

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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-641

JOAN STORMO

vs.

PETER T. CLARK.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff¹ brought successful claims for legal malpractice and violation of G. L. c. 93A against her former lawyer, Peter T. Clark. The trial judge allowed her motion to amend the judgment to add attorney's fees and costs under G. L. c. 93A, and awarded one hundred percent of the attorney's fees requested. However, her order failed to address costs. The judge denied Clark's motion for judgment notwithstanding the verdict and, on the same date, agreed to give Clark an opportunity to contest the amount of the attorney's fees by offering the testimony of an expert witness at an evidentiary hearing. The judge ordered Clark to disclose any such expert witnesses fourteen days prior to the hearing. When Clark failed

¹ Karen Monteiro and Stephen Prosky, who were plaintiffs in the trial court, have not filed notices of appeal.

to do so, the court cancelled the evidentiary hearing, but did not otherwise rule on the costs.

Clark filed a notice of appeal of both the court's judgments and its posttrial rulings. The plaintiff filed a cross appeal solely on the question of whether the court erred in its failure to address or award costs.² After twice being given extensions by this court for filing his brief and appendix, Clark failed to file them by the deadline, and the appellant moved to dismiss Clark's appeal for lack of prosecution. This court dismissed that appeal and subsequently allowed the plaintiff to proceed with this cross appeal.

The issue presented by the appeal is straightforward. The appellant is entitled to statutory costs in the form of court filing fees and service of process fees, apparently totaling \$331.60. The award of such fees is mandatory. See Waldman v. American Honda Motor Co., 413 Mass. 320, 322 (1992) ("Certain taxable costs . . . are recoverable as a matter of course by successful litigants"). See also G. L. c. 261, §§ 1, 23; G. L. c. 262. It appears that the trial judge did not address these - - and perhaps the other costs -- merely as a result of an oversight. The plaintiff is also entitled to reasonable costs

² In her brief, appellant explains that in light of the minimal amount of the costs compared to the judgments, she would not have filed an appeal had Clark not done so.

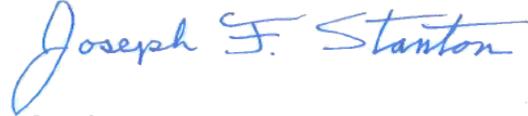
incurred in connection with a successful 93A action. G. L. c. 93A, § 9 (4) (costs "shall" be awarded). On that basis, the plaintiff asserts she was entitled to \$9,450 in expert witness fees paid to a legal malpractice expert and deposition costs related to several depositions of the parties in this and related proceedings, a number of which were actually used at trial. The trial judge is in the best position to determine whether these costs were wholly or partially attributable to the litigation of the c. 93A claim. See Charles River Constr. Co. v. Kirksey, 20 Mass. App. Ct. 333, 344-345 (1985). For deposition costs that are not attributable to the c. 93A claim, the judge may consider whether those costs are otherwise subject to award as "reasonably necessary." See Mass. R. Civ. P. 54 (e), as amended, 382 Mass. 829 (1981); Waldman, 413 Mass. at 328 ("a judge awarding discretionary deposition costs must make an express finding of reasonable necessity"). Expert witness costs not attributable to the c. 93A claim are governed under G. L. c. 262, § 29. See Waldman, supra at 322-324.

Because the judge's posttrial order does not address the plaintiff's costs, we will vacate the amended judgment and remand the matter so that the trial judge may enter a judgment awarding statutory costs and any reasonable costs of litigation,

the amounts of which, of course, should be determined by the trial judge in the first instance.

So ordered.

By the Court (Vuono, Rubin & Sullivan, JJ.³),



Clerk

Entered: April 30, 2021.

³ The panelists are listed in order of seniority.