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COMMONWEALTH OF MASSSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPT.
C.A. 18159

AUGUST V. MEDEIROS and SANDRA MEDEIROS v. DONALD LLOYD, D.V.M.	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MEASURE OF DAMAGES

It is the long-settled rule in Massachusetts that when a plaintiff has lost property that has no market value, the measure of damages "is the actual value of the property to its owner." Sarkesian v. Cedric Chase Photographic Laboratories, Inc., 324 Mass. 620, 87 N.E. 2d 745, 746 (1949) (lost roll of film). Where the plaintiff was deprived of an oil portrait of his father, the Supreme Judicial Court in Green v. Boston and Lowell Railroad, 128 Mass. 221, 226-227 (1880) affirmed the refusal of the trial judge to instruct the jury that the measure of damages was fair market value and held that the fair market value rule

> does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the ... loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just role of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner.

Accord, Hall v. Paine, 224 Mass. 62, 68 (1916) ("In general when exceptional circumstances appear which demonstrate that the rule of fair market value would not afford compensation, then the usual principle becomes no longer applicable and inquiry is made as to the real damages sustained ..."); Weston v. Boston and Maine Railroad, 190 Mass. 298, 300 (1906) ("[W]here the property ... has no market value but has a special damage to the plaintiff he can recover that value"); Wall v. Platt, 169 Mass. 398, 406, 407 (1897) (The Supreme Judicial Court rejected the defendant's contention that the measure of damages was fair market value. "In some cases there is no market value, properly speaking, and in others, if there is, it plainly would not of itself afford full indemnity ... (F)air market value ... would have nothing to do with the real value of the articles, or with their actual worth to the owner ... (T)he damages should be assessed according to the actual worth of the articles to her ... at the time of the fire"); Beale v. City of Boston, 166 Mass. 53, 56 (1896) (The Supreme Judicial Court reversed the ruling of the trial judge that the jury was permitted only to consider fair market value. "But in estimating the loss ... we think all these particulars might be considered, not as showing independent and distinct items to be added to his loss, but as elements which

might be considered in determining the real value of what he had before the taking, and of what he had afterwards"); Stickney v. Allen, 10 Gray 352, 356 (1858) (The Supreme Judicial Court affirmed the refusal of the judge to instruct the jury that the measure of damages for the loss of stereotype plates was market fair market value. "(The plates) were of very trifling value, except to the plaintiffs. Such things with any propriety cannot be said to have a market value and the actual value to him who owns ... them is the just rule of damages .."). See also, Mieske v. Bartell Drug Company, 92 Wash. 2d 40, 593 P. 2d 1308, 1310 (1979) (the Court, in affirming a jury verdict of $7,500 for the loss of family movies, held that "if the destroyed property has no market value and cannot be replaced or reproduced, then the value to the owner is to be the proper measure of damages ..."); Brown v. Frontier Theatres, Inc., 369 S.W. 2d 299 (Tx. 1963) (In the case of loss of items of no market value "the most fundamental rule of damages that every wrongful injury or loss to persons or property should be adequately and reasonably compensated requires the allowance of damages in compensation for the reasonable special value of such articles to their owners taking into consideration the feelings of the owner for such property").

Dated:

By their attorney,

Steven M. Wise
Fraser & Wise, P.C.
896 Beacon Street
Suite 303
Boston, MA 02215
267-4455

COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT DEPT.
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AUGUST V. MEDEIROS and SANDRA MEDEIROS v. DONALD LLOYD, D.V.M.	PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR COUNT FOR THE VIOLATION OF G.L. c.93A

I. DR. LLOYD IS LIABLE FOR VIOLATING G.L. c.93A

A. G.L. c.93A APPLIES TO VETERINARIANS

The practice of veterinary medicine, like the practice of other professions, constitutes "trade or commerce" for purposes of liability under G.L. c.93A sec. 2, which states that:

> Unfair methods or competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

See Tower v. Hirschhorn, 397 Mass. 581, 492 N.E. 2d 728 (1986) (doctor); Doucette v. Kwiat, 392 Mass. 915, 467 N.E. 2d 1374 (1984) (lawyer); Guenard v. Burke, 387 Mass. 802, 443 N.E. 2d 892 (1982) (lawyer); Little v. Rosenthal, 376 Mass. 573, 382 N.E. 2d 1037 (1978) (doctor); Brown v. Gerstein, 17 Mass. App. 558, 460 N.E. 2d 1043, further app. rev. den. (1984) (lawyer); Frank Cooke, Inc. v. Hurwitz, 10 Mass. App. 99, 406 N.E. 2d 678 (1980) (accountant); G.L. c.93A §1(b)

("Trade" and "commerce" shall include...the...distribution of any services...); 940 CMR 3.01(17) which defines "(P)roduct" as "includ(ing)...services....". See also J.R. Pirozollo and R.L. Binder, "Chapter 93A, Sec. 11: The Massachusetts Little F.T.C. Act," 70 Massachusetts Law Review, 15, 19 (March, 1985) ("Similarly Chapter 93A is applicable to the practice of law and can support a claim of malpractice.")

B. DR. LLOYD COMMITTED UNFAIR OR DECEPTIVE ACTS OR PRACTICES

940 CMR 3.05(1) (General Misrepresentations) states that the following acts or omissions are unfair or deceptive acts or practices:

> No claim or representation shall be made by any means concerning a product (defined in 940 CMR 3.01[17] to include services) which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect. This prohibition includes, but is not limited to, representations or claims relating to the... reliability...safety...or the utility of such product or any part thereof...or the benefit to be derived from the use thereof.

940 CMR 3.16 (General) states that the following acts or omissions are unfair or deceptive acts or practices:

> Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of Chapter 93A, Section 2 if:

(1) It is oppressive or otherwise unconscionable in any respect; or

(2) Any person or other legal entity subject to this act fails to disclose to a buyer or prospective buyer any fact, the disclosure of which may have influenced the buyer or prospective buyer not to enter into the transaction; or

(3) It fails to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety, or welfare promulgated by the Commonwealth or any political subdivision thereof intended to provide the consumers of this Commonwealth protection; or

(4) Violates the Federal Trade Commission Act, the Federal Consumer Credit Protection Act or other Federal Consumer protection statutes within the purview of Section 2 of Chapter 93A.

E.g., Grossman v. Waltham Chemical Co., 14 Mass. App. 932, 436 N.E. 2d 1243, 1245, further rev. den. (1982) ("A failure to disclose any fact, the disclosure of which may have influenced a person not to enter into a transaction, is a violation of c.93A."; Homsi v. C.H. Babb Co., Inc., 10 Mass. App. 474, 479, 409 N.E. 2d 219, 224 further app. rev. den. (1980). See also Purity Supreme, Inc. c. Attorney, 380 Mass. 762, 777, 407 N.E. 2d 297, 307 (1980) ("A practice may be 'deceptive' if it 'could reasonably be found to have caused a person to act differently from the way he otherwise would have acted." quoting from Lowell Gas Co. v. Attorney General, 377 Mass. 37, 53, 385 N.E. 2d 240, 249 (1979); V.S.H. Realty, Inc. v. Texaco, Inc., 757

F.2d 411 (1st Cir. 1985). H.J. Alperin and R.F. Chase, 35 Massachusetts Practice - Consumer Rights and Remedies, §93 at 226 (1979) (Alperin and Chase) ("Courts have often pointed out that unconscionability may be shown by evidence of... specific representations").

1. THE RULING OF THE BOARD OF REGISTRATION IN VETERINARY MEDICINE PURSUANT TO G.L. c.112 sec. 61, THAT DR. LLOYD WAS GUILTY OF NEGLIGENCE IS COLLATERAL ESTOPPEL ON DR. LLOYD'S VIOLATION OF 940 CMR 3.16(3) AND G.L. c.93A

The ruling of the Board of Registration in Veterinary Medicine, pursuant to G.L. c.112 sec. 61, that Dr. Lloyd was guilty of negligence is, according to the terms of the plaintiff's partial summary judgment "established ... for other issues to which it might be relevant." It is therefore collateral estoppel on Dr. Lloyd's violation of 940 CMR 3.16(3) and G.L. c.93A. See, Memorandum in Support of Plaintiff's Motion for a Directed Verdict on their G.L. c.93A Count.

2. THE FACTS FOUND BY THE BOARD OF REGISTRATION IN VETERINARY MEDICINE ARE COLLATERAL ESTOPPEL

The facts found by the Board of Registration in Veterinary Medicine in support of its conclusion that Dr. Lloyd was guilty of negligence and malpractice are collateral estoppel for the purpose of G.L. c.93A. Thus his failure to prescribe heartworm prophylaxis,

his failure to perform a complete health profile prior to initiating heartworm therapy, his failure to take diagnostic radiographs, use accepted heartworm therapy, or diagnose the continued deterioration of the patient should be taken as established.

3. THE FACTS PRODUCED AT TRIAL SHOW THAT DR. LLOYD VIOLATED G.L. c.93A

Dr. Lloyd's failure to recommend a chemical internally-taken heartworm preventative is one of the core unfair or deceptive acts or practices. By not doing so, he attempted to ensure that he would make money by treating the heartworm that the unprotected dog subsequently contracts. Dr. Lloyd's failure to inform the Medeiros' that arsenic was the only way to treat canine heartworm and his substitution of a useless drug, Levamisole, was another attempt to ensure that he would make money when they brought the dog back to him again and again as the heartworm progressed. His repeated failures to treat Pooch's heartworm, his false statements that he was treating Pooch correctly, his repeated failures to refer Pooch to a qualified veterinarian all constitute violations of G.L. c.93A.

II. DR. LLOYD IS LIABLE FOR MULTIPLE DAMAGES

G.L. c.93A requires an award of single damages if the defendant committed an unfair or deceptive act or

practice even if he had no knowledge that he was doing so. Slaney v. Westwood Auto, Inc., 366 Mass. 388, 393, 322 N.E. 2d 768, 772 (1975); In Re Leger, 34 B.R. 873 (1983). E.g., Montgomery Ward and Company v. Federal Trade Commission, 379 F.2d 666, 670 (7th Cir. 1967) (This case interpreted the FTC Act, 15 USC 45(a)(1), which constitutes a guide to the interpretation of G.L. c.93A).

Pursuant to G.L. c.93A sec. 9(3), one who commits an unfair or deceptive act or practice is liable for no less than double damages and no more than treble damages, if the court finds either that:

1) The use or employment of the unfair or deceptive act or practice was willful or knowing, or

2) The failure to grant relief upon the plaintiff's demand was made in bad faith with knowledge or reason to know that the act or practice complained of was unfair or deceptive.

E.g., Heller v. Silverbranch Construction Corporation, 376 Mass. 621, 627-628, 382 N.E. 2d 1065, 1070 (1978).

A. DR. LLOYD'S USE OR EMPLOYMENT OF UNFAIR OR DECEPTIVE ACTS OR PRACTICES WAS WILLFUL OR KNOWING

One object of G.L. c.93A is to permit an injured person to be compensated without having to prove the

elements of the common law action for fraud or deceit against the defendant. Slaney, supra. Even the negligent use or employment of an unfair or deceptive act or practice, while insufficient to support an action for fraud and deceit, Nolan, supra, sec. 113 at 173 (1979) has been held to be sufficient to support a claim for compensatory damages under G.L. c.93A, sec. Linthicum v. Archambault, 379 Mass. 381, 388, 398 N.E. 2d 482, 487 (1979); McGillivary v. W. Dana Bartlett Ins. Agency of Lexington, Inc., 14 Mass. App. 52, 60, 436 N.E. 2d 964, 969 (1982). See, D.A. Rice, "New Private Remedies for Consumers: The Amendment of Chapter 93A," 54 Mass. L.Q. 307, 314 (1969) (Rice) ("Neither intent to engage in an unlawful act nor knowledge of its unlawfulness is required in order to establish liability"), quoted in Linthicum, supra, Mass. at 388, n.12, N.E. 2d at 487, n.12.

In International Fidelity Insurance Co. v. Wilson, 387 Mass. 841, 853, 443 N.E. 2d 1308, 1316 (1983), the Supreme Judicial Court held that

> Chapter 93A ties liability for multiple damages to the degree of the defendant's culpability by creating two classes of defendants. The first class is those defendants who have committed relatively innocent violations of the statute's substantive provisions. These defendants are not liable for multiple damages. (citation omitted) The second class is those defendants who have committed "willful or knowing" violations ....Based on the egregiousness of each defendant's conduct, the trial judge may assess between double and treble damages....

A willful or knowing violation includes even those representations made with reckless disregard for the truth. Shaw v. Rodman Ford Truck Center, Inc., 19 Mass. App. 709, 711-712 (1985); Computer Systems Engineering, Inc. v. Qantel Corp., 571 F. Supp. 1365 1375 (D. Mass.), aff. 740 F.2d 59 (1983). The false statements that Dr. Lloyd made to the Medeiros' were made, at minimum, with reckless regard for the truth.

B. DR. LLOYD REFUSED TO GRANT RELIEF UPON DEMAND IN BAD FAITH WITH KNOWLEDGE OR REASON TO KNOW THAT HE HAD VIOLATED G.L. c.93A sec. 9

G.L. c.93A sec. 9(3) states that

> At least thirty days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be mailed or delivered to any prospective respondent. Any person receiving such a demand for relief who, within thirty days of the mailing or delivery of the demand for relief, makes a written tender of settlement which is rejected by the claimant may, in any subsequent action, file the written tender and an affidavit concerning its rejection 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 twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the court finds that the use of employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two.

In Wilson, supra, Mass. at 857, N.E. 2d at 1318, the Supreme Judicial Court described the purpose of the settlement provisions of Chapter 93A.

> The promotion of reasonable settlement offers is a prime goal of c.93A secs. 9 and 11. While the procedures set out in the two sections differ, they both aim at "achieving the same objective of facilitating settlement and fixing damages." Nader (v. Citron), 372 Mass. 96, 100, 360 N.E. 2d 870, 874 (1977). Both sections are designed to make it "unprofitable" for a defendant to ignore meritorious claims. See, Heller v. Silverbranch Constr. Corp., supra, (Mass. at 627, N.E. 2d at 1065). That a willful violator can limit his liability by making a reasonable settlement offer demonstrates the critical importance of the settlement process. Indeed, the conduct proscribed by the statute is as much the failure to make a reasonable settlement offer as it is the substantive violation of c.93A. Multiple damages are "the appropriate punishment" for forcing plaintiffs to litigate clearly valid claims. (My emphasis).

Professor David Rice, the principal author of Chapter 93A, has noted, Rice, supra at 319, that

> it would seem that "bad faith" is a redundant term since its existence under a statute designed to promote settlement should be implied from the mischievous putting of a complaint to suit the knowledge or reason to know of the unlawfulness exists.

In Heller, supra, Mass. at 627, N.E. 2d at 1065, the Supreme Judicial Court stated that the "refusal to grant relief" portion of sec. 9 covers two distinct areas, that it is:

> an attempt to promote prelitigation settlements by making it unprofitable for the defendant either to ignore the plaintiff's request for relief or to bargain with the plaintiff with respect to such relief in bad faith. (My emphasis).

The very fact that the alleged acts or practices are:

> declared unlawful by the Attorney General's rules and regulations ... the defendant ha(s) at least 'reason to know' that those acts or practices violated Section 2. Rice, New Private Remedies at 319.

Slaney, supra, Mass. at 705, n.20, N.E. 2d at 779, n.20.

> The knowledge or reason to know is that which exists after receipt of the complaint and not at the time of the alleged violation. The standard is objective and requires the defendant to investigate the facts and consider the legal precedents.

On August 23, 1983, the Medeiros's sent Dr. Lloyd a demand letter pursuant to G.L. c.93A sec. 9. It set out special damages of $1,203.35 and sought $100,000.00 for all damages. Dr. Lloyd's response was to offer the sum of $500.00.

Dr. Lloyd has "(t)he burden of proving the reasonableness of the settlement tendered." Patry v. Harmony Homes, Inc., 10 Mass. App. 1, 404 N.E. 2d 1265, 1268 (1980), in relation to the injury suffered. Kohl v. Silver Lake Motors, Inc., 369 Mass. 795, 802, 343 N.E.

2d 375, 377 (1976); e.g. Annotation--Reasonableness of Offer of Settlement under State Deceptive Trade Practice and Consumer Protection Acts, 90 ALR 3d 1350, 1351 (1979). The offer should not be indefinite, should address the demands contained within the demand letter, and should be appropriate to the attending circumstances. Patry, supra, N.E. 2d at 1268.

In DiMarzo v. American Mutual Insurance Company, 389 Mass. 45, 445 N.E. 2d 1189 (1983), the Supreme Judicial Court affirmed the Superior Court's finding that an offer of $50,000.00 on an execution of $149,068.78, approximately 33%, was not a reasonable tender of settlement for the purposes of the statute. In the case at bar, Dr. Lloyd made an offer that was less than 50% of Pooch's veterinary expenses and failed to take anything else into account.

III. THE MEDEIROS'S ARE ENTITLED TO RECOVER REASONABLE ATTORNEY'S FEES AND COSTS PURSUANT TO G.L. c.93A sec. 9(4)

G.L. c.93A sec. 9(4) states that

> If the court finds in any action commenced hereunder that there has been a violation of section two, 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, 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 days of the mailing or delivery of the written demand for relief required by this section.