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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Defendants' motions for directed verdict and judgment notwithstanding the verdict, where there was insufficient evidence to sustain a verdict in Plaintiffs' favor on their negligence claim.
2. Whether the trial court erred in denying Defendants' request for an instruction on comparative negligence, where there was ample evidence that Ms. Herman's own negligence contributed to the development of her respiratory problems.
3. Whether the trial court abused its discretion in denying Defendants' request for a special question regarding causation, where causation was a central and hotly contested issue at trial.
4. Whether the trial court abused its discretion in submitting the G.L. c. 93A count to the jury, where doing so was highly prejudicial to Defendants.
5. Whether the trial court properly awarded damages pursuant to G. L. c. 93A, §9(3) on a joint and several basis.

STATEMENT OF THE CASE

This appeal arises out of a civil action in which Helen Herman and Christian Langlois (collectively, "Plaintiffs") sought damages arising out of the alleged acts and omissions of John Sullivan, Kevin Sullivan and Margaret Sullivan (collectively, "Sullivans" or "Defendants") during the course of Plaintiffs' tenancy at 56 River Road in Tewksbury, Massachusetts (the "56 River Road residence"). On March 30, 2005, Ms. Herman and Mr. Langlois filed a complaint alleging negligence, breach of the implied warranty of habitability and breach of the covenant of quiet enjoyment. The complaint was later amended to add a count under G. L. c. 93A, §9. A. 14-18.¹

Trial by jury on Plaintiffs' complaint was held on March 3 through March 12, 2009.² At the close of Plaintiffs' case, the Sullivans moved for a directed verdict on all claims. A. 42. The Sullivans renewed their motion at the close of all evidence. A. 43. Both motions were denied.

¹References to the Appendix are indicated by "A."

² Justice David D. Kerman of the Northeast Housing Court presided over the jury trial, sitting as a Superior Court judge by designation pursuant to G. L. c. 111B, §9.

In spite of the Sullivans' requests and timely objections, the trial court failed to instruct the jury on comparative negligence, T. 961-964, 998,³ declined to include a special question regarding the issue of causation on the special verdict slips, T. 960-961, 998-999, and submitted the G. L. c. 93A count to the jury, T. 2-3, 5-7, 968, 998.

On March 12, 2009, the jury returned a verdict in Plaintiffs' favor on all counts. A. 73-79. In a case where the jury awarded damages amounting to only \$4,200 and \$12,600 on Plaintiffs' breach of the implied warranty of habitability and covenant of quiet enjoyment claims, A. 75-76, the jury awarded actual damages amounting to \$726,000 on the negligence and G. L. c. 93A claims, A. 74, 77. On April 16, 2009, the trial court entered judgment in favor of Plaintiffs and awarded double damages pursuant to G. L. c. 93A, §9(3) against John and Kevin Sullivan on a joint and several basis. A. 80-86. Final judgment entered on May 4, 2009. A. 87. Two days later, Plaintiffs filed a motion to alter or amend the judgment. The following day, on May 7, 2009, the

³References to the Transcript are indicated by "T." These pages are included in the second and third volumes of the Joint Appendix in Transcript Volumes I and II.

Sullivans filed a motion for judgment notwithstanding the verdict. A. 97-98. On May 26, 2009, the trial court entered an order denying the Sullivans' motion for judgment notwithstanding the verdict and Plaintiffs' motion to alter or amend the judgment. A. 99-107.

The Sullivans filed their Notice of Appeal on June 1, 2009. A. 108. Ms. Herman and Mr. Langlois filed their Cross Notice of Appeal on June 3, 2009. A. 109.

STATEMENT OF THE FACTS

1. Plaintiffs' Tenancy. In 2003, Plaintiff Helen Herman sought to relocate from her home in Wilmington, Massachusetts. T. 240. She viewed two other homes in Tewksbury, before visiting the 56 River Road residence which was owned by the Sullivans. A. 472, 475. After inspecting the 56 River Road residence on at least three occasions, T. 830, Ms. Herman took occupancy as a month-to-month tenant on July 15, 2003, T. 486-488. Mr. Langlois was often at the 56 River Road residence after Ms. Herman took occupancy, and he moved in after he and Ms. Herman got married on September 27, 2004. T. 579, 634.

Ms. Herman testified at trial that, shortly after moving into the 56 River Road residence, she noticed that the closets were damp, moldy, and mildewed. T. 246.

Rather than inform the Sullivans of the problem, she attempted to remedy it herself. T. 247. Similarly, although Ms. Herman claimed that she began to notice a musty smell at the 56 River Road residence in the winter of 2003, she did not notify the Sullivans until March 2004. T. 261-262, 489.

In September 2003, Ms. Herman began to experience problems with a leak in her kitchen sink. T. 250-251, 261. After she notified John Sullivan, he sent workers to repair the leak on at least three occasions. T. 580. According to Ms. Herman's testimony, the Sullivans addressed three plumbing issues at the 56 River Road residence. First, the Sullivans paid for the replacement of the kitchen sink strainer in September 2003, resolving the leak temporarily. T. 251, 261-263. Second, in the spring of 2004, the Sullivans repaired a leak in the kitchen sink's elbow, by putting putty around the joint, resolving the leak once again. T. 274. Third, the Sullivans arranged for the replacement of a rotted drainpipe at the property. T. 272-273, 276. On one occasion, when Ms. Herman turned the Sullivans' workers away, T. 279-289, the Sullivans arranged, at an additional cost to them, for the workers to return the next day to conduct repairs. T. 840-842.

In August 2004, Ms. Herman complained to John Sullivan that the leak continued to be a problem. T. 266-267. However, when Mr. Sullivan contacted Ms. Herman, Ms. Herman informed him that the sink wasn't a "big deal" and that the issue had already been taken care of. T. 850.

Although neither Ms. Herman nor Mr. Langlois made any further complaints about the kitchen sink, in November 2004, Ms. Herman notified the Sullivans of a moisture problem at the 56 River Road residence. T. 289. On February 9, 2005, Dean Trearchis of the Board of Health inspected the property at Plaintiffs' request. T. 757.

On February 11, 2005, the Board of Health sent the Sullivans a letter, requiring them to conduct repairs at the property. A. 19-20. Although no professional tests had confirmed the presence of mold at the property, John Sullivan promptly hired workers to bring the 56 River Road residence into compliance with the February 11, 2005 correspondence. T. 858-860. When Mr. Trearchis returned to the property for a second inspection on February 16, 2005, he observed Mr. Sullivan's workers conducting repairs at the property. T. 768. The Board of Health then sent follow up correspondence to the Sullivans,

clarifying the required repairs. A. 11-12. On March 5, 2005, Mr. Trearchis once again returned to the property and observed that the Sullivans were working to comply with the Board's requirements. T. 779-780.

By May 2005, the Sullivans had completed repairs to bring the 56 River Road residence into compliance with the Board of Health's February 2005 correspondence, and as a result, on May 12, 2005, the Board closed the case. T. 781-782. The Board would not have done so if it did not believe the property was in compliance. T. 801-802.

Ms. Herman and Mr. Langlois vacated the 56 River Road residence during the first week of March 2005. T. 339. On March 10 and March 14, 2005, Mark Goldman conducted the first professional mold testing at the property at the Sullivans' request.⁴ T. 680. The test results yielded "relatively low" levels of mold at the 56 River Road residence. T. 687. In fact, the results in the kitchen/dining room area were "a common level frequently exceeded outside." T. 691. According to Mr.

⁴The only other professional mold testing was conducted by David Gordon on December 8, 2006, more than 18 months after Plaintiffs had moved out of the 56 River Road residence. T. 166, 191. At that time, Mr. Gordon took air and surface samples, which indicated "massive amounts of mold." T. 176. He admitted, however, that water intrusions occurring after Ms. Herman and Mr. Langlois vacated the premises could account for the dramatic increase in mold. T. 176-177.

Goldman, low levels of mold can be found in nearly every home in New England. T. 692. Although mold requires elevated moisture levels in order to grow, T. 700, Mr. Goldman found only normal moisture levels at the property, T. 701. The moisture levels were below the threshold necessary to establish fungal growth. T. 701.

Ms. Herman's Respiratory Problems. In the early spring of 2004, Ms. Herman began to experience "huffing and puffing" upon exertion, wheezing, coughing and mucus production. T. 285-287. Although her symptoms began in the spring, Ms. Herman first visited Dr. McKee at the Lahey Clinic about her respiratory problems in December 2004. T. 302, 308. On February 28, 2005, just a few days before she moved out of the 56 River Road residence, Ms. Herman was sent for allergy testing. T. 539. The results of the test were negative for an allergy to mold, T. 125-128, 543. In fact, she showed no reaction to the types of mold that Mr. Goldman discovered in low levels at the property in March 2005: cladosporium, T. 127, 542, 692-693, aspergillus, T. 127-128, 692-693, and penicillium, T.128, 542, 692-694, 697. Consequently, her allergist was unable to conclude that her respiratory symptoms were mold-related. T. 322. Much

like her allergist, Ms. Herman's treating pulmonologist failed to conclude that her respiratory symptoms were related to mold exposure, T. 658-659; he suspected, however, that Ms. Herman suffered from multiple chemical sensitivity, a diagnosis in which individuals are "hypersensitive to many different exposures in their environment," T. 664. Finally, based on a review of Ms. Herman's records, an expert in pulmonary medicine concluded that Ms. Herman's pulmonary function tests from February 28, 2005 and January 26, 2006 were normal, T. 15, she showed no signs of an allergy to mold, T. 19, and, as of 2006, she did not suffer from asthma as a result of mold exposure, T. 19.

In contrast to the conclusions of two of Ms. Herman's treating physicians and a leading expert in pulmonary medicine, Dr. Karen Hyuck opined that Ms. Herman's respiratory problems were mold-related, although she did not begin seeing Ms. Herman until December 2007, T. 100, nearly two years after Plaintiffs moved out of the 56 River Road residence, and after Ms. Herman had experienced several additional occupational and environmental exposures to noxious substances, T. 351, 354-356, 359-360. In arriving at her opinion, Dr. Hyuck

disregarded the fact that Ms. Herman had tested negative for an allergy to mold in February 2005, T. 125-129; relied upon pulmonary testing conducted in January 2008, nearly three years after Plaintiffs vacated the 56 River Road residence, T. 98; and only confirmed Ms. Herman's exposure to mold at the premises between 2003 and 2005 by reference to mold testing conducted by Mr. Gordon more than 18 months after Plaintiffs had moved out, T. 101. Furthermore, although Dr. Hyuck attempted to discount some of the potential alternative causes of Ms. Herman's respiratory problems, T. 77-80, her records were often incomplete and lacked specific details as to the nature and extent of Ms. Herman's exposures to noxious substances, T. 125-129.

3. Ms. Herman's Other Exposures. Although Ms. Herman claimed that her respiratory problems were the result of mold exposure at the 56 River Road residence, she was exposed to numerous harmful substances over the course of her lifetime through both her social habits and her employment.

Ms. Herman began smoking when she was a teenager, T. 323, and only quit in 2004, after her respiratory problems began, T. 324. Mr. Langlois smoked at the 56 River Road residence throughout Plaintiffs' tenancy

there. T. 608. In 1999, Ms. Herman began participating in group motorcycle rides, during which she would inhale exhaust fumes from the motorcycles in front of her. T. 239-240, 465-468, 492-493. During her tenancy at 56 River Road, she and Mr. Langlois went on day-long motorcycle rides nearly every weekend. T. 635-637.

Ms. Herman's employment also exposed her to a variety of noxious chemicals. At the outset of her career, Ms. Herman spent at least five years as a construction laborer, where she was exposed to diesel fumes and dust. T. 216, 400. In 1987, she began working for the MBTA, where she spent at least seven and a half years as a bus driver. T. 230-231. During that time, she spent between 30 and 40 hours per week driving in Boston, Somerville, Medford, Malden, Burlington, Everett, and Charlestown, T. 437-438, and was exposed to exhaust fumes on a daily basis, T. 421.

After a three year stint as a flagger, Ms. Herman began working in a collector's booth for the MBTA. T. 233. During the five years she spent in the collector's booth, she was exposed to dust, dirt, and diesel fumes. T. 235, 449. She worked in the collector's booth until December 2003, five months after she began her tenancy at 56 River Road. T. 235.

While at the 56 River Road residence, Ms. Herman accepted a position as a general helper at the Everett Garage, where she worked in January 2004, T. 235-237, and from January 2005 to May or June 2005, T. 339, 516, 518-519. There, she was exposed to phosphates, fumes and microscopic dust carbons. T. 259, 341. In comparing her workplace to other garages, she described it as "the dirtiest one that you would want to work in." T. 257.

After she moved from the 56 River Road residence, Ms. Herman worked at the Riverside car facility in Newton, MA for approximately one year, during which time she was exposed to brake dust and carbons. T. 349, 351. She also noticed a mildew issue in the women's room, which caused the area to smell. T. 351. Between July 2006 and January 2007, she worked in the central stockroom in Everett, where she was once again exposed to diesel fumes. T. 354-356. About five or six months after working in the central stockroom, Ms. Herman accepted a position driving a truck for Dunbar Security, where she became sick because of exposure to diesel fumes. T. 359-360. At the time of trial, Ms. Herman was employed as a driver for North Reading Transportation, where she was frequently exposed to diesel fumes. T. 363-366.

SUMMARY OF ARGUMENT

The trial court erred in denying the Sullivans' motions for directed verdict and judgment notwithstanding the verdict on Ms. Herman's and Mr. Langlois' negligence claim. At trial, there was insufficient evidence that the Sullivans were negligent in responding either to Plaintiffs' complaints or to correspondence from the Board of Health. To the contrary, the record reflects that the Sullivans responded to all of these concerns in a timely fashion. As importantly, there was insufficient evidence that Ms. Herman's respiratory symptoms were caused by the Sullivans' alleged acts or omissions. Not only did Ms. Herman's allergy tests indicate that she does not suffer from a mold allergy, she had multiple harmful exposures over the course of her lifetime that could have caused her respiratory problems. Moreover, two of her treating physicians and an expert in pulmonary medicine failed to conclude that Ms. Herman's respiratory symptoms were related to mold-exposure. As a result, Ms. Herman and Mr. Langlois failed to demonstrate that there was a greater likelihood that their injuries were caused by the Sullivans' actions than any other cause. Accordingly, the trial court erred in denying Defendants' motions for

directed verdict and judgment notwithstanding the verdict as to Plaintiffs' negligence claim.

The trial court also erred in denying the Sullivans' request for an instruction on comparative negligence. At trial, there was ample evidence that Ms. Herman was negligent in delaying in notifying Defendants of a potential problem with mold, mildew and chronic dampness at the property, in failing to seek prompt medical attention for her respiratory symptoms and in failing to move from the 56 River Road residence in a timely fashion. Consequently, the Sullivans were entitled to a comparative negligence instruction and were prejudicially harmed by the court's failure to include such an instruction.

Third, the trial court erred in denying the Sullivans' request that it include a special question on causation in the special verdict slips submitted to the jury. It is reversible error for a trial court to enter a judgment in answer to special questions unless the answer disposes of all material issues. The purpose of special questions is to assist the jury in differentiating amongst important and determinative issues and isolate potential errors, where potential confusions of fact or law are implicated. In the present

case, Ms. Herman tested negative for a mold allergy, two of her treating physicians failed to conclude that her respiratory symptoms were caused by mold exposure, and her respiratory symptoms could in fact have resulted from one of many harmful exposures during her lifetime. This issue of causation was hotly contested and was at the core of the case. The trial court abused its discretion in refusing to include a special question for the jury as to this central issue in the trial.

Fourth, the trial court erred in submitting the G. L. c. 93A count to the jury. Although a trial court is permitted to submit a consumer protection claim to a jury on a binding or non-binding advisory basis, here, the submission of this issue to the jury was highly prejudicial. Not only did the trial court risk that the jury would confuse the applicable legal standards by submitting the common law claims to the jury alongside the G. L. c. 93A claim, but the trial court also invited the jury to view Defendants as bad actors and permitted the jury to consider evidence relevant only to the G. L. c. 93A claim when deciding the common law claims. The submission of the 93A issues to the jury was therefore an abuse of the court's discretion.

Finally, the trial court properly awarded damages on a joint and several basis rather than on an independent basis. The trial court properly recognized the applicable case law in this area, and in accordance with the legal principles set forth in the cases, determined that the most appropriate penalty would be accomplished through joint and several liability. There was no error in the trial court's determination.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE SULLIVANS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFFS' NEGLIGENCE CLAIM.

In this case, where the evidence was insufficient to sustain a verdict in Plaintiffs' favor on their negligence claim, the trial court erroneously denied the Sullivans' motions for directed verdict and for judgment notwithstanding the verdict.

On appeal from the denial of a motion for directed verdict or a motion for judgment notwithstanding the verdict, the reviewing court must determine, "whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff[s].'" Cherick Distributs. v. Polar Corp.,

41 Mass. App. Ct. 125, 126 (1996), quoting from Poirier v. Plymouth, 374 Mass. 206, 212 (1978). In order for an inference to be reasonable, it must be "based on probabilities and not the result of 'mere speculation and conjecture.'" Cherick, supra, quoting from Power Serv. Supply, Inc. v. E.W. Wiggins Airways, Inc., 9 Mass. App. Ct. 122, 127 (1980).

To prevail on their negligence claim, Ms. Herman and Mr. Langlois were required to show by a preponderance of the evidence that the Sullivans owed them a duty of reasonable care, that the Sullivans breached that duty, that Ms. Herman and Mr. Langlois were damaged, and that the Sullivans' negligence caused that damage. See Glidden v. Maglio, 430 Mass. 694, 696 (2000).

Plaintiffs' claim fails in two important respects.

First, Ms. Herman and Mr. Langlois failed to establish that the Sullivans breached a duty of care owed to them.

Second, Ms. Herman and Mr. Langlois failed to establish a causal connection between the Sullivans' alleged breach and Ms. Herman's respiratory symptoms.

- A. The Sullivans Were Entitled to a Directed Verdict in Their Favor Where the Evidence Was Insufficient to Warrant an Inference that They Breached a Duty of Reasonable Care Owed to Plaintiffs.

At trial, Ms. Herman and Mr. Lappois asserted that the Sullivans breached their duty of care by failing to adequately address Ms. Herman's complaints and the Board of Health's February 2005 correspondence. In fact, the record is devoid of any evidence to warrant a reasonable inference that the Sullivans were negligent in responding either to Ms. Herman's complaints or to the Board's correspondence.

John Sullivan testified at trial that upon receiving a complaint from a tenant, he would ordinarily talk to the tenant on the telephone in order to determine the nature of the situation; go to the premises to investigate the problem; and arrange to have the problem fixed. T. 820-821. Consistent with those procedures, he spoke with Ms. Herman over the telephone about the leak in her kitchen sink. T. 837. After speaking with her, he drove over to the property to investigate the problem, but Ms. Herman was not home, so he left a note on her door to indicate that he was there. T. 838. When Ms. Herman called him after this visit, she and Mr. Sullivan set up an appointment for Defendants' plumber, Rick Sorenson, to repair the leak. T. 838. Similarly, upon receiving Ms. Herman's complaints associated with the rotted drainpipe, John Sullivan went to the property to

inspect the pipe with Mr. Sorensen. T. 835-836. Based on that inspection, he determined that the rotted drainpipe had to be replaced, and arranged for plumbers to do so. T. 276, 837. By Mr. Langlois' own admission, John Sullivan sent plumbers to conduct repairs on at least three occasions. T. 580. Even when Ms. Herman and Mr. Langlois denied Mr. Sullivan's workers access to the property, John Sullivan arranged for the workers to return the following day to conduct repairs at additional cost to him. T. 510, 840-842.

At the end of November 2004, nearly a year after Ms. Herman claims to have observed mold, mildew and moisture in her closets, Ms. Herman notified John Sullivan of her observations of a moisture problem at the 56 River Road residence. T. 246, 249-250, 289. On February 9, 2005, Dean Trearchis inspected the property on behalf of the Board of Health at Plaintiffs' request. T. 757. After the inspection, the Board of Health sent John Sullivan a letter dated February 11, 2005. A. 19-20. John Sullivan promptly hired workers to complete repairs to bring the property into compliance with the Board's correspondence, even though there had as yet been no professional tests done to confirm the presence of any mold at the 56 River Road residence. T. 858-860. When Mr. Trearchis returned

only five days after the letter of February 16, 2005, for a second inspection and again on March 9, 2005, he observed Mr. Sullivan's workers conducting repairs on the property in response to the Board's correspondence. T. 768, 779-80. In May 2005, the Board of Health concluded that the Sullivans had satisfied all requirements set forth in the Board's February 2005 letters. T. 781. As a result, the Board closed the case regarding the 56 River Road residence. T. 781-782. Mr. Trearchis testified that the Board would not have done so if it did not believe the property was in compliance. T. 801-802.

Based on the foregoing there was insufficient evidence to warrant an inference that the Sullivans were negligent in responding either to Ms. Herman's complaints or to the Board of Health's February 2005 correspondence. Consequently, the Sullivan's were entitled to a directed verdict in their favor on the negligence claim.

B. Defendants Were Entitled to a Directed Verdict in Their Favor Where the Evidence Was Insufficient to Warrant an Inference that Their Negligence Caused Ms. Herman's Injuries.

Even assuming that Ms. Herman and Mr. Langlois were able to establish that the Sullivans breached a duty of care owed to them, a breach of duty, standing alone, does not impose liability because causation is an essential

element of a negligence cause of action. See Glidden, supra. To prove causation, Ms. Herman and Mr. Langlois were required to show "that there was a greater likelihood or probability that the harm complained of was due to causes for which [Defendants were] responsible than from any other cause." Mullins v. Pine Manor College, 389 Mass. 47, 58 (1983) (quotation marks and citation omitted). Even when the evidence is viewed in the light most favorable to the Plaintiffs, they failed to carry this essential burden at trial.

Although Ms. Herman claims her respiratory problems were caused by exposure to mold at the 56 River Road residence, the testimony of two of her own treating physicians, as well as an expert in pulmonary medicine, was directly contrary to these claims, T. 15, 19, 322, 658-659. Both Ms. Herman's inhalant skin and mold panel tests, conducted on February 28, 2005, only days before she vacated the 56 River Road residence, yielded negative results, indicating the absence of an allergic reaction to mold. T. 125-128, 541-543. In fact, she showed no reaction to the types of mold that Mr. Goldman discovered in low levels at the property in March 2005: cladosporium, T. 127,

542, 692-693, aspergillus, T. 107-108, 692-693, and penicillium, T.128, 541, 691-694, 697.

Both her allergist and her pulmonologist failed to conclude that her respiratory symptoms were allergy or mold-related. T. 322, 658-659. Moreover, an expert in pulmonary medicine concluded, based on his review of her medical records, that Ms. Herman showed no signs of a mold allergy and did not suffer from asthma related to mold exposure, T. 19. In the absence of evidence that Ms. Herman suffered from a mold allergy, any inference that her respiratory symptoms were caused by mold exposure at the 56 River Road residence would be "mere speculation and conjecture." See Power Serv. Supply, supra.

Ms. Herman was exposed to a wide array of harmful substances over the course of her lifetime that could have caused her respiratory problems. She smoked for approximately 20 years, and Mr. Langlois admitted to smoking while he and Ms. Herman resided at 56 River Road. T. 487, 605. For at least five years, Ms. Herman was exposed to dust and fumes as a construction laborer. T. 216, 400. For at least seven and a half years, she was exposed to exhaust fumes for thirty to forty hours per week as a bus driver for the MBTA. T. 230-231, 437. As a toll collector, she was exposed to dust, dirt and fumes

for five years, concluding in 2003. T. 235,449. During her tenancy at 56 River Road, she was employed at the Everett Garage in January of 2004 and from January 2005 until May or June of 2005, where she was exposed to phosphates, fumes, and microscopic dust carbons. T. 235-236, 257-259, 339-341, 516. Beginning in 1999 and throughout her tenancy, Ms. Herman was also exposed to exhaust fumes on group motorcycle rides. T. 239-240, 465-467, 492-493. Each of these exposures could have caused Ms. Herman's respiratory problems. In light of the dearth of evidence that there was a greater likelihood that Ms. Herman's respiratory problems were due to causes for which the Sullivans were responsible than from any other cause,⁵ the Sullivans were entitled to a directed verdict in their favor. See Mullins, supra.

II. THE TRIAL COURT ERRED IN DENYING THE SULLIVANS' REQUEST FOR AN INSTRUCTION ON COMPARATIVE NEGLIGENCE, WHERE THERE WAS AMPLE EVIDENCE THAT

⁵ Although Dr. Hyuck opined that Ms. Herman's respiratory symptoms were mold related, she did not examine Ms. Herman until December 2007, T. 100, nearly two years after Plaintiffs vacated the 56 River Road residence and after Ms. Herman had experienced several additional exposures to noxious substances, T. 351, 354-356, 359-360. While Dr. Hyuck attempted to discount some harmful exposures as alternative causes of Ms. Herman's respiratory problems, T. 77-80, her records were often incomplete and lacked specific detail regarding the nature and extent of Ms. Herman's occupational and environmental exposures to noxious substances over the course of her lifetime, T. 125-129.

**MS. HERMAN'S OWN NEGLIGENCE CONTRIBUTED TO THE
DEVELOPMENT OF HER RESPIRATORY PROBLEMS.**

At the close of evidence, the Sullivans requested a comparative negligence instruction. T. 961-964. The trial court denied the request and declined to instruct the jury on comparative negligence. T. 964. Consistent with the requirements of Mass. R. Civ. P. 51(b), 365 Mass. 816 (1974), the Sullivans renewed their objection before the jury retired to consider its verdict. T. 998.

"When a party makes a request for a specific instruction legally correct and pertinent to the issues presented by the case, it is incumbent upon the court to instruct the jury in a manner which substantially covers the particular point in question." Higgins v. Delta Elevator Serv. Corp., 45 Mass. App. Ct. 643, 649 (1998), quoting from Varelakis v. Etterman, 4 Mass. App. Ct. 841, 842 (1976). The question of a plaintiff's comparative negligence presents a question of fact, which can only be taken from the jury "when no rational view of the evidence warrants a finding that the [plaintiff] was negligent." Zeuski v. Jenny Mfg. Co., 363 Mass. 324, 327 (1973). In assessing whether the question of Ms. Herman's own negligence should have been submitted to the jury, the evidence is viewed in the light most favorable

to Defendants. Lake v. Mass. Bay Transp. Auth., 65 Mass. App. Ct. 794, 811-812 (2006) (if "when viewed in the light most favorable to the defendant," a rational jury could have found that the plaintiff was negligent and "that that negligence contributed to the causation of his injuries," the defendant is entitled to a comparative negligence instruction). Here, there was ample evidence from which a rational jury could have concluded that Ms. Herman's own negligence contributed to the development her respiratory problems.

A plaintiff injured by a tort, such as a defendant's alleged negligence, has a duty to use reasonable care to minimize her damages. See Brian v. B. Sopkin & Sons, Inc., 314 Mass. 180, 183 (1943); Quaranto v. Silverman, 345 Mass. 423, 428 (1963). "[I]f [s]he fails to make the reasonable effort, with the result that [her] injury is greater than it would otherwise have been, [s]he cannot recover judgment for the amount of this avoidable and unnecessary increase." McKenna v. Commissioner of Mental Health, 347 Mass. 674, 676 (1964) (quotation marks and citations omitted).

Ms. Herman breached her duty to mitigate damages by failing to notify Defendants of a problem with mold, mildew and chronic dampness at the 56 River Road

residence in a timely fashion, denying Defendants a reasonable opportunity to correct the problem and prevent any injury to Plaintiffs. See Roderick v. Brandy Hill Co., 36 Mass. App. Ct. 948, 950 (1994) ("A residential landlord cannot be held liable in negligence unless he knew or reasonably should have known of the defect and had a reasonable opportunity to repair or remove it"). Although Ms. Herman discovered that the closets were damp, moldy and mildewed shortly after moving into the 56 River Road residence in July 2003, T. 246, she failed to inform the Sullivans of the problem immediately, instead attempting to remedy the problem herself. T. 247, 249-250. She delayed over a year in notifying Defendants of the issue with the closets, first mentioning it in written correspondence dated November 29, 2004, T. 289, 852-853. In fact, John Sullivan first learned of the allegations of mold on the property from the February 2005 correspondence from the Board of Health. T. Similarly, although Ms. Herman claimed that she noticed a musty smell at the 56 River Road residence in the winter of 2003, she did not notify the Sullivans of the presence of an odor until March 2004. T. 261-262, 489. Because Ms. Herman's failed to provide prompt notice of problems with the property, Defendants were unable to address the

alleged mold issue at the premises in a timely fashion and avoid any resulting injury to Plaintiffs. Based on the foregoing, a rational jury could have found that, as a result of her own negligence, Ms. Herman's injury was "greater than it would otherwise have been" and she was not entitled to "recover judgment for the amount of this avoidable and unnecessary increase." McKenna, supra.

Ms. Herman breached her duty to mitigate her damages in two other important respects. First, she Herman unreasonably delayed in seeking medical attention for her respiratory problems. Although she claimed that she first began experiencing respiratory symptoms in the spring of 2004, T. 285, Ms. Herman failed to seek medical treatment until December 23, 2004. T. 308. Second, although Ms. Herman was a month-to-month tenant, T. 486-487, 830, she failed to move out of the 56 River Road premises until March of 2005, T. 245. Indeed, she remained at the premises for almost two years, despite her claims of various problems with the property, including damp, mildewed closets discovered only a few months after moving in, T. 246, 249, and a musty odor discovered in the winter of 2003, T. 261-262.

When viewed in the light most favorable to the Defendants, see Mullins, supra at 56, a rational jury

could have found that Ms. Herman's own negligence contributed to the causation of her injuries. See Lakew, supra. Accordingly, Defendants were entitled to an instruction on comparative negligence. See ibid. The trial court's failure to provide such an instruction, over the Sullivans' objection, constitutes reversible error.⁶

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE SULLIVANS' REQUEST FOR A SPECIAL QUESTION ON THE ISSUE OF CAUSATION, WHERE CAUSATION WAS A CENTRAL AND HOTLY CONTESTED ISSUE AT TRIAL.

At the close of evidence, the Sullivans requested that the trial court submit a special question on the issue of causation to the jury. T. 960-961. Although causation was a central issue at trial and an essential element of Plaintiffs' claim for negligence, the trial court denied the Sullivans' request over their objection. T. 961. After the jury instructions were given, the

⁶The prejudice from the omission of the comparative negligence instruction is evident from the damages awarded by the jury in this case. In the contract area, where comparative negligence is not a defense, the jury awarded only \$4,200 for the breach of the implied warranty of habitability and \$12,600 for the breach of the covenant of quiet enjoyment. A. 75-76. By contrast, the jury, not having been instructed to consider and adjust for Plaintiffs' own comparative negligence, awarded \$726,000 in damages on the negligence claim. A. 74. There is certainly reason to believe that this enormous figure might have been different if Plaintiffs' own negligent behavior also could have been considered by the jury.

Sullivans renewed their objection to the court's failure to submit the requested special question to the jury. T. 998-999.

"The nature, scope and form of special questions submitted to a jury pursuant to Mass. R. Civ. P. 49(A), 365 Mass. 812 (1975), are matters within the discretion of the trial judge." Everett v. Bucky Warren, Inc., 376 Mass. 280, 291 (1978). Notwithstanding this discretion, it is reversible error for a trial court to enter judgment on a verdict in answer to special questions unless the answer disposes of all material issues. See Stone v. Orth Chevrolet Co., 284 Mass. 525, 528 (1933).

The "essential purposes of the use of special questions are to assist the jury in differentiating among the various issues presented and to isolate the damaging affect of any errors, but not to limit the jury's role by the simple expedient of submitting only a few narrow questions." Henderson v. D'Annolfo, 15 Mass. App. Ct. 413, 418 n. 9 (1983) (citations omitted). A special question's "purpose and best achievement is to enable errors already potential because of confusions of fact or law 'to be localized so that the sound portions of the verdict may be saved'" McCue v. Prudential Ins. Co., 371

Mass. 659, 666 (1976), quoting from Morris v.

Pennsylvania R.R., 187 F.2d 837, 841 (2d Cir. 1951).

Here, the trial court did submit special questions for the jury's resolution; however, those questions did not dispose of all material issues in the case. See Stone, supra. On the negligence claim, the court inquired "Did the Landlords negligently fail to maintain the premises?", A. 74, but declined to include an additional question regarding whether there was a causal link between Defendants' negligence and Plaintiffs' injuries, despite the fact that causation is an essential element of a negligence cause of action. See Glidden, supra. The issue of causation was not adequately covered by another question. Contrast Everett, supra at 292. As a result, there was a clear potential for error resulting from "confusions of fact or law." McCue, supra.

Although Ms. Herman claimed a causal link between her respiratory problems and the presence of mold at the 56 River Road residence, the issue was hotly contested at trial. Ms. Herman tested negative for an allergy to mold, T. 125-127, 541-543, and two of her treating physicians, as well as a expert in pulmonary medicine, failed to conclude that her respiratory problems were mold-related, T. 15, 19, 322, 658-659. Furthermore, Ms.

Herman was exposed to a multitude of substances which could have caused her respiratory problems throughout her lifetime, including cigarette smoke, T. 487, 605, diesel fumes, T. 216, 231, 437, 349-351, 363, 360, phosphates, T. 259, dust, T. 216, dirt, T. 449, carbons, T. 341, 351, 523, and motorcycle exhaust, T. 464-467.

Given the absence of evidence that Ms. Herman suffered from a mold allergy and the myriad of possible causes of her respiratory problems, a special question was necessary to focus the jury's attention on whether "there was a greater likelihood or probability that the harm complained of was due to causes for which [Defendants were] responsible than from any other cause." Mullins, supra at 58. Accordingly, the trial court abused its discretion in denying the Sullivans' request that a separate special question be submitted to the jury on the issue of causation.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN SUBMITTING PLAINTIFFS' G. L. c. 93A CLAIM TO THE JURY, WHERE DOING SO WAS HIGHLY PREJUDICIAL TO DEFENDANTS.

The trial court abused its discretion by submitting the G.L. c. 93A claim to the jury over the Sullivans' objection.⁷

"[T]here is no right to a trial by jury for actions cognizable under G. L. c. 93A." Nei v. Burley, 388 Mass. 307, 315 (1983). While the Legislature is free to confer a right to a jury trial in a G. L. c. 93A action, it has declined to do so. See ibid. Although a trial court has discretion submit a G. L. c. 93A claim to the jury on a binding or non-binding advisory basis where the c. 93A claim is joined with common law claims triable to a jury, see Achushnet Federal Credit Union v. Roderick, 26 Mass. App. Ct. 604, 606 (1988), the better practice would be to reserve all aspects of the G. L. c. 93A claim for resolution by the court, particularly where submission to the jury would be highly prejudicial to a defendant.

G. L. c. 93A "dispenses with the need to prove many of the essential elements of those common law claims." Nei, supra at 313. As a result, where the G. L. c. 93A claim is submitted to the jury alongside the common law claims, the trial court risks that the jury will confound

⁷The trial court submitted the question of unfair and deceptive practices on a binding basis, T. 968, A. 77, and the question of willful and knowing violation on a non-binding advisory basis, T. 5, A. 79.

the applicable legal standards. In Defendants' case, that risk was particularly acute, where the trial court instructed the jury that Plaintiffs' claims for negligence, habitability, quiet enjoyment, and unfair or deceptive acts in trade or commerce are "four different ways of looking at the same thing." T. 995.

The trial court also provided the jury with a series of confusing and highly prejudicial instructions on the issues of unfair and deceptive practices and willful and knowing violation. Explaining the G. L. c. 93A count to the jury, the trial judge instructed that "unfair and deceptive acts or practices in the conduct of any trade or commerce are declared unlawful," T. 984, and "to determine whether or not an act is unfair you may consider whether . . . the act or practice is immoral, unethical, oppressive, or unscrupulous," T. 986. In submitting the question of willful or knowing violation to the jury, the trial court informed the jury, "I do want your advice as to what you think about . . . whether or not any act or practice that you may have found was willful or knowing." T. 987. The trial court further instructed that, "[i]nsofar as deception is concerned a person makes a knowingly false representation if he makes the representation knowing that it was false. A person

makes willfully false representations if he makes the representation without knowing whether or not it's true or false but with reckless disregard for whether or not it was true or false. With respect to unfairness, the law is this: [t]he willful or knowing requirement of the statute doesn't go to the actual knowledge of the terms of the statute but rather to the knowledge or reckless disregard of conditions which whether the defendant knows it or not amount to violations of the law. Neither the failure of the defendant to appraise [sic] himself fully of the law nor his misapprehension of what he did know about his obligations is sufficient to negate the conclusion that his conduct runs afoul of the law. So it's the willful or knowing." T. 987-988.

Simply by providing an instruction on unfair and deceptive practices, the trial court invited the jury to associate Defendants with pejorative terms, such as "immoral, unethical, oppressive, or unscrupulous," T. 986, implying that Defendants were bad actors, and based on that fact alone, the jury should find them culpable on all counts of Plaintiffs' complaint. In addition, by instructing that violation of the implied warranty of habitability and violation of the covenant of quiet enjoyment are unfair and deceptive practices, T. 988-989,

991, the trial court invited the jury to assume that Plaintiffs' had carried their burden of proving both of these underlying common law claims, without the need for deliberation.

The trial court's instruction on willful or knowing violation of G. L. 93A was no less prejudicial. Much like the instruction on unfair and deceptive practices, the instruction on willful or knowing violation invited the jurors to view the Defendants as "reckless" bad actors, T. 996, who should be held liable on all claims. Moreover, the mere submission the willful and knowing violation prong of the G. L. c. 93A claim to the jury, even on an advisory basis, invited the jurors to assume that Defendants had committed an unfair and deceptive practice, obviating the need for deliberation on the issue. The full force of the prejudicial impact of the G. L. c. 93A instructions is apparent, when they are read in their entirety. T. 985-991.

The prejudice inherent in the submission of the G. L. c. 93A claim to the jury was compounded by the admission of evidence pertinent only to the G. L. c. 93A claim alongside evidence relevant to the common law claims, at the risk that the jury would be unable to exclude evidence relevant only to the G. L. c. 93A claim

from its consideration of the common law claims. At trial, the jury was exposed to evidence that the Sullivans served Ms. Herman with a notice to quit contemporaneously with her complaints about the leaking sink, and that they locked Plaintiffs out of the 56 River Road residence before Plaintiffs had given formal notice. T. 567-570, T. 280-283, 602-514. Although this evidence was relevant only to the question of whether Defendants had engaged in unfair and deceptive practices under G. L. c. 93A, the information was nonetheless submitted to the jury despite the likelihood that it would result in a negative and highly prejudicial inference against the Sullivans on the common law claims. Similarly, the jury was exposed to testimony about Kevin Sullivan's 10-year term at the Board of Health, T. 941, and Defendants' failure to obtain building permits for renovations conducted prior to Plaintiffs taking occupancy at the 56 River Road residence, T. 955-956. While this evidence was relevant only to the question of willful or knowing violation of G. L. c. 93A, once again, the information was submitted to the jury alongside the common law claims, in spite of its undoubtedly prejudicial effect.

Both the potential for jury confusion and undue prejudice to Defendants could easily have been avoided by

a bench trial on the G. L. c. 93A claim. Where the trial court reserves the resolution of the G. L. c. 93A claim for itself, it is permitted to hear additional evidence pertinent only to the G. L. c. 93A claim after the trial of the common law claims before the jury has concluded. See Teitelbaum v. Hallmark Cards, Inc., 25 Mass. App. Ct. 555, 556 (1988); Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 340 (1994).

Accordingly, the trial court abused its discretion by submitting the G. L. c. 93A claim to the jury, conflating the 93A claim with Plaintiffs' common law claims.

V. THE TRIAL COURT PROPERLY AWARDED DAMAGES PURSUANT TO G. L. C. 93A, §9(3) ON A JOINT AND SEVERAL BASIS RATHER THAN ON AN INDEPENDENT BASIS.

Plaintiffs argue that the trial court erred by awarding multiple damages against John and Kevin Sullivan on a joint and several basis rather than on an independent basis. The jury awarded actual damages of \$726,000. A. 77-78. Following the jury verdict, the trial court found that co-defendants father and son John and Kevin Sullivan had committed a "willful or knowing" violation, based on the facts that Defendants did not "seek or obtain any building permit or certificate of

occupancy for the property" and that they performed and authorized renovations "without the preliminary, interval, and final inspections by building officials as required by the State Building Code." A. 81, 82. Based on those findings, the trial court determined that, under the statute, it was required to award multiple damages up to three, but not less than two times the amount of actual damages.

In this case, the trial court awarded double damages in the amount of \$726,000. As the trial court properly noted, the "multiplication of Chapter 93A damages for a 'willful or knowing' violation imposes a penalty that is to vary with the 'culpability' of the defendant, and is based upon the 'egregiousness' of the particular conduct.'" A. 83, citing, inter alia, Kattar v. Demoulas, 433 Mass. 1, 15-16 (2000). In order to determine the appropriate level of punishment, the trial court then made the following additional factual findings: (1) the underlying willful and knowing violation by each of Defendants John and Kevin Sullivan was "exactly the same," (2) the level of damages on a doubled basis was "substantial," and (3) additional sanctions would be "piling on." A. 85. Based on the trial court's findings, the trial court entered judgment

for Plaintiffs awarding double damages on a joint and several basis. Plaintiffs now appeal that judgment.

Plaintiffs argue on appeal that the trial court was mandated to order independent damages against each of Kevin and John Sullivan. The trial court recognized that under the general rule laid out in International Fidelity Ins. Co. v. Wilson, 387 Mass. 841 (1983), independent liability may often be appropriate, but found, in a considered analysis, that under the specific facts of this case, that general rule was not appropriate here. Nothing in the statute, or International Fidelity or its progeny, requires that the trial court order damages on an independent basis. As the court in International Fidelity recognized, the statute does not direct a decision either way. See id. at 854.

As for the International Fidelity case itself, the issue in that case was whether it was permissible for the court to award damages on an independent basis. Analyzing the statute and the legislative intent, the Court held that the trial court was not "limited to a single award of multiple damages for which [defendants] are jointly and severally liable." Id. at 853. This proposition, however, does not mandate its opposite. A holding that the trial court is not limited to joint and

several liability does not mean that joint and several liability is never permitted. Such a ruling would be contrary to the principles emphasized in International Fidelity and that underlie its holding. The Court in International Fidelity contrasted G. L. c. 93A with its federal analog -- the Clayton Antitrust Act -- in which "the trial judge has no discretion to deny the plaintiff treble damages once a violation -- even a merely negligent one -- is proved" and as to which liability is joint and several. Id. at 854. By contrast, the Court held that G. L. c. 93A is intended to impose a punishment, "a penalty that varies with the culpability of the defendant." Id. at 856. Plaintiffs' argument would impose the same type of straight-jacket, discretion-limiting approach on the trial court that the SJC was explicitly trying to avoid in International Fidelity.⁸

⁸International Fidelity also noted that independent liability could promote settlements, a "prime goal" of 93A. This principle, however, is not implicated in this case. The trial court found that there was insufficient evidence to support Plaintiffs' claim for multiple damages based on a purported bad faith refusal to grant 93A relief upon demand, and withdrew from the jury's consideration Plaintiffs' written 93A demand and Defendants' response thereto. See A. 104. Plaintiffs have not appealed from this ruling, and it is therefore not before this Court.

The Supreme Judicial Court's decision in Kattar v. Demoulas, supra, is demonstrative of the Court's refusal to impose restrictive black-and-white rules in this area. In that case, the trial court ordered multiple damages against one of the defendants. The plaintiffs appealed claiming that because the trial court had found that two other defendants had acted similarly toward plaintiff, the court was "required to find that they, too, willfully violated c. 93A and be subjected to multiple damages." Id. At 15. The SJC rejected such a discretion-limiting tactic. "Ultimately, c. 93A ties liability for multiple damages to the degree of the defendant's culpability. Here, the judge found that the difference between the conduct of Demoulas, who was the mastermind, and the others, was a matter of degree. His findings were based on his experience with the case in its entirety, and well within the range of his discretion. We cannot conclude that this finding was clearly erroneous." Id. at 16 (citations omitted).

As the trial court here recognized, the courts have identified exceptions to this general rule in other circumstances. For example, where a company is liable because of the acts of its agent, the courts have held that joint and several liability -- not independent

liability -- is appropriate. See Augat, Inc. v. Aegis, Inc., 417 Mass. 484 (1994). The goal of G. L. c. 93A's multiple damages provision is to impose an appropriate, individually-tailored punishment for each defendant. Just as in some circumstances -- perhaps even most circumstances -- that goal is best achieved by independent liability, there is no reason why in the appropriate case, that same objective cannot be accomplished through joint and several liability. In this case, the trial court was well aware of the applicable case law. As the trial court explained, however, in denying Plaintiffs' motion to alter or amend the judgment on this ground, "I continue to believe that joint and several liability (double damages) rather than independent and several liability (in effect, treble damages) is appropriate given the facts of the particular case." A. 106. Based on its factual findings and the unique facts of this case, the trial court determined that joint and several liability was the most appropriate punishment for the two defendants in the case. There is no case law or statutory provision barring that.⁹

⁹ For this reason, the argument of amicus City Life/Vida Urbana misses the mark. No one is asking this Court to "overturn the precedent set in International," Amicus Br. at 12. To the

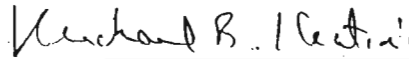
CONCLUSION

For the foregoing reasons, the Judgment in favor of Plaintiffs should be reversed as to Plaintiffs' negligence claim and 93A claim. If this court affirms the 93A claim, the court's decision as to multiple damages should be affirmed.

Respectfully Submitted,

JOHN SULLIVAN, KEVIN SULLIVAN
and MARGARET SULLIVAN,

By their attorneys,

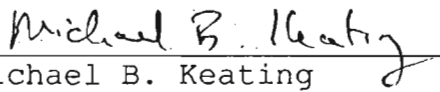


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contrary, the actions of the trial court were entirely consonant with the principles set forth in International.

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

I, Michael B. Keating, hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.


Michael B. Keating

Dated: February 26, 2010