deanna J. Green, Esq. added for Plaintiff Governo Law Firm LLC		
12/28/2016	Attorney appearance On this date Christopher Kevin Sweeney, Esq. added for Plaintiff Governo Law Firm LLC		
01/03/2017	Affidavit of Jennifer A.P. Carson	7	
01/03/2017	Opposition to to Preliminary Injunction filed by Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer A (Defendant); Misiura, Bryna R (Defendant); Bergeron, Kendra A (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	8	
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant CMBG3 Law LLC		
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant Jennifer AP Carson		
01/03/2017			

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant Bryna Rosen Misiura		
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant Kendra Ann Bergeron		
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant David A Goldman		
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant Brendan J Gaughan		
01/03/2017	Attorney appearance On this date Peter F Carr, II, Esq. added for Defendant John P Gardella		
01/03/2017	Event Result: The following event: Hearing on Preliminary Injunction scheduled for 01/03/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
01/11/2017	The following form was generated: Notice to Appear - BLS Sent On: 01/11/2017 12:07:31		
01/13/2017	Endorsement on Motion for Preliminary Injunction (#4.0): DENIED after hearing. See Memorandum and Order (dated 1/11/17) notice sent 1/13/17		
01/13/2017	MEMORANDUM & ORDER: Denying Plaintiff's Motion for a Preliminary Injunction: Plaintiff's motion for a preliminary injunction is DENIED. A MRCP 16 scheduling conference shall take place on Feb. 14, 2017 at 2:00pm (see P#9 for full order) (dated 1/11/17) notice sent 1/13/17 Judge: Salinger, Hon. Kenneth W	9	Image
01/13/2017	General correspondence regarding Notice of defts Motion to enlarge time to file responsive pleading	10	
01/19/2017	ORDER: NOTICE OF ACCEPTANCE INTO THE BUSINESS LITIGATION SESSION 2 (entered 12/28/16) notices in hand 1`2/28/16	11	
02/10/2017	Received from Defendant CMBG3 Law LLC, Jennifer AP Carson, Bryna Rosen Misura, Kendra Ann Bergeron, David A Goldman, Grendan J Gaughan and John P. Gardella: Answer with a counterclaim; and Third Party Complaint	12	Image
02/14/2017	Event Result: The following event: BLS Rule 16 Litigation Control Conference scheduled for 02/14/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
02/14/2017	The following form was generated: Notice to Appear Sent On: 02/14/2017 14:48:03		
02/15/2017	Plaintiff Governo Law Firm LLC, David M Governo's Submission of Proposed Tracking Order: APPROVED, as amended (dated 2/14/17) notice sent 2/15/17	13	Image
02/27/2017	Service Returned for Defendant Governo, David M: Service accepted by counsel;	14	Image
02/27/2017	Summons, returned SERVED Applies To: Bergeron, Kendra A (Defendant)	16	Image
02/27/2017	Summons, returned SERVED Applies To: Misiura, Bryna R (Defendant)	15	Image
02/27/2017	Summons, returned SERVED Applies To: Goldman, David A (Defendant)	17	Image
02/27/2017		18	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Summons, returned SERVED Applies To: Gaughan, Brendan J (Defendant)		
02/27/2017	Summons, returned SERVED Applies To: Gardella, John P (Defendant)	19	Image
02/27/2017	Summons, returned SERVED Applies To: Carson, Jennifer A (Defendant)	20	Image
02/27/2017	Summons, returned SERVED Applies To: CMBG3 Law LLC (Defendant)	21	Image
03/30/2017	Received from Plaintiff Governo Law Firm LLC: Answer to the Counterclaim;	22	Image
03/30/2017	Plaintiff's Notice of intent to file motion to dismiss counterclaim Applies To: Governo Law Firm LLC (Plaintiff)	23	
04/25/2017	Defendant CMBG3 Law LLC's Motion for Expedited Trial on issues and claims related to client property (w/opposition) Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	24	
04/26/2017	The following form was generated: Notice to Appear Sent On: 04/26/2017 14:47:44		
05/01/2017	Attorney appearance On this date James F Kavanaugh, Jr., Esq. added for Plaintiff Governo Law Firm LLC		
05/01/2017	Attorney appearance On this date James F Kavanaugh, Jr., Esq. added for Defendant David M Governo		
05/02/2017	Party(s) file Stipulation of Dismissal (filed 5/1/17) as to count three of the counterclaim without prejudice and without costs JUDGMENT entered on docket pursuant to Mass R Civ P 58(a) as amended and notice sent to parties pursuant to Mass R Civ P 77(d) Applies To: Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gardella, John P (Defendant)	25	Image
05/02/2017	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 05/02/2017 15:12:33		
05/02/2017	Event Result: The following event: Motion Hearing scheduled for 05/02/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled		
05/02/2017	Event Result: The following event: Conference to Review Status scheduled for 07/25/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
05/03/2017	Endorsement on Motion for Expedited Trial on Issues and Claims Related to Client Property. (#24.0): DENIED But a final pre trial conference shall take place on July 19,2017 (in lieu of the previously scheduled status conference on July 25) (Dated 5/2/17) Notice sent 5/3/17 Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)		Image
07/07/2017	Plaintiff Governo Law Firm LLC's Joint Motion to enlarge Tracking Order and to convert scheduled Final Pre-Trial Conference to Status Conference	26	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant); Governo, David M (Defendant)		
07/12/2017	The following form was generated: Notice to Appear Sent On: 07/12/2017 15:45:44		
07/12/2017	Event Result: The following event: Final Pre-Trial Conference scheduled for 07/19/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
07/14/2017	Endorsement on Motion to Enlarge Tracking Order and to Convert Scheduled Final Pre Trial Conference to Status Conference (#26.0): ALLOWED This court sees no need for July 19, 2017 status conference in light of extension, further Rule 16 conference scheduled for 11/15/17 at 2:00pm (dated 7/12/17) notice sent 7/14/17		Image
08/01/2017	Plaintiff(s) Governo Law Firm LLC motion filed to compel Production of Documents, Answers to Interrogatories with Superior Court Rule 9C Certification (w/opposition)	27	
08/08/2017	Endorsement on Motion to Compel Production of Documents and Answers to Interrogatories (#27.0): DENIED for reasons stated in the opposition (dated 8/7/17) notice sent 8/7/17		Image
08/09/2017	Plaintiff Governo Law Firm LLC's Joint Motion to Enter Stipulated "Claw Back" Agreement Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	28	
08/14/2017	Endorsement on Motion to Enter Stipulated "Claw Back" Agreement (#28.0): ALLOWED see Order (dated 8/11/17) notice sent 8/14/17 Judge: Sanders, Hon. Janet L		Image
08/14/2017	ORDER: Stipulated "Claw Back" Agreement SO ORDERED (see P#29) (dated 8/11/17)	29	Image
10/19/2017	Plaintiff Governo Law Firm LLC's Joint Motion to enlarge tracking order to allow for mediation Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	30	
10/23/2017	Event Result: Judge: Sanders, Hon. Janet L The following event: Rule 16 Conference scheduled for 11/16/2017 02:00 PM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
10/23/2017	The following form was generated: Notice to Appear - BLS Sent On: 10/23/2017 14:42:33		
10/24/2017	Endorsement on Motion to Enlarge Tracking Order to allow for Mediation (#30.0): ALLOWED 11/16/17 Rule 16 conference is cancelled. Rescheduled to 3/15/18 at 2:00pm (dated 10/23/17) notice sent 10/23/17 Judge: Sanders, Hon. Janet L		Image
01/29/2018	Attorney appearance On this date Christopher Kevin Sweeney, Esq. dismissed/withdrawn for Plaintiff Governo Law Firm LLC		
01/29/2018			

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Attorney appearance On this date Alexis Porcella Theriault, Esq. added for Plaintiff Governo Law Firm LLC		
02/01/2018	Event Result: Judge: Salinger, Hon. Kenneth W The following event: BLS Rule 16 Litigation Control Conference scheduled for 03/15/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
02/01/2018	The following form was generated: Notice to Appear - BLS Sent On: 02/01/2018 11:09:38		
02/22/2018	Defendants CMBG3 Law LLC's EMERGENCY Motion for Protective Order and to Compel Plaintiff to Produce Documents of Alleged Email and Date Deletion Activity: DENIED without prejudice, as there is no apparent emergency. If the parties cannot for some reason, resolve this on their own, then they may suspend the deposition and seek relief on a non emergency basis in accordance with Superior Court Rule 9A (dated 2/21/18) notice sent 2/22/18 Judge: Salinger, Hon. Kenneth W	31	
03/19/2018	Defendants(s) CMBG3 Law LLC, Jennifer AP Carson, Bryna Rosen Misiura, Kendra Ann Bergeron, David A Goldman, Brendan J Gaughan, John P Gardella motion filed to compel PlaintiffProduction of Documents concerning deletion of electronically stored information (w/opposition)	32	
03/21/2018	The following form was generated: Notice to Appear Sent On: 03/21/2018 08:11:45		
03/28/2018	Defendants CMBG3 Law LLC's Motion to File and Serve a Trade Secret Disclosure (w/opposition) Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	33	
04/02/2018	Plaintiff Governo Law Firm LLC's Joint Motion to Enlarge Tracking Order Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant); Governo, David M (Defendant)	34	
04/03/2018	Endorsement on Motion for Plaintiff to File and Serve a Trade Secret Disclosure (#33.0): ALLOWED Plaintiff's interrogatory answers do not meaningfully distinguish those parts of its electronic files and data bases that allegedly constitute trade secrets, from those that constitute other kinds of allegedly confidential information from those that reflected specialized knowledge shared by anyone experienced in asbestos litigation. Plaintiff shall produce the requested Trade Secret Discovery by April 25, 2018 (dated 3/29/18) notice sent 4/2/18 Judge: Salinger, Hon. Kenneth W		Image
04/04/2018	The following form was generated: Notice to Appear Sent On: 04/04/2018 14:23:18		
04/04/2018	Event Result: Judge: Salinger, Hon. Kenneth W The following event: Motion Hearing to Compel scheduled for 04/04/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled		
04/04/2018	Event Result: Judge: Salinger, Hon. Kenneth W The following event: BLS Rule 16 Litigation Control Conference scheduled for 04/04/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled		
04/05/2018			Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Endorsement on Motion to compel production of documents concerning deletion of electronically stored information (#32.0): DENIED Notice Sent: 04/05/18 (Dated: 04/04/2018) After hearing and for the reasons stated on the record, this motion is DENIED, and the court further orders that :(1) plaintiff shall produce the PST files and all other files containing the relevant emails and email logs and (2) since the court is not compelling production of the communications with Mr. Desrosiers of Turn 2 Technology, neither Mr. Desrosiers nor any one else at turn 2 technology may testify, submit an affidavit, or submit other evidence in this case. Judge: Salinger, Hon. Kenneth W		
04/05/2018	Endorsement on Motion to enlarge tracking order (#34.0): ALLOWED Notice Sent: 04/05/18 (Dated: 04/04/2018) ALLOWED. A summary judgment hearing will held on November 13, 2018 at 2:00 p.m. Judge: Salinger, Hon. Kenneth W		Image
05/29/2018	Defendants CMBG3 Law LLC's Motion for sanctions (w/opposition) Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	35	
05/30/2018	Plaintiff Governo Law Firm LLC's Request to file sur-reply brief with regard to defts "Motion for sanctions for plff's (alleged) violation of Trade Secret Disclosure Order" Allowed Plff may file a three-page sur-reply Notice sent 5/30/18 Judge: Salinger, Hon. Kenneth W	36	
05/30/2018	Defendants CMBG3 Law LLC's Reply to Plaintiff's opposition to motion for sanctions for failure to comply with trade secret disclosure order (filed 5/29/18) Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	37	
06/01/2018	Endorsement on Motion for Sanctions for Plaintiff's Violation of Trade Secret Disclosure Order (#35.0): DENIED Plaintiff has adequately complied with the Court's March 29, 2018 order (dated 5/31/18) notice sent 5/31/18 Judge: Salinger, Hon. Kenneth W		Image
07/12/2018	Plaintiff Governo Law Firm LLC's Motion to Compel Answers to Request for Admission or, in the alternative, to Deem Requests Admitted and Motion to Compel the Production of "Duplicate" Emails and Text Messages (with opposition)	38	
07/12/2018	Plaintiff Governo Law Firm LLC's Motion to Compel GMBG3 Law LLC to Produce its Employee Practices and Policies (with opposition)	39	
07/17/2018	Event Result:: Motion Hearing to Compel scheduled on: 07/17/2018 11:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
07/18/2018	Endorsement on Motion to Compel CMBG3 Law to Produce its employee Practices and Policies (#39.0): DENIED for reasons stated in opposition and in open court (dated 7/17/18) notice sent 7/18/18 Judge: Sanders, Hon. Janet L		Image
07/18/2018	Endorsement on Motion to Compel Answers to Requests for Admission or to deem requests Admitted (#38.0): DENIED after hearing for reasons stated in opposition and in open court (dated 7/17/18) notice sent 7/18/18		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Judge: Sanders, Hon. Janet L		
10/17/2018	Opposition to Defendants' Request for a Rule 16 Status Conference filed by Governo Law Firm LLC (Partial Opposition)	40	
10/18/2018	Defendant CMBG3 Law LLC's Request for Rule 16 Status Conference	41	Image
10/23/2018	The following form was generated: Notice to Appear Sent On: 10/23/2018 11:32:52		
10/25/2018	Endorsement on Submission of Partial Opposition to Defendants' Request for a Rule 16 Status Conference (#40.0): Other action taken The Nov. 13, 2018 date will be used for a status conference. The parties should be prepared to address all discovery and scheduling issues and to select a trial date (dated 10/22/18) notice sent 10/22/18 Judge: Kaplan, Hon. Mitchell H		Image
11/13/2018	Event Result:: Rule 56 Hearing scheduled on: 11/13/2018 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
11/13/2018	Event Result:: Conference to Review Status scheduled on: 11/13/2018 02:00 PM Has been: Held as Scheduled Hon. Janet L Sanders, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
11/13/2018	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 11/13/2018 14:32:10		
11/28/2018	Plaintiff Governo Law Firm LLC's Assented to Motion to continue Trial Date by Two Weeks	42	
11/30/2018	Event Result:: Jury Trial scheduled on: 05/16/2019 09:00 AM Has been: Not Held For the following reason: Request of Plaintiff Hon. Janet L Sanders, Presiding Appeared: Staff:		
11/30/2018	Event Result:: Jury Trial scheduled on: 05/20/2019 09:00 AM Has been: Not Held For the following reason: Request of Plaintiff Hon. Janet L Sanders, Presiding Appeared: Staff:		
12/07/2018	Endorsement on Motion to continue trial date by two weeks; (#42.0): ALLOWED dated 11/30/18 notice sent 12/6/18		Image
03/26/2019	Joint Pre-Trial Memorandum filed:	43	
03/28/2019	Event Result:: Final Pre-Trial Conference scheduled on: 03/28/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Appeared: Staff: Richard V Muscato, Assistant Clerk Magistrate		
04/29/2019	Defendant David M Governo's Motion in limine to exclude spoliation of evidence (w/opposition)	44	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/29/2019	Defendant CMBG3 Law LLC's Motion in limine to strike trade secrets damages and to preclude expert testimony on damages (w/opposition)	45	
04/29/2019	Defendant CMBG3 Law LLC's Motion to strike jury demand (w/opposition)	46	
04/29/2019	Plaintiff in a Counterclaim Governo Law Firm LLC's Motion for attorney conducted voir dire	47	
04/29/2019	Defendant CMBG3 Law LLC's Motion for attorney conducted voir dire	48	
05/02/2019	Plaintiff Governo Law Firm LLC's EMERGENCY Motion to Preclude Defendants' Late-Produced Documents	49	
05/02/2019	Event Result:: Final Trial Conference scheduled on: 05/02/2019 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
05/02/2019	Endorsement on Motion to strike (#46.0): DENIED jury demand Notice sent 5/6/19		Image
05/02/2019	Endorsement on Motion in (#44.0): DENIED Limine Notice Sent 5/6/19		Image
05/06/2019	Opposition to to Emergency Motion to Preclude Documents filed by CMBG3 Law LLC Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant); Governo, David M (Defendant)	50	Image
05/08/2019	Endorsement on Motion in Limine to Strike Trade Secrets Damages and to Preclude Expert Testimony (#45.0): DENIED in Part and ALLOWED in Part. See Memorandum and order (dated 5/3/19) notice sent 5/7/19		Image
05/08/2019	Endorsement on Motion to Preclude Defendants' Late-Produced Documents (#49.0): DENIED for reasons stated in Defendants' opposition (Dated 5/7/19) notice sent 5/7/19		Image
05/08/2019	MEMORANDUM & ORDER: on Defendants' Motion to Strike Trade Secret Damages and to Preclude Expert Testimony on Damages: Defendants' Motion in limine regarding damages is ALLOWED in Part and DENIED in part. The motion is Allowed to the extent it seeks to bar the testimony of Jaime C. d'Almeida. It is denied to the extent that Defendants seek to bar Plaintiff from offering any evidence regarding damages at trial Judge: Salinger, Hon. Kenneth W (see P#51 for full decision) (dated 5/3/19) notice sent 5/7/19	51	Image
05/08/2019	MEMORANDUM & ORDER: Denying Defendants' Motion to Strike Jury Demand: Defendants' Motion to Strike Plaintiff's Jury Demand is DENIED. In the exercise of discretion, the Court will grant a jury trial on two claims, for breach of duty of loyalty and violation of GLc. 93A, as to which Plaintiff has no right to a jury trial. The jury will decide all claims in this case. (see P#52 for full decision) (dated 5/3/19) notice sent 5/7/19 Judge: Salinger, Hon. Kenneth W	52	Image
05/14/2019	Plaintiff Governo Law Firm LLC's EMERGENCY Motion for reconsideration	53	
05/14/2019	Plaintiff Governo Law Firm LLC's Motion to impound motin for reconsideration	54	
05/15/2019	Plaintiff Governo Law Firm LLC's Motion to Impound (REVISED)	55	
05/15/2019	Plaintiff Governo Law Firm LLC's EMERGENCY Motion for Reconsideration (REVISED)	56	
05/15/2019	Opposition to emergency motion for reconsideration of damages order filed by CMBG3 Law LLC	57	
05/16/2019	Endorsement on Motion to Impound (#54.0): ALLOWED (dated 5/15/19) notice sent 5/15/19		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/16/2019	Endorsement on Motion to Impound (REVISED) (#55.0): ALLOWED (dated 5/15/19) notice sent 5/15/19		Image
05/16/2019	Endorsement on Motion for reconsideration; (#56.0): DENIED see memorandum and order.; (dated 5/15/19) notice sent 5/16/19		Image
05/16/2019	MEMORANDUM & ORDER: denying plaintiff's motion for reconsideration of an order barring certain expert testimony on damages.; (dated 5/15/19) notice sent 5/16/19 Judge: Salinger, Hon. Kenneth W	58	Image
05/24/2019	List of exhibits Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant); Governo, David M (Defendant)	59	
05/24/2019	Witness list Joint Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant); Governo, David M (Defendant)	60	
05/28/2019	Event Result:: Jury Trial scheduled on: 05/28/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
05/29/2019	Event Result:: Jury Trial scheduled on: 05/29/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/03/2019	Event Result:: Jury Trial scheduled on: 06/03/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/04/2019	Event Result:: Jury Trial scheduled on: 06/04/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/05/2019	Event Result:: Jury Trial scheduled on: 06/05/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/06/2019	Event Result:: Jury Trial scheduled on: 06/06/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/07/2019	Event Result:: Jury Trial scheduled on: 06/07/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/10/2019	Event Result:: Jury Trial scheduled on: 06/10/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/10/2019	Defendants CMBG3 Law LLC's Motion for Directed Verdict filed Applies To: CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	61	
06/11/2019	Event Result:: Jury Trial scheduled on: 06/11/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/11/2019	Request for Jury instructions filed by Defendants CMBG3 Law LLC, Jennifer AP Carson, Bryna Rosen Misiura, Kendra Ann Bergeron, David A Goldman, Brendan J Gaughan, John P Gardella 1st Supplemental Request	62	
06/12/2019	Endorsement on Motion for Directed Verdict (#61.0): ALLOWED in part as to claims based on solicitations of clients or employees, or the keeping of electronic equipment. Otherwise DENIED for the reasons stated on the record (dated 6/10/19) notice sent 6/12/19		Image
06/12/2019	Event Result:: Jury Trial scheduled on: 06/12/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/13/2019	Event Result:: Jury Trial scheduled on: 06/13/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/14/2019	Event Result:: Jury Trial scheduled on: 06/14/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/17/2019	Event Result:: Jury Trial scheduled on: 06/17/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/17/2019	Verdict of jury for party	63	Image
06/17/2019	Event Result:: Jury Trial scheduled on: 06/17/2019 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Richard V Muscato, Assistant Clerk Magistrate		
06/18/2019	JUDGMENT ON JURY VERDICT it is hereby Ordered and Adjudged That plff recover of the defts jointly & Severally the amount of $900,000 with interest in the amount of 267,082.20 and costs in the amount of $280.00 for a total sum of $1,167,362.20 Judge: Salinger, Hon. Kenneth W Applies To: Governo Law Firm LLC (Plaintiff); CMBG3 Law LLC (Defendant); Carson, Jennifer AP (Defendant); Misiura, Bryna Rosen (Defendant); Bergeron, Kendra Ann (Defendant); Goldman, David A (Defendant); Gaughan, Brendan J (Defendant); Gardella, John P (Defendant)	64	Image
06/18/2019	Defendant CMBG3 Law LLC's Motion for directed verdict (renewed motion) & Denied Notice sent 6/14/19 (entered 6/13/19)	65	Image
06/20/2019	Plaintiff Governo Law Firm LLC's Motion for preliminary injunction (w/opposition); ALLOWED in part. see memorandum and order; (dated 6/18/19) notice sent 6/19/19	66	Image
06/20/2019	ORDER: Post-trial preliminary injunction; see paper No. 67.0 (dated 6/18/19) notice sent 6/19/19	67	Image
06/21/2019	MEMORANDUM & ORDER: (corrected) memorandum and order on plaintiff's motion for a post-trial preliminary injunction; plaintiff's motion for a post-trial preliminary injunction is ALLOWED in part. an injunction consistent with the court's memorandum shall issue; (dated 6/18/19) notice sent 6/21/19 Judge: Salinger, Hon. Kenneth W	68	Image
06/28/2019	Plaintiff Governo Law Firm LLC's Notice of plff's Motion to amend Judgment to award costs	69	
06/28/2019	Plaintiff Governo Law Firm LLC's Notice of plff's Motion to amend Judgment to award costs	70	Image
07/09/2019	Defendant CMBG3 Law LLC's Motion for Judgment Notwithstanding the Verdict, or to Alter and Amend the Judgment to Vacate Jury Verdict, or in the Alternative to Remit Jury Award or for New Trial on Damages, or to Alter or Amend Judgment to Eliminate Assessment of Pre Judgment Interest (with opposition)	71	
07/11/2019	Defendant CMBG3 Law LLC's Motion for lv to file reply to plff's opposition to post-verdict motions	72	
07/24/2019	Plaintiff Governo Law Firm LLC's Motion to Amend Judgment to Award Costs (with opposition)	73	
07/29/2019	Endorsement on Motion for Judgment Notwithstanding the Verdict, or to Alter and Amend the Judgment to Vacate Jury Verdict, or in the Alternative to Remit Jury Award or for New Trial on Damages, or to Alter or Amend Judgment to Eliminate Assessment of Pre Judgment Interest (with opposition) (#71.0): ALLOWED in part as to pre-judgment interest. otherwise denied. see memorandum and order. an amended judgment that does not include any pre-judgment interest shall enter; (dated 7/23/19) notice sent 7/29/19		Image
07/29/2019	MEMORANDUM & ORDER: on defendant's post-trial motion for judgment notwithstanding the verdict and other relief; (dated 7/25/19) notice sent 7/29/19 Judge: Salinger, Hon. Kenneth W	74	Image
08/02/2019	AMENDED JUDGMENT It is Ordered and Adjudged That the plff recover from the defts Jointly & Severally the amount of $900,000.00 in damages plus $280.00 in costs for a total sum of $900,280.00 The amended judgment does not include any amount of prejudgment interest entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Salinger, Hon. Kenneth W	75	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/02/2019	Plaintiff Governo Law Firm LLC's Notice of plff 's post trial motions	76	
08/02/2019	Attorney appearance On this date Kurt Baran Fliegauf, Esq. added for Defendant David M Governo		
08/02/2019	Attorney appearance On this date Alexis Porcella Theriault, Esq. added for Defendant David M Governo		Image
08/09/2019	Plaintiff Governo Law Firm LLC's Motion for Permanent Injunction and Appointment of Expert to Oversee Deletion Process	77	Image
08/09/2019	Plaintiff Governo Law Firm LLC's Motion for Post-Judgment Security (Hearing Requested)	78	Image
08/09/2019	Opposition to Plaintiff's Motion for Equitable Relief to Secure Payment of a Money Judgment filed by CMBG3 Law LLC	79	Image
08/09/2019	Opposition to Post-Judgment Permanent Injunction filed by CMBG3 Law LLC	80	Image
09/13/2019	ORDER: MEMORANDUM AND ORDERS ON PLAINTIFF'S MOTIONS FOR A PERMANENT INJUNCTION, POST-JUDGMENT SECURITY, AND COSTS: ORDERS - (1) Plaintiff's motion for a permanent injunction is ALLOWED IN PART. A permanent injunction consistent with the Court's memorandum shall issue. (2) The parties or their counsel shall meet and confer regarding Plaintiff's motion for post-judgment security, and attempt to agree upon a payment plan and reasonable post-judgment security. No later than September 30, 2019, Defendants shall file either: (a) a jointly proposed order, agreed to by the Plaintiff, to provide post-judgment security in a form acceptable to all parties; or (b) an alternative proposal by the Defendants for reasonable and adequate post-judgment security. (3) Plaintiff's motion to amend judgment to award costs is ALLOWED IN PART. An amended judgment shall enter that awards Plaintiff $900,000 in damages plus $15,937.23 in costs, for a total of $915,937,23.00. The amended judgment shall not include any amount of prejudgment interest. Dated: September 4, 2019 Notice sent 9/13/19	81	Image
09/13/2019	ORDER: PERMANENT JUNCTION: (See P#82 for complete order) Dated: September 4, 2019 Notice sent 9/13/19	82	Image
09/13/2019	SECOND AMENDED JUDGMENT It is Ordered and Adjudged That the plff recover from the defts Jointly & Severally the amount of $900,000.00 in damages plus $15,937.23 in costs for a total sum of $915,937.00 The amended judgment does not include any amount of prejudgment interest entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Salinger, Hon. Kenneth W Judge: Salinger, Hon. Kenneth W	83	Image
09/18/2019	Plaintiff Governo Law Firm LLC's EMERGENCY Motion in Regarding Time to File Notice of Appeal and Certificate of Compliance with Superior Court Rule 9A(d)(1)	84	Image
09/18/2019	Notice of appeal filed. Applies To: Governo Law Firm LLC (Plaintiff)	85	Image
09/26/2019	Opposition to Plaintiff's Emergency Motion (P#84) Regarding Time to File Appeal filed by	86	Image
09/27/2019	Endorsement on Motion in Regarding Time to File Notice of Appeal and Certificate of Compliance with Superior Court Rule 9A(d)(1) (#84.0): ALLOWED see memorandum and order; (dated 9/23/19) notice sent 9/26/19 Judge: Salinger, Hon. Kenneth W		Image
09/27/2019	MEMORANDUM & ORDER: allowing plaintiff's motion regarding time to file notice of appeal; (dated 9/23/19) notice sent 9/26/19 Judge: Sanders, Hon. Janet L Judge: Salinger, Hon. Kenneth W	87	Image
09/30/2019		88	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Defendant CMBG3 Law LLC's EMERGENCY Motion to reconsider and vacate Sept. 23, 2019 order granting plaintiff's emergency motion regarding time to file appeal;		
09/30/2019	Defendant CMBG3 Law LLC's Motion for leave to deposit funds into court to satisfy money judgment;	89	Image
10/01/2019	Plaintiff Governo Law Firm LLC's Submission of Counter-Proposal to Defendants' Proposal for Post-Judgment Security	90	Image
10/02/2019	Endorsement on Motion for Post Judgment Security (#78.0): DENIED as Moot because Defendants have agreed to pay the full amount of the judgment into court (dated 9/30/19) notice sent 10/1/19		Image
10/02/2019	Endorsement on Motion to Reconsider and Vacate September 23, 2019 Order Granting Plaintiff's Emergency Motion Regarding Time to File Appeal (#88.0): DENIED A motion to amend judgment is a rule 59(e) Motion. See Lopes v. City of Peabody, 426 Mass. 1001, 1002 (1997). The timely service of such a motion tolls the running of the appeal period (dated 9/30/19) notice sent 10/1/19		Image
10/02/2019	Endorsement on Motion for Leave to Deposit Funds into Court to Satisfy Money Judgment (#89.0): ALLOWED (dated 9/30/19) notice sent 10/1/19		Image
10/03/2019	Certification/Copy of Letter of transcript ordered from Court Reporter 06/03/2019 09:00 AM Jury Trial, 06/04/2019 09:00 AM Jury Trial, 06/05/2019 09:00 AM Jury Trial, 06/06/2019 09:00 AM Jury Trial, 06/07/2019 09:00 AM Jury Trial, 06/10/2019 09:00 AM Jury Trial, 06/11/2019 09:00 AM Jury Trial, 06/12/2019 09:00 AM Jury Trial, 06/13/2019 09:00 AM Jury Trial	91	Image
10/10/2019	Certification/Copy of Letter of transcript ordered from Court Reporter 06/14/2019 09:00 AM Jury Trial, 06/17/2019 09:00 AM Jury Trial	92	Image
10/24/2019	Plaintiff Governo Law Firm LLC's Motion to Modify Permanent Injunction (w/opposition)	93	Image
10/28/2019	Notice of appeal filed. Notice sent 10/29/19 Applies To: Governo Law Firm LLC (Plaintiff)	94	Image
11/05/2019	Governo Law Firm LLC's MOTION for Clarification on paper #89.0, dated 09/30/2019.	95	Image
11/05/2019	Response to and Opposition to Plaintiff's Motion for Clarification as to Allowance of Motion for Leave to Deposit Funds into Court filed by CMBG3 Law LLC	96	Image
11/06/2019	Endorsement on Motion to Modify Permanent Injunction (w/opposition) (#93.0): DENIED a trial judge has broad discretion to determine the appropriate scope of permanent injunctive relief. see, e.g. Borne V. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306,323-324 (2003). the court entered the permanent injunction that it deemed to be appropriate and equitable based on the evidence presented at trial. it declines to reconsider that order based on new evidence offered long after trial. see Shafnacker V. Raymond Jones & Assocs, Inc. 425 Mass. 724,730 (1997. the rest of the motion merely reargues points that the court has already considered.; (dated 11/5/19) notice sent 11/6/19		Image
11/08/2019	Court received Certification Regarding Transcript Order related to appeal	97	Image
11/12/2019	Endorsement on Motion for Clarification on paper #89.0, dated 09/30/2019. (#95.0): ALLOWED in part. by allowing defendant's prior motion to deposit funds into court, the court intended both that those funds would constitute sufficient post-judgment security and that the payment would satisfy the judgment in full if the judgment is affirmed on appeal.; (dated 11/7/19) notice sent 11/12/19		Image
11/26/2019	Notice of appeal filed. Notice sent 11/27/19 Applies To: Governo Law Firm LLC (Plaintiff)	98	Image
12/05/2019	Court received Certification Regarding Transcript Order related to appeal	99	Image
02/18/2020	CD of Transcript of 06/03/2019 09:00 AM Jury Trial, 06/04/2019 09:00 AM Jury Trial, 06/05/2019 09:00 AM Jury Trial, 06/06/2019 09:00 AM Jury Trial, 06/07/2019 09:00 AM Jury Trial, 06/10/2019	100	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	09:00 AM Jury Trial, 06/11/2019 09:00 AM Jury Trial, 06/12/2019 09:00 AM Jury Trial, 06/13/2019 09:00 AM Jury Trial, 06/14/2019 09:00 AM Jury Trial, 06/17/2019 09:00 AM Jury Trial received from Faye LeRoux.		
02/19/2020	Pursuant to Mass. R. App. P. 8 (b)(3), the parties are hereby notified that all transcripts have been received by the clerk's office and that the record will be assembled pursuant to Mass. R. Civ. P. 9(e).		
03/10/2020	Notice of assembly of record sent to Counsel Applies To: Carr, II, Esq., Peter F (Attorney) on behalf of CMBG3 Law LLC (Defendant); Fliegauf, Esq., Kurt Baran (Attorney) on behalf of Governo Law Firm LLC (Plaintiff); Kavanaugh, Jr., Esq., James F (Attorney) on behalf of Governo Law Firm LLC (Plaintiff); Green, Esq., Deanna J. (Attorney) on behalf of Governo Law Firm LLC (Plaintiff); Theriault, Esq., Alexis Porcella (Attorney) on behalf of Governo Law Firm LLC (Plaintiff)		
03/10/2020	Notice to Clerk of the Appeals Court of Assembly of Record		
03/17/2020	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2020-P-0437) was entered in this Court on March 16, 2020.	101	Image

Notice

7/29

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT.
1684CV03949-BLS2

GOVERNO LAW FIRM LLC

v.

CMBG3 LAW LLC and Others[1]

MEMORANDUM AND ORDER ON DEFENDANTS' POST-TRIAL MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND OTHER RELIEF

The Governo Law Firm LLC brought suit alleging that six of its former partners and their new law firm took and used copies of electronic files and databases that belong to the Governo Firm. A jury returned a verdict in the Governo Firm's favor on some but not all of its claims. The jury found that Defendants converted some electronic files or information that belong to the Governo Firm, that the six individual Defendants breached their duty of loyalty by misusing some confidential information that belongs to the Governo Firm, and that all but one of the Defendants conspired to commit a tort. On the other hand, the jury also found that Defendants did not misappropriate any trade secrets and did commit any unfair or deceptive act or practice. It awarded $900,000 in unjust enrichment damages, which was not quite one-third of the $2.793 million sought by the Governo Firm. Final judgment entered against all Defendants jointly and severally for the $900,000 in damages, $267,082.20 in pre-judgment interest, and $280.00 in costs, or a total of $1,167,362.20.

Notice sent 07.29.19 PFC II Escrn JFIC KBF APT C/LLP DJG KMP

Defendants have moved for judgment in their favor notwithstanding the verdict on liability or just on damages, or to remit the jury's damage award to $410.00, or for a new trial on damages, or to strike the award of prejudgment interest.

The Court will deny this motion to extent it challenges the jury's findings of liability and damages or seeks a new trial on damages, because the jury's verdict is consistent with a reasonable view of the evidence and with the jury instructions. However, the Court will allow the request to strike the award of prejudgment interest. An amended final judgment will enter in the amount of $900,280.

[1] Jeniffer A.P. Carson, Bryna Rosen Misiura, Kendra Ann Bergeron, David A. Goldman, Brendan J. Gaughan, and John P. Gardella.

1. Legal Standards. "A jury verdict must be sustained," and a motion for judgment notwithstanding the verdict ("JNOV") must be denied, if the record contains "any evidence from which the jury reasonably could have arrived at that verdict." *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 820-821 (1997). In considering a JNOV motion, a court must "view the evidence in the light most favorable" to the nonmoving party "and disregard evidence favorable" to the moving party, as the jury was free to do at trial. *Id.*

The standard for deciding a new trial motion "is more favorable to the moving party because 'the judge must necessarily consider the probative force of the evidence,' rather than performing only the quantitative analysis called for in a motion for a directed verdict." *O'Brien* v. *Hanover*, 449 Mass. 377, 384 (2007), quoting *Hartmann* v. *Boston Herald-Traveler Corp.*, 323 Mass. 56, 60 (1948). Nonetheless, a party is entitled to a new trial only if "the verdict 'is so greatly against the weight of the evidence as to induce ... the strong belief that it was not due to a careful consideration of the evidence, but that it was the product of bias, misapprehension, or prejudice.' " *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. 119, 127 (1992), quoting *Scannell* v. *Boston Elev. Ry.*, 208 Mass. 513, 514 (1911). "The judge should only set aside a verdict as against the weight of the evidence when it is determined that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.' " *O'Brien*, 449 Mass. at 384, quoting *Robertson* v. *Gaston Snow & Ely Bartlett*, 404 Mass. 515, 520 (1989).

2. Liability. Defendants argue there was no lawful basis for the jury's findings that Defendants converted documents, files, or information that belongs to the Governo Firm, that the six individual Defendants breached their duty of loyalty to the Governo Firm by misusing confidential information that belonged to the Firm, and that all but one of the Defendants conspired to commit the wrongful act of taking and using databases or files that belonged to the Governo Firm. The Court disagrees.

2.1. Conversion.

2.1.1. Liability for Taking or Retaining Property. Defendants assert that Attorneys Carson, Bergeron, Goldman, Gaughan, and Gardella cannot be individually liable for conversion because there is no evidence that they personally

copied any part of the Governo Firm's so-called "8500 New Asbestos Litigation Files." This argument is without merit.

First of law, the jury could reasonably have credited Carson's testimony that Misiura, Goldman, and Bergeron all participated in the copying.

Furthermore, the jury could reasonably have found that all of the Defendants were liable for conversion even though some of them did not personally copy and take files from the Governo Firm. Conversion can be proved either by showing wrongful acquisition of property or by showing a wrongful refusal to return the property upon demand. See *Waxman* v. *Waxman*, 84 Mass. App. Ct. 314, 321 (2013) (son who lawfully possessed parents' car committed conversion when, after father's death, son refused to return if after a valid demand by mother); see generally *Atlantic Finance Corp.* v. *Galvam*, 311 Mass. 49, 50 (1942).

The Court instructed the jury that a Defendant was liable for conversion if the Governo Firm proved that the Defendant exercised dominion or control over Governo property, had no right to possession of that property, did so intentionally, and unjustly profited as a result. It explained that the second element could be proved by showing that at some point the Defendant was not entitled to keep the property and refused to returned it after being asked to do so. The jury could reasonably have found that all the Defendants exercised dominion or control over the 8500 New Asbestos Files that were taken from the Governo Firm, that the Governo Firm asked that these files be returned, that each Defendant refused to do so, and that Defendants obtained some unjust profit as a result. The Governo Firm was not required to prove that each Defendant participated in wrongfully taking property from the Firm; Defendants' refusal to return the files was sufficient. [2]

---

[2] The Governo Firm correctly notes that multiple defendants may be held liable for conversion on a joint venture theory, even if not every participant personally committed every element of the tort of conversion. See *Foreign Car Center, Inc.* v. *Essex Process Service, Inc. (No. 1)*, 62 Mass. App. Ct. 806, 813 (2005); see generally *Chelsea Hous. Auth.* v. *McLaughlin*, 482 Mass. 579, 586 n.10 (2019) (" 'Massachusetts retains the traditional principle of joint and several liability in tort cases' as part of the common law.") (quoting Glannon, Liability of Multiple Tortfeasors in Massachusetts: The Related Doctrines of Joint and Several Liability, Comparative Negligence and Contribution, 85 Mass. L. Rev. 50, 50 (2000)). And the jury could have credited the testimony by Ms. Misiura that all of the individual Defendants agreed

2.1.2. Liability for Copying Electronic Files. Defendants also argue that the copying of intangible electronic files containing valuable business information cannot give rise to a claim for conversion, because such property is not a physical chattel. The Court disagrees.

"If paper documents can be converted, as they no doubt can ... no reason appears that computer files cannot." *Network Sys. Architects Corp.* v. *Dimitruk*, Suffolk Sup. Ct. civ. action no. 06-4717-BLS2, 2007 WL 4442349, at *10 (Mass. Super. 2007) (Fabricant, J.); accord *Integrated Direct Marketing, LLC* v. *May*, 495 S.W.3d 73, 76 (Ark. 2016); *Thompson* v. *UBS Fin. Servs., Inc.*, 115 A.3d 125, 132 (Md. 2015); *Thyroff* v. *Nationwide Mut. Ins. Co.*, 864 N.E.2d 1272, 1278 (N.Y. 2007); *E.I. DuPont de Nemours and Co.* v. *Kolon Industries, Inc.*, 688 F.Supp.2d 443, 454-454 (E.D. Va. 2009); see also *Kremen* v. *Cohen*, 337 F.3d 1024, 1029-1036 (9th Cir. 2002) (internet domain name) (applying California law).

The related argument that there could be no conversion here because the Governo Firm retained copies of all the materials taken by Defendants is unavailing as well. See *Datacomm Interface, Inc.* v. *Computerworld, Inc.*, 396 Mass. 760, 773-775 (1986) (defendant-in-counterclaim liable for conversion by retaining and using carbon copy of magazine circulation list, after returning original list to rightful owner). "Conversion is the 'wrongful exercise of dominion or control over the personal property of another.' " *Waxman*, 84 Mass. App. Ct. at 321, quoting *Cahaly* v. *Benistar Property Exch. Trust Co.*, 68 Mass. App. Ct. 668, 679 (2007). "There is no requirement that the one converting property be shown to have had the intent to deprive permanently the rightful owner of its use and enjoyment, as in stealing." *In re Hilson*,

---

that she should copy and take large parts of the 8500 New Asbestos Files to their new firm, and told Ms. Misiura what parts of the files they wanted her to copy.

But the Governo Firm did not ask for a joint liability instruction and did not try its claims on a joint venture theory. Instead, the jury was instructed (without objection) that the Governo Firm had to prove that each Defendant exercised ownership, control, or dominion over documents, files, or information in a manner that was inconsistent with the Governo Firm's rights.

As a result the Court may not consider Plaintiff's new theory of joint liability in deciding Defendants' post-trial motion. Cf. *DeRose* v. *Putnam Management Co.*, 398 Mass. 205, 212 (1986) (party may not defend or challenge jury verdict based on new theory of law that differs from theory on which case was tried).

448 Mass. 603, 611 (2007). One of the rights of ownership is the ability to decide who gets to use one's property. The jury could reasonably have found, consistent with the jury instructions, that Defendants converted electronic files belonging to the Governo Firm by exercising dominion or control over them in a manner that was inconsistent with the Governo Firm's rights.

2.1.3. Factual Issue about Client File Materials. Defendants reiterate their position that all of the materials they took with them belonged to their clients. Once again, this argument provides no basis for negating the jury's verdict.

Whether the 8500 New Asbestos Files constituted or contained client file materials that Defendants' clients were entitled to take with them when they transferred their legal representation from the Governo Law Firm to CMBG3 Law was a question of fact for the jury. The Court instructed the jury that if they were to find that the only documents, files, or information converted by a Defendant consisted of materials that a client was entitled to take with them, then the Governo Firm could not prove its conversion claim against that Defendant. Based on the evidence presented, the jury could reasonably have found that a substantial portion of the electronic files that Defendants copied and took with them did not belong to any of Defendants' clients.

2.1.4. Unjust Enrichment Damages. Finally, Defendants' argument that the Governo Firm could not seek unjust enrichment damages on its conversion claim is also without merit.

In a case involving the conversion of tangible physical property, where a plaintiff has been deprived of its ability to use its own property, "damages are measured by the value of the converted goods at the time of the conversion, with interest from that time." *Welch* v. *Kosasky*, 24 Mass. App. Ct. 402, 404 (1987). In such a case "[t]he owner is not bound to accept a return of his property, but if he retakes it he may recover as damages the difference between the value of the property when converted and when returned, plus damages for loss of use during the period of wrongful detention." *George* v. *Coolidge Bank & Tr. Co.*, 360 Mass. 635, 641 (1971). In other words, "[w]here ... the rightful owner elects to receive back the converted goods, the rule of damages ... is still based on value at the time of the conversion, but

the converter is (1) credited with the value of the returned goods at the time of their return, and (2) charged with damages for loss of use of the goods during the period of the detention." *Welch, supra*, at 404-405.

But this case is different. Defendants took copies of the disputed materials but left the original electronic files intact with the Governo Firm. As a result a different measure of damages applied here.

The Supreme Judicial Court "has recognized three acceptable methods of measuring damages in cases involving business torts such as the misappropriation of trade secrets" or other proprietary information or databases: "the defendant's profits realized from his tortious conduct, the plaintiff's lost profits, or a reasonable royalty." *Curtiss-Wright Corp.* v. *Edel-Brown Tool & Die Co.*, 381 Mass. 1, 11 (1980). "[T]he 'reasonable royalty' measure of damages is only appropriate where the defendant has made no actual profits and the plaintiff is unable to prove a specific loss." *Id.* at 11 n.9, quoting *Jet Spray Cooler, Inc.* v. *Crampton*, 377 Mass. 159, 171 n.10 (1979) ("*Jet Spray II*"). Furthermore, "the value of the misappropriated trade secrets to the defendants is not the basis of the defendants' liability, and the value of the misappropriated trade secrets should not form the basis of the plaintiffs' recovery." *Jet Spray II*, 377 Mass. at 172. And, of course, if a successful plaintiff such a case obtains a permanent injunction barring any further use of the plaintiff's trade secret, proprietary database, or other confidential information, then the plaintiff will not be entitled to any future damages because there cannot be any further misuse of the plaintiff's property. See *Curtis-Wright, supra*, at 9-10 and 12.

The Governo Law Firm was entitled to seek disgorgement of any unjust profits earned by Defendants from using the Governo Firm's property. The Court barred the Governo Law Firm from seeking royalty-based damages because Defendants had made actual profits. *Id.* at 11 n.9. The Governo Law Firm chose not to seek its own lost profits as damages. It was entitled to waive any damage claim based on its own losses and instead seek to recover any profits that Defendants realized from their allegedly tortious conduct. *USM Corp.* v. *Marson Fastener Corp.*, 392 Mass. 334, 338

(1984) ("*USM Corp. II*").[3] "The guiding principle" of this measure of damages "is to order the wrongdoing defendant to give up all gain attributable to the misuse of the trade secret and to measure that gain as accurately as possible." *Id.* at 339-340.

It is too late in the case for Defendants to assert, as they do in their JNOV motion, that the only damages that the Governo Firm could seek on their conversion claim was the fair market value of the files or databases that were copied and taken by the Defendants. Before trial, the Defendants asked the Court to bar proposed expert testimony proffered by the Governo Firm on damages, including proposed testimony regarding the value of the copied databases measured by the alleged cost to recreate those databases. The Court allowed that motion in limine and barred any evidence of replacement cost on the ground that Governo Firm was not entitled to recover the value of the copied materials. See *Jet Spray II*, 377 Mass. at 172. Consistent with that ruling, the Court instructed the jury that to prove conversion against a Defendant the Governo Firm would have to prove, among other things, that the Defendant unjustly profited from the alleged conversion, and that any damages should equal net profits earned through the misuse of the Governo Firm's property. Since Defendants did not object to those instructions, they are law of the case and Defendants may not challenge them. See *Freeman* v. *Planning Bd. of W. Boylston*, 419 Mass. 548, 559 (1995); accord *Gendreau* v. *C.K. Smith & Co., Inc.*, 22 Mass. App. Ct. 989, 990 (1986) (unobjected-to instructions on damages were law of the case).

Having succeeded in barring the Governo Firm from offering evidence of fair market value before trial, Defendants cannot now assert that fair market value was the only acceptable measure of damages.

2.2. Duty of Loyalty. Defendants' attacks on the jury's findings that each individual Defendant breached their duty of loyalty to the Governo Firm are also unavailing. When the individual Defendants worked at the Governo Firm, they were non-equity partners with responsibility for key client relationships. Each of them therefore owed the Governo Firm a duty of loyalty. See *Meehan* v. *Shaughnessy*,

[3] The Governo Firm was similarly entitled to seek restitution of Defendants' gain from misusing Plaintiff's property, in order to prevent unjust enrichment, as a remedy for breach of Defendants' duty of loyalty. See *Demoulas* v. *Demoulas Supermarkets, Inc.*, 424 Mass. 501, 556 (1997).

404 Mass. 419, 433-434, 438 (1989) (law firm partners, non-equity junior partner, and associates all owed duty of loyalty to firm). As the Court instructed the jury, Defendants were free to make secret plans to compete with the Governo Firm while still working there. See *Augat, Inc.* v. *Aegis, Inc.*, 409 Mass. 165, 172 (1991); *Meehan*, *supra*, at 435. But they could not take with them confidential information or other property that belonged to the Governo Firm and use it to their advantage, for example to compete against their old firm. See *Augat*, *supra*, at 172-173; *Jet Spray Cooler, Inc.* v. *Crampton*, 361 Mass. 835, 840 (1972) ("*Jet Spray I*").

The jury could reasonably have found that the 8500 New Asbestos Files were a proprietary compilation of materials that gave the Governo Firm a competitive advantage, that material parts of that collection were not client file materials belonging to clients that transferred their representation to CMBG3 Law, that Defendants breached their duty of loyalty by taking proprietary materials that did not belong to Defendants' clients, and that Defendants used those materials to compete against the Governo Firm. The fact that the jury found that these materials were not trade secrets, after the Court instructed that information in the public domain cannot be a trade secret, does not bar the claim for breach of duty of loyalty. See *Warner-Lambert Co.* v. *Execuquest Corp.*, 427 Mass. 46, 49 (1998) ("[C]onfidential and proprietary business information may be entitled to protection, even if such information cannot claim trade secret protection."); *Augat*, 409 Mass. at 169 (information may be "protectible as confidential" even if it "would not be a 'trade secret' of the traditional kind").

Whether and to what extent the 8500 New Asbestos Files were confidential and proprietary were factual issues for the jury to resolve. Viewing the evidence in the light most favorable to the Governo Firm, the jury could reasonably have found that Defendants breached their duties of loyalty.

2.3. Conspiracy. Defendants argue that the conspiracy claims must be dismissed because no underlying tortious act was proved. Cf. *Kurker* v. *Hill*, 44 Mass. App. Ct. 184, 188-189 (1998) (civil conspiracy consists of a group of tortfeasors acting together pursuant to "a common plan to commit a tortious act").

But the jury reasonably found that each Defendant converted property that belonged the Governo Firm and breached their duties of loyalty to the Plaintiff, as discussed above. It was similarly reasonable for the jury to find that the Defendants had and carried out a common plan to convert intangible property belonging to the Governo Firm and to breach their duties of loyalty.

3. Damages. Defendants argue that the jury's award of $900,000 as compensation for Defendants' misuse of documents or databases that belong to the Governo Firm should be vacated or remitted because it is not supported by the evidence. In particular, Defendants argue that there was no evidence to support a finding that Defendants earned $900,000 in net profit by using the 8500 New Asbestos Files on behalf of their clients. This argument fails because it mistakenly assumes that the Governo Firm had the burden of proving what part of Defendants' profits was attributable to use of Plaintiffs' database.

Although there is often "an element of uncertainty" in determining the appropriate compensation to an injured plaintiff in business tort cases, that is "not a bar" to the recovery of damages or restitution. See, e.g., *Datacomm*, 396 Mass. at 777, quoting *National Merchandising Corp.* v. *Leyden*, 370 Mass. 425, 430 (1976). So long as the evidence permits a "reasonable approximation" of appropriate damages or restitution, a verdict that is consistent with that evidence must be upheld. *Targus Group Int'l* v. *Sherman*, 76 Mass. App. Ct. 421, 437 (2010). "An award of damages can stand on less than substantial evidence ... particularly [in] the case of business torts, where the critical focus is on the wrongfulness of the defendant's conduct." *Zimmerman* v. *Bogoff*, 402 Mass. 650, 662 (1988), quoting *Datacomm*, *supra*.

The jury could reasonably have found, in accord with the Court's instructions, that the Governo Firm proved that Defendants earned net profits after leaving to start their own law firm and that at least part of Defendants' net profits was attributable to Defendants' misuse of the copied materials.

Per the Court's instructions, the jury would therefore have found that the burden shifted to the Defendants to prove the costs or expenses that should be offset against their revenue to calculate net profit, and also to prove what part of their

profits was not attributable to any misuse of the copied materials. See *USM Corp. II*, 392 Mass. at 338 & 339 n.3; accord *Jet Spray II*, 377 Mass. at 174 n.14.

The Governo Firm was not required to prove exactly what part of Defendants' profit was attributable to misuse of materials taken from the Governo Firm. It only had to prove that some part of Defendants' profits resulted from that misuse, which would then shift the burden of proof to the Defendants. *Id.*

"If a defendant cannot meet its burden as to costs and profits, the defendant must suffer the consequences." *USM Corp. II, supra*; accord *Jet Spray II*, 377 Mass. at 174 n.14. In other words, if a defendant in these circumstances fails "to segregate the portion of their profits which is attributable to the misappropriated trade secrets" or confidential information "from the portion of their profits which may be attributable to other factors," they cannot complain after the verdict that a jury's award of some or all of the defendant's net profits as compensation to the plaintiff is excessive. *Jet Spray II, supra*, at 183. Though Defendants testified that only a de minimis part of their total profits was attributable to misuse of any part of the 8500 New Asbestos Files, the jury was not required to credit that evidence and could reasonably have found that Defendants failed to prove that contention.

Defendants knew going into the trial that, depending on the jury's findings, Defendants might face the burden of proving what costs and expenses should be deducted from the gross profits and of proving what part of their net profits was not attributable to any misuse of Governo Firm property. The Court reminded the parties of the case law discussed above in a pre-trial ruling on one of Defendant's motions in limine. The Court issued that decision, in the form of a written memorandum, a month before opening statements to the jury.

The jury's verdict demonstrates that they followed the Court's instructions, considered the issue carefully, did not engage in speculation, and did not act out of bias or prejudice. The jury could reasonably have found, and indeed it was essentially undisputed at trial, that since leaving the Governo Firm the Defendants earned net profits of almost $2.8 million, including income that the Defendants paid to

themselves as salary.[4] The jury found that most of those profits were not attributable to Defendants' misuse of the copied materials, because it found that Defendants earned $900,000 in net profits through the misuse of Governo Firm proprietary materials. Defendants' disappointment that they failed to convince the jury to award a smaller amount of compensation is not a good reason to vacate the award, order a remittitur, or order a new trial on damages. See, e.g., *Solimene* v. *B. Grauel & Co., KG*, 399 Mass. 790, 803 (1987).

4. Prejudgment Interest. The Court agrees with Defendants that the Governo Firm has no statutory right to recover prejudgment interest. In the exercise of its discretion, the Court declines to award such interest under its common law powers.

A monetary award to disgorge profits earned by the misuse of trade secrets or confidential information is not "damages" within the meaning of the statutes that govern prejudgment interest, and thus is not the sort of recovery as to which prejudgment interest accrues as of right. *USM Corp. II*, 392 Mass. at 348-350 (plaintiff seeking disgorgement of profits for misuse of trade secrets not entitled to prejudgment interest under G.L. c. 231, § 6B, which governs prejudgment interest for tort claims); see also *Jet Spray II*, 377 Mass. at 183-184 (same under G.L. c. 235, § 8, which governs prejudgment interest where judgment is rendered upon the report of an auditor or master).

The Legislature did not "overrule[] the prejudgment analysis found in" *USM Corp. II* and *Jet Spray II* by enacting G.L. c. 231, § 6H, in late 1983, as the Governo Firm now argues. Section 6H "provides for the award of prejudgment interest

---

[4] Prior to trial, the Court ruled that the Governo Firm could not present evidence regarding "reasonable royalty" damages if Defendants had earned profits since starting their own firm, that monies paid by CMBG3 to its partners as distributions of profit or as salaries all count as profit for this purpose, and the fact that the individual Defendants had paid themselves substantial salaries meant that their new firm was profitable and reasonable royalty damages were not available. See *Curtiss-Wright*, 381 Mass. at 11 n.9; *Jet Spray II*, 377 Mass. at 171 n.10. Defendants agreed with and benefitted from that ruling; they tried the case on that basis; and the Court then instructed the jury on that basis. Defendants may not now argue that their salaries should have been treated as a cost rather than as part of their new firm's profit when the jury determined what portion of Defendants' profits should be disgorged to the Governo Firm. Cf. *DeRose*, 398 Mass. at 212; *Bisson* v. *Eck*, 40 Mass. App. Ct. 942, 943 (1996) (rescript); *Gendreau*, 22 Mass. App. Ct. at 990.

whenever compensatory damages are awarded." *George* v. *National Water Main Cleaning Co.*, 477 Mass. 371, 378 (2017).[5] But not all verdicts that order a defendant to pay money to a successful plaintiff constitute an award of "damages" within the meaning of § 6H. For example, an action to recover monies owed for labor and materials by enforcing a mechanics lien is an *in rem* proceeding, and thus a prevailing plaintiff in such an action does not recover "damages" and is not entitled to prejudgment interest under § 6H. *National Lumber Co.* v. *United Casualty and Surety Ins. Co., Inc.*, 440 Mass. 723, 729-730 (2004).[6] Similarly, an award of restitution that requires a defendant to disgorge and pay plaintiff part or all of their profit or gain from certain conduct (as in this case) is an equitable remedy for unjust enrichment, not an award of "damages" to compensate a plaintiff for economic injury that it suffered. See *Bonina* v. *Sheppard*, 91 Mass. App. Ct. 622, 626-627 (2017); *Santagate* v. *Tower*, 64 Mass. App. Ct. 324, 336 (2005). If a judgment requiring disgorgement of profits to remedy unjust enrichment from misuse of business information is not an award of "damages" for the purposes of § 6B, as the Supreme Judicial Court held in *USM Corp. II*, then it cannot be an award of "damages" for the purposes of § 6H either.[7]

The Court nonetheless has the power to award prejudgment interest under common law principles. See *USM Corp. II*, 392 Mass. at 350. Where to do so depends on a court's balancing of the equities in a particular case. *Id.*

---

[5] Section 6H provides as follows: "In any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law, there shall be added by the clerk of court to the amount of damages interest thereon at the rate provided by section six B to be determined from the date of commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law."

[6] Indeed, any action to enforce a lien is considered to be an *in rem* proceeding against particular property. See *Chrisakis* v. *D'Arc*, 471 Mass. 365, 367-368 (2015); *National Lumber*, *supra*; *Howard* v. *Robinson*, 59 Mass. (5 Cush.) 119, 121 (1849); *Residences at Cape Ann Heights Condominium Ass'n* v. *Halupowski*, 83 Mass. App. Ct. 332, 333-335 (2013).

[7] The Court is not convinced by the contrary conclusion in *Mill Pond Assocs., Inc.* v. *E & B Giftware, Inc.*, 751 F.Supp. 299, 301 (D.Mass. 1990) (Young, J.), which was decided before *National Lumber*, *Bonina*, and *Santagate*.

After balancing the equities, the Court concludes that no award of prejudgment interest is appropriate in this case.

There is no need to award prejudgment interest to make the Governo Firm whole. "Prejudgment interest on compensatory damages is designed to make a plaintiff whole for the loss of money during the time it was owed but not paid." *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 327 (1993) (emphasis added). That rational does not apply here "because the monetary relief in this case is based on the defendants' gain and not on [plaintiff's] losses." *USM Corp. II*, 392 Mass. at 350 n.14; accord *Jet Spray II*, 377 Mass. at 183-184 n.24.

Nor is there any reason to believe that Defendants will be unjustly enriched if they are not required to pay prejudgment interest on the $900,000 in profits that they must disgorge to the Governo Firm. That is so for several reasons. Most of Defendants profits were earned well after this lawsuit was filed, and much closer in time to the jury verdict and entry of judgment. See *USM Corp. II*, 392 Mass. at 349; *Jet Spray II*, 377 Mass. at 182 n.21. Prejudgment interest on disgorged profits should logically only run on after-tax profits, but the Governo Firm only presented evidence of Defendants' pre-tax profits. See *USM Corp. II, supra*, at 351. And it seems quite likely that the jury awarded restitution damages of $900,000 because Defendants were unable fully to segregate the portion of their profits that was attributable to misuse of the Governo Firm's proprietary information from the portion of their profits attributable to other factors. See *Jet Spray II, supra*, at 183. Many of the materials in the 8500 New Asbestos Files that would be most valuable to clients that left the Governo Firm and transferred their legal representation to the Defendants—such as information about job sites where the client products were present, the client's settlement history, deposition transcripts from a client's prior cases, and other parts of a client's prior case files—would appear to be client file materials that the Governo Firm would have been required to send to the client or their new legal counsel if Defendants had not preemptively copied and taken those materials with them when they left. Given these circumstances, the Court concludes that no prejudgment interest should be awarded.

The Governo Firm's assertion that it "was precluded from introducing evidence of its own loss," and therefore should be allowed to recover pre-judgment interest, is

incorrect. The Court never barred Plaintiff from presenting evidence that it suffered a loss as a result of Defendants' alleged misconduct. Though the Court barred evidence of a reasonable royalty measure of damages, as discussed above, the Governo Firm was free to seek damages on the theory that alleged misconduct by the Defendants caused Plaintiff to lose profits. The Governo Firm opted not to do so, explaining (during the final trial conference) that it could not prove it had lost any profits. The Governo Firm's inability to, or voluntary decision not to, offer evidence of its own lost profits cannot justify an award of prejudgment interest on the portion of Defendants' profits that they jury found was attributable to the misuse of materials taken from the Governo Firm.

ORDER

Defendant's motion for judgment notwithstanding the judgment is ALLOWED IN PART and DENIED IN PART. It is allowed to the extent that Defendants seek to strike the award of pre-judgment interest. The motion is denied to the extent that Defendants seek any other relief. An amended judgment shall enter that awards Plaintiff $900,000 in damages plus $280 in costs, for a total of $900,280.00; the amended judgment shall not include any amount of prejudgment interest.

Kenneth W. Salinger
Justice of the Superior Court

25 July 2019

232 Conn. 480
Supreme Court of Connecticut.

LARSEN CHELSEY REALTY COMPANY
v.
S. Craig LARSEN et al.

No. 14941.
|
Argued Nov. 1, 1994.
|
Decided April 4, 1995.

Synopsis

Real estate brokerage company brought action for libel, unfair trade practices, interference with contractual relations, and violation of Connecticut Unfair Trade Practices Act (CUTPA) against former employee and competitor for which employee had gone to work. After verdict was directed with regard to counts against competitor, jury returned partial judgment for brokerage company, and the Superior Court, Judicial District of New Haven, DeMayo, J., granted in part employee's motion to set aside judgment against him and rendered supplemental judgment in favor of employer and competitor on issues of punitive and exemplary damages. Brokerage company appealed, and the Supreme Court, Berdon, J., held that: (1) matter would be remanded for new trial with regard to grant of directed verdict on claims of libel and violation of CUTPA against employee due to inadequacy of record; (2) allegations by brokerage company against employee could constitute violation of CUTPA even though no consumer relationship existed; (3) finding that employee's conduct violated CUTPA was supported by evidence; but (4) reviewing court was precluded from ordering new trial on claims against competitor based on actions of employee where jury had awarded only nominal damages against employee; and (5) issue of whether competitor authorized deceptive conduct and itself violated CUTPA was for jury.

Affirmed in part, reversed in part and remanded for further proceedings. *

* The plaintiff's appeal was subsequently withdrawn January 18, 1996.

Procedural Posture(s): On Appeal.

West Headnotes (36)

[1] **Appeal and Error** Remand without decision in general

Appeal and Error Error Not Shown

Where meaningful appellate review is precluded by incompleteness of record, courts take two approaches; under first approach, which is usually taken, court disposes of appeal by summarily affirming decision of trial court, but court may also utilize its authority pursuant to Practice Book to remand case to trial court in order that it may articulate grounds for decision. Practice Book 1978, § 4061.

[2] **Jury** Judgment

Jury Re-examination or other review of questions of fact tried by jury

Trial court's decision to set aside jury verdict can implicate party's constitutional right to trial by jury.

3 Cases that cite this headnote

[3] **Appeal and Error** Remand without decision in general

Action in which incompleteness of record precluded meaningful appellate review of trial court's grant of directed verdict was remanded to allow trial court to articulate grounds for its decision rather than summarily affirming decision of trial court where decision of trial court to set aside jury verdict could potentially have implicated constitutional right to jury trial and trial court did not comply with express requirement of Practice Book that it file memorandum stating grounds for decision

when setting aside verdict. Practice Book 1978, §§ 322, 4061.

2 Cases that cite this headnote

[4] **Jury** Antitrust and trade regulation cases

Party is not entitled to jury trial on violations of Connecticut Unfair Trade Practices Act (CUTPA); party who wishes CUTPA issues to be tried to court need only move to strike case from jury list, but if parties fail to take such action, CUTPA issues may be tried to jury. C.G.S.A. § 42–110a et seq.

19 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Purpose and construction in general

Antitrust and Trade Regulation Businesses in General; Competitors and Competition

Connecticut Unfair Trade Practices Act (CUTPA), by its own terms, applies to broad spectrum of commercial activity; entire act is remedial in character. C.G.S.A. § 42–110b(a, d).

58 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Employer and employee

Alleged actions of former employee of real estate brokerage company in accepting job with competing company and then, while acting as competitor, taking actions that harmed brokerage company were outside employer-employee relationship and could constitute violation of Connecticut Unfair Trade Practices Act (CUTPA), even though no consumer relationship existed between company and employee. C.G.S.A. § 42–110a et seq.

77 Cases that cite this headnote

[7] **Antitrust and Trade Regulation** Businesses in General; Competitors and Competition

Finding that activities of former employee of real estate brokerage company who accepted position with competitor in seeking to attract clients implicated trade or commerce, and could constitute violation of Connecticut Unfair Trade Practices Act (CUTPA), was supported by evidence that employee mailed letter to clients of brokerage company which falsely stated that company would cease operations and merge its personnel with competitor and that employee instructed city board of realtors that he was no longer affiliated with brokerage company and that brokerage company was going out of business. C.G.S.A. § 42–110a et seq.

29 Cases that cite this headnote

[8] **Antitrust and Trade Regulation** Legal professionals; attorney and client

Allowing former client to sue attorney under Connecticut Unfair Trade Practices Act (CUTPA) on basis of professional services attorney had rendered for client would infringe on attorney-client relationship and is not permitted; however, entrepreneurial aspects of practice of law, such as attorney advertising, remain well within scope of CUTPA. C.G.S.A. § 42–110a et seq.

21 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Consumers, purchasers, and buyers; consumer transactions

Connecticut Unfair Trade Practices Act (CUTPA) imposes no requirement of consumer relationship. C.G.S.A. § 42–110a et seq.

22 Cases that cite this headnote

[10] **Statutes** Policy behind or supporting statute

Statutes Language

Statutes Legislative History

In interpreting statute, it is relevant to consider words of statute, legislative history, and legislative policy statute was designed to implement.

[11] **Antitrust and Trade Regulation** Persons and Transactions Covered Under General Statutes

Although consumers were expected to be major beneficiary of passage of Connecticut Unfair Trade Practices Act (CUTPA), CUTPA was designed to provide protection to much broader class. C.G.S.A. § 42–110a et seq.

22 Cases that cite this headnote

[12] **Trial** Nature and Grounds

Trial court may direct jury to reach verdict if it determines that jury could not reasonably and legally reach contrary conclusion.

1 Cases that cite this headnote

[13] **Appeal and Error** Preverdict motions; direction of verdict

In reviewing trial court's decision to direct verdict, reviewing court considers all evidence, including reasonable inferences, in light most favorable to party against whom verdict was directed.

1 Cases that cite this headnote

[14] **Labor and Employment** Intentional Acts

Under doctrine of "respondeat superior," master is liable for wilful torts of his servant committed within scope of servant's employment and in furtherance of his master's business.

68 Cases that cite this headnote

[15] **Antitrust and Trade Regulation** In general; what is unfair competition

Torts Business relations or economic advantage, in general

Torts Prospective advantage, contract or relations; expectancy

Recognized under umbrella term of "unfair competition," in addition to cases involving use of similar trade names, are such causes of action as tortious interference with business expectancy, and unjustifiable interference with person's right to pursue his or her lawful business or occupation.

11 Cases that cite this headnote

[16] **Torts** Knowledge and intent; malice

Torts Improper means; wrongful, tortious or illegal conduct

Torts Presumptions and inferences

In causes of action such as tortious interference with business expectancy and unjustifiable interference with person's right to pursue his or her lawful business or occupation, which come under umbrella term of unfair competition, plaintiff must prove that defendant was guilty of fraud, misrepresentation, intimidation, or molestation, or that defendant acted maliciously, in interfering with plaintiff's business prospects; trier of fact ordinarily may infer such intent from defendant's conduct or acts in light of circumstances of particular case.

18 Cases that cite this headnote

[17] **Principal and Agent** Rights and liabilities of principal

When plaintiff brings claim against principal based solely upon tortious conduct of agent, plaintiff cannot recover any more compensatory damages from principal than it could from agent, and it is error for trier of fact to return verdict for compensatory damages in greater amount against principal than against agent. Restatement (Second) of Agency, §§ 217B(2), 359C(2).

4 Cases that cite this headnote

[18] **Appeal and Error** Preverdict motions; direction of verdict

Reviewing court was precluded from ordering new trial in action brought by real estate brokerage company against former employee and competitor for which employee had gone to work on count in which brokerage company alleged that competitor was vicariously liable for employee's intentional torts where, even assuming that trial court improperly directed verdict for competitor, recovery for company was limited to nominal damages of two dollars as jury had returned verdict of only one dollar on each count after finding that employee had engaged in unfair competition and had interfered with plaintiff's contractual relations.

5 Cases that cite this headnote

[19] **Appeal and Error** Nominal damages

When reviewing court's disposition of claim on appeal entitles party to trial in which only nominal damages may be awarded, court will not remand case for new trial.

2 Cases that cite this headnote

[20] **Corporations and Business Organizations** Nature and ground of corporate liability

Corporations, like individuals, are liable for their torts; liability arises apart from, and is distinguishable from, liability under theory of respondeat superior.

4 Cases that cite this headnote

[21] **Principal and Agent** Agent's acts in general

Principal and Agent Rights and liabilities of principal

Principal and Agent Operation and Effect

Theory of respondeat superior attaches liability to principal merely because agent committed tort while acting within scope of his employment; principal may be directly liable, however, for acts of its agents that it authorizes or ratifies. Restatement (Second) of Torts, §§ 212, 218.

24 Cases that cite this headnote

[22] **Corporations and Business Organizations** Corporation as Distinct Entity

Corporations and Business Organizations Corporation acts through officers or agents

Corporation is distinct legal entity that can act only through its agents.

4 Cases that cite this headnote

[23] **Appeal and Error** Preverdict motions; direction of verdict

Reviewing court was precluded from remanding for new trial in action by real estate company against former employee and competitor for which employee had gone to work with regard to count alleging that competitor was directly

liable, even assuming that trial court erred in directing verdict, where acts alleged were same as those supporting claim that employee individually was liable for unfair competition and interference with contractual relations and jury had awarded damages of one dollar on those counts; previous jury findings would be controlling on remand and would allow only nominal damages.

1 Cases that cite this headnote

[24] **Antitrust and Trade Regulation** Questions of law or fact

Issue of whether president of real estate company had authorized or ratified deceptive and unfair trade practices of employee in seeking to recruit clients from competitor for which employee had formerly worked, so that real estate company itself was in violation of Connecticut Unfair Trade Practices Act (CUTPA), was for jury in action brought by competitor where president told employee she would be happy to talk to other employees of competitor, and allowed if not encouraged employee to send letter to clients of competitor which incorrectly stated that competitor had merged with company. C.G.S.A. § 42–110a et seq.

14 Cases that cite this headnote

[25] **Antitrust and Trade Regulation** Punitive or exemplary damages

Antitrust and Trade Regulation Attorney fees

Remedy for plaintiff who establishes liability under Connecticut Unfair Trade Practices Act (CUTPA) is not limited to mere compensatory damages; rather, under CUTPA, plaintiff is entitled to have trial court consider awarding both punitive damages and attorney fees. C.G.S.A. § 42–110g(a, d).

26 Cases that cite this headnote

[26] **Appeal and Error** Preverdict motions; direction of verdict

New trial was required following trial court's erroneous grant of directed verdict in action alleging violation of Connecticut Unfair Trade Practices Act (CUTPA) as plaintiff if successful was entitled to have trial court consider awarding both punitive damages and attorney fees, although new trial was not required with regard to other claims asserted even if grant of directed verdict regarding those claims was appropriate due to fact that only nominal damages would have been obtainable. C.G.S.A. § 42–110g(a, d).

5 Cases that cite this headnote

[27] **Trial** Surplusage

Language “plus plaintiff's attorney's fees” in verdict summary returned by jury in action in which multiple claims were asserted was mere surplusage, and trial court acted properly in ordering jury to strike words from verdict form, where court had provided jury with detailed, instructive interrogatories that allowed jury to insert damages it found under each count alleged as sum certain and jury's answer to each count was in itself a verdict, in none of verdicts set forth did jury attempt to award attorney fees, and mere task of carrying forward total of individual verdicts into verdict form was ministerial in nature.

2 Cases that cite this headnote

[28] **Damages** Nature and Theory of Damages Additional to Compensation

Term “punitive damages” refers to expenses of bringing legal action, including attorney fees, less taxable costs.

11 Cases that cite this headnote

[29] **Damages** Exemplary damages

It is responsibility of trier of fact to award common-law punitive damages for intentional torts.

5 Cases that cite this headnote

[30] **Damages** Exemplary damages

Damages Objections and exceptions to inquest or assessment

Trial court properly denied posttrial motion for award of common-law punitive damages for intentional tort in action in which plaintiff sought to recover based on alleged intentional torts and violation of Connecticut Unfair Trade Practices Act (CUTPA) where plaintiff informed court prior to trial that it sought punitive damages only on CUTPA counts in complaint, did not request court to charge jury on issue of common-law punitive damages, and did not take exception when trial court did not deliver instruction. C.G.S.A. § 42–110a et seq.

14 Cases that cite this headnote

[31] **Evidence** Value or Market Price of Property

Trial court did not abuse its discretion in determining that financial report and revenue projections for real estate brokerage company were not admissible for purpose of determining value of company in action brought against competitor and former employee who had gone to work for competitor based on alleged unfair trade practices where documents were prepared several months before events at issue, financial report was prepared for purpose of obtaining credit and was couched in optimistic phrases, and projections of revenues included commissions with reference to listings which would have expired.

1 Cases that cite this headnote

[32] **Evidence** Form and Sufficiency in General

Trial court did not abuse its discretion in excluding summary of real estate brokerage company's private listings which was prepared at least two months before events in question and later admitting version on which column for "gross commission potential" was redacted in company's action against competitor based on alleged unfair trade practices where witness through whom summary was sought to be introduced testified that he did not know if premises upon which document's "gross commission potential" was based had ever occurred.

[33] **Witnesses** Effect of impeachment by inconsistent statements

Summary of real estate brokerage company's private listings was not admissible as prior inconsistent statement of former employee in action brought by company against employee and competitor for which employee had gone to work based on alleged unfair trade practices where company sought to introduce summary before employee had ever testified and did not attempt to impeach employee with summary's contents while employee was on stand.

[34] **Evidence** Petitions, affidavits, and depositions

Letter written by former employee of real estate brokerage company who had gone to work for competitor was not judicial admission of competitor and was not admissible against competitor in action brought by brokerage company alleging unfair trade practices where competitor in its answer expressly stated that it denied

or had no knowledge or belief about any allegations regarding letter in complaint, even though letter was admissible as judicial admission of former employee.

[35] **Appeal and Error** Necessity of Specific Objection

Rules of practice provide that reviewing court is not bound to consider claims of error unless they are distinctly raised at trial. Practice Book 1978, §§ 315, 4185.

[36] **Appeal and Error** Instructions

Alleged error of court in instructing jury that it could award general damages as it deemed fair and reasonable after court had indicated that it would use different instruction was not preserved for review where plaintiff only objected to charge on ground that court had not defined general damages and court responded to objection by recharging jury in that regard. Practice Book 1978, §§ 315, 4185.

2 Cases that cite this headnote

Attorneys and Law Firms

****1013** ***482** Raymond A. Garcia, with whom was Constantine G. Antipas, New Haven, for appellant (plaintiff).

Gary P. Sklaver, with whom, on the brief, was Irving H. Perlmutter, New Haven, for appellee (named defendant).

Patrick J. Monahan, with whom, on the brief, was Denise M. Bourque, Hartford, for appellee (defendant H. Pearce Co.).

***483** Before PETERS, C.J., and CALLAHAN, BERDON, KATZ and PALMER, JJ.

Opinion

BERDON, Associate Justice.

The plaintiff, Larsen Chelsey Realty Company, instituted this thirteen count action against the defendants, S. Craig Larsen (Larsen) and H. Pearce Company (Pearce Company), seeking monetary damages, legal fees and punitive damages. The plaintiff was a real estate broker with an office in New Haven. Larsen is the former president of the plaintiff and an employee of Pearce Company, a competing real estate broker in New Haven. The ten counts directed against Larsen alleged, in the first and third counts, libel; in the second and fourth counts, slander; in the fifth count, breach of fiduciary duty; in the sixth count, unfair competition; in the seventh count, theft of corporate opportunity; in the eighth count, interference with contractual relations; in the ninth count, conversion; and in the tenth count, violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42–110a et seq. The three counts directed against Pearce Company alleged, in the eleventh count, vicarious responsibility under the doctrine of respondeat superior for certain actions taken by Larsen; in the twelfth count, "tortious conduct," including unfair competition, unfair trade practices, and interference with contractual relations; and in the thirteenth count, violations of CUTPA. [1]

[1] The defendants, in their answers to the complaint, asserted several special defenses. We need not discuss these defenses, however, in order to decide the issues raised in this appeal.

At trial, after both sides had rested, the trial court granted Pearce Company's motion for a directed verdict on all of the counts against it. The trial court also granted Larsen's motion for a directed verdict on the fourth count, which alleged slander, and on the ninth count, which alleged conversion. The eight remaining counts were submitted ****1014** to the jury. The jury concluded that the plaintiff had failed to sustain its burden of proof on the second count, which alleged slander, and on the ***484** third count, which alleged libel. [2] The jury returned a verdict for the plaintiff against Larsen on six of the remaining counts in the following amounts: on the first count, libel,

$165; on the fifth count, breach of fiduciary duty, $6000; on the sixth count, unfair competition, $1; on the seventh count, theft of corporate opportunity, $1; on the eighth count, tortious interference with business relations, $1; and on the tenth count, violations of CUTPA, $1. The court subsequently granted Larsen's motion to set aside the jury verdicts on the first count, which alleged libel, and on the tenth count, which alleged violations of CUTPA. The plaintiff has appealed, claiming error in these and other rulings of the trial court. [3] We reverse in part the judgment of the trial court.

2 The plaintiff has not appealed these verdicts.

3 The plaintiff appealed from the judgment of the trial court to the Appellate Court, and this appeal was transferred to this court pursuant to Practice Book § 4023 and General Statutes § 51–199(c).

The jury reasonably could have found the following facts. The plaintiff was formed in 1987 as a combination of Chelsey Realty Company and Larsen Realty Company, the latter of which was owned by Larsen's father, Stuart Larsen. The plaintiff hired Larsen as its president in October, 1987, and it began operations in January, 1988. By all accounts, however, the new company was less than a financial success. Throughout 1988, the company never had a profitable month.

In 1989, the events which form the basis for this action began to unfold. In January, Chester A. Zaniewski, the chairman of the plaintiff's board of directors, met with Larsen and expressed his displeasure with the performance of the company. Larsen, who originally had taken the job with a salary of $80,000, agreed to tie his salary to commissions instead. He and Zaniewski also agreed that Larsen would try to find a buyer or an investor for the plaintiff.

***485** On February 1, Larsen met with Barbara Pearce, president of the competing Pearce Company, to learn whether Pearce Company might be interested in buying or investing in the plaintiff. Larsen had been a commercial sales agent for Pearce Company in 1983, and he had a good relationship with the company and the Pearce family. At this meeting, Pearce informed Larsen that her company was not interested in buying or investing in the plaintiff, but she did ask whether he would be interested in taking a position with Pearce Company. At that meeting Larsen gave Pearce a list of the brokers working for the plaintiff. Larsen never discussed this meeting with Zaniewski. Larsen again met with Pearce on February 21, 23 and 24.

On February 27, unbeknown to Zaniewski, Larsen told the plaintiff's employee brokers that the company was going to close, and he encouraged them to contact Pearce for jobs. Meanwhile, Larsen prepared a letter to mail to the plaintiff's clients and business contacts. The letter, dated and mailed on March 6, 1989, stated that the plaintiff was going to cease independent operations and would merge with Pearce Company. [4] That ****1015** same day, Larsen wrote a letter to the New Haven board of realtors advising it that the plaintiff would be ***486** "closing," that he and two other realtors would be "transferring" to Pearce Company, and that "[w]e are using the month of March to finish up all old business and to transfer any new business to [Pearce Company]." [5] Larsen then began to solicit agents and sign listings on behalf of Pearce Company.

4 The March 6, 1989 letter read as follows:
"Dear Sir or Madam:
It is with great pleasure and much excitement that I share with you the following news. As of April 1, 1989, the Larsen Chelsey Realty Company of New Haven will merge its personnel with the H. Pearce Company of North Haven, Connecticut. This joining of forces under the H. Pearce Company's corporate umbrella will provide both our firms the opportunity to enhance the level of service and commitment to our existing and future clients.
The Larsen Chelsey Realty Company was formulated and built upon the objective of providing a high level of personal service, knowledge, and expertise in the field of real estate. To this end we were successful; however, we also learned that to provide these services at the levels requested, we had to grow and expand our operations at unrealistic proportions. The

H. Pearce Company's business philosophy and commitment to excellence so closely parallels our own that a consolidation of efforts and objectives presents the ideal opportunity to meet the demands of the greater New Haven business community in the best possible manner.

My associates and I will be working hand in hand with the H. Pearce Company professionals to continue and broaden the scope of service and commitment to your organization. We look forward to better serving you now and in the years to come.

As President of the Larsen Realty Company, I thank you for your past support and ask you for your continued confidence at the H. Pearce Company.

Sincerely,

S. Craig Larsen

President"

[5] The letter Larsen wrote to the greater New Haven board of realtors read as follows:

"Ms. Joan Barrows

Greater New Haven Board of Realtors

P.O. Box 1426

New Haven, CT 06506

Dear Joan:

Please be advised that as of April 1, 1989, the Larsen Chelsey Realty Company at 555 Long Wharf Drive, New Haven and 1360 Whitney Avenue, Hamden will be closing. The following realtors will be transferring to the H. Pearce Company in North Haven:

Realtor	Effective Transfer Date
S. Craig Larsen (DR)	March 6, 1989
Paul Celotto	March 6, 1989
Joan Veillette	March 6, 1989

We are using the month of March to finish up all old business and to transfer any new business to the H. Pearce Company. This letter should also serve as notice to cancel all C.I.D. and M.L.S. books to both our Hamden and New Haven office to be effective April 1, 1989.

Thank you for your cooperation [in] this matter. Should you have any questions, please feel free to contact me.

Sincerely,

S. Craig Larsen

President"

***487** Two days later, on March 8, Zaniewski and his business adviser, Irwin Ganson, visited Larsen to discuss his attempts to sell the company. While waiting in a conference room, they discovered copies of the March 6 letter that Larsen had prepared and mailed. Zaniewski and Ganson confronted him with the letter and then consulted counsel. Two days later, on March 10, they returned to the office and fired him. On the same day, Larsen spoke to a representative of the owner of the building that leased space to the plaintiff and told her that the plaintiff was closing and moving that day. The owner of the building then applied for and received a prejudgment remedy, which allowed it to change the locks on the plaintiff's offices and prevent the plaintiff's agents from removing furniture, equipment, books and records. We will discuss additional facts as they become relevant.

I

We first consider the plaintiff's claim that the trial court improperly set aside the jury's verdict for the plaintiff against Larsen on the first and tenth counts of the complaint, which alleged libel and violations of CUTPA.

A

The plaintiff initially claims that the trial court improperly set aside the jury verdict for the plaintiff on the first count of the complaint, which alleged that Larsen had libeled the plaintiff in the March 6 letter mailed to the plaintiff's clients. [6]

[6] See footnote 4.

The following additional facts are relevant to this claim. Before the court instructed the jury, Larsen moved for a directed verdict on several counts of the complaint, including the libel count. The trial court denied his motion. Thereafter, the jury returned

a verdict ***488** for the plaintiff on the libel count. Larsen then moved for the court to set aside the verdict on that count, which had awarded $165 in damages to the plaintiff, and to render judgment for him in accordance with Practice Book § 321.[7] The plaintiff also ****1016** moved to set aside the verdict against Larsen as to damages only, claiming that the jury verdict for the plaintiff on the first count was inadequate as a matter of law.

7 Practice Book § 321 provides: "Whenever a motion for a directed verdict made at any time after the close of the plaintiff's case in chief is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. After the acceptance of a verdict and within the time stated in Sec. 320 for filing a motion to set a verdict aside, a party who has moved for a directed verdict may move to have the verdict and any judgment rendered thereon set aside and have judgment rendered in accordance with his motion for a directed verdict; or if a verdict was not returned such party may move for judgment in accordance with his motion for a directed verdict within the aforesaid time after the jury have been discharged from consideration of the case. If a verdict was returned the court may allow the judgment to stand or may set the verdict aside and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The trial court held a hearing on May 14, 1993, on these and other posttrial motions filed by the parties. The court did not rule on these motions in court on that day. Neither party received notice of any action taken by the court. On July 13, 1993, the parties returned to court for a hearing on motions related to other counts of the complaint. During this hearing, they reminded the court that it apparently had not yet ruled on their motions to set aside the verdict as to count one. The court informed the parties that it, in fact, had made its decision in chambers after they had left court on May 14. Apparently, the clerk's office had failed to ***489** notify counsel for the parties of the court's orders.[8] The court stated that it had denied the plaintiff's motion for a new trial on damages[9] but had granted Larsen's motion to set aside the plaintiff's verdict on the libel count and to render judgment for Larsen. The court did not explain the grounds for its decision either in a written memorandum of decision or orally on the record, nor did either party ever ask the court to articulate its reasoning.

8 The record indicates that the trial court did enter orders on these motions on May 14, 1993.

9 In this appeal, the plaintiff has not pursued the trial court's denial of its motion on the sufficiency of the damages.

[1] Faced with such a scant record, we are unable to determine whether the trial court was correct in setting aside the jury verdict for the plaintiff and rendering judgment for Larsen on this count. In cases such as this, where meaningful appellate review is precluded by the incompleteness of the record, we have taken two approaches. Under the first approach, and the one we usually take, we have disposed of the appeal by summarily affirming the decision of the trial court. See, e.g., *Ginsberg v. Fusaro,* 225 Conn. 420, 431–32, 623 A.2d 1014 (1993) (trial court, in *denying* motion to set aside verdict, had failed to file memorandum of decision). Reasoning that it is ultimately the responsibility of the appellant to secure an adequate appellate record, we have refused to entertain claims of error brought by a party who has failed to undertake this obligation. Id. Under the second approach, however, we have utilized this court's authority, pursuant to Practice Book § 4061,[10] to remand the case to the trial court in order that it may articulate the grounds for its decision. See, e.g., *Rostain v. Rostain,* 213 Conn. 686, 694, 569 A.2d 1126 (1990).

10 Practice Book § 4061 provides in relevant part: "If the court deems it necessary to the proper disposition of the cause, it may remand the case for a further articulation of the basis of the trial court's factual findings or decision...."

[2] **[3]** ***490** We conclude that, under the facts of this case, the second approach is more appropriate in this instance. We reach this result for several reasons. First, a trial court's decision to set aside a jury verdict can implicate a party's constitutional right to a trial by jury. *Young v. Data Switch Corp.*, 231 Conn. 95, 101, 646 A.2d 852 (1994). We must be certain, therefore, that the trial court's decision to set aside the jury verdict for the plaintiff on the first count of the complaint has not infringed this right. Second, Practice Book § 322 provides that a trial court, upon granting a motion to set aside a verdict, "*shall* file a memorandum stating the grounds of its decision."[11] (Emphasis added.) It is undisputed that the trial ****1017** court in this case did not comply with this requirement. Finally, the parties did not receive notice of the court's ruling until they raised the issue during a hearing on another issue two months later.

11 "While a memorandum of decision is not legally required on the *denial* of the motion to set aside the verdict but only on the granting of it, it is sound practice, where the motion is not frivolous, to set forth in a memorandum the basic reasons why the motion is denied." (Emphasis added.) W. Moller & W. Horton, Connecticut Practice —Practice Book Annotated, Superior Court Civil Rules (1989) § 322, p. 517, comment.

Under these circumstances, and because of our respect for the integrity of the jury verdict, we believe that in order to dispose of this issue properly we must remand this count to the trial court, pursuant to Practice Book § 4061, for an articulation of its grounds for setting aside the jury verdict for the plaintiff, as required by Practice Book § 322.[12]

12 See footnote 45.

B

[4] The trial court also set aside the jury verdict[13] for the plaintiff on the tenth count of the complaint, which ***491** alleged that Larsen had violated CUTPA. See General Statutes § 42–110a et seq. The trial court based its decision on two factors.[14] First, the court considered CUTPA's requirement that any claim arising under the act must involve "the conduct of any trade or commerce." See General Statutes § 42–110b(a). Finding that "the pleadings and the evidence repeatedly describe an employer-employee relationship" between the plaintiff and Larsen, the trial court concluded that such a relationship is not "trade or commerce" and, therefore, could not be the basis for a CUTPA claim. Second, the trial court considered the impact of our decision in *Jackson v. R.G. Whipple, Inc.*, 225 Conn. 705, 627 A.2d 374 (1993), which was released shortly after the jury in this case returned a verdict for the plaintiff on the CUTPA count. The trial court interpreted our holding in *Jackson* as stating that a plaintiff can only prevail in a CUTPA action if the plaintiff possesses some type of "consumer relationship" with the defendant. Therefore, on the basis of its finding that the plaintiff and Larsen had an employer-employee relationship, rather than a consumer relationship, the trial court set aside the jury verdict for the plaintiff on the CUTPA count.

13 After this case was tried, we held that parties are *not entitled* to a jury trial on violations of CUTPA. *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 162, 645 A.2d 505 (1994). A party who wishes CUTPA issues to be tried to the court, therefore, need only move to strike such a case from the jury list. If the parties fail to take such action, however, CUTPA issues may be tried to the jury. See, e.g., *A–G Foods, Inc. v. Pepperidge Farm, Inc.*, 216 Conn. 200, 579 A.2d 69 (1990).

14 On appeal, the parties focus only on the relationship between the plaintiff and

Larsen. They do not argue that Larsen's actions fail, as a matter of law, to constitute a violation of CUTPA. See part II C of this opinion.

We conclude that in setting aside the verdict, the trial court (1) improperly focused on the employer-employee relationship between the plaintiff and Larsen, rather than on his anticompetitive activities that were outside the scope of his employment, and (2) incorrectly interpreted this court's holding in *Jackson.* Accordingly, we reverse the judgment of the trial court.

[5] ***492** CUTPA, by its own terms, applies to a broad spectrum of commercial activity.[15] The operative provision of the act, § 42–110b(a), states merely that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Trade or commerce, in turn, is broadly defined as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." General Statutes § 42–110a(4). The entire act is remedial in character; General Statutes § 42–110b(d); *Hinchliffe v. American Motors Corp.,* 184 Conn. 607, 615 n. 4, 440 A.2d 810 (1981); and must "be liberally construed in favor of those whom the legislature intended to benefit." (Internal quotation marks omitted.) *Concept Associates, Ltd. v. Board of Tax Review,* 229 Conn. 618, 623, 642 A.2d 1186 (1994).

15 See part II C of this opinion.

The trial court, in determining whether Larsen had engaged in "trade or commerce" for purposes of a CUTPA violation, concluded that "the pleadings and the evidence repeatedly describe an employer-employee relationship" ****1018** and "there is no allegation in the complaint which describes [Larsen's] behavior as CUTPA violations committed 'in the conduct of any trade or commerce.' " Therefore, relying on the holding of the Appellate Court in *Quimby v. Kimberly Clark Corp.,* 28 Conn.App. 660, 613 A.2d 838 (1992), the trial court set aside the jury verdict. We conclude that the trial court's analysis was not correct for two reasons. First, the Appellate Court's decision in *Quimby* does not apply to this case. Second, the trial court failed to consider Larsen's activities, rather than his relationship to the plaintiff, as a basis for a CUTPA violation.

***493** In *Quimby,* the plaintiff employee contended that her employer, which was self-insured for the purposes of workers' compensation, had administered her claim of injury improperly. Specifically, the plaintiff claimed as CUTPA violations "the defendant's failure to pay benefits in a timely manner, to investigate reasonably and promptly the plaintiff's claim and to enter into a reasonable resolution of the plaintiff's claim...." Id., at 669–70, 613 A.2d 838. The Appellate Court, however, rejected this claim: "The plaintiff does not allege that the defendant committed these acts 'in the conduct of any trade or commerce.' ... The relationship in this case is not between a consumer and a commercial vendor, but rather between an employer and an employee. There is no allegation in the complaint that the defendant advertised, sold, leased or distributed any services or property to the plaintiff." Id., at 670, 613 A.2d 838.

The Appellate Court's decision in *Quimby* addressed only the applicability of CUTPA to acts occurring within the very limited confines of the employer-employee relationship. The misconduct revolved entirely around administrative shortcomings and an intracompany workers' compensation dispute. Without deciding the validity of *Quimby,*[16] we conclude that its holding is not relevant to the case before us.

16 We emphasize that we do not decide today whether the Appellate Court's holding in *Quimby* accurately sets forth the law with respect to CUTPA's applicability to employer-employee relationships. We merely conclude that the holding in *Quimby,* even if correct, is inapposite to the facts of this case.

[6] In this case, the acts of which the plaintiff complains involve conduct occurring outside the confines of the employer-employee relationship. Unlike the situation in *Quimby,* this case presents a fact pattern that involves a potentially viable

cause of action under CUTPA because Larsen's allegedly tortious conduct was outside the scope of his employment relationship ***494** with the plaintiff. The plaintiff contends, in short, that Larsen accepted a job with a competing real estate broker and then, acting as a competitor, took actions that harmed the plaintiff. Because these allegations lie outside the narrow confines of the employer-employee relationship and may constitute a violation of CUTPA, the trial court should not have set aside the jury verdict for the plaintiff on this basis.

Having determined that the Appellate Court's decision in *Quimby* is inapposite to this case, the issue then becomes whether the jury reasonably could have found that Larsen's activities implicated trade or commerce. We conclude that the jury could have so found.

[7] The plaintiff presented evidence showing that Larsen, while still the president of the plaintiff, was offered and subsequently accepted a position at a real estate brokerage firm which was an acknowledged competitor of the plaintiff. Both companies were in the business of selling and leasing real estate to the public. The evidence showed that the March 6 letter prepared and mailed by Larsen [17] to clients of the plaintiff falsely stated that the plaintiff would cease operations and merge its personnel with Pearce Company. Finally, Larsen admitted instructing the New Haven board of realtors that he no longer was affiliated with the plaintiff and instead was affiliated with Pearce Company, and that the plaintiff was going out of business. [18] These activities implicated the services ****1019** of both Larsen and the plaintiff as real estate brokers in the New Haven area and thus implicated trade or commerce under CUTPA.

17 See footnote 4.

18 See footnote 5.

The trial court also was incorrect in relying on our decision in *Jackson v. R.G. Whipple, Inc.,* supra, 225 Conn. 705, 627 A.2d 374, for its assertion that a CUTPA violation can ***495** only arise out of a "consumer relationship." In *Jackson,* the plaintiff owned a mobile home that was located on property owned by a third party. The property owner, wishing to remove the mobile home, retained an attorney to initiate eviction proceedings. The plaintiff subsequently sued the property owner's attorney under CUTPA, claiming that as a provider of legal services to the property owner, the attorney had caused damage to her mobile home.

We rejected the plaintiff's claim as an impermissible infringement on an attorney's duty of loyalty to his or her client: "Imposing liability under CUTPA on attorneys for their representation of a party opponent in litigation would not comport with a lawyer's duty of undivided loyalty to his or her client. This consideration compels a conclusion that the trial court properly determined that the plaintiff did not have the requisite relationship with [the property owner's attorney] to allow [the plaintiff] to bring suit against [the attorney] under § 42–110g of CUTPA. Consequently, the plaintiff cannot prevail...." Id., at 729, 627 A.2d 374.

According to the trial court, we rejected the plaintiff's claim in *Jackson* not because it would have impermissibly infringed on the attorney-client relationship, but because the plaintiff and the attorney did not share a "consumer relationship." Concluding, therefore, that "[n]owhere in the pleadings has the plaintiff in this case alleged a consumer relationship between itself and the defendant," the trial court in this case set aside the jury verdict for the plaintiff on the CUTPA count against Larsen.

[8] The trial court has misinterpreted our holding in *Jackson.* Although we acknowledge the presence of dicta in *Jackson* pertaining to consumer relationships, our holding in that case was merely that allowing a plaintiff to sue her opponent's attorney under CUTPA ***496** would infringe on the attorney-client relationship. Indeed, we emphasized that it was the sanctity of the attorney-client relationship that "compels" such a conclusion. Id. Elsewhere in the *Jackson* opinion we reiterated the narrowness of our holding: "[I]n this case we conclude that in a situation where a party to a lawsuit sues the adversary's lawyer, CUTPA does not provide a private cause of action." Id., at 726 n. 15, 627 A.2d 374. In other words, we declined to recognize the right of that client's opponent to sue the attorney under CUTPA on the basis of the

professional services the attorney had rendered for the client. [19]

19 We hasten to add, however, that the entrepreneurial aspects of the practice of law, such as attorney advertising, remain well within the scope of CUTPA. *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo,* 190 Conn. 510, 515, 461 A.2d 938 (1983); see also *Jackson v. R.G. Whipple, Inc.,* supra, 225 Conn. at 729–31, 627 A.2d 374 (*Berdon, J.,* concurring).

[9] We previously have stated in no uncertain terms that CUTPA imposes no requirement of a consumer relationship. In *McLaughlin Ford, Inc. v. Ford Motor Co.,* 192 Conn. 558, 473 A.2d 1185 (1984), we concluded that "CUTPA is not limited to conduct involving consumer injury" and that "a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury." Id., at 566, 567, 473 A.2d 1185; see *Della Construction, Inc. v. Lane Construction Co.,* 42 Conn.Supp. 202, 612 A.2d 147 (1991). Federal district courts interpreting Connecticut law also have reached this conclusion. See, e.g., *Dial Corp. v. Manghnani Investment Corp.,* 659 F.Supp. 1230 (D.Conn.1987).

[10] Even if we were to revisit this issue, however, we would reach the same conclusion that the application of CUTPA does not depend upon a consumer relationship. In making this determination we find it is relevant to consider the words of the statute, the legislative history and the legislative policy it was designed to implement. *United Illuminating Co. v. Groppo,* 220 Conn. 749, 756, 601 A.2d 1005 (1992).

****1020** ***497** First, there is no indication in the language of CUTPA to support the view that violations under the act can arise only from consumer relationships. Indeed, various provisions of CUTPA reveal that the opposite is true. CUTPA provides a private cause of action to "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a [prohibited] method, act or practice...." General Statutes § 42–110g(a). "Person," in turn, is defined as "a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity...." General Statutes § 42–110a(3). If the legislature had intended to restrict private actions under CUTPA only to consumers or to those parties engaged in a consumer relationship, it could have done so by limiting the scope of CUTPA causes of action or the definition of "person," such as by limiting the latter term to "any party to a consumer relationship." "The General Assembly has not seen fit to limit expressly the statute's coverage to instances involving consumer injury, and we decline to insert that limitation." *McLaughlin Ford, Inc. v. Ford Motor Co.,* supra, 192 Conn. at 566–67, 473 A.2d 1185.

[11] Second, the legislative history of CUTPA reveals that, although consumers were expected to be a major beneficiary of its passage, the act was designed to provide protection to a much broader class. According to Representative Howard A. Newman, who reported the CUTPA legislation out of committee to the House of Representatives, the act "gives honest businessmen great protection [against] deceptive or unscrupulous [businessmen] who by unfair methods of competition and deceptive advertising, etc., unlawfully divert trade away from law abiding businessmen." 16 H.R.Proc., Pt. 14, 1973 Sess., p. 7323. Other supporters of the bill made similar comments. See, e.g., Conn. Joint Standing Committee Hearings, General Law, Pt. 2, 1973 ***498** Sess., p. 724, remarks of Stuart Dear, a member of the board of directors of the Connecticut Consumer Association (CUTPA will "assist the businessman in not losing out to those members of the business community who won't play fair"); Conn. Joint Standing Committee Hearings, General Law, Pt. 1, 1978 Sess., pp. 307–308, remarks of Assistant Attorney General Robert M. Langer (CUTPA covers transactions "between one business and another business").

Finally, the legislature clearly announced its policy for interpreting CUTPA by directing us to the federal legislation upon which CUTPA is modeled. According to § 42–110b(b), courts construing the scope of CUTPA "shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission

Act (15 U.S.C. § 45(a)(1))...."[20] The federal courts have repeatedly and historically applied that act's provisions to situations not involving consumers. See, e.g., *Yamaha Motor Co., Ltd. v. Federal Trade Commission,* 657 F.2d 971 (8th Cir.1981), *cert. denied sub nom. Brunswick Corp. v. Federal Trade Commission,* 456 U.S. 915, 102 S.Ct. 1768, 72 L.Ed.2d 174 (1982) (agreement between competitors not to compete); *Sandura Co. v. Federal Trade Commission,* 339 F.2d 847 (6th Cir.1964) (same); *American Tobacco Co. v. Federal Trade Commission,* 9 F.2d 570 (2d Cir.1925), *aff'd,* 274 U.S. 543, 47 S.Ct. 663, 71 L.Ed. 1193 (1927) (wholesaler's refusal to deal).

20 The full text of General Statutes § 42–110b(b) provides: "It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)), as from time to time amended."

Accordingly, the trial court was incorrect both in holding that a violation of CUTPA can only arise from ***499** a "consumer relationship" and in setting aside the jury verdict on that ground. We therefore order the trial court to reinstate the verdict for the plaintiff against Larsen on the tenth count in the amount of $1 and remand that count to the trial court so that it may consider the plaintiff's claims for punitive damages and attorney's fees under the tenth count of the complaint.[21]

21 During the trial, the parties stipulated that the court, rather than the jury, would rule on the issue of punitive damages and expenses of litigation under CUTPA. Because we have concluded that the trial court was incorrect in setting aside the verdict of $1 in compensatory damages for the plaintiff on this count, we remand to the trial court the issue of whether the plaintiff is entitled to punitive damages and attorney's fees under CUTPA. See generally part II C of this opinion.

****1021** II

We next consider the plaintiff's claim that the trial court improperly directed the jury to return verdicts in favor of Pearce Company on the eleventh, twelfth and thirteenth counts of the complaint.

[12] A trial court may direct a jury to reach a verdict if it determines that the jury could not reasonably and legally reach a contrary conclusion. *Krawczyk v. Stingle,* 208 Conn. 239, 244, 543 A.2d 733 (1988); *Bound Brook Assn. v. Norwalk,* 198 Conn. 660, 667, 504 A.2d 1047, *cert. denied,* 479 U.S. 819, 107 S.Ct. 81, 93 L.Ed.2d 36 (1986). Directed verdicts, however, are not favored. *Fleming v. Garnett,* 231 Conn. 77, 83, 646 A.2d 1308 (1994). "It must always be borne in mind that litigants have a constitutional right to have issues of fact decided by the jury and not by the court." *Ardoline v. Keegan,* 140 Conn. 552, 555, 102 A.2d 352 (1954). Furthermore, there is a practical reason for this policy: "Where the trial court's decision to direct a verdict is determined to have been erroneous, the parties and the judicial system are subjected to the burdens of a new trial. The preferred procedure, therefore, is to submit ***500** the issues to the jury, and then to set aside the verdict. Finding error in such a case, this court could simply direct that the verdict be reinstated. See *Santor v. Balnis,* 151 Conn. 434, 437, 199 A.2d 2 (1964)." *Boehm v. Kish,* 201 Conn. 385, 394, 517 A.2d 624 (1986).

[13] In reviewing the trial court's decision to direct a verdict, this court considers all the evidence, including reasonable inferences, in the light most favorable to the party against whom the verdict was directed. *Fleming v. Garnett,* supra, 231 Conn. at 83, 646 A.2d 1308. The plaintiff now argues that the trial court improperly concluded that the jury, relying on the evidence that had been presented, could not reasonably or legally have returned a verdict for the plaintiff against Pearce Company on any of these counts.

A

[14] In the eleventh count of its complaint, the plaintiff alleged that Pearce Company was liable under the doctrine of respondeat superior for Larsen's acts pertaining to the common law torts of unfair competition, unfair trade practices, conversion and interference with contractual relations. Under the doctrine of respondeat superior, a master is liable for the wilful torts of his servant committed within the scope of the servant's employment and in furtherance of his master's business. *Pelletier v. Bilbiles,* 154 Conn. 544, 547, 227 A.2d 251 (1967). "The master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject." (Internal quotation marks omitted.) *Stulginski v. Cizauskas,* 125 Conn. 293, 296, 5 A.2d 10 (1939). "[I]n order to hold an employer ***501** liable for the intentional torts of his employee, the employee must be acting within the scope of his employment and in furtherance of the employer's business. *Cardona v. Valentin,* 160 Conn. 18, 22, 273 A.2d 697 (1970); *Pelletier v. Bilbiles,* supra, 154 Conn. at 547, 227 A.2d 251; *Antinozzi v. A. Vincent Pepe Co.,* 117 Conn. 11, 13, 166 A. 392 (1933); *Son v. Hartford Ice Cream Co.,* 102 Conn. 696, 699, 129 A. 778 (1925). But it must be the affairs of the principal, and not solely the affairs of the agent, which are being furthered in order for the doctrine to apply. *Mitchell v. Resto,* 157 Conn. 258, 262, 253 A.2d 25 (1968); *Wells v. Walker Bank & Trust Co.,* 590 P.2d 1261, 1264 (Utah 1979) (if employee's actions are not authorized by his employer and he is acting for his own interests and not in furtherance of his employer's business, employer cannot be held vicariously liable for employee's actions)." (Internal quotation marks omitted.) ****1022** *A–G Foods, Inc. v. Pepperidge Farm, Inc.,* 216 Conn. 200, 208, 579 A.2d 69 (1990).

[15] **[16]** The jury found that Larsen had engaged in two of the four illegal practices that the plaintiff sought to attribute to Pearce Company under the doctrine of respondeat superior.[22] Specifically, the jury found that Larsen had engaged in unfair competition[23] (sixth count ***502** of the complaint), and that he had interfered with the plaintiff's contractual relations[24] (eighth count of the complaint). In order to hold Pearce Company liable for the actions complained of in those two counts, the plaintiff needed only to show that Larsen was a servant of ***503** Pearce Company and that he had committed the acts within the scope of his employment and in furtherance of Pearce Company's business. *Pelletier v. Bilbiles,* supra, 154 Conn. at 547, 227 A.2d 251. In other words, the only issue remaining to be proved was agency.

22 The complaint initially contained claims against Larsen alleging four separate illegal practices that could have been attributed to Pearce Company under the doctrine of respondeat superior. Count nine, which stated a claim against Larsen for conversion, was resolved by a directed verdict rendered against the plaintiff by the trial court, and the plaintiff has not appealed this decision. The portion of count eleven that stated in part a claim for unfair trade practices apparently has been abandoned by the plaintiff as a separate ground of liability. See footnote 25.

23 "Unfair competition is now a generic name for a number of related torts involving improper interference with business prospects." W. Prosser & W. Keeton, Torts (5th Ed.1984) § 130, p. 1013. In Connecticut, several cases alleging unfair competition have involved the use of similar trade names. See, e.g., *Shop–Rite Durable Supermarket, Inc. v. Mott's Shop Rite,* 173 Conn. 261, 377 A.2d 312 (1977); *Yale Co-operative Corp. v. Rogin,* 133 Conn. 563, 53 A.2d 383 (1947). It is settled, however, that this court also recognizes under the umbrella term of "unfair competition" such causes of action as tortious interference with business expectancy; see *Sportsmen's Boating Corp. v. Hensley,* 192 Conn. 747, 754, 474 A.2d 780 (1984); and "unjustifiable interference with any [person's] right to

pursue his [or her] lawful business or occupation." *Skene v. Carayanis,* 103 Conn. 708, 714, 131 A. 497 (1926). In these latter cases, a plaintiff must prove that the defendant was guilty of fraud, misrepresentation, intimidation or molestation, or that the defendant acted maliciously, in interfering with the plaintiff's business prospects. *Sportsmen's Boating Corp. v. Hensley,* supra, 192 Conn. at 754, 474 A.2d 780; *Skene v. Carayanis,* supra, 103 Conn. at 714, 131 A. 497; see *Kecko Piping Co. v. Monroe,* 172 Conn. 197, 201–202, 374 A.2d 179 (1977); *Busker v. United Illuminating Co.,* 156 Conn. 456, 461, 242 A.2d 708 (1968); *Goldman v. Feinberg,* 130 Conn. 671, 674, 37 A.2d 355 (1944). The trier of fact ordinarily may infer such intent from the defendant's conduct or acts in light of the circumstances of the particular case. *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.,* 193 Conn. 208, 216–17, 477 A.2d 988 (1984); *State v. Just,* 185 Conn. 339, 355, 441 A.2d 98 (1981); *Munn v. Scalera,* 181 Conn. 527, 530–31, 436 A.2d 18 (1980); *State v. Avcollie,* 178 Conn. 450, 466, 423 A.2d 118 (1979), *cert. denied,* 444 U.S. 1015, 100 S.Ct. 667, 62 L.Ed.2d 645 (1980); *Bergen v. Bergen,* 177 Conn. 53, 57, 411 A.2d 22 (1979); *Heffernan v. New Britain Bank & Trust Co.,* 175 Conn. 8, 12, 392 A.2d 481 (1978). As Professor Keeton notes, however, the distinct trend among American courts is to move away from requiring plaintiffs to show malice or another form of specific intent. See W. Prosser & W. Keeton, supra, pp. 1014–15.

24 The elements of a cause of action for tortious interference with contract rights are well settled. "This court has long recognized a cause of action for tortious interference with contract rights or other business relations.... Nevertheless, not every act that disturbs a contract or business expectancy is actionable.... [F]or a plaintiff successfully to prosecute such an action it must prove that the defendant's conduct was in fact tortious. This element may be satisfied by proof that the defendant was guilty of fraud, misrepresentation, intimidation or molestation ... or that the defendant acted maliciously.... [A]n action for intentional interference with business relations ... requires the plaintiff to plead and prove at least some improper motive or improper means.... [A] claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself." (Citations omitted; internal quotation marks omitted.) *Robert S. Weiss & Associates, Inc. v. Wiederlight,* 208 Conn. 525, 535–36, 546 A.2d 216 (1988).

[17] **[18]** Nevertheless, even if we were to conclude on appeal that the trial court improperly directed a verdict for Pearce Company on the eleventh count of the plaintiff's complaint, we would be precluded from ordering a new trial. As noted above, any liability of Pearce Company under the eleventh count of the complaint was necessarily premised upon Larsen's liability to the plaintiff under the sixth and eighth counts of the complaint. On each of those counts, the jury ****1023** returned a verdict for the plaintiff against Larsen in the amount of $1. It is well settled that when a plaintiff brings a claim against a principal based solely upon the tortious conduct of the agent, the plaintiff cannot recover any more compensatory damages from the principal than it could from the agent. 1 Restatement (Second), Agency § 217B(2) (1958); 2 Restatement (Second), Agency § 359C(2) (1958); W. Seavey, Agency (1964) § 95(D), p. 170. This is so because "there is a logical inconsistency in a small judgment against the agent and a large judgment against the principal, in cases in which the fault is wholly that of the agent." 1 Restatement (Second), supra, § 217B, comment (c). Indeed, in such cases, it is error for the trier of fact to return a verdict for compensatory damages in a greater amount against the principal than against the agent. Id., § 217B, comment (e). Therefore, if we were to remand this case to the trial court for a new trial against Pearce Company on the eleventh count of the complaint, and if the

trier of fact were to find the issue of agency for the plaintiff, the verdict against Pearce Company would be limited to $1 in damages for vicarious liability under the sixth and eighth counts. In other words, the plaintiff ***504** would be entitled to recover only $2 in nominal compensatory damages against Pearce Company on the eleventh count of the complaint. [25]

25 The plaintiff would not be entitled to seek punitive damages under this count because it failed to preserve that claim. See part IV of this opinion.

[19] "Nominal damages mean no damages. They exist only in name and not in amount." (Internal quotation marks omitted.) *Sessa v. Gigliotti,* 165 Conn. 620, 622, 345 A.2d 45 (1973); *Beattie v. New York, N.H. & H.R. Co.,* 84 Conn. 555, 559, 80 A. 709 (1911). Our case law makes clear that when our disposition of a claim on appeal entitles a party to a trial in which only nominal damages may be awarded, we will not remand the case for a new trial. *Sessa v. Gigliotti,* supra, 165 Conn. at 622, 345 A.2d 45; *Went v. Schmidt,* 117 Conn. 257, 259–60, 167 A. 721 (1933); *Cheshire Brass Co. v. Wilson,* 86 Conn. 551, 558–59, 86 A. 26 (1913); *Beattie v. New York, N.H. & H.R. Co.,* supra, 84 Conn. at 559, 80 A. 709. Accordingly, the plaintiff's appeal on this count is dismissed.

B

[20] **[21]** In the twelfth count of its complaint, the plaintiff alleged that Pearce Company, independent of any vicarious liability, had itself committed the business related torts of interference with contractual relations and unfair competition. [26] It is a general rule of substantive law that corporations, like individuals, are liable for their torts. *Isaacson v. Husson College,* 297 A.2d 98, 102 (Me.1972). This liability arises apart from, and is distinguishable from, liability under the theory of respondeat superior. *Schoedler v. Motometer Gauge & ***505** Equipment Corp.,* 134 Ohio St. 78, 83, 15 N.E.2d 958 (1938); *American Ins. Group v. McCowin,* 7 Ohio App.2d 62, 65, 218 N.E.2d 746 (1966). As we indicated previously, the theory of respondeat superior attaches liability to a principal merely because the agent committed a tort while acting within the scope of his employment. "It refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." W. Prosser & W. Keeton, Torts (5th Ed.1984) § 70, p. 502. A principal may be directly liable, however, for the acts of its agents that it authorizes or ratifies. Id., pp. 501–502; 1 Restatement (Second), supra, § 212 (principal liable for authorized conduct) and § 218 (principal liable for ratified conduct). "In order to find that a corporation ****1024** has committed an intentional act, a court or jury must find that the corporation committed, directed or ratified the intentional act." *Cathay Mortuary (Wah Sang) v. United Pacific Ins. Co.,* 582 F.Supp. 650, 653 (N.D.Cal.1984).

26 In its complaint, the plaintiff alleged that Pearce Company had committed "unfair competition, unfair trade practices, and interference with contractual relations...." In its brief before this court, however, the plaintiff addressed "unfair competition and trade practices" as one cause of action, and did not provide a separate analysis of any tort identified as "unfair trade practices." Moreover, the cases cited by the plaintiff in this section of its brief referred only to the tort of unfair competition. Accordingly, we limit our discussion to the common law tort of unfair competition.

[22] In order to hold Pearce Company directly liable for tortious conduct, therefore, the plaintiff needed to prove that Pearce Company, as a principal, had authorized or ratified the specified tortious acts. It is well settled, however, that a corporation is a distinct legal entity that can act only through its agents. *Lieberman v. Reliable Refuse Co.,* 212 Conn. 661, 673, 563 A.2d 1013 (1989). In order for direct liability to attach to Pearce Company, therefore, agents of the corporation, acting on behalf of the corporation, must have authorized or ratified the wrongful acts. In other words, for example, the plaintiff in this case needed to prove that Barbara Pearce, acting as the president of and on behalf of Pearce Company, authorized or ratified actions constituting the substantive torts of

interferencewith ***506** contractual relations[27] and unfair competition.[28]

27 See footnote 24.

28 See footnote 23.

[23] Just as we were precluded from ordering a new trial on the eleventh count of the complaint, however, we also are precluded from ordering a new trial on this count. Each and every one of the acts alleged under the twelfth count of the complaint also was included in the sixth and eighth counts, which alleged that Larsen individually had committed the torts of unfair competition and interference with contractual relations. The jury determined, under the sixth and eighth counts, that these acts had caused the plaintiff to suffer only nominal damages. It is settled that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." 1 Restatement (Second), Judgments § 27 (1982); see *Crochiere v. Board of Education,* 227 Conn. 333, 343, 630 A.2d 1027 (1993); *Scalzo v. Danbury,* 224 Conn. 124, 128, 617 A.2d 440 (1992). With certain exceptions, none of which are applicable in this case, a party also is precluded from relitigating these issues "with another person." 1 Restatement (Second), supra, § 29. If we were to remand the twelfth count to the trial court for a new trial against Pearce Company, therefore, the previous jury's finding that these acts had caused the plaintiff to suffer only nominal damages would be controlling. As we stated previously, we will not remand a count for a new trial in which only nominal compensatory damages can result.[29]

29 The plaintiff would not be entitled to seek punitive damages under this count because it failed to preserve that claim. See part IV of this opinion.

***507** C

In the thirteenth count of its complaint, the plaintiff alleged that Pearce Company had engaged in "deceptive and unfair conduct" and thereby had violated CUTPA. It is clear that "CUTPA has come to embrace a much broader range of business conduct than does the common law tort action." *Sportsmen's Boating Corp. v. Hensley,* 192 Conn. 747, 756, 474 A.2d 780 (1984). "While liability in tort is imposed only if the defendant maliciously or deliberately interfered with a competitor's business expectancies, CUTPA liability is premised on a finding that the defendant engaged in unfair competition and unfair or deceptive trade practices." Id., at 755, 474 A.2d 780.

In determining whether the defendant has engaged in such activity and thereby violated CUTPA, courts must apply the so-called "cigarette rule," which asks "(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers [competitors or other businessmen]." (Internal quotation marks omitted.) ****1025** *Jacobs v. Healey Ford–Subaru, Inc.,* 231 Conn. 707, 725, 652 A.2d 496 (1995); *Sanghavi v. Paul Revere Life Ins. Co.,* 214 Conn. 303, 311–12, 572 A.2d 307 (1990); *Sportsmen's Boating Corp. v. Hensley,* supra, 192 Conn. at 756, 474 A.2d 780.

[24] We conclude that the plaintiff introduced sufficient evidence to allow the jury to conclude that Barbara Pearce, acting on behalf of the corporation, had authorized or ratified the actions of Larsen and, therefore, ***508** that Pearce Company had violated the first and second of these tests. It is undisputed that Barbara Pearce was the president of Pearce Company at the time of these incidents and was acting on behalf of the corporation. See generally *Czarnecki v. Plastics Liquidating Co.,* 179 Conn. 261, 267, 425 A.2d 1289 (1979); *Cohen v. Holloways', Inc.,* 158 Conn. 395, 407, 260 A.2d 573 (1969). Moreover, the jury could have concluded, on the basis of the evidence presented,

that Barbara Pearce had authorized or ratified Larsen's actions with respect to the plaintiff. Larsen testified that he had gone to Pearce Company's office on February 1, 1989, to inquire whether Pearce Company might be interested in purchasing or investing in the plaintiff. Barbara Pearce informed Larsen that Pearce Company was not interested in buying or investing in the plaintiff, but she proceeded to offer him a position as commercial and industrial sales manager. She further informed him that she would be happy to speak with any other employees of the plaintiff and might offer them jobs. She accepted from Larsen a list of the brokers working for the plaintiff, and she discussed their backgrounds with him. Larsen told his coworkers that " 'she would be happy to interview them.' "

Barbara Pearce met with Larsen, who was still the president of her competitor, three more times during the month of February. During the course of these meetings, they discussed at least one property that was listed with the plaintiff. On March 6, while still in the employment of the plaintiff, Larsen signed a listing agreement as an agent of Pearce Company and also notified the New Haven board of realtors that he and other brokers of the plaintiff would become affiliated with Pearce Company. He also sent a letter to a client of the plaintiff instructing the client how to withdraw its listing from the plaintiff's computer system and to re-enter it immediately under the Pearce Company ***509** computer system. The change of address form prepared by Larsen forwarded all mail of the plaintiff to the office of Pearce Company.

Furthermore, before mailing the March 6 letter to clients of the plaintiff, Larsen testified that he had allowed Barbara Pearce to examine a draft and to offer comments about it. Larsen deleted a portion of the draft, which referred to a "merger," after Barbara Pearce took exception to it. This was the only change Larsen made before mailing the letter. Barbara Pearce did not ask Larsen to remove references in the letter to Pearce Company. On the contrary, she allowed, if not encouraged, Larsen to include extremely favorable references to Pearce Company in the letter. On the basis of this evidence, the jury reasonably could have inferred that Barbara Pearce, the president of Pearce Company, had authorized or ratified the actions of Larsen, which the jury concluded had violated CUTPA.[30] The trial court, therefore, should not have directed a verdict for Pearce Company on the thirteenth count of the complaint.

30 See part I B of this opinion; see also footnotes 23 and 24.

[25] **[26]** Unlike our disposition of the eleventh and twelfth counts, however, we conclude that this count must be remanded to the trial court for a new trial. We reach this conclusion because "[t]he plaintiff who establishes CUTPA liability has access to a remedy far more comprehensive than the simple damages recoverable under common law." *Hinchliffe v. American Motors Corp.*, supra, 184 Conn. at 617, 440 A.2d 810. This remedy is not limited to mere compensatory damages. *Gill v. Petrazzuoli Bros., Inc.*, 10 Conn.App. 22, 34–35, 521 A.2d 212 (1987). Rather, under CUTPA, a plaintiff is entitled to have the trial court consider awarding both punitive damages; General Statutes § 42–110g(a); and attorney's fees. General Statutes § 42–110g(d); see ****1026** *Hinchliffe v.* ***510** *American Motors Corp.*, supra, 184 Conn. at 617–18, 440 A.2d 810. This count, therefore, must be remanded for a new trial.

III

The plaintiff next claims that the trial court, after receiving the jury's summary of the verdict in the amount of "$6,169 plus plaintiff's attorney's fees," improperly ordered the jury to strike the words "plus plaintiff's attorney's fees" from this form.

The following facts are relevant to our disposition of this claim. The parties stipulated at the commencement of the trial that the court, rather than the jury, would determine after the jury returned its verdict whether the plaintiff was entitled to recover attorney's fees and, if so, the amount of these fees. Accordingly, the court did not instruct the jury on these damages and the plaintiff did not request such a charge.

At the conclusion of the trial court's instructions to the jury, the court provided the jury with a document entitled "Jury Instructions." These "instructions" consisted of seventeen pages of detailed, instructive

interrogatories, covering each of the ten counts against Larsen,[31] and were designed to lead the jury through the complex maze of the ten counts and their essential elements.[32] After the jury reached the final interrogatory for each count, it was directed to insert the amount of damages, if any, to be awarded to the plaintiff under that count.[33] The jury ****1027** then progressed through the ten ***511** counts, until it had completed all of the interrogatories and filled in all of the damage awards. The trial court also supplied the jury with a "plaintiff's verdict" form.

31 The court had directed a verdict for Pearce Company and, therefore, the interrogatories did not address the liability of that defendant.

32 See generally R. Berdon, "Instructive Interrogatories: Helping the Civil Jury To Understand," 55 Conn.B.J. 179 (1981).

33 For example, the interrogatory for the first count of the complaint, which had alleged libel, provided as follows (answers by the jury are indicated by an "X" or a dollar figure):
"FIRST COUNT
1. Did the plaintiff Larsen Chelsey Realty Company prove, by a fair preponderance of the evidence, that the statements made in the letter of March 6, 1989, Plaintiff's Exhibit T, were understood by the recipients of the letter to prejudice Larsen Chelsey Realty Company in the conduct of its business or to deter others from dealing with it?
X Yes
..... No
If the answer to #1 is yes, proceed to the next question.
If the answer to #1 is no, you should skip questions 2–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.
2. Did the plaintiff Larsen Chelsey Realty Company prove, by a fair preponderance of the evidence, that the statements made in the letter of March 6, 1989 were false?
X Yes
..... No
If the answer to #2 is yes, proceed to the next question.
If the answer to #2 is no, you should skip questions 3–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.
3. Did the plaintiff Larsen Chelsey Realty Company prove, by a fair preponderance of the evidence, that the defendant S. Craig Larsen either intentionally misstated facts or negligently misstated facts in making the statements contained in the letter of March 6, 1989?
X Yes
..... No
If the answer to #3 is yes, proceed to the next question.
If the answer to #3 is no, you should skip questions 4–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.
4. Did the plaintiff Larsen Chelsey Realty Company prove, by a fair preponderance of the evidence, that the statements made in the letter of March 6, 1989 were a substantial factor in causing some or all of the injuries claimed by the plaintiff?
X Yes
..... No
If the answer to #4 is yes, proceed to the next question.
If the answer to #4 is no, you should skip questions 5–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.
5. Did the defendant S. Craig Larsen prove, by a fair preponderance of the evidence, that the statements made in the letter of March 6, 1989 were substantially true?
..... Yes
X No
If the answer to #5 is yes, you should skip questions 6–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.
If the answer to #5 is no, proceed to the next question.
6. Did the defendant S. Craig Larsen prove, by a fair preponderance of the evidence, that the statements contained in the letter

of March 6, 1989 were made with the consent of the plaintiff Larsen Chelsey Realty Company?

..... Yes
X No

If the answer to #6 is yes, you should skip questions 7–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.

If the answer to #6 is no, proceed to the next question.

7. Did the defendant S. Craig Larsen prove, by a fair preponderance of the evidence, that the statements made in the letter of March 6, 1989, even if they could be construed to convey a defamatory meaning, were reasonably susceptible to more than one interpretation and one such interpretation was not defamatory?

..... Yes
X No

If the answer to #7 is yes, you should skip questions 8–10 below, award no damages to the Plaintiff on the First Count, and proceed to question 11.

If the answer to #7 is no, proceed to the next question.

8. Has the Plaintiff proved, by a fair preponderance of the evidence, that the Defendant S. Craig Larsen made the statements contained in the letter of March 6, 1989 with malice as that term was defined in the judge's instructions?

X Yes
..... No

If the answer to #8 is yes, proceed to the next question.

If the answer to #8 is no, skip question 9 and proceed to question #10.

9. If you have answered questions 1–8 above and, as a result of your answers, have been instructed to proceed to this question, state, as a dollar figure, the Plaintiff's 'general damages' (as that term was defined by the judge), if any, which were caused in substantial part, by the publication of the statements contained [in] the letter of March 6, 1989. This dollar figure should be adjusted as noted in the next paragraph.

Your damages should reflect a reduction, if any, to the extent that you find that the Defendant has proved by a fair preponderance of the evidence that the Plaintiff failed to mitigate damages as that [term] has been defined by the judge in his instructions.

$165.00

Proceed to the next question.

10. If you have answered either 1–8 above or 1–9 above and, as a result of your answers, have been instructed to proceed to this question, state, as a dollar figure, those *actual damages,* if any, which you find the plaintiff Larsen Chelsey Realty Company proved, by a fair preponderance of the evidence, would reasonably compensate it for the injuries caused, in substantial part, by the publication of the statements contained [in] the letter of March 6, 1989. This damage figure should be adjusted as noted in the next paragraph.

Your damages should reflect a reduction, if any, to the extent that you find that the Defendant has proved by a fair preponderance of the evidence that the Plaintiff failed to mitigate damages as that term has been defined by the judge in his instructions.

Do not include in your answer any damages awarded under question 9 above.

$–
0–"

***512** The completed interrogatories in the document entitled "Jury Instructions" revealed that the jury had ***513** reached the following verdicts. On the first count, the jury found that the plaintiff had proved libel and awarded $165 in damages. On the second count, the jury failed to find the necessary elements for slander. On the third count, the jury failed to find the necessary elements for libel. The court had directed a verdict with respect to the fourth count and the jury was not required to answer. On the fifth count, the jury found that the plaintiff had proved breach of a fiduciary duty and awarded $6000 in damages. On the sixth count, the jury found that Larsen had engaged in unfair competition and awarded $1 in damages. On the seventh count, the jury found that Larsen had engaged in a theft of corporate opportunity and awarded $1

in damages. On the eighth count, the jury found that Larsen had interfered with the plaintiff's contractual relations and awarded $1 in damages. The court had directed a verdict with respect to the ninth count and the jury was not required to answer. Finally, on the tenth count, the jury found that Larsen had violated CUTPA and awarded $1 in damages.

When the jury returned the "Jury Instructions," it also returned the plaintiff's verdict form, on which the jury had written that the plaintiff was to recover from Larsen damages in the amount of "$6,169 plus plaintiff's ***514** attorney's fees." The plaintiff conceded before the trial court that the "attorney's fees" the jury had announced must have meant attorney's fees under CUTPA, and the plaintiff further conceded that the parties had agreed to allow the court to determine this issue. The court therefore ordered the jury to retire to the jury room and delete the ****1028** words "plus plaintiff's attorney's fees" from the plaintiff's verdict form.[34] The jury did so, returning a few moments later with the same form, but with a line drawn through the words "plus plaintiff's attorney's fees." The plaintiff timely objected to this procedure, arguing that the court should have informed the jurors that they could not award attorney's fees and, therefore, that they should reconsider their verdict.[35]

34 The court instructed the jury as follows:

> "The Court: Please be seated, ladies and gentlemen.... Counsel and I have gone through the interrogatories, and everything would appear to coordinate. There is just one matter I must take up with you, and that has to do with the plaintiff's verdict, and the award ... of attorney's fees. The question of whether or not a plaintiff is ... entitled to attorney's fees and the amount of those fees, if they're found to be deserving, is an area for the Court, and for the Court alone. And, therefore, I ask that you just amend your verdict, by removing that phrase. And rather than waste a lot of time, by retyping everything and starting all over again, if the foreman would just delete that, with pen and ink, and, then, initial the change, we could ... we'll let you retire and do that. And, then, we'll collect it. Do you want ... to retire to—I think you ought to retire to do it.... It might—be better if you retired and did it ... together."

35 The plaintiff's counsel took exception to the procedure as follows: "I'd like to note my exception to the charge. I believe the charge should have instructed them to go back, to be advised that they could not award legal fees, that their award had to be in a dollar sum certain, and that, in deleting the statement [of 'plus plaintiff's attorney's fees'], together with attorney's fees, they could reconsider the award, and reconsider the verdict and the amount awarded, in view of that amendment."

The plaintiff now argues that the trial court committed reversible error when it ordered the jurors to amend their verdict by deleting the words "plus plaintiff's attorney's fees." The plaintiff argues that ***515** *Gurland v. D'Adamo,* 41 Conn.Supp. 407, 579 A.2d 144 (1990), sets out the proper procedure a court should follow when faced with an improper verdict, and that the trial court in this case improperly failed to follow that precedent.

In *Gurland,* after several days of deliberation, the jury rendered a verdict for the plaintiff against all defendants for the sum of $20,000, " 'plus court costs and legal fees.' " Id., at 407, 579 A.2d 144. The court, after instructing the jurors that attorney's fees were not an element of damages that they could consider, furnished them with another verdict form and instructed them to reconsider the verdict. Id. The jury returned within fifteen minutes with a verdict for the plaintiffs for $50,000, which the court accepted. Id., at 408, 579 A.2d 144. The court thereafter denied the defendants' motion for a remittitur, concluding that it had followed proper procedure. After determining that Connecticut statutes and rules of practice strictly circumscribe the options available to the court when a jury returns a seemingly improper verdict,[36] the trial court concluded that it could not instruct jurors on how to amend or correct their verdict form. The trial court held that, "[w]hen returning the jury to reconsider their verdict, it is proper for the court to inform them of the reason why they are being returned. *Ryan v. Scanlon,* 117 Conn. 428, 436, 168 A. 17 (1933). It is, however, improper for the court to direct them to change the ***516** amount of their verdict. [W]hether they should change the amount or adhere to the verdict as rendered was a question solely for their determination. *Cruz v. Drezek,* 175 Conn. 230, 242, 397 A.2d 1335 (1978)." (Internal quotation marks omitted.) *Gurland v. D'Adamo,* supra, 41 Conn.Supp. at 408, 579 A.2d 144.

36 General Statutes § 52–223 provides: "The court may, if it judges the jury has mistaken the evidence in the action and has brought in a verdict contrary to the evidence, or has brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for the same reason may return them to a third consideration. The jury shall not be returned for further consideration after a third consideration."
Practice Book § 311 provides: "The court may, if it determines that the jury have mistaken the evidence in the cause and have brought in a verdict contrary to it, or have brought in a verdict contrary to the direction of the court in a matter of law, return them to a second consideration, and for like reason may return them to a third consideration, and no more."

[27] We need not decide whether the trial court should have returned the jury under the procedure outlined in *Gurland,* because the court in this case had provided the jury with detailed, instructive interrogatories that ****1029** allowed the jury to insert the damages it found under each count as a sum certain. In effect, the jury's monetary answer on damages in the interrogatories to each count of the complaint was in itself a verdict, and the verdict form that the jury returned to the court merely constituted a summary of those individual verdicts. Indeed, the final instruction on the interrogatories directed the jury to "place the total of all damages, if any, shown in response to [the previous damages questions] on the line below. *This will conclude your deliberations* as to S. Craig Larsen."[37] (Emphasis added.) This directive informed the jury that by entering the sum of the damages it had awarded under the interrogatories, the jury had completed its deliberations. The mere task of carrying forward the total of the individual verdict amounts into the "verdict form," therefore, was ministerial in nature. The trial court, in fact, explicitly had instructed the jury prior to deliberations that its only duty in filling out the plaintiff's verdict form was to "carry those figures forward, insert them into the verdict, and you will have tied the two together."

37 The final question on the jury instructions provided in its entirety: "42. As to the defendant S. Craig Larsen, place the total of all damages, if any, shown in response to questions 9, 10, 18, 26, 29, 32, 35, 38, 41 on the line below. This will conclude your deliberations as to S. Craig Larsen." In response to this question, the jury foreperson wrote in the dollar amount "$6,169.00," the sum total of the damages the jury had awarded on all counts in favor of the plaintiff.

***517** In none of the verdicts set forth in the interrogatories, which totaled $6169, did the jury attempt to award attorney's fees to the plaintiff. The language in the verdict summary, that Larsen was to pay that sum "plus plaintiff's attorney's fees," could therefore be regarded as mere surplusage. See *Kilduff v. Kalinowski,* 136 Conn. 405, 71 A.2d 593 (1950);

Oneker v. Liggett Drug Co., 124 Conn. 83, 197 A. 887 (1938). The trial court, therefore, acted properly in ordering the jury to strike those words from its summary form.

IV

[28] The plaintiff next claims that the trial court improperly refused to allow it to recover common law punitive damages from Larsen under the intentional tort counts.[38] After the trial, the plaintiff asked the court to award common law punitive damages on the tort counts, arguing that the jury's explicit finding of malice by Larsen in writing and mailing the March 6 letter[39] required the court to award such damages. The court refused.[40] The plaintiff now claims that the trial court's decision was improper. We disagree.

38 Under Connecticut common law, the term "punitive damages" refers to the expenses of bringing the legal action, including attorney's fees, less taxable costs. *Venturi v. Savitt, Inc.,* 191 Conn. 588, 592, 468 A.2d 933 (1983); *Chykirda v. Yanush,* 131 Conn. 565, 568, 41 A.2d 449 (1945).

39 The jury made this finding in response to question eight of the instructive interrogatory for count one. See footnote 33.

40 Although the parties had stipulated that the court, rather than the jury, would rule on the issue of punitive damages, this stipulation was limited to punitive damages available under CUTPA. See footnote 21.

[29] **[30]** It is well settled, as the trial court noted, that it is the responsibility of the trier of fact to award common law punitive damages for intentional torts. *Kenny v. Civil Service Commission,* 197 Conn. 270, 277, 496 A.2d 956 (1985); *Gionfriddo v. Avis Rent A Car System, Inc.,* 192 Conn. 280, 295, 472 A.2d 306 (1984); *Vogel v. Sylvester,* 148 Conn. 666, 673, 174 A.2d 122 (1961); *Hanna* ***518** *v. Sweeney,* 78 Conn. 492, 494, 62 A. 785 (1906); *Bennett v. Gibbons,* 55 Conn. 450, 452, 12 A. 99 (1887). This case was tried to a jury. The jury, as the trier of fact, and not the trial court, would ordinarily have had the authority to award punitive damages. The plaintiff informed the court prior to trial that it was seeking punitive damages only on the CUTPA counts, however, and the plaintiff did not request the court to charge the jury on the issue of common law punitive damages. Furthermore, when the court did not deliver such an instruction, the plaintiff did not take exception to the charge as given. See *Berry v. Loiseau,* 223 Conn. 786, 814, 614 A.2d 414 (1992) ("[Practice Book § 315] ****1030** provides that this court is not bound to review claims of error in jury instructions if the party raising the claim did not either submit to the trial court a written request to charge or promptly except to the charge after it was delivered"). The trial court, therefore, acted properly in denying the plaintiff's posttrial motion for common law punitive damages on the tort counts.

V

The plaintiff next argues that the trial court made improper rulings on evidence. First, the plaintiff argues that the court improperly excluded several financial documents from evidence. Second, the plaintiff argues that, although the court properly allowed the March 6 letter into evidence against Larsen, it improperly refused to allow the letter into evidence against Pearce Company. We consider these arguments in turn.

A

The plaintiff first contends that the trial court improperly excluded from evidence several documents, including: (1) a financial report entitled "Analysis: Larsen Chelsey Financial Report"; (2) three handwritten summaries of revenue projections; and (3) a summary of the plaintiff's exclusive listings.

***519** The plaintiff's business adviser, Irwin Ganson, had prepared the financial report in May or June, 1988, as part of a bank application for a line of credit for the plaintiff. The report consisted of a narrative about the company and included projections for the plaintiff's income for the second half of 1988 and all of 1989.

Larsen had prepared the handwritten revenue projections at different times during 1988. He prepared the first projection in May, 1988. That projection was the basis for the revenue projections Ganson later included in his financial report. Larsen prepared the second and third projections in August, 1988. The third projection, in fact, was calculated by adding up the figures contained in the first two projections. Each projection contained information about the properties the plaintiff had listed, including the expiration date of the listing and the commission the plaintiff would earn if it found a buyer or tenant for the listed properties.

Finally, Larsen had prepared a summary of the plaintiff's exclusive listings in either December, 1988, or January, 1989. The summary included the addresses of the properties which were listed exclusively with the plaintiff and the "gross commission potential" for each.

The plaintiff argued that these documents tended to show the value of the plaintiff's business and its "opportunity value," and therefore were material to the issue of damages the plaintiff suffered as a result of the defendants' actions in March, 1989. The court, however, rejected the financial report and the handwritten revenue projections as irrelevant. The court also refused to admit the summary of exclusive listings, concluding that the plaintiff had failed to provide a proper foundation for the document. The court, however, expressly noted that "I'm not closing the door on your renewing this" by providing the proper foundation through another witness, such as the plaintiff's expert ***520** on business valuation. Indeed, the trial court later allowed this document into evidence on the condition that the plaintiff redact the last column showing "gross commission potential." The plaintiff did not object to the condition, agreeing that "[i]f [the court] want[s] to eliminate the last column, I think that's okay, too."

On appeal, the plaintiff argues that the court improperly refused to admit the documents. First, it contends that all of the documents were relevant to the issue of damages. Second, it argues that the documents prepared by Larsen "were offered to contradict his testimony" and as prior inconsistent statements, which may be used not only to impeach a witness but also as substantive evidence of the matters contained therein. See *State v. Whelan,* 200 Conn. 743, 746–47, 513 A.2d 86, *cert. denied,* 479 U.S. 994, 107 S.Ct. 597, 93 L.Ed.2d 598 (1986).

The plaintiff offered all of the documents in question to prove the value of its business immediately prior to March 10, 1989, when it claims that the actions of the defendants ****1031** caused the business to become valueless. The trial court needed to determine as a threshold issue, therefore, whether the documents were relevant to the determination of damages.

"The rules for determining the admissibility of evidence are well settled. The trial court has broad discretion to determine both the relevancy and remoteness of evidence.... Only upon a showing of a clear abuse of discretion will this court set aside on appeal rulings on evidentiary matters.... In considering the relevancy of evidence, we ask whether it tends to establish the existence of a material fact or to corroborate other direct evidence in the case.... Because there is no precise and universal test of relevancy, however, the question must ultimately be addressed on a case-by-case basis in accordance with the teachings of reason ***521** and judicial experience." (Citations omitted; internal quotation marks omitted.) *Dunham v. Dunham,* 204 Conn. 303, 324, 528 A.2d 1123 (1987).

[31] The trial court was justified in concluding that none of the documents proffered tended to establish the value of the plaintiff's business immediately prior to March 10, 1989. All of the documents were prepared several months before the events at issue here. The financial report was prepared for the purpose of obtaining a line of credit, and the trial court recognized that "it would be couched in very optimistic phrases." The projections of revenues were prepared between seven and ten months before the events in question. Moreover, the projections included commissions calculated with reference to sales or leases for several properties whose listings with the plaintiff would have expired prior to March, 1989. For all these reasons, it was well within the broad discretion of the trial court to conclude that the financial report and the revenue projections were not admissible for the purpose of determining the value of the plaintiff's business in March, 1989.

[32] Similarly, we conclude that the trial court properly excluded the summary of the plaintiff's exclusive listings, prepared at least two months before the incidents at issue here. The plaintiff attempted to introduce the summary while its president, Zaniewski, was on the witness stand. He testified that he did not know if any of the financial premises upon which the document's "gross commission potential" was based had ever occurred. Although the trial court acknowledged that the document was "not so remote" in time, the court declined to allow it into evidence through Zaniewski, concluding that the plaintiff had failed to furnish the proper foundation for admitting the document. The court, however, later admitted the document into evidence through another witness, on the condition that the column showing the "gross commission potential" ***522** be redacted. As noted earlier, the plaintiff not only failed to object to this condition, but expressly consented to it.

Accordingly, we conclude that the trial court did not abuse its discretion in excluding the documents from evidence as irrelevant and in admitting the summary of the plaintiff's exclusive listings with the redaction.[41]

41 The plaintiff also argues that all of the documents were business records and that all of the documents prepared by Larsen qualified as admissions of a party opponent. Because we have concluded that the trial court did not abuse its discretion in determining that the documents were irrelevant to the plaintiff's damage claim, we need not reach the hearsay issues.

The plaintiff's second argument for the admissibility of the documents—that the documents prepared by Larsen "were offered to contradict his testimony" and as prior inconsistent statements—is equally without merit.

[33] "The accepted foundation for the introduction of such statements is first to ask the witness on cross-examination whether he made the alleged statement, alerting him to the time and place.... Inconsistent statements may be shown only *after* a witness has testified and may not be introduced in anticipation of contradiction or to lay the basis for later cross-examination. *State v. Zdanis,* 173 Conn. 189, 195–196, 377 A.2d 275 (1977); *Adams v. The Herald Publishing Co.,* [82 Conn. 448, 452–53, 74 A. 755 (1909)]." (Citations omitted; emphasis in original.) C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.1988) § 7.24.3(b), p. 209. As the trial ****1032** court concluded, the plaintiff did not lay a proper foundation to use any of the documents as prior inconsistent statements of Larsen.

The plaintiff attempted to introduce the financial report into evidence before Larsen ever testified and did not attempt to impeach him with its contents while he was on the stand. Thus, the plaintiff failed to lay ***523** the proper foundation for this document as a prior inconsistent statement of Larsen.

The plaintiff attempted to introduce the earlier two revenue projections into evidence before Larsen testified and did not attempt to impeach him with their contents while he was on the stand. The plaintiff did attempt to introduce all three projections into evidence after Larsen had testified. The plaintiff did not, however, inform the court that it was offering them as prior inconsistent statements of Larsen or to contradict his testimony. Instead, the plaintiff referred only to their value as proving its damages.

The summary of exclusive listings was the only document that the plaintiff moved to introduce during Larsen's testimony. As noted previously, the court allowed it into evidence on the condition that the plaintiff redact the last column showing "gross commission potential," and the plaintiff agreed to this deletion.

Against this procedural background, the plaintiff's claim on appeal that the trial court improperly refused to allow the documents as prior inconsistent statements of Larsen is without merit.

B

The plaintiff's final claim of evidentiary error involves the trial court's decision to admit the March 6 letter as evidence against Larsen but not against Pearce Company. The plaintiff attached the letter to its complaint pursuant to Practice Book § 141.[42] The plaintiff argues ***524** that the letter, because it

was attached to the complaint, constitutes a "judicial admission" by Pearce Company and that the trial court therefore improperly refused to admit it as evidence against Pearce Company. We disagree.

42 Practice Book § 141 provides in relevant part: "Where the plaintiff desires to make a copy of any document a part of his complaint, he may, without reciting it or annexing it, refer to it as Exhibit A, B, C, etc., as fully as if he had set it out at length; but in such case he shall serve a copy of such exhibit or exhibits on each other party to the action forthwith upon receipt of notice of the appearance of such party and file the original or a copy of such exhibit or exhibits in court with proof of service on each appearing party. Where such copy or copies exceed in all two pages in length, if the plaintiff annexes them to, or incorporates them in, his complaint at full length, he shall not be allowed in his costs for such part of the fees of the officer for copies of such complaint left in service, as are chargeable for copying such instrument or instruments, except to the extent of two pages."

[34] The plaintiff correctly argues that our rules of practice provide that "[e]very material allegation in any pleading which is not denied by the adverse party shall be deemed to be admitted, unless he avers that he has not any knowledge or information thereof sufficient to form a belief." Practice Book § 129. The plaintiff, however, disregards the fact that Pearce Company, in its amended answer to the complaint, expressly stated that it denied or had no knowledge or belief about any of the allegations in the complaint in regard to the March 6 letter. Accordingly, we affirm the trial court's decision not to admit the letter against Pearce Company on the grounds proffered by the plaintiff. [43]

43 During the retrial of the plaintiff's action against Pearce Company on the thirteenth count of the complaint, however, the trial court may determine that some or all of these documents may be relevant and admissible evidence against Pearce Company.

VI

Finally, the plaintiff claims that the trial court improperly charged the jury. At a charging conference the day prior to delivering its instructions, the court informed counsel for the parties that it would instruct the jury that "the plaintiff cannot recover general damages, but would be restricted in any recovery to those damages specifically alleged and proved." In delivering the charge, however, the court instructed the jury that it could award "such general damages as you ****1033** deem ***525** fair and reasonable." Although the plaintiff noted at trial that the court "seemed to change your mind overnight," it only objected to the charge on the ground that the court had not defined "general damages." The court, in response to this objection, recharged the jury by furnishing a definition of "general damages" as "damages that ... don't, necessarily, have to be, specifically, proven." The plaintiff did not take exception to this second charge.

The plaintiff, while acknowledging that the charge given was more favorable to it than the charge originally proposed, nevertheless claims that the court's decision to alter the charge "without any prior warning to counsel ... was simply substantially unfair." The plaintiff contends that, in its closing argument, it "spent an hour reinforcing a theory requiring some calculation and the judge spent fifteen seconds, the time it takes to read four lines of text, telling [the jury that it] could award more, without regard to the actual damages."

[35] **[36]** The plaintiff, however, has failed to preserve this claim for appeal. Our rules of practice provide that we are not bound to consider claims of error unless they are distinctly raised at trial. See Practice Book §§ 4185, 315; [44] *Berry v. Loiseau,* supra, 223 Conn. at 813, 614 A.2d 414. In this case, the plaintiff objected only to the court's failure to define "general damages" in its initial jury charge, and the court responded to that objection by recharging ***526** the jury in this regard. The plaintiff made no further objections to the charge, and failed to indicate in any other manner that it was concerned with the new charge the court had delivered. Because the plaintiff failed

to preserve this claim of error properly, we cannot resurrect it on appeal.

44 Practice Book § 4185 provides in pertinent part: "The court on appeal shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial."
Practice Book § 315 provides: "The supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon request, opportunity shall be given to present the exception out of the hearing of the jury."

VII

We affirm the actions of the trial court: (1) in ordering the jury foreperson to delete the words "plus plaintiff's attorney's fees" from the verdict form; (2) in refusing to award the plaintiff common law punitive damages from Larsen on the tort counts; and (3) in its rulings on evidentiary issues. In addition, we reject the plaintiff's claims that the trial court improperly: (1) directed a verdict for Pearce Company on the eleventh count of the complaint, which alleged that Pearce Company was vicariously liable for certain of Larsen's tortious acts under a theory of respondeat superior; (2) directed a verdict for Pearce Company on the twelfth count of the complaint, which alleged that Pearce Company had committed the common law torts of unfair competition and interference with contractual relations; and (3) prejudiced the plaintiff by charging the jury that it could award general damages.

We reverse the trial court insofar as it: (1) set aside the jury verdict for the plaintiff against Larsen on the tenth count of the complaint, which alleged violations of CUTPA; and (2) directed a verdict for Pearce Company on the thirteenth count of the complaint, which alleged that Pearce Company had violated CUTPA.

On remand, the trial court should: (1) articulate its grounds for setting aside the jury verdict for the plaintiff on the first count of the complaint, which alleged libel; [45] (2) reinstate the jury verdict for the plaintiff ***527** against Larsen on the tenth count of the complaint, which alleged violations of CUTPA; (3) reconsider the plaintiff's motion for punitive damages and attorney's fees against Larsen based on the tenth count of the complaint; and (4) conduct a new trial on the thirteenth count of the plaintiff's complaint, ****1034** which alleged that Pearce Company had violated CUTPA.

45 If the plaintiff and Larsen are able to resolve their dispute on this matter, an articulation shall not be required. Under those circumstances, they should file a statement to that effect with the clerk of this court.

In this opinion the other justices concurred.

All Citations

232 Conn. 480, 656 A.2d 1009

End of Document

751 F.Supp. 299
United States District Court, D. Massachusetts.

MILL POND ASSOCIATES, INC., Plaintiff,
v.
E & B GIFTWARE, INC., d/b/a Enticements, Defendant.

Civ. A. No. 86–3399–Y.
|
Nov. 26, 1990.

Synopsis

Action was filed alleging violations of Lanham Act, unfair competition pursuant to Massachusetts common law, and violation of Massachusetts Businessperson's Protection Act. After defendant defaulted, the District Court, Young, J., awarded compensatory and punitive damages as well as attorney fees, and held that: (1) plaintiff was entitled to prejudgment interest on award made pursuant to common-law unfair competition theory calculated by measuring defendant's wrongful profits; (2) plaintiff was entitled to prejudgment interest on Businessperson's Protection Act claim at rate of 12% only upon compensatory portion of award; and (3) entire judgment including compensatory and punitive damages as well as attorney fees was required to be considered principal in calculating postjudgment interest.

So ordered.

West Headnotes (5)

[1] **Interest** Computation of rate in general

Massachusetts statute providing for award of 12% prejudgment interest in any action in which damages were awarded but in which interest was not otherwise provided for by law required prejudgment interest at rate of 12% on award made pursuant to common-law unfair competition theory calculated by measuring defendant's wrongful profits. M.G.L.A. c. 231, § 6H.

2 Cases that cite this headnote

[2] **Interest** Prejudgment Interest in General

State law governs issue of prejudgment interest in federal courts when plaintiff recovers under state law cause of action, regardless of whether jurisdiction in federal court is based upon diversity or whether it is pendent to federal claim.

2 Cases that cite this headnote

[3] **Interest** Punitive damages; penalties

Under Massachusett's law, plaintiff was not entitled to prejudgment interest on punitive portion of damages awarded pursuant to Massachusetts Businessperson's Protection Act; Massachusetts statute providing for award of prejudgment interest in any action in which interest was not otherwise provided for by law did not apply to Businessperson's Protection Act since award under Act did carry prejudgment interest, but limited it only to compensatory portion of award.

M.G.L.A. c. 93A, § 1 et seq.

3 Cases that cite this headnote

[4] **Interest** Mode of computation in general

Longstanding uniform practice of Superior Court to calculate prejudgment interest only on compensatory portion of award made pursuant to Massachusetts Businessperson's Protection Act was entitled to significant weight in interpreting Act. M.G.L.A. c. 93A, § 1 et seq.

[5] **Interest** Computation of rate in general

Interest Mode of computation in general

Entire judgment including compensatory and punitive damages as well as attorney fees was required to be considered principal in calculation of postjudgment interest at rate of 8.24% per annum. 28 U.S.C.A. § 1961.

8 Cases that cite this headnote

Attorneys and Law Firms

***300** Charles B. Straus, Fordham & Starrett, Boston, Mass., for plaintiff.

George Neuner, Boston, Mass., for defendant.

MEMORANDUM AND ORDER

YOUNG, District Judge.

After the defendant E & B Giftware, Inc. ("Giftware") had defaulted, this Court held a jury waived trial to assess damages. The trial concluded on June 25, 1990, whereupon this Court, in a decision issued from the bench, awarded Mill Pond Associates, Inc. ("Mill Pond") $45,526.00 for violations of the Lanham Act, 15 U.S.C. 1125(a) (Count I) and $45,526.00 for unfair competition pursuant to Massachusetts' common law (Count II). As to each of these counts, the Court based the damages upon an accounting of the profits garnered by Giftware from its wrongful acts. The third count was predicated on the Massachusetts Businessperson's Protection Act. Mass.Gen.Laws ch. 93A, § 11. Pursuant to the provisions of that statute, the Court doubled the sum awarded on the first two counts. The Court also awarded attorneys' fees of $45,000 on the third count. After these several findings, Mill Pond is entitled to a judgment aggregating $136,052.00. Various questions have arisen concerning the proper calculation of interest on the award in this matter. This memorandum addresses these issues.

A. Prejudgment Interest on the Award Made Pursuant to the Common Law Unfair Competition Theory—Count II.

[1] **[2]** As noted in the recent First Circuit case, *Doty v. Sewall,* 908 F.2d 1053, 1063 (1st Cir.1990), state law governs the issue of prejudgment interest when a plaintiff recovers under a state law cause of action, regardless of whether jurisdiction in federal court is based upon diversity or whether it is pendent to a federal claim.

Contrary to the general rule allowing prejudgment interest on a tort case from the date of the filing of the complaint, *see* Mass.Gen.Laws ch. 231, § 6B (authorizing interest at the rate of twelve percent from the date of the commencement of an action upon judgments "for pecuniary damages for personal injuries ... or for consequential damages, or for property damage"), Massachusetts courts have held that prejudgment interest should not be applied to cases in which the court calculates the plaintiff's damages by measuring the defendant's wrongful profits. *USM Corp. v. Marson Fastener Corp.,* 392 Mass. 334, 348–51, 467 N.E.2d 1271 (1984); *Jet Spray Cooler, Inc. v. Crampton,* 377 Mass. 159, 181–83, 385 N.E.2d 1349 (1979). These cases reason that the plaintiff's damages, when calculated by the defendant's profits, are designed to avoid the unjust enrichment of the defendant rather than to compensate the plaintiff for property damage. *Jet Spray,* 377 Mass. at 182, 385 N.E.2d 1349. Damages calculated in this manner are different than the typical tort judgment because a "monetary award based on the defendants' profits is not designed to make the plaintiff whole and because ... the defendants' monetary gain accrue[s] after the commencement of th[e] action." *USM Corp.,* 392 Mass. at 348, 467 N.E.2d 1271. When an award is made to make a plaintiff whole, the plaintiff is entitled to prejudgment interest on the incurred loss. *See id.* Although cases have awarded prejudgment interest upon one other type of damage which accrues after the initiation of suit, ***301** *e.g., Charles D. Bonanno Linen Service, Inc. v. McCarthy,* 708 F.2d 1, 12 (1st Cir.1983) (awarding prejudgment interest on damages for loss of future earning capacity); *Griffin v. General Motors Corp.,* 380 Mass. 362, 366–67,

403 N.E.2d 402 (1980) (same); *Carey v. General Motors Corp.*, 377 Mass. 736, 746, 387 N.E.2d 583 (1979) (same), the Supreme Judicial Court in *USM Corp.* distinguished each of the above-cited cases on the basis that damages calculated by measuring the defendant's wrongful net profit are not "designed to make the plaintiff whole," whereas damages for loss of future earning capacity are so designed. 392 Mass. at 348–49, 467 N.E.2d 1271.

In this case, as the damages for unfair competition have been calculated in such a manner as to permit Mill Pond to recover the wrongful profits of Giftware, the line of Massachusetts precedent just discussed would seem to settle the matter were it not for Mill Pond's argument that the enactment of Mass.Gen.Laws ch. 231, § 6H legislatively overrules the prejudgment interest analysis found in both *USM Corp.* and *Jet Spray Cooler*. Section 6H (added to the General Laws by Mass.Statute 1983, ch. 652, § 1 and made applicable to all actions commenced on or after March 20, 1984 [1]) provides for an award of twelve percent prejudgment interest dating from the commencement of "any action in which damages are awarded, but in which interest on said damages is not otherwise provided by law...."

[1] Mass.Statute 1983, ch. 652, sec. 3. *See* Const. Amend. Art. 48, Ref., Pt. 1 (absent special provisions, Massachusetts statutes become effective 90 days after signature by the Governor); *Sharpe v. Springfield Bus Terminal,* 406 Mass. 62, 66, 545 N.E.2d 1168 (1989) (section 6H applies to action commenced after March 19, 1983).

Apparently, there are no cases analyzing the reach of § 6H. Although several cases have referred to § 6H, none has analyzed the section's effects. *See e.g., Sharpe v. Springfield Bus Terminal Corp.,* 406 Mass. 62, 65–6, 545 N.E.2d 1168 (1989) (court cited § 6H but found it inapplicable as the action was commenced before March 19, 1984); *Gaulin v. Commissioner of Public Welfare,* 23 Mass.App.Ct. 744, 746 n. 6, 505 N.E.2d 898 (1987) (in action commenced prior to March 19, 1984, parties did not dispute an award of 12% interest under Mass.Gen.Laws ch. 231, §§ 6B and 6H without distinguishing between the two sections), *Bushkin Associates, Inc. v. Raytheon Co.,* 906 F.2d 11, 16, 19 (1st Cir.1990) *aff'g* 717 F.Supp. 18 (D.Mass.1989), (court remarked upon § 6H's extension of prejudgment interest rule to include "any action" rather than just tort and contract actions under §§ 6B and 6C but found § 6H irrelevant and made its ruling under § 6C); *Turner v. Johnson & Johnson,* 624 F.Supp. 830, 835–36 (D.Mass.1985) (court held that damages awarded to a plaintiff for a defendant's fraudulent inducement of a contract were not within the ambit of the damages specified in § 6B and, since the complaint was filed in 1979, § 6H was inapplicable); *Ryan v. Raytheon Data Systems, Co.,* 601 F.Supp. 243, 254 (D.Mass.1984) (court awarded interest under Mass.Gen.Laws ch. 231 § 6B, 6C, 6H without distinguishing among the three sections).

In this case, however, the matter must be squarely faced since Mill Pond argues that, pursuant to § 6H, pre-judgment interest is due on the entirety of this Court's June 25, 1990 judgment. At least as to the second count, wherein damages for common law unfair competition have been calculated on the basis of Giftware's wrongful profits, this Court agrees with Mill Pond that, as to cases commenced after March 19, 1984, the prejudgment interest analysis of *USM Corp.* and *Jet Spray Cooler* has been legislatively altered by the enactment of Mass.Gen.Laws ch. 231, § 6H. That section unequivocally provides that, "[i]n any action in which damages are awarded, but in which interest on such damages is not otherwise provided by law, there shall be added by the clerk of court ... interest at the rate provided by [Mass.Gen.Laws ch. 231, § 6B]." The plain language of this statute fits this aspect of the case precisely. This count advances a legal theory upon which damages have been awarded, but in which interest on such damages has not otherwise been provided by law. The ***302** fact that the Supreme Judicial Court had earlier reasoned that no interest ought be calculated upon damages based on wrongful profits cannot survive the plain meaning of the language used by the Massachusetts Legislature in § 6H. [2] Accordingly, prejudgment interest at the rate of twelve percent shall be calculated on the damages awarded under the unfair competition count from the commencement of the action.

2 Massachusetts statutes are to be construed according to the plain and ordinary meaning of the words used. *A. Belanger & Sons, Inc. v. Joseph M. Concannon Corp.,* 333 Mass. 22, 25, 127 N.E.2d 670 (1955); *Rambert v. Commonwealth,* 389 Mass. 771, 773, 452 N.E.2d 222 (1983).

B. Prejudgment Interest on the Award Made Pursuant to Mass.Gen.Laws ch. 93A—Count III.

[3] Massachusetts law allows prejudgment interest on the compensatory portion of a Chapter 93A claim. *Patry v. Liberty Mobilehome Sales, Inc.,* 394 Mass. 270, 272, 475 N.E.2d 392 (1985). Prejudgment interest, however, is not allowed on the punitive portion of a Chapter 93A claim, *Makino v. Metlife Capital Credit Corp.,* 25 Mass.App.Ct. 302, 320–21, 518 N.E.2d 519 (1988), or on the award of attorney's fees, *Patry,* 394 Mass. at 271–73, 475 N.E.2d 392. Each of these cases, however, arose prior to the effective date of Mass.Gen.Laws ch. 231, § 6H.

As was the case with prejudgment interest on the unfair competition award, Mill Pond here argues that the enactment of Mass.Gen.Laws ch. 231, § 6H, requires prejudgment interest on both the compensatory *and* the punitive portions of the chapter 93A award. The Court rejects this argument for three reasons.

First, as the title of the enactment adding § 6H to the Massachusetts General Laws makes clear, this section is not a general catch-all provision providing for prejudgment interest. Rather it applies only to "certain judgments," *see* Mass.Statutes 1983, ch. 652 and *Silverman v. Wedge,* 339 Mass. 244, 245, 158 N.E.2d 668 (1959) ("The title of an act is to be considered in construing the act") specifically, actions "in which damages are awarded, but in which interest on said damages is not otherwise provided by law." Mass.Gen.Laws ch. 231, § 6H. This is simply not such a case. Under *Patry,* an award under chapter 93A does carry prejudgment interest, but such interest is calculated only on the compensatory portion thereof. *Patry,* 394 Mass. at 272, 475 N.E.2d 392; *Makino,* 25 Mass.App.Ct. at 320–21, 518 N.E.2d 519.

Second, sound policy considerations support this result. As Mr. Justice Kass observed:

> Prejudgment interest, as is well understood, compensates the prevailing party for loss of the use of money that party, as determined by the judgment, should have had in the first place and not been obliged to chase. In that way compensatory damages are truly compensatory and, in monetary terms, the winner is no less well off for the chase. See *Bernier v. Boston Edison Co.,* 380 Mass. 372, 388 [403 N.E.2d 391] (1980), and cases cited. No similar purpose would be served by imposing interest on punitive damages which, as we have seen, have a purpose beyond restoring to a plaintiff what should have been his. Indeed, to add interest on punitive damages in a c. 93A case would have the flavor of an unseemly piling on. Such is the preponderant weight of authority among courts which have considered the question.

Makino at 320–21, 518 N.E.2d 519 (collecting cases).

[4] Third, and most important, it appears that the uniform procedure within the Superior Court has been—and has remained since the effective date of Mass.Gen.Laws ch. 231, § 6H—to calculate prejudgment interest only on the compensatory portion of the chapter 93A award.[3] This ***303** Court takes judicial notice, Fed.R.Evid. 201(b)(2) and (f), of the standard operating procedures of the courts of the Commonwealth within this judicial district.[4] The long-standing uniform practice of an agency charged

with the responsibility of implementing a statute is entitled to significant weight in Massachusetts statutory interpretation. *Johnson v. Robison,* 415 U.S. 361, 367, 94 S.Ct. 1160, 1165, 39 L.Ed.2d 389 (1974); *Massachusetts Trustees v. U.S.,* 377 U.S. 235, 241, 84 S.Ct. 1236, 1241, 12 L.Ed.2d 268 (1964); *Manning v. Boston Redevelopment Authority,* 400 Mass. 444, 453, 509 N.E.2d 1173 (1987). This Court, of course, is required to follow that interpretation under *Erie* principles. *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Accordingly, prejudgment interest on the chapter 93A claim—Count III—will be calculated at the rate of twelve percent upon the compensatory portion of the damage award only.

3 Telephone conversations with Francis Orfanello, Esq., Executive Secretary to the Chief Justice of the Superior Court, and John Connolly, Assistant Clerk, Suffolk Superior Court, September 14, 1990.

4 Should any party object to the propriety of taking judicial notice on this matter, the Court will hold a hearing thereon. Fed.R.Evid. 201(e).

C. Post Judgment Interest.

[5] Both parties agree that the post judgment interest rate should be 8.24% computed daily. The parties disagree as to the principal amount to which the rate should apply. Mill Pond asserts that 8.24% should be applied to the full award, including compensatory and punitive damages, as well as attorney's fees—$136,052.00. Giftware asserts that 8.24% should be applied only to the compensatory portion of the award —$45,526.00.

Section 1961 of Chapter 28, United States Code, provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." The District Court of Maine has held that this statute is applicable to post judgment interest awarded by a federal court in a diversity case. *Harmon v. Clark Equipment Co.,* 657 F.Supp. 873, 874 (D.Me.1987) (noting that the First Circuit has implied that 28 U.S.C. § 1961 should be applied to post judgment interest in federal cases, *Elias v. Ford Motor Co.,* 734 F.2d 463 [1984]).

In *United States v. Michael Schiavone & Sons, Inc.,* 450 F.2d 875, 876 (1st Cir.1971), the First Circuit stated that "once final judgment has been entered in a civil suit in a federal court the prevailing party becomes a judgment creditor and is entitled to post-judgment interest under the mandatory terms of 28 U.S.C. sec. 1961." The First Circuit clearly rejected the argument that a judgment should be parceled into component parts of which only some of the parts would be entitled to post judgment interest. In *Schiavone,* the court allowed post judgment interest on the entire judgment, including a punitive award of treble damages. *Id.* In *Perkins v. Standard Oil Co.,* 487 F.2d 672, 675 (9th Cir.1973), the Ninth Circuit drew no distinction between judgments for attorney's fees and judgments for other damages in holding that "attorney's fees, being unliquidated until they are determined by a court, are not entitled to pre judgment interest ... [b]ut once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed." *Accord Littlejohn v. Null Mfg. Co.,* 619 F.Supp. 149, 151 (D.C.N.C.1985).

Accordingly, the entire judgment in this case, $136,052.00, must be considered principal in the calculation of post judgment interest at the rate of 8.24% per annum.

SO ORDERED.

All Citations

751 F.Supp. 299

End of Document