COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2021-P-0524

VERMONT MUTUAL INSURANCE COMPANY, APPELLANT

V.

PAUL POIRIER, JANE POIRIER, PHYLLIS MASTON, Individually and as EXECUTRIX of THE ESTATE of DOUGLAS MASTON, APPELLEES

On Appeal from Middlesex Superior Court

APPELLANT'S BRIEF FOR VERMONT MUTUAL INSURANCE COMPANY

Date: August 13, 2021

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Appellant, Vermont Mutual Insurance Company states that it has no parent company, and that no publicly held corporation owns more than 10% of its stock.

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ISSUE PRESENTED.

Whether an award of attorney's fees against an insured based on a violation of M.G.L. c.93A constitutes "damages because of bodily injury" under the insuring agreement of a Businessowners Policy, where the policy otherwise states that the only time attorney's fees incurred by a party other than the insured will be considered "damages because of bodily injury" is when the insured assumes the obligation to pay another party's attorney's fees in certain specified indemnity agreements.

STATEMENT OF THE CASE

After the Court's decision in the underlying matter of Maston v. Poirier, 81 Mass. App. Ct. 1131 (2012) (Further appellate review denied) (RA 123), Vermont Mutual Insurance Company (hereinafter "Vermont Mutual") initiated this Declaratory Judgment action in the Middlesex Superior Court to obtain a judicial determination as to its rights and obligations under a so called "Businessowners Policy" issued to Paul Poirier and Jane Poirier dba Servpro of Fitchburg/ Leominster (hereinafter, "Servpro") (RA 18). The subject dispute involves the question of whether liability insurance coverage extends to an award of attorney's fees under G.L. c.93A where the Court found that Servpro engaged in a "substantial breach of warranty" which constituted a violation of G.L. c.93A §2. (RA 116)

Maston answered the Declaratory Judgment Complaint asserting a Counterclaim against Vermont Mutual under G.L. 93A (RA 23). Thereafter, Maston and Vermont Mutual submitted an Agreed Statement of Facts along with Cross-Motions for Summary Judgment with respect to Vermont Mutual's request for Declaratory Judgment. (RA 28 – 34, 185, 188) Servpro joined Maston's opposition and Cross-motion. (RA 190) On July 12, 2016, the Court (Tuttman, J.) denied Vermont Mutual's Motion and allowed Maston's Cross-Motion, ruling that the attorney's fee award was covered under the Vermont Mutual policy. (RA 193-203) [1]

With Maston's Counterclaim still pending, on March 3, 2021, separate and final judgment entered declaring that the policy issued by Vermont Mutual provided coverage for the award for Maston's attorney's fees under its general provision providing coverage for "damages because of bodily injury." (RA 209)

On March 8, 2021, Vermont Mutual's Notice of Appeal was again docketed. (RA 210)

STATEMENT OF THE FACTS

a. The underlying litigation.

On or about June 29, 1999, the Mastons engaged Servpro to clean their basement after the basement was exposed to raw sewage as a result of a city sewer backup.

[1] Due to a prematurely filed Notice of Appeal before the entry of Separate and Final Judgment, the Record on Appeal was previously assembled, the appeal was docketed and thereafter dismissed as premature. See RA 7, et seq, Papers 13-22. See also 2016-P-1346.

(RA 107) The Mastons agreed to pay $400.00 for such services. A disinfectant solution was sprayed on the contaminated areas and the damaged property was removed. The work was completed within four hours. (RA 107 – 108)

In August, 1999, Ms. Maston was diagnosed with a nasal infection. (RA 109) Thereafter, Ms. Maston experienced numerous difficulties which she attributed to the Servpro cleaning solution. The Trial Court noted "Mrs. Maston has historically experienced a litany of health problems for which she sought extensive treatment with multiple doctors". (RA 109) On or about May 24, 2001, counsel on behalf of Mr. and Mrs. Maston sent a so called "demand" under M.G.L. c.93A. (RA 147) The demand alleged that Servpro violated the covenant of good faith and fair dealing by introducing toxic chemical vapor into the Mastons' home, "and thereafter refusing to mechanically ventilate unless paid additional money". (RA 149) Servpro denied the allegations. Thereafter, on or about September 16, 2002, the Mastons filed a Complaint alleging negligence, breach of contract, and violation of G.L. c.93A. (RA 145-147)

When the matter was called for trial in 2009, the Mastons waived the negligence and breach of contract counts of their Complaint and elected to force a bench trial of only the G.L. c.93A claims over Servpro's objection. (RA 106) After a nine day bench trial commencing in September, 2009, on December 11, 2009, the Court (Tucker, J.) issued Findings of Fact, Rulings of Law and an Order

for Judgment whereby the Court found that Servpro violated M.G.L. 93A by breaching the Warranty of Merchantability and the Warranty of Fitness for a Particular Purpose, that Ms. Maston's total damages were $267,248.67 and Mr. Maston's damages were $5,000.00.[2] (RA 106 – 119). These awards and all interest thereon, have been satisfied in full by Vermont Mutual's payment of $696,669.48 and are not the subject of the Declaratory Judgment action. (RA 30, paragraph 12)

On or about May 13, 2010, Tucker, J., awarded $215,328.00 in attorney's fees based upon his finding of a violation of M.G.L. c.93A. (RA 121 – 122) On appeal, the award was affirmed over Servpro's arguments that the case had never been about a sale of goods, and no breach of warranty claim had been presented in the eight (8) years that the case had been litigated. The Court concluded that "by the time the parties' post trial briefs were exchanged, there could be no doubt that the plaintiffs were asserting that the defendants' failure to warn constituted a breach of Warranty of Merchantability". (RA 123 – 125) An additional attorney fee award related to appellate efforts was requested in the amount of $96,225.00. The Court rejected that request but ordered that $21,600.00 be paid by Servpro for attorney's fees related to the appellate proceedings, pursuant to M.G.L. 93A. (RA 128 – 129)

[2] Notably, no allegations of breach of warranty were set out in the 93A demand or the Complaint. The fact that a breach of warranty claim supporting the 93A claim was not part of the trial was noted by Justice Katzmann during the appellate argument. (RA 160)

b. The subject insurance policy.

Vermont Mutual issued to Paul Poirier a policy of so called "Businessowners" insurance effective December 17, 1998 through December 17, 2001. (RA 39) There is no doubt that the Mastons' claim falls within the applicable policy period.

The subject policy provided First Party Property Coverage as well as "Businessowners Liability Coverage", under Form BP0006 (01/97). (RA 68) This policy form is a copyrighted form from Insurance Services Office, Inc. The pertinent policy provisions are as follows:

I. Business Liability

a. We (Vermont Mutual) will pay those sums that the insured becomes legally obligated to pay *as damages because of "bodily injury"*, "property damage", "personal injury", or "advertising injury", to which this insurance applies.[3] We have the right and duty to defend the insured against any "suit" seeking those damages.....
No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension – Supplementary Payments. (RA 68) (Emphasis supplied.)

b. This insurance applies:

(1) To "bodily injury" and '"property damage"' only if:

(a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
(b) The "bodily injury" or "property damage" occurs during the policy period....

[3] Where there is no argument that the attorney's fee award constituted damages because of "property damage", "personal injury" or "advertising injury", for the purposes of brevity, Vermont Mutual's argument will focus on the phrase "damages because of 'bodily injury'."

c. Damages because of "bodily injury" include damages claimed by a person or organization for care, loss of service or death resulting at any time from the "bodily injury".

d. Coverage Extension – Supplementary Payment

In addition to the Limit of Insurance, we will pay, with respect to any claim we investigate or settle or any "suit" against an insured we defend: …

(5) All costs taxed against the insured in the "suit"……

If we defend and insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit" we will defend that indemnitee if all of the following conditions are met…..

So long as the above conditions are met, *attorney's fees incurred by us in the defense of that indemnitee*, necessary litigation expenses incurred by us, and necessary litigation expenses incurred by the indemnitee at our request *will be paid as Supplementary Payments. Notwithstanding the provisions of paragraph* ***B(1)(b)(2)*** *of Exclusions, such payments will not be deemed to be damages for "Bodily Injury" and "Property Damage" and will not reduce the limit of insurance….* (RA 68 - 69) (Emphasis supplied)

B. Exclusions

1. Applicable to Business Liability Coverage……

(b) Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages: ….

(2) Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution

of the contract or agreement. *Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage",* provided:

(a) Liability to such party for, or for the cost of, that party's defense has been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for the defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. (Emphasis supplied) (RA 70)

F. Liability and Medical Expense Definitions...

(3) "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time..... (RA 79)

(8) "Insured contract" means:....

(a) A contract of a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

(b) A sidetrack agreement;

(c) Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

(d) An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

> **(e)** An elevator maintenance agreement;
>
> **(f)** That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with the work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;.... (RA 79)
>
> **(12)** "Occurrence" means an accident including continuous or repeated exposure to substantially the same general harmful conditions. (RA 80)
>
> **(15)** "Property damage" means:
>
> **(a)** Physical injury to tangible property, including all resulting loss of use of that property....
>
> **(16)** "Suit" means a civil proceeding, in which damages because of "bodily injury", "property damage", "personal injury", or "advertising injury" to which this insurance applies are alleged." (RA 81)

c. Vermont Mutual Declaratory Judgment Action

Upon conclusion of the appellate proceedings in the underlying litigation, Vermont Mutual issued payment to Mrs. Maston and the Estate of her deceased husband for the full amount of the damage awards, costs, and interest. ($696,669.48) (RA 30) As set out above, it also filed the instant Complaint for Declaratory Judgment whereby it asserted that the only unpaid element of the

judgment was not covered under the policy. (RA 18) To date, the award for attorney's fees has not been paid by either Servpro or Vermont Mutual.

SUMMARY OF THE ARGUMENT

I. *Standard of review*

The interpretation of an insurance contract presents issues of law which are reviewed de novo. 22

II. *Rules of policy interpretation*

In construing an insurance policy, the Court must ascertain the fair meaning of the language used as applied to the subject matter. The policy is to be read as a whole and exclusions are to be read together with the grant of coverage which they serve to limit. An interpretation which gives effect to all provisions of the contract is favored over an interpretation which leaves parts of the contract useless, inexplicable or a nullity. Words which have acquired a peculiar and appropriate meaning at law shall be construed in accord with such meaning. 23

III. Historical use and interpretation of words and phrases employed in the insuring agreement

a. Bodily injury

The Court has found the phrase "bodily injury" to be an unambiguous and narrow phrase that refers only to physical injuries and the consequences thereof. The phrase has been used extensively in statutes governing insurance

coverage and in the policies previously construed by the Court, and the technical interpretation used in construing the policies and statutes must control the interpretation herein. No Massachusetts decision has included attorney's fees within "bodily injury". 24

b. *Damages*

Massachusetts decisions have set out that the term "damages" is an unambiguous term which "describes a payment made to compensate a party for injury suffered". Incorporating the established definitions of "bodily injury" and "damages" into the insuring agreement, the insuring agreement provides that the insurer will pay "those sums that the insured becomes legally obligated to pay *to compensate a party for injury suffered* because of *physical injuries to the body and the consequences thereof.* 28

i. *Attorney's fee awards under M.G.L. c.93A are not "damages".*

Damages and attorney's fee awards are treated differently under M.G.L. c.93A. Where there has been a violation of M.G.L. c.93A §2, full attorney's fees shall be awarded even if the claimant is only entitled to injunctive relief. Damages are governed by M.G.L. c.93A §9(3) and attorney's fees are addressed separately in M.G.L. c.93A §9(4). Attorney's fees constitute a separate form of relief separate and distinct from the award of damages. Such awards are designed to deter and penalize one who engages in such violation. 28

c. *"Because of"*

The phrase "because of" means "on account of, by reason of". The phrase commands "but for" causation. The award of attorney's fees under M.G.L. c.93A does not have "but for" causation with "bodily injury", as such attorney's fee awards can be made without any bodily injury or any damages at all. The policy incorporates a different phrase ("arising out of") where more relaxed causation standard is to be used, and the policy drafter's use of different causation standards must be recognized. 32

IV. *Attorney's fee awards under M.G.L. c.93A are not "damages because of bodily injury"*

Giving effect to the technical meaning ascribed to the phrases "damages" and "bodily injury", while recognizing the "but for" causation required with the use of the "because of" language, it is proper to conclude that awards for injury to the body and related consortium claims are covered, but the insurer will have no obligation to pay sums for other claims expect explicitly covered under the supplementary payment provision. Where fee awards and damages under M.G.L. c.93A are treated separately under the statute, the additional liability for attorney's fees is not within the insuring agreement and constitutes an uncovered financial exposure borne by those engaged in commerce. Ms. Maston's proposed interpretation cannot peacefully co-exist with the historical use of the same operative language in the Underinsured Motorist Statute, where

that language has never been construed to allow for an award of attorney's fees. In order to avoid confusion and to present a harmonious interpretation to effectuate a consistent body of law, the interpretation of the operative words must be consistent between the statutes addressing insurance requirements and the policy language.

V. *Construing the policy as a whole compels a conclusion that attorney's fees awards under M.G.L. c.93A are not "damage because of bodily injury"*

Indemnity agreements where an insured assumes the tort liability, including the obligation to pay attorney's fees, are prevalent. The policy has made specific provision to cover attorney's fees assumed by an insured in specified "insured contracts". To effectuate the intent, the exception to the contractual liability exclusion sets out: "Soley for purposes of liability assumed in an 'insured contract', reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury'……". Where the policy sets out the "sole" circumstance where attorney's fees are deemed to be damage because of "bodily injury", the policy cannot be intepreted in such a way that it affords coverage for attorney's fee awards which do not satisfy the "sole" criteria.

VI. *Decisions from other jurisdictions interpreting different policy forms are not entitled to deference*

The Motion Judge relied upon a decision of the Ohio Supreme Court which

did not interpret the same policy form. The policy form in the Ohio Supreme Court case did not contain the language setting out the "sole" circumstance where attorney's fees would be deemed to be "damages because of bodily injury" as used in this policy. Reliance on this decision, or any other decision which interprets a different form without the same language, is misplaced. Employing the approach invoked by the Trial Court renders the "insured contract" exception entirely superfluous as all attorney's fee awards will always be deemed "damages because of bodily injury", whenever the underlying litigation involves a physical injury. Such a construction negating significant and important portions of the policy, violates the canons of policy interpretation. 42

ARGUMENT

I. *Standard of Review*

The question as to whether an award of attorney's fees under M.G.L. c.93A will constitute "damages because of bodily injury" under this policy form is a novel issue which has not been addressed in any appellate decisions in this Commonwealth or elsewhere.[4] The interpretation of an insurance policy is a

[4] In the Trial Court proceedings below, Maston offered the alternative theory that attorney's fees awarded against an insured under M.G.L. c.93A should be considered "costs" and thus, be covered under the Supplementary Payment Provision D(5). The Court rejected this argument. Since then, the Appeals Court has determined that attorney's fees awarded against an insured under M.G.L. c.93A, based upon a violation of M.G.L. c.142A (Home Improvement Contractor Statute), will not constitute "costs" covered under Supplementary Payment Provision of a policy employing similar language. See Styller v. National Fire & Marine Insurance Company, 95 Mass. App. Ct. 538 (2019).

question of law and on appeal, the Court undertakes a de novo review. Green Mountain Insurance Company, Inc. v. Wakelin, 484 Mass. 222, 226 (2020) citing Boazova v. Safety Insurance Company, 462 Mass. 346, 350 (2012).

II. *Rules of Policy Interpretation*

"The rules which govern the interpretation of language in an insurance policy are the same rules which govern the interpretation of language in written contracts generally. In either case, (the Court) must ascertain the fair meaning of the language used as applied to the subject matter." Sav-Mor Supermarkets, Inc. v. Skelly Detective Services, 359 Mass. 221, 226 (1971). See also Hakim v. Massachusetts Insurers Insolvency Fund, 424 Mass. 275, 280-81 (1997). The policy is to be read as a whole without according undue emphasis to any particular part over another. Mission Insurance Company v. United States Fire Insurance Company, 401 Mass. 492 (1988) quoting Woogmaster v. Liverpool & London and Globe Insurance Company, 312 Mass. 479, 480 (1942). In construing the entire document, exclusions are to be read together with the grant of coverage they serve to limit. Murphy v. Noonan, 30 Mass. App. Ct. 950, 951 (1991) (review denied 410 Mass. 1103 (1991).) "An interpretation which gives reasonable meaning to all of the provisions of the contract is preferred to one that leaves a part useless or inexplicable". Sherman v. Employers Liability Insurance Co., Corp., 343 Mass. 354, 357 (1961). See also Hakim, supra ("(The court will) read the policy as

written and (is) not free to revise it or change the order of the words"). "Policies of insurance, like all other contracts, must be reasonably construed by giving to the words contained therein their usual and ordinary significance, unless it appears that they are to be given a peculiar or technical meaning." Styller v. National Fire & Marine Insurance Company, 95 Mass. App. Ct. 538, 542 (2019) quoting Woogmaster, supra at 481. Like statutes, when words in an insurance policy have a technical meaning which "have acquired a peculiar and appropriate meaning in law (the words used in the policy) shall be construed and understood according to such meaning" M.G.L. c.4 s 6. See Styller, supra at note 6. If the words are not ambiguous, they are construed in their ordinary sense. "Ambiguity is not created simply because controversy exists between the parties, each favoring an interpretation contrary to the other." Citation Insurance Company v. Gomez, 426 Mass. 379, 381 (1998).

III. *Historical use and interpretation of words and phrases employed in the insuring agreement.*

a. *"bodily injury."*

The Court has, on numerous occasions, interpreted the scope of the technical term "Bodily Injury" as used and defined in liability insurance policies and statutes governing insurance coverage. In Allstate Insurance Company v. Diamant, 401 Mass. 654 (1988), the Court determined that the term was "unambiguous and understood to mean hurt or harm to the human body". Id.

quoting Farm Bureau Mutual Insurance Company v. Hoag, 136 Mich. App. 326, 334 (1984). The Court noted that "Bodily injury…is a narrow term and encompasses only physical injuries to the body and the consequences thereof". (Emphasis supplied.)

Following the decision in Allstate, supra, the Appeals Court similarly held "that 'Bodily Injury' as used in an insurance policy is a narrow and unambiguous term. It includes only physical injuries to the human body and the consequences thereof; it does not include humiliation and mental anguish and suffering. …Bodily injury imports harm arising from corporal contact. In this connection 'bodily' refers to an organism of the flesh and blood. It is not satisfied by anything short of physical and confined to that kind of injury. …The words 'bodily injury' in an insurance policy do not comprehend non-physical harm to the person, such as mental suffering not connected with or arising out of the physical injuries." Richardson v. Liberty Mutual Fire Insurance Company, 47 Mass. App. Ct. 698, 702 (1999) quoting Allstate, supra and Williams v. Nelson, 228 Mass. 191, 196 (1917).

The term "Bodily Injury" has an extended history of use in insurance contracts. In Williams, supra, the Court addressed the requirements of St. 1914, c. 464, which "permits a judgment creditor of one insured by contract of casualty insurance against loss or damage on account of *bodily injury* or death", to reach

and apply the insurance proceeds to satisfaction of a judgment.[5] The technical term used by the legislature in this statute and other similar statutes, must be construed as the technical term has been viewed throughout this history. Styller, supra.

The Underinsured Motorist statute (M.G.L. c.175 §113L), incorporates the same phrase, in a slightly different manner, and requires that insurers afford coverage "for the protection of persons insured thereunder who are legally entitled to recover *damages* from owners or operators of uninsured motor vehicles, trailers or semitrailers and hit-and-run motor vehicles *because of bodily injury*, sickness or disease, including death resulting therefrom…" (Emphasis supplied)

Beyond the insurance field, the phrase "bodily injury" has also been narrowly interpreted with respect to claims for so called "assault pay" under G.L. c.126 §18A. In Modica v. Sheriff of Suffolk County, 477 Mass. 102 (2017), the Court reiterated that the phrase only encompasses physical injuries to the body and the consequences thereof.

In Williams, supra, the Court determined that financial losses suffered by a

[5] See Lorando v. Gethro, 228 Mass. 181, 183 which sets out the full terms of the 1914 Act. Section 1 provided "In respect to every contract of insurance made between an insurance company and any person…..by which such person….is insured against loss or damage on account of bodily injury or death by an accident of any person, for which loss or damage such person….is responsible, whenever the loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon satisfaction by the assured of a final judgment…." The provisions only applied to "loss or damage on account of bodily injury or death". (See Sections 1 and 2 thereof.)

husband as a result of the physical injuries to his wife, did not constitute "bodily injury" under the applicable statute. The present day statute (M.G.L. c.90 §34A – Definition of "Motor Vehicle Liability Policy") expanded the compulsory automobile liability coverage requirements to include "consequential damages consisting of expenses incurred by a husband, wife, parent or guardian for medical, nursing, hospital or surgical services", and the policy terms have been revised to include coverage for loss of consortium. In this policy, that was accomplished by including Section A(1)(c) which provides "damages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury'." (RA 68) No similar policy provision expands the definition of this phrase to include attorney's fee awards except in the sole circumstance where the insured agrees to pay another parties attorney's fees in a so called "insured contract", and then, only under limited circumstances. No statute or regulation requires that such coverage be afforded and no Massachusetts decision includes attorney's fee awards within "bodily injury".

b. *"Damages"*

In Massachusetts and elsewhere, "'damages' describes a payment made to compensate a party for injuries suffered". See 116 Condominium Trust v. Aetna Casualty & Surety Co., 433 Mass. 373, 276 (2001) citing Jaffe v. Crawford

Insurance Co., 168 Cal. App. 3d. 930, 935 (1985). In 116 Condominium Trust, supra, the court rejected an argument that the term "damages" was ambiguous and stated:

> Even if the term "damages" were ambiguous, any ambiguity in the "insuring agreement" section is dispelled by the "Exclusions" section that directly follows...[6]

Incorporating the well-established case law into the insuring agreement, the insurer agrees to pay "those sums that the insured becomes legally obligated to pay *to compensate a party for injuries suffered* (i.e. "damages") because of *physical injuries to the body and the consequences thereof* (i.e. "bodily injury")".

i. Attorney's fee awards under M.G.L. c.93A are not "damages".

M.G.L. c.93 §9 has two distinct sections that deal with potential awards under the statute. Under subsection 1, a person injured by an act declared to be unlawful by M.G.L. c.93A §2 is authorized to bring a lawsuit "for damages and such equitable relief including an injunction, as the Court deems to be necessary and proper". Under Section 9(3), prior to bringing such an action, a written demand for relief identifying the injuries suffered must be mailed thirty (30) days

[6] In contrast to the approach of the Appeals Court in 116 Condominium Trust, supra, here, the Motion Judge concluded that "The phrase ("damages because of bodily injury") must be interpreted without reference to the exception (to the exclusion)". (RA 199) Once again, this exception sets out the "sole" circumstance where attorney's fees of another party are deemed to be "damages because of bodily injury" and is not satisfied in this case. Vermont Mutual suggests that the Trial Court's approach failed to comply with the principles of policy interpretation which requires that "exclusions are to be read together with the grant of coverage they serve to limit." Murphy, supra.

prior to commencement of the action. If a reasonable offer of relief is made by the defendant and rejected by the claimant, the defendant may tender an affidavit concerning the rejection of the offer "and thereby limit any recovery to the relief tendered if the Court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. In all other cases, if the Court finds for the petitioner, recovery shall be in the amount of actual damages or $25.00, whichever is greater…". (Emphasis provided).

A separate and distinct subsection of G.L. c.93A §9 addresses attorney's fee awards. Nowhere does the statute indicate a nexus between attorney's fees and damages, and to the contrary, all "damages" are awarded under §9(3). Specifically, M.G.L. c.93A §9(4) provides that if the Court finds there has been a violation of subsection 2, "the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees and costs incurred in connection with said action, provided, however, that the Court shall deny recovery of attorney's fees and costs which are incurred after the rejection of a reasonable written offer of settlement made within thirty (30) days….".

"Damages" and attorney fee awards are treated differently under M.G.L. c.93 and serve different purposes. Where there has been a violation of M.G.L. c.93A §2, whether or not willful, and whether or not the damages exceed the

$25.00 minimum recovery, attorney's fees are awarded. If a reasonable offer of relief is tendered, there can be no award of multiple damages. However, pre-offer attorney's fees are still recoverable based upon the violation alone. If no damages are awarded, but only equitable relief is provided, attorney's fees are still recoverable. See Refuse and Environmental Systems, Inc. v. Industrial Services of America, 932 F.2d. 37, 45 (1991) (Attorney's fees may be awarded even if the Court does not award damages under 93A. ....This is because "there is a benefit to the public where deception in the marketplace is brought to light (and thereby corrected) by an individual who has been deceived even though his actual damages were not proved.") See also Drywall Systems, Inc. v. ZVI Construction Co., Inc., 435 Mass. 664, 672 (2002). The attorney fee award is not included with the "damage" award for the purposes of doubling or trebling in the case of a willful violation. Rex Lumber Company v. Action Block, Inc., 29 Mass. App. Ct. 510, 522 (1990). See also Shapiro v. Public Service Mutual, 19 Mass. App. Ct. 648 (1985). Attorney's fees incurred for separate claims, if distinct from the violation of M.G.L. c.93A §2, are not recoverable, even where the claimant is successful in proving a violation of section 2. Refuse and Environmental Systems, Inc., supra.

In Barron v. Fidelity Magellan Fund, 57 Mass. App. Ct. 507, the court discussed the structure of M.G.L. c.93A and the basis for attorney's fees awards and stated:

> "The extent of which *damages* and equitable relief are available in circumstances where the plaintiff has prevailed is set out in §9(3). *Attorney's fees* and costs on the other hand, *are treated separately* in G.L. c.93, §9(4) . . . The language of the statute is plain: attorney's fees and costs shall be awarded in 'any action' brought under §9 and are to be considered 'in addition' to any other relief . . . Our conclusion that the limitation on damages in §9(3) does not prohibit recovery of the plaintiff's counsel's fees and costs under §9(4) is reinforced by the fact that attorney's fees *constitute a separate form of relief separate and distinct from the award of damages*.... We have long recognized that the award of attorney's fees and costs in consumer actions can be essential to the enforcement of c.93A and the important public policy it serves. The entire tenor of G.L. c.93A is to award attorney's fees and costs to a party who succeeds in demonstrating that a defendant has violated G.L. c.93A, §2(a)... Such a view is consistent with the scheme of the statute and the legislative's manifest purpose of deterring misconduct by affording both private and public plaintiffs who succeed in proving violations of c.93A, §2 reimbursement for the legal services and cost . . ." (Emphasis supplied).

The case law interpreting the statute and the structure of the statute demonstrate all G.L. c.93A "damages" are awarded under §9(3) that the awards of attorney's fees under §9(4) are not an award of "damages" because of the underlying injury, but rather, a penalty to deter violations of M.G.L. c.93A even where there are no recoverable damages. See Leardi v. Brown, 394 Mass. 151, 160 (1985).[7] See also Holland v. Jachmann, 85 Mass. App. Ct. 292, 298 (2014).

[7] In Leardi, the Court indicated that "for the purposes of invoking G.L. c.93A §9, 'injury' means 'the invasion of a legally protected interest of another' and 'the most usual form of injury is the infliction of some harm; but there may be an injury although no harm is done'."

c. *"because of"*

Different phrases in an insurance policy connote different levels of causation. For example, the term "arising out of" is construed expansively, and "ordinarily held to mean 'originating from, growing out of, flowing from, instant to, or having connection with'." Nguyen v. Arbella Insurance Group, 91 Mass. App. Ct. 565, 568 (2017), quoting Metropolitan Property & Casualty Insurance Company v. Fitchburg Mutual, 58 Mass. App. Ct. 818, 820-21 (2003).[8] The phrase "arising out of" is used multiple times throughout the policy, but is not used in the insuring agreement. Under the Pollution Exclusion, the policy does not respond to "bodily injury or property damage *arising out of*....release or escape of pollutants". (RA 71) Similarly, the policy does not respond to bodily injury *arising out of* the ownership or use of aircraft, autos or watercraft. (RA 72, exclusions g and h.)

The phrase "because of" is defined by Webster's II New Riverside University Dictionary, 1984, and Oxford Dictionary as "on account of; by reason of". The use of this phrase in the insuring agreement is markedly narrower than an agreement to pay "damages arising out of (or 'originating from, growing out of, flowing from, incident to, or having connection with, see Nguyen, supra) bodily

[8] Recently, the Court observed that a jury instruction equating "arising out of" with "originates from, grows out of, flows from or has connection with..." was consistent with the legislature's intent in drafting G.L. c. 258D. See Stephens v Comm., 100 Mass. App. Ct. 1102 (2021), 2021 Mass. App. Unpub. LEXIS 529, 2021 WL 3027289. (Rule 23.0 Summary Disposition)

injury". The use of a different phrase connotes a different level of causation, and the drafter's decision to use the narrower "because of", as opposed to the broader "arising out of" is required to be considered as the policy is interpreted.

In University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 350, 133 S.Ct. 2517, 2427, 186 L. Ed. 2d 503, 517 (2013), the Supreme Court examined the use of the phrase "because of" in the context of a Title VII retaliation claim. Observing that "it is… textbook tort law that an action is not regarded as a cause of an event if the particular event would have occurred without it", the Court went on to address the Civil Rights Act prohibition on discrimination "*because of* such individual's race, color, religion, sex or national origin." (Emphasis supplied) The Court observed that a "lessened causation standard" was adopted for certain claims under subsection 2000 e-2, which provided that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was *a motivating factor* for any employment practice". (Emphasis supplied) Citing Gross v. FBL Financial Services, 557 U.S. 167, 129 S.Ct. 2343, 174 L.Ed. 2d 119 (2009), the Court employed the Webster's, Oxford and Random House dictionary definitions of "because of"[9] and held that where the statute prohibits discrimination "because of" race, the plaintiff needed to establish "but for" causation. In reaching this result, the Court cited Safeco

[9] "By reason of" or "on account of"

Insurance Company of America v. Burr, 551 U.S. 47, 63-64, 127 S.Ct. 2201, 167 L.Ed. 2d 1045 (2007) where the Court equated "because of" with "based on" and again, required "but for" causation proof.

In Doull v. Foster, 487 Mass. 118 (2021) in the context of a medical malpractice claim, the Court noted that "another way to think about the "but for" standard is one of necessity, the question is whether the defendant's conduct was necessary to bring about the harm." Here, the corollary question is whether the bodily injury or property damage is necessary to bring about the award of attorney's fees.

Awards for pain and suffering, medical expenses, disfigurement, loss of earning capacity, and loss of enjoyment of life are, without doubt, "damages because of bodily injury". The physical injury to the human body is the "but for" cause of the pain and suffering, medical expenses, et al. Where a question could exist with respect to consortium claims, a specific provision was added to the insuring agreement stating that such claims will be considered "damages because of bodily injury". Where attorney's fee awards under M.G.L. c.93A are available whenever there is a violation, irrespective of whether or not there is any injury, (see Argument, III (b)(i) supra), the "but for" causation is not satisfied and such awards are not "on account of", "by reason of" or "based on" "physical injuries to the human body and the consequences thereof". Allstate Insurance Company,

supra.

IV. *Attorney's fee awards under G.L. 93A are not "damages because of bodily injury"*

Construing the phrase "damages because of bodily injury" in isolation, and employing the technical meaning ascribed to the phrases "damages" and "bodily injury" while giving effect to the distinction between "because of" and "arising out of" (as used in other sections of the policy), it is proper to conclude that awards for injury to the body and related consortium claims are covered, but "no other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension-Supplementary Payments." When the remaining policy provisions are examined in conjunction with the insuring agreement, however, one is compelled to the conclusion that except in the one stated circumstance involving a so called "insured contract", an award of attorney's fees is *never* considered to be "damages because of bodily injury…"

Where attorney fee awards and damages under M.G.L. c.93A are treated separately under entirely distinct subsections of M.G.L. c.93A §9, the distinct awards should not be construed as one and the same where, in the insuring agreement, the insurer agrees to pay "damages because of bodily injury", but the policy expressly states that the insurer will have "no other obligation or liability to pay sums….." awarded against the insured except as provided for under the Supplementary Payment provisions.. The additional liability under M.G.L. c.93A

§9(4) is not within the insuring agreement and constitutes an uncovered financial exposure borne by those engaged in commerce.

Attorney's fee awards under M.G.L. c.93A have the "manifest purpose of deterring misconduct by affording both private and public plaintiffs who succeed in proving violations of Chapter 93A §2 reimbursement for legal services and costs". See Barron, supra. The manifest purpose of an award of attorney's fees under M.G.L. 93A exists whether or not there is "bodily injury" or any harm whatsoever. (See Leardi, supra and M.G.L. c.93A §2, and 9, permitting an award or attorney's fees when nominal damages are awarded.) As the Motion Judge below noted, "Damages and attorney's fees are treated as separate forms of recovery under sections 9(1) and 9(4) of G.L. c. 93A". (RA 199). The grant of coverage does not provide that the insurer will pay all sums that the insured must pay where someone sustains some physical injury. Rather, employing the well understood meaning of the terms used in the Commonwealth's statutes and the insurance contracts incorporating similar terms, it is plain that some business exposures will be covered where others are not. Where the Court has previously held that both the phrases "damages" and "bodily injury" are unambiguous, and the policy drafters (like the United States Congress) chose the narrower causation construct ("because of") as opposed to the broader "arising out of" language, the

phrase "damages because of bodily injury" cannot be construed in the broad manner urged by Ms. Maston.

The interpretation urged by Ms. Maston cannot peacefully co-exist with the historical use of the same operative language in the Uninsured Motorist statute. Adopting the approach urged by Ms. Maston will lead to either unintended results or confusion regarding the proper interpretation of the phrases beyond the confines of this dispute between Vermont Mutual and Ms. Maston. Where the Uninsured Motorist Statute uses the same operative language, if Ms. Maston's proposed interpretation were adopted, it would rationally follow that in addition to compensation for the physical injuries, the Uninsured Motorist insurer is required to pay attorney's fees related to pursuing the Uninsured Motorist claim. (See M.G.L. 175 s 113L, compelling coverage for "damages…for bodily injury…." where a motor vehicle operator is uninsured/underinsured.) Such was clearly not the legislature's intent. The interpretation of the operative words must be consistent between the statutes and the policy language in order to avoid confusion and to present a harmonious interpretation "to effectuate a consistent body of law". Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass 372, 387 (2019). See also Commerce Ins. Co. v Blackburn, 81 Mass App Ct 519, 512 (2012). Where the policy language uses the same unambiguous words and phrases as used in M.G.L. c.175 §113L, a construction that results in an expansion of the coverage required

under M.G.L. c.175 §113L (or other statute addressing damages on account of bodily injury), is to be avoided. (See Town of Canton v. Commissioner of Massachusetts Highway Department, 455 Mass. 783, 799 (2010) "Statutory language is not to be enlarged or limited by construction unless its object and plain meaning require it.")

V. *Construing the policy as a whole compels a conclusion that attorney's fee awards under G.L. 93A are not "damages because of bodily injury"*

The policy sets out that there is one circumstance and one circumstance only, where "reasonable attorney's fees and necessary litigation expenses incurred by a party other than the insured will be deemed to be 'damages because of bodily injury' ". As set out in Commerce Ins. Co., supra at 521, "A contract is to be construed to give a reasonable effect to each of its provisions... Every phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties." Id. citing McMahon v. Monarch Life Ins. Co., 345 Mass. 261 (1962), J.A. Sullivan Corp. v. Commonwealth, 397 Mass. 789, 795 (1986), quoting from Charles I. Hosmer, Inc. v. Commonwealth, 302 Mass. 495, 501 (1939). The Motion Judge concluded that the operative phrase ("damages because of bodily injury") "must be interpreted without reference to" the exception to the Contractual

Liability exclusion which specifically addressed when the phrase would be interpreted to include attorney fee awards. This was error and violated the fundamental principles of policy construction.

As set forth in the recitation of the applicable policy language above, the policy addresses risks presented to business owners under so called "indemnity agreements" contained in so called "insured contracts". The policy has a broad exclusion for contractual liability, and has an exception from that exclusion for liability for property damage or bodily injury assumed in an "insured contract" which is executed prior to the time that a bodily injury/property damage occurs; i.e., an indemnity agreement. Where the insured has entered an indemnity agreement in a lease or other specified contract, the liability assumed in the indemnity agreement is not excluded by the Contractual Liability Exclusion. Often times, such agreements contain provisions requiring that the insured either defend or pay for attorney's fees incurred by the party to be indemnified. (See for example Harnois v. Quannapowitt Development, Inc., 35 Mass. App. Ct. 286 (1993) at footnote 1. See also Mass. Port Authority v. Johnson Controls, Inc., 54 Mass. App. Ct. 541 (2002) at 542 ("Contractor will defend, indemnify and hold harmless building manager....from and against all claims...costs of suit and attorney's fees arising out of or in any way related to contractor's operations....")

Indemnity provisions and fee shifting agreements related thereto are so prevalent in the business community that the legislature has set limits on their application (see M.G.L. 149 §29C, M.G.L. c.186 §15). Insurance coverage for such exposures may be of particular importance to those in the business community. The subject Businessowners Policy has taken these agreements into account, and employed specific provisions to address them.

As set out under Part D – Coverage Extension – Supplementary Payments, if the insurer is defending the insured in a suit, and the indemnitee of the insured is also named as a party, the insurer will defend the indemnitee if various conditions are met. When those conditions are met, "attorney's fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as supplementary payments". Stated differently, when the conditions are met the attorney's fees of the indemnitee are paid by the insurer even if the policy limit is exhausted. (RA 69) If the conditions are not met, however, and the insurer does not undertake the joint defense of the indemnitee, the Supplementary Payment provision does not apply, and any attorney's fee award against the insured under the indemnity agreement will be covered based on the exception to the exclusion, but subject to the overall policy limits. (RA 69 - 70) The exposure to attorney's fees was clearly contemplated and the policy set clear limits on when and how that

exposure would be covered. Since the intent of the policy is to pay attorney's fee awards associated with such "insured contracts", a blanket exclusion of coverage for all claims for attorney's fees would not effectuate the parties' purposes and would deprive the business community of coverage for the attorney's fee exposure related to "insured contracts" which the insurers are prepared to underwrite.

In the context of addressing the exposure for attorney's fees under such indemnity agreements, the Contractual Liability Exclusion states:

> "Solely for the purposes of liability assumed in an 'insured contract', reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of bodily injury….." (Emphasis supplied.)

When the policy states that "solely for" a single purpose, attorney's fees of another party will be deemed to be "damages because of bodily injury", the only reasonable interpretation of the contract as a whole is that when this sole scenario is not satisfied, the award of attorney's fees will not be deemed to be "damages because of bodily injury". As in 116 Condominium Trust, when the insuring agreement is read in conjunction with the exclusions which limit its scope, it is plain that an attorney's fee award under G.L. c.93A, (which does not constitute an "assumed liability" in an "insured contract") cannot be deemed to be "damages because of bodily injury" because it does not fall within the "sole" exception. In order to determine that attorney's fee awards under M.G.L. c.93A are "damages

because of bodily injury", the provisions addressing payment of attorney's fee awards under an indemnity agreement needs to be neutralized or ignored. To do so, however, violates the fundamental principles of policy interpretation requiring that all provisions be given a reasonable interpretation in order to construe the policy as a harmonious whole.

While it is Vermont Mutual's position that standing alone, the phrase "damages because of bodily injury" does not encompass awards of attorney's fees under M.G.L. c.93A, any doubt concerning the proper construction of the policy is removed when the additional provisions addressing indemnity agreements are considered in conjunction with the insuring agreement. When properly construed, the policy does not provide coverage for attorney's fee awards under M.G.L. c.93A since such an award does not satisfy the "sole" criteria for when such awards are deemed to be "damages because of bodily injury".

VI. Decisions from other jurisdictions interpreting different policy forms are not entitled to deference

The Motion Judge relied upon a decision of the Ohio Supreme Court in Neal-Pettit v. Lahman, 125 Ohio St. 3d 327, 928 N.E. 2d 421 (2010) where the Court observed that the insuring agreement did not "limit coverage to damages solely because of bodily injury". Id. at 330. (See also RA 20) Notably, the policy at issue in Neal-Pettit did not have the provisions contained in this policy which set out the "sole" circumstances where attorney's fee incurred by another party are

deemed to be "damages because of bodily". Here, the exact word which the Neal-Pettit Court indicated needed to be in the insuring agreement, is found elsewhere in the policy, making patently clear the policy intent that awards of attorney's fees under "insured contracts" will be covered and any other award of attorney's fees will not be covered. Neal-Pettit is distinguishable and does not guide in the interpretation of this policy form.

The dissenting justices in Neal-Pettit observed that "attorney fees are not compensable damages because of bodily injury" and focused on the availability of such awards only when punitive damages were justified. The 11th circuit took a similar view in Alea London Ltd. V. American Home Services, Inc., 638 F. 3d 768, 779 (11th Cir. 2011). In Alea London, Ltd., the Court held that an attorney fee award under the Telephone Consumer Protection Act (TCPA) was not covered under a policy affording coverage for "damages because of advertising injury" because an attorney fee award to an opponent does not constitute "damages". Once again, however, the policy form considered in Alea London, Ltd., like the policy form construed in Neal-Pettit, did not contain the updated provision setting out the only circumstance that coverage for attorney's fee awards would be provided, i.e., the insured contract exception.

The ISO coverage form at issue (BP0006 01 97) was first available for use starting in 1997, and with that, there are numerous decisions of the Federal District

Court, Superior Courts, and unpublished decisions addressing the "solely" provision in the context of attorney's fee claims under indemnity agreements. None of these decision address the question of whether an award of attorney's fees not made pursuant to an indemnity agreement, is covered as "damages because of bodily injury". The issue presented in this case, under this policy form, is one of first impression.

Where Neal-Pettit, supra, was a split decision over the dissent of two justices involving significantly different policy language, neither Neal-Pettit, nor any other similar decision examining the earlier policy language, provides the basis to adopt the position urged by Ms. Maston. Construing the Servpro policy as a whole such that no provision is rendered superfluous or inexplicable, the only time that attorney's fees of an opponent are covered is when the "insured contract" exception is satisfied. Employing the approach invoked by the Trial Court in reliance on Neal-Pettit renders the "insured contract" exception entirely superfluous, and a nullity, as all attorney's fee awards, whether under indemnity agreements or otherwise, will always be deemed to be covered whenever there is bodily injury. Such a construction violates the cannons of policy interpretation and must be rejected.

CONCLUSION

For the foregoing reasons, Vermont Mutual requests that the Court vacate the separate and final judgment entered by the Trial Court, and order a new judgment declaring that the Vermont Mutual policy issued to Servpro does not provide coverage for the attorney's fee award in the underlying action.

/s/ Peter E. Heppner

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ADDENDUM TABLE OF CONTENTS

i. Memorandum of Decision

11

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1281CV2759

VERMONT MUTUAL INSURANCE COMPANY

vs.

PAUL POIRIOR, JANE POIRIER, AND PHYLLIS MASTON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF DOUGLAS MASTON

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT PHYLLIS MASTON'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Vermont Mutual Insurance Company ("Vermont Mutual") filed this action seeking a declaratory judgment that a business owner's insurance policy (the "Insurance Policy" or the "Policy") it issued to defendants Paul and Jane Poirier ("the Poiriers") does not provide coverage for attorney's fees awarded by the Superior Court and the Appeals Court to defendant and plaintiff-in-counterclaim Phyllis Maston, individually and in her capacity as executrix of the estate of Douglas Maston ("Maston"), in connection with an underlying judgment against the Poiriers. This matter is before the court on Vermont Mutual's motion for summary judgment on its claim for declaratory relief, and Maston's cross-motion for summary judgment, in which she asserts that Vermont Mutual is obligated to provide coverage for the attorney's fees under the Insurance Policy. The Poiriers also oppose Vermont Mutual's summary judgment motion and have joined Maston's cross-motion.[1] After hearing, for the reasons that follow, Vermont

[1] In their opposition memorandum, the Poiriers raise an issue that goes beyond interpretation of the Insurance Policy. They assert that Vermont Mutual is estopped from denying coverage under the Policy based on certain

RA193

Mutual's motion for summary judgment is DENIED, and Maston's cross-motion for summary judgment is, accordingly, ALLOWED.

BACKGROUND[2]

Vermont Mutual provided business owner's insurance to the Poiriers, doing business as Servpro of Fitchburg-Leominster, under the Insurance Policy, with a coverage period from December 17, 1998 to December 17, 2001.

Phyllis Maston and her husband, Douglas Maston (collectively, "the Mastons"), filed a lawsuit in Worcester Superior Court against the Poiriers, doing business as Servpro, as a result of bodily injuries caused on or about June 29, 1999 ("the Underlying Action"). The Insurance Policy was in effect when the injuries giving rise to that lawsuit occurred.

On or about December 11, 2009, a judge of the Worcester Superior Court issued an order in the Underlying Action after a jury-waived trial, in favor of the Mastons, awarding money damages of $267,248.67 to Phyllis Maston for her personal injuries, and $5,000.00 to Douglas Maston for his loss of consortium, on their claims for breach of warranty under G. L. c. 93A. The judge did not find the level of culpability required for multiple damages. Subsequently, the same judge awarded the Mastons $215,328.00 in attorney's fees and $15,447.61 in costs, also pursuant to G. L. c. 93A.

Vermont Mutual appealed the liability finding and the attorney's fees and costs award in the Underlying Action to the Appeals Court. The Appeals Court affirmed the decision on April 24, 2012, and the Supreme Judicial Court denied further appellate review on June 8, 2012. On

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representations it made to them through their attorney. Because this issue will require additional briefing, the parties have agreed to defer further action on it until after this Court issues a decision interpreting the Policy (see Stipulation of the Parties, Paper #10).

[2] The information in this section is based on the agreed statement of facts filed by Vermont Mutual and Maston in connection with their cross-motions for summary judgment, and the exhibits attached to the agreed statement of facts.

June 27, 2012, the Appeals Court awarded the Mastons an additional sum of $21,600.00 in appellate attorney's fees, and $1,970.35 in appellate costs.

On or about July 9, 2012, Vermont Mutual paid the Mastons $696,669.48, which represented payment for all sums awarded except the attorney's fees and interest thereon in the Underlying Action and in the appeal from that action.

The Insurance Policy provides, in relevant part, as follows:

"A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury', 'property damage', 'personal injury or 'advertising injury to which this insurance applies. . . . No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension – Supplementary Payments. . . .

c. Damages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury" . . .

d. Coverage Extension – Supplementary Payments

In addition to the Limit of Insurance, we will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend . . .

(5) All costs taxed against the insured in the 'suit'.

B. Exclusions

1. This insurance does not apply to . . .

b. Contractual Liability

'Bodily injury' or 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages: . . .

> (2) Assumed in a contract or agreement that is an 'insured contract' . . . Solely for the purposes of liability assumed in an 'insured contract', reasonable attorney's fees and necessary litigation expenses incurred by or for a party other than the insured are deemed to be damages because of 'bodily injury' or 'property damage,' provided:
>
> (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same 'insured contract'; and
>
> (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged. . . .

F. Liability and Medical Expenses Definitions

> 3. 'Bodily injury' means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time. . . .
>
> 8. "Insured contract' means: . . .
> f. That part of any contract or agreement pertaining to your business . . . Under which you assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization."

The Insurance Policy is a "Business Owners Liability Form" prepared by the Insurance Services Office (ISO). After Vermont Mutual issued the Poiriers' Insurance Policy, ISO amended the "Business Owners Liability Form," changing the language for "Coverage Extensions-Supplementary Payment," under section "A," subsection "d." The new language specifically excludes attorney's fees and attorney's expenses from coverage available for "court costs taxed against the insured in the 'suit.'" Vermont Mutual adopted the amended form, but the Poirier's coverage was not affected by this change.

DISCUSSION

Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v.

General Motors Corp., 410 Mass. 706, 714 (1991). In this case, the relevant facts are not disputed, and the sole issue involves the proper interpretation of the Insurance Policy, which is a question of law. Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, 449 Mass. 621, 628 (2007).

An insurance policy is interpreted in the same way as any other contract. The court "must ascertain the fair meaning of the language used as applied to the subject matter." Save-Mor Supermarkets, Inc., v. Skelly Detective Services, 359 Mass. 221, 226 (1971). When language in an insurance policy is ambiguous, it must be "interpreted against the insurer . . . and in favor of the insured." Allmerica, 449 Mass. at 628. "This rule of construction applies with particular force to exclusionary provisions." Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 282 (1997). However, contract language is not ambiguous simply because the parties disagree as to its proper interpretation. Jefferson Ins. Co. of New York v. Holyoke, 23 Mass. App. Ct. 472, 475 (1987). "An ambiguity exists in an insurance contract when the language contained therein is susceptible of more than one meaning. . . .It must be shown that reasonably intelligent persons would differ as to which one of two or more meanings is the proper one." Id. at 474-475 (internal citations omitted).

Vermont Mutual asserts that the Insurance Policy does not provide coverage for the attorney's fees awarded against the Poiriers because: (1) where the Policy explicitly provides coverage for attorney's fees as "damages for 'bodily injury'" in a single scenario, in an exception to an exclusion not applicable to this case, attorney's fees are not otherwise covered as "damages for 'bodily injury'" under the Policy, and a contrary interpretation would render the exception superfluous; (2) attorney's fees awards are not "damages because of 'bodily injury'" under G. L. c. 93A because the statute distinguishes between and treats separately "actual damages" and

attorney's fees, and because attorney's fees may be awarded under the statute even where only nominal damages are recovered; and (3) attorney's fees awarded under G.L. c. 93A are not "costs taxed against the insured in the 'suit.'" Maston and the Poiriers contend that the attorney's fees are covered under the Policy, either as "damages because of 'bodily injury'" or as "costs," and that to the extent the Policy language is ambiguous in either regard, it must be construed in favor of the Poiriers, as the insured. The parties' contentions will be addressed sequentially.

I. The effect of the Insurance Policy's exception covering attorney's fees

The Insurance Policy's general exclusion of coverage for an insured's contractual liability is subject to an exception, under which attorney's fees and litigation expenses are covered as "damages because of 'bodily injury.'" This exception applies "*solely* for the purposes of liability assumed in an 'insured contract.'" (Emphasis added).

Vermont Mutual argues that this exception must be interpreted to mean that attorney's fees are not covered elsewhere in the Policy, and suggests that a contrary interpretation would render the exception superfluous and entirely unnecessary. See Sherman v. Employers Liability Assurance Corp., 343 Mass. 354, 357 (1961) (an insurance policy should be interpreted to avoid leaving any part of it "useless or inexplicable."). This argument lacks merit.

The exception is neither superfluous nor ambiguous. It modifies the Policy's exclusion of coverage for bodily injury for which an "insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement," in the limited circumstances where an insured is contractually liable to indemnify a third party, and incurs attorney's fees and litigation expenses in defending that third party in a civil proceeding. The exception is narrowly tailored to this single factual scenario, and, as such, it cannot be read to modify the Policy's general grant

of coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury.'" That phrase must be interpreted without reference to the exception.

II. Attorney's fees as "damages because of 'bodily injury'" under G. L. c. 93A

As Vermont Mutual notes, damages and attorney's fees are treated as separate forms of recovery under sections 9(1) and 9(4) of G.L. c. 93A, and attorney's fees are recoverable under the statute even when only nominal damages are awarded. See Barron v. Fid. Magellan Fund, 57 Mass. App. Ct. 507, 515-516 (2003).

However, the issue in this case is not whether attorney's fees are treated differently from damages under chapter 93A, but rather, whether attorney's fees may be considered as covered "sums that the insured becomes obligated to pay as damages because of 'bodily injury'" under the Policy. To construe this language, the court must consider what the plain meaning of the policy would be to an objectively reasonable insured party. Boazova v. Safety Insurance Co., 462 Mass. 346, 358 (2012); Trustees of Tufts Univ. v. Commercial Union Ins. Co., 415 Mass. 844, 849 (1993); Hazen Paper Co. v. United States Fid. & Guar. Co., 407 Mass. 689, 700 (1990).

The parties have not identified, and the court is not aware of, any Massachusetts cases directly on point. The defendants rely on Neal-Pettit v. Lahman, 125 Ohio St. 3d 327, 928 N.E.2d 421 (2010), in which the Ohio Supreme Court examined an Allstate insurance policy with language analogous to the Vermont Mutual Policy at issue here, and concluded that an award of attorney's fees may be characterized as "damages which an insured person is legally obligated to pay because of bodily injury sustained by any person."

In Neal-Pettit, the plaintiff sued the defendant for compensatory and punitive damages as the result of an automobile accident. A jury awarded the plaintiff compensatory and punitive damages, and also awarded attorney's fees based on a finding that the defendant had acted with

malice. The trial court established the amount of attorney's fees, and also awarded certain expenses. Allstate, the defendant's automobile insurer, paid the plaintiff the amounts awarded as compensatory damages, interest, and expenses, but denied payment of the punitive damages and attorney's fees. The plaintiff later successfully argued on summary judgment that she was entitled to the attorney's fees. The summary judgment order was affirmed by Ohio's Eighth District Court of Appeals, which held that attorney's fees are "conceptually distinct" from punitive damages, and that, while the Allstate policy language expressly excluded coverage for punitive damages, it did not exclude coverage for attorney's fees.

In affirming the judgment of the Eighth District, the Ohio Supreme Court rejected Allstate's argument "that the award is not covered under the policy, because attorney fees are not damages themselves, but are derivative of punitive damages and thus are not awarded as a result of bodily injury." Id. at 329. Rather, the Court noted that the Allstate policy did not define the term, "damages," id. at 329, and did "not limit coverage to damages *solely* because of bodily injury." Id. at 330 (emphasis in original). The Court also noted that attorney's fees, even when awarded as a result of punitive damages, "stem from the underlying bodily injury." Id. Ultimately, the Court concluded that "[a]ttorney fees may therefore fall under the insurance policy's general coverage of 'damages which an insured person is legally obligated to pay' because of 'bodily injury,'" as long as they are not specifically excluded by other language in the policy. Id.

The Ohio Supreme Court's analysis is informative. The Vermont Mutual Policy similarly does not define the term "damages," and does not limit coverage to damages solely because of bodily injury. Additionally, the Policy does not specifically exclude attorney's fees from coverage as "those sums that the insured becomes obligated to pay as damages because of

'bodily injury.'" As such, a reasonable person in the Poiriers' position would understand the phrase, "those sums that the insured becomes obligated to pay as damages because of 'bodily injury,'" to encompass coverage for attorney's fees awarded in connection with a judgment for breach of warranty under G. L. c. 93A. See Boazova, 462 Mass. at 358. Moreover, to the extent that phrase is susceptible to more than one interpretation, it must be construed in favor of the insured. Allmerica, 449 Mass. at 628.

Vermont Mutual had the option to draft its Policy to avoid this result. It could simply have defined "those sums that the insured becomes obligated to pay as damages because of 'bodily injury'" to exclude attorney's fees.[3] In failing to do so, it exposed itself to liability for attorney's fees where, as here, those fees stemmed from the underlying bodily injury. For this reason, Vermont Mutual's motion for summary judgment must be denied, and the defendants' cross-motion allowed.

III. Attorney's fees as costs taxed against the insured

The defendants alternatively contend that the attorney's fees awarded against the Poiriers are recoverable as costs under the "Coverages Extension-Supplementary Payments" section of the Policy which states: "In addition to the Limit of Insurance we will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend . . . [a]ll costs taxed against the insured in the 'suit.'" Again, the parties have not cited, and the court is not aware of, any Massachusetts case that is directly on point.

In support of their argument, the defendants point to a decision of the Idaho Supreme Court, interpreting the same language that appears in the Vermont Mutual Policy. In Mutual of

[3] As noted previously, Vermont Mutual has now adopted new wording in its standard business owner's policy to specifically exclude coverage for attorney's fees as court costs taxed against its insured in a suit.

Enumclaw v. Harvey, 115 Idaho 1009, 772 P.2d 216 (1989), the Idaho Supreme Court held that "costs taxed against the insured in the suit" included attorney's fees and costs awarded against the insured in the underlying action. The Court noted that, "though the word 'costs' as a legal term of art may be ambiguous, it is not so from the perspective of the ordinary person unfamiliar with the jargon of the legal and insurance professions standing in the position of the insured. An insurance policy must be interpreted from that perspective . . . [and] [t]he plain, ordinary and popular meaning of 'costs' is the expense of litigation which includes attorney's fees." 115 Idaho at 1013. The defendants also point to the fact that Vermont Mutual is now using a new "Business Owner's Liability Form" which specifically excludes attorney's fees from coverage as "costs taxed against the insured in the suit" (see n. 3, *supra*). The defendants argue that this change is evidence that the Poiriers' Policy, which does not include the language of exclusion, should be interpreted to cover attorney's fees, or that, at a minimum, the Policy language is ambiguous and must be interpreted in their favor.

However, as Vermont Mutual notes, the term "taxable costs" has a specific meaning under Massachusetts law, and such costs are distinct from attorney's fees. Thus, "costs" is not ambiguous as a legal term of art in Massachusetts. See, generally, Waldman v. American Honda Motor Co., 413 Mass. 320, 321-322 (1992). The Washington Court of Appeals has held, in defining coverage for "taxable costs" to exclude attorney's fees, that "[a] legal or technical meaning will be applied to a term in an insurance policy if 'it is clear that the parties to the contract intended that the language have a [legal or] technical meaning.'" Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 786 (2010), quoting Thompson v. Ezzell, 61 Wn. 2d 685, 688 (1963) (second alteration in original). Because both the insured and the insurer were sophisticated business entities, the Court held that they intended to define "taxable costs"

according to its common legal meaning in Washington, which does not include attorney's fees. Polygon, 143 Wn. App. at 786.

In this court's view, particularly because the Insurance Policy is a business owner's policy, the analysis of the Washington court is persuasive, and more consistent with Massachusetts law. However, because the attorney's fees awarded to Maston are covered under the Policy as "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury,'" as discussed, *supra*, it is not necessary to determine whether they are also covered as "costs taxed against the insured in the 'suit.'"

ORDER

Based on the foregoing, plaintiff Vermont Mutual's motion for summary judgment is **DENIED**, and defendant Maston's cross-motion for summary judgment, in which defendants Paul and Jane Poirier join, is **ALLOWED**. Accordingly, judgment shall enter declaring that the Vermont Mutual Insurance Policy provides coverage for Maston's attorney's fees under its general provision for coverage of damages for bodily injury.

Dated: July 12, 2016

Kathe M. Tuttman
Justice of the Superior Court

ii. Pertinent policy provisions

BUSINESSOWNERS LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section C - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section F- Liability And Medical Expenses Definitions.

A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury", or "advertising injury" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.
But:

(1) The amount we will pay for damages is limited as described in Section D-Liability And Medical Expenses Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension - Supplementary Payments.

b. This insurance applies:

(1) To "bodily injury" and "property damage" only if:

(a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(b) The "bodily injury" or "property damage" occurs during the policy period.

(2) To:

(a) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you;

(b) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services;

but only if the offense was committed in the "coverage territory" during the policy period.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

d. Coverage Extension - Supplementary Payments

In addition to the Limit of Insurance we will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

(1) All expenses we incur.

(2) Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which Business Liability Coverage for "bodily injury" applies. We do not have to furnish these bonds.

(3) The cost of bonds to release attachments, but only for bond amounts within our Limit of Insurance. We do not have to furnish these bonds.

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(4) All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

(5) All costs taxed against the insured in the "suit".

(6) Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the Limit of Insurance, we will not pay any prejudgment interest based on that period of time after the offer.

(7) All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within our Limit of Insurance.

If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph B.1.b.(2) of Exclusions, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in Paragraph f. above are no longer met.

2. Medical Expenses

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the Limit of Insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

B. Exclusions

1. Applicable To Business Liability Coverage

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. **Employer's Liability**

"Bodily Injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(a) Whether the insured may be liable as an employer or in any other capacity; and

(b) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. **Pollution**

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured;

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any insured or any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations:

(i) If the pollutants are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor; or

(ii) If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Subparagraph (d)(i) does not apply to "bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if *the fuels, lubricants or other operating* fluids are intentionally discharged, dispersed or released, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent to be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor.

Subparagraphs (a) and (d)(i) do not apply to "bodily injury" or "property damage" arising out of heat, smoke or fumes from a hostile fire.

As used in this exclusion, a hostile fire means one which becomes uncontrollable or breaks out from where it was intended to be.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand or order that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading".

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of the operation of any of the following equipment:

(a) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(b) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition or stunting activity.

i. War

"Bodily injury" or "property damage" due to war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution. This exclusion applies only to liability assumed under a contract or agreement.

j. Professional Services

"Bodily injury", "property damage", "personal injury" or "advertising injury" due to rendering or failure to render any professional service. This includes but is not limited to:

(1) Legal, accounting or advertising services;

(2) Preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications;

(3) Supervisory, inspection or engineering services;

(4) Medical, surgical, dental, x-ray or nursing services treatment, advice or instruction;

(5) Any health or therapeutic service treatment, advice or instruction;

(6) Any service, treatment, advice or instruction for the purpose of appearance or skin enhancement, hair removal or replacement or personal grooming;

(7) Optometry or optical or hearing aid services including the prescribing, preparation, fitting, demonstration or distribution of ophthalmic lenses and similar products or hearing aid devices;

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation, or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization that may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. **Financial Responsibility Laws**

a. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, the insurance provided by the policy for "bodily injury" liability and "property damage" liability will comply with the provisions of the law to the extent of the coverage and limits of insurance required by that law.

b. With respect to "mobile equipment" to which this insurance applies, we will provide any liability, uninsured motorists, underinsured motorists, no-fault or other coverage required by any motor vehicle law. We will provide the required limits for those coverages.

4. **Legal Action Against Us**

No person or organization has a right under this policy:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

5. **Separation Of Insureds**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

F. **Liability And Medical Expenses Definitions**

1. "Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan.

2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

   b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or

   c. All parts of the world if:

      (1) The injury or damage arises out of:

         (a) Goods or products made or sold by you in the territory described in a. above; or

         (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

      (2) The insured's responsibility to pay damages is determined in a "suit" on the merits in the territory described in a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

   a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

   b. You have failed to fulfill the terms of a contract or agreement;

   if such property can be restored to use by:

      (1) The repair, replacement, adjustment or removal of "your product" or "your work"; or

      (2) Your fulfilling the terms of the contract or agreement.

8. "Insured contract" means:

   a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

   b. A sidetrack agreement;

   c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

   d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

   e. An elevator maintenance agreement;

   f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

   Paragraph f. does not include that part of any contract or agreement

   (1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing;

   (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

      (a) Preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection or engineering services.

9. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

10. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

11. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, on which are permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

12. "Occurrence" means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

13. "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor;

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

14. "Products - completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at the job site has been put to its intended use by any other person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

The "bodily injury" or "property damage" must occur away from premises you own or rent, unless your business includes the selling, handling or distribution of "your product" for consumption on premises you own or rent.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured; or

(2) The existence of tools, uninstalled equipment or abandoned or unused materials.

15. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

16. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

17. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

18. "Your product" means:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(1) You;

(2) Others trading under your name; or

(3) A person or organization whose business or assets you have acquired; and

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

b. The providing of or failure to provide warnings or instructions.

"Your product" does not include vending machines or other property rented to or located for the use of others but not sold.

iii. **Stephens v. Commonwealth,100 Mass. App. Ct. 1102 (2021), 2021 Mass. App. Unpub. LEXIS 529, 2021 WL 3027289**

Stephens v. Commonwealth

Appeals Court of Massachusetts

July 19, 2021, Entered

20-P-840

Reporter
2021 Mass. App. Unpub. LEXIS 529 *; 100 Mass. App. Ct. 1102; 2021 WL 3027289

JAMES STEPHENS *vs.* COMMONWEALTH.

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See *Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008)*.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

Disposition: Judgment affirmed.

Core Terms

convictions, vacated, license, guilty plea, inconsistency, instructions, innocent, felony, instruction of a jury, inconsistent verdict, license application, entitled to relief, motor vehicle, civil case, impersonating, girlfriend's, discharged, distribute, indictment, apartment, connected, preserved, contends, answers, conceal, grounds, waived

Judges: Sullivan, Desmond & Singh, JJ. **[*1]**

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, James Stephens, appeals from a Superior Court jury verdict finding that he was not entitled to compensation for a wrongful conviction under G. L. c. 258D, § 1. On appeal he contends that (1) there was error in the jury instruction regarding the relationship between an offense to which he pleaded guilty and the conviction that was vacated, and (2) the jury's verdict was legally inconsistent. We affirm.

Background. Subsequent to the execution of a search warrant on his girlfriend's residence, the plaintiff was charged with (1) conspiracy to violate drug laws, G. L. c. 94C, § 32A (c); (2) falsely impersonating a person in an application for a motor vehicle license, G. L. c. 90, § 24B; and (3) possession of cocaine with intent to distribute, G. L. c. 94C, § 32A (c). In June 2008, a jury found the plaintiff guilty of counts two and three. The plaintiff's convictions were subsequently vacated, and the case was remanded for a new trial. See *Commonwealth v. Stevens,*[1] *81 Mass. App. Ct. 1117, 962 N.E.2d 245 (2012)* (unpublished decision issued pursuant to our former rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]). On remand, the plaintiff pleaded guilty to falsely impersonating a person in an application for a motor vehicle license. The jury found the **[*2]** plaintiff guilty of the distribution charge. See *Commonwealth v. Stevens, 87 Mass. App. Ct. 1119, 30 N.E.3d 134 (2015)* (unpublished decision issued pursuant to our former rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]). Once again, the plaintiff appealed, and the conviction was vacated, this time on sufficiency grounds. See *id.*

In May 2016, the plaintiff filed a civil suit seeking compensation for the erroneous drug conviction. The jury found that he was innocent of the distribution offense, but that the false license application offense arose out of or was connected to the narcotics charge.

[1] Stephens was prosecuted under the name "Stevens," but he filed this action under the name "Stephens."

Accordingly, the jury returned a verdict in favor of the Commonwealth.

Discussion. Jury instructions. Entitlement to compensation under G. L. c. 258D turns, among other things, on a showing that the plaintiff "did not commit the crimes or crime charged in the indictment or complaint or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony." G. L. c. 258D, § 1 (C) (vi). The judge gave a comprehensive jury instruction regarding the relationship between the false license offense to which the plaintiff pleaded guilty, and the convictions that were later vacated on appeal.[2]

The plaintiff now asserts error in that instruction, specifically with respect to the definitions of "arising out of" and "connection." The plaintiff did not object at the time the instructions were given. See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974). In fact, the plaintiff agreed that the instruction was correct.[3] Accordingly, this argument is waived on appeal. See *Selmark Assocs. v. Ehrlich, 467 Mass. 525, 547 n.37, 5 N.E.3d 923 (2014)* ("Our rules require that, to claim error in the jury charge on appeal, an objection must first be made before the trial court judge"). See also Composto v. Massachusetts Bay Transp. Auth., 48 Mass. App. Ct. 477, 480, 722 N.E.2d 984 (2000).

Even if the issue was preserved, it has not been made to appear that the judge's definition of "arising out of" was erroneous.[4] The plaintiff attempts to import a much narrower meaning to the words "arising out of" on appeal, claiming that the offenses should have a "peculiar" or "intrinsic" connection. Had the legislature wished to employ such a test, it could have selected other language. Arguably, **[*5]** the broad language of the statute reflects the legislature's intent in balancing the Commonwealth's interest in preserving its right to sovereign immunity against the competing interest in providing the wrongfully convicted with a mechanism for the recovery of damages. See *Irwin v. Commonwealth, 465 Mass. 834, 840-843, 992 N.E.2d 275 (2013)*. However, in the absence of objection, we decline to reach the issue.

2. *Legally inconsistent verdict.* The plaintiff also contends that he is entitled to relief because the verdict was legally inconsistent. When a party is faced with an inconsistent jury verdict, the litigant "must request the judge to instruct the jury to reconsider their verdict before they are discharged and when there is time to correct any inconsistency." *Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 466, 781 N.E.2d 787 (2003)*. "Failure to make such a timely request constitutes a waiver of any challenge to the verdict on the ground that it is inconsistent." *Id.* This rule applies with equal force to claims of legal inconsistency in civil cases. See Adams v. United States Steel Corp., 24 Mass. App. Ct. 102, 104, 506 N.E.2d 893 (1987). The jury were discharged without objection, and the argument is therefore waived on appeal.

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[2] The judge's instructions on the issue were:

> "If . . . you find that there is some relationship between the two **[*3]** [charges], then you must decide whether the relationship meets at least one of two tests. The first test is whether the false application offense arises out of the facts supporting the narcotics charge.
>
> "The phrase arised out of means that the false application offense originates from, grows out of, flows from, or has a connection with the narcotics charge. To find that the false application charge arises out of the narcotics charge you would have to find that the facts supporting the false application offense originate from, grow out of, flow from, or have a connection with the narcotics charge. If so, then you answer question yes. If not, then you still need to consider the second test.
>
> "The second test asks whether the false application offense is reasonably connected to the facts, if any, supporting the narcotics charge. This test has three parts. You start by looking at what facts, if any, supported the narcotics charge, then you ask whether those facts are connected to the false application offense. If so, then the third step requires you to assess whether the connection is reasonable. For this purpose reasonable means that the connection is logical and meaningful rather than farfetched, **[*4]** trivial, or insubstantial."

[3] In response to a jury question, plaintiff's counsel, in a discussion with the judge, agreed that the instruction was correct. He stated:

> "And then, again, I note that the court used — defined arise out of to mean that the false application offense originates from, grows out of, flows from, or has a connection with the charge — the narcotics charges. And I think that's a sensible definition of arise out of . . ."

[4] The plaintiff urges us to review for a substantial risk of a miscarriage of justice. Substantial risk review is reserved for criminal cases. See ***Commonwealth v. Randolph, 438 Mass. 290, 294-295, 780 N.E.2d 58 (2002)***. We are unaware of any case applying this standard in a civil case for money damages and the plaintiff has not cited one.

If we were to consider the merits of the claim, the plaintiff is still not entitled to relief. Reversal of a civil case on the grounds of a legally inconsistent verdict is a rarity. **[*6]** "In determining whether there is an inconsistency in the jury's answers, the answers are to be viewed in the light of the attendant circumstances, including the pleadings, issues submitted, and the judge's instructions." *Palriwala v. Palriwala Corp., 64 Mass. App. Ct. 663, 670-671, 834 N.E.2d 1241 (2005)*, quoting *Solimene v. B. Grauel & Co., KG, 399 Mass. 790, 800, 507 N.E.2d 662 (1987)*. The jury were permitted to conclude that the plaintiff tried to get a false license to conceal his identity, and that he wanted to conceal his identity because he was involved in drug distribution with others in the apartment. The jury could also have concluded that the plaintiff was innocent of possessing or distributing the drugs that were found by the police that day in his girlfriend's apartment. But that does not mean that the license application offense and the distribution charge were unrelated. The erroneous conviction statute permits plaintiffs to recover only if they can prove that they were innocent of the underlying crime (here distribution) and all other related felonies. See *G. L. c. 258D, § 1 (C) (vi)*. Thus, the statute specifically contemplates situations such as this where one or more convictions are vacated but other convictions remain intact.

Judgment affirmed.

By the Court (Sullivan, Desmond & Singh, JJ.[5]),

Entered: July 19, 2021.

End of Document

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[5] The panelists are listed in order of seniority.

CERTIFICATE OF COMPLIANCE

I, Peter E. Heppner, hereby certify that the foregoing Appellant's Brief for Vermont Mutual Insurance Company complies with the applicable Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including Mass.R.App.P. 16(a)(13), 16(e), 18, 20, and 21.

This Brief has been prepared using Times New Roman typeface in 14-point size via the Microsoft Word 2010 program.

Excluding the Table of Contents, Table of Authorities, and Certificate of Service, this Brief contains 8,594 words, including 5,634 words of argument.

Signed under the pains and penalties of perjury this 13th day of August, 2021.

/s/ Peter E. Heppner

Peter E. Heppner, Esq.

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Rules of Appellate Procedure 13(d), I hereby certify, under the penalties of perjury, that on August 13, 2921, I have made service of this Brief upon the attorney of record for each party, by email and the Electronic Filing Service Provider (Massachusetts Court System Tyler Host) on:

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