COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-425

THERESA SYNAKOWSKI

vs.

CHRISTOPHER COSTA & ASSOCIATES, INC., & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Christopher Costa & Associates, Inc. (CCAI), and Christopher Costa (collectively, Costa defendants) timely appeal from the second corrected judgments entered on January 7, 2020.[2] On appeal, the Costa defendants argue that the trial judge erred by denying their motions for directed verdict and for judgment notwithstanding the verdict (judgment n.o.v.) on the negligence and G. L. c. 93A claims. We affirm in part and reverse in part.

[1] Christopher Costa. The plaintiff elected not to appeal from the judgments in favor of defendant David French.

[2] The "second corrected judgment" after judicial finding awarded to the plaintiff $15,453.60 in damages, another $15,453.60 in punitive damages, interest, and attorney's fees of $41,080 against CCAI only. The "second corrected judgment" on the jury verdict awarded $36,058.40 in damages jointly and severally against the Costa defendants in connection with the jury's negligence finding, after offset for the plaintiff's contributory negligence, plus interest and costs.

1. Background.[3] a. The project. After deciding to build an addition on her home (project) in East Falmouth (town) around 2010, Theresa Synakowski brought her plans to a builder, Robert Dalpe. After consulting Dalpe, draftsman Joseph Botelho, and others, Synakowski retained CCAI, a surveying and engineering company, to provide her with a certified plot plan for the project.

In July 2011, Synakowski discussed the project by telephone with Matthew Costa of CCAI.[4] She expressly informed him that there was a power easement on her property.[5] She subsequently met with CCAI employee and general manager David French, and signed a proposal for professional services (contract). The scope of the contractual work covered four distinct services: (1) the research of recorded plans, benchmarks, and documents; (2) field reconnaissance, and the performance of a traverse and a survey; (3) the preparation of a certified plot plan "showing

[3] We review the evidence "in the light most favorable to the plaintiff, 'without weighing the credibility of the witnesses or otherwise considering the weight of the evidence.'" Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 295 n.11 (2016), quoting Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91, 94 n.5 (2009). We disregard evidence favorable to the defendants. Esler v. Sylvia-Reardon, 473 Mass. 775, 777 (2016).

[4] Matthew Costa, who was unlicensed at all relevant times, is Christopher Costa's son. Matthew and Christopher were the sole officers, directors, and shareholders of CCAI. Because they share the same last name, we shall refer to them hereinafter by their first names.

[5] The easement was held by NSTAR Electric Company (NSTAR).

new addition"; and (4) the supply of copies of the plan. The cost of this work was $650. Synakowski told French of the easement. French stated, "Yes, we know [about] that [easement]. . . . That's part of what we do."

French, who holds no professional licenses and was untrained by CCAI in easements, performed the research and field work services called for by the contract. After reviewing the rough sketch prepared by Botelho, French notified Botelho that in fact, a minor modification was needed to the garage portion of the plan to meet zoning set back requirements. Botelho made the change, French finalized the plot plan, and submitted it to Christopher, a licensed professional land surveyor, for approval.[6]

On August 16, 2011, Christopher signed and stamped the plan. The stamp states:

> "I hereby certify that the above dwelling is located on the ground as shown, that it conformed to the town's zoning setback regulations at the time it was constructed and that this mortgage inspection was performed in accordance with the technical standards for mortgage loan inspections as adopted by the Massachusetts Association of Land Surveyors and Civil Engineers, Incorporated. This plan may not be added to, deleted from, or altered in any way by anyone other than Christopher Costa & Associates."

[6] Christopher had health problems at the time and worked two to three hours per day. French and Christopher had no memory of meeting to discuss the Synakowski plan.

The certified plot plan showed that a portion of the proposed addition was located within the easement for the overhead powerlines that ran across Synakowski's property. The plan did not contain a warning about the easement. Christopher knew that the easement holder had "an exclusive right over the property," and that Synakowski could not occupy the easement area without permission from the holder.

When Synakowski went to pick up the plan, French reviewed it with her and twice assured her she could build in the easement area. French admitted that he had no recollection of telling Synakowski she needed to do additional research or speak with an attorney before building in the easement area.

French testified that the stamp meant the project "was good to go." Dalpe gave similar testimony. Botelho relied on the stamp to tell him that "everything [was] okay" and it was unnecessary "to push the house over."

Synakowski discussed the structural plans, the plot plan, and the easement with Dalpe and informed him she was told "[the easement] wasn't a problem." Accompanied by Dalpe, Synakowski met with one of the town building inspectors and provided him with the certified plot plan, the building plans finalized by Botelho, and her application for a permit. The town issued a building permit.

Synakowski served as her own general contractor, and hired the subcontractors, including Dalpe, for the project. Work commenced, and after the foundation was poured, French performed a second survey and prepared an as-built foundation plan required by the town.[7] Thereafter, significant additional construction on the project was performed.

In June 2012, NSTAR served Synakowski in hand with a cease and desist letter, demanding that she stop all construction and remove the partial structure encroaching upon its easement.[8] (RA/1:118) Work on the project halted. Thereafter, NSTAR refused Synakowski's request to allow the addition to remain as constructed in the easement area. As of October 2015, Dalpe estimated that the cost to correct the encroachment was $52,812.

Synakowski went to CCAI's office and asked for Christopher; the secretary directed her to Matthew. Synakowski explained that NSTAR's attorney suggested she talk to Christopher and ask him to file an insurance claim. Matthew replied, "It's not our problem." Acting on behalf of CCAI, Matthew subsequently wrote to her, disclaiming all liability for the situation.

---

[7] Synakowski paid CCAI an additional $250 for that work. (V:43) There was no significant change between the proposed plan and the as-built plan signed and stamped by Christopher on May 6, 2012.

[8] The easement gave the holder many rights, including the right to demolish and remove any structure from the easement area.

CCAI ceased operations in 2013. When Matthew and Christopher cleaned out the office, they threw out most of the paperwork and records; at that time Synakowski had not yet filed suit.

b. Procedural background. Synakowski commenced this action against the Costa defendants and French. Following Synakowski's subsequent filing of an application for a complaint with the division of professional licensure, the Board of Registration of Professional Engineers and Land Surveyors (board) notified her that it was not "going to pursue [her complaint] at that time."

After a seven-day trial of this matter in October 2018, a jury returned a special verdict, finding the Costa defendants liable in negligence and Synakowski thirty percent at fault for her damages.[9] On the negligent misrepresentation count, the jury found that French and CCAI made a false statement to Synakowski about "some fact that a reasonable person in her position would

[9] A motion judge granted summary judgment in favor of Christopher and French on the breach of contract claims and in favor of French on the intentional misrepresentation claim. The trial judge directed a verdict in favor of French on all remaining claims and on the c. 93A claim against Christopher, but otherwise denied the Costa defendants' motion. With the consent of French's attorney, the trial judge allowed the jury to decide the negligent misrepresentation claim against French to avoid the possible need for a retrial. The jury's verdict demonstrates that the negligence finding was based on breach of professional duty as opposed to breach of contractual duty.

consider important to a decision she was about to make," and that they negligently failed to determine its truth or falsity, but that neither intended that Synakowski would rely on the statement in making a decision. The jury rendered an advisory verdict in favor of Synakowski on her G. L. c. 93A claim against CCAI, but found for the defendants on her breach of contract and intentional misrepresentation claims. The trial judge subsequently denied the Costa defendants' motion for judgment n.o.v., adopted the jury's advisory c. 93A verdict in full, and after further hearing, awarded multiple damages, attorney's fees, and costs against CCAI. This appeal followed.

2. Discussion.[10] a. Issue preclusion. We discern no abuse of the judge's wide discretion in declining to apply the doctrine of collateral estoppel to bar Synakowski's negligence claims. See Bellermann v. Fitchburg Gas & Elec. Light Co., 470 Mass. 43, 60 (2014). The board dismissed Synakowski's application for a complaint without asking her a single question and without conducting a hearing. See Matter of Brauer, 452

[10] The orders denying the defendants' motions for a directed verdict and for judgment n.o.v. "both present questions of law reviewed under the same standard used by the trial judge." O'Brien v. Pearson, 449 Mass. 377, 383 (2007). We review the rulings to 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]." Gyulakian, 475 Mass. at 295 n.11, quoting Esler, 473 Mass. at 780.

Mass. 56, 67 (2008), quoting Matter of Cohen, 435 Mass. 7, 15 (2001) (party against whom estoppel is asserted must have had "full and fair opportunity to litigate the issue in the first action"). Moreover, the board elected not to commence formal disciplinary proceedings under G. L. c. 30A. The issue that the defendants seek to preclude -- breach of duty -- was thus not actually litigated, no findings were issued, and no judgment entered. See Brauer, supra at 66 ("For the doctrine to apply, there must be an identity of issues, a finding adverse to the party against whom [estoppel] is being asserted, and a judgment by a court or tribunal of competent jurisdiction" [quotations and citation omitted]).

b. Negligence. The Costa defendants contend that because the evidence of negligence and causation was insufficient, the judge erred by failing to allow their motions for a directed verdict and for judgment n.o.v. on the negligence claims. We are not persuaded.

In professional malpractice cases, the plaintiff must establish the existence of a professional relationship (undisputed here), the standard of care owed by the professional, a deviation from the standard, and reasonably foreseeable loss or damages caused by the professional's negligence. See, e.g., Correia v. Fagan, 452 Mass. 120, 127 (2008); Palandjian v. Foster, 446 Mass. 100, 105 (2006).

"[E]xpert testimony is generally necessary to establish the standard of care owed by [the professional] in the particular circumstances," Glidden v. Terranova, 12 Mass. App. Ct. 597, 598 (1981), and the defendant's "fail[ure] to meet the standard." Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 500 (2010).

Here, the jury found that Christopher and CCAI owed a duty of care to Synakowski in providing professional services to her; they breached the duty of care in providing those services; and the breach of duty was a proximate cause of damages to Synakoswki. These findings were amply supported by the evidence.

Synakowski's expert witness, Steven Gioiosa, an experienced registered professional civil engineer, testified that the Costa defendants' acts and omissions fell below the standard of care in several respects.[11] First, Gioiosa testified that in his opinion to a reasonable degree of professional certainty, a competent surveyor would have considered the easement at the preliminary pencil (design) stage of the project because it

[11] On appeal, the defendants do not challenge the expert's qualifications, nor do they argue that the expert's opinions as to the standard of care for a professional surveyor should have been excluded as lacking sufficient reliability under the judge's gatekeeping role, see Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and Commonwealth v. Lanigan, 419 Mass. 15 (1994). We accordingly express no views on those subjects.

created significant restrictions and posed an impediment to Synakowski achieving her building goal, and would have advised Synakowski that an addition was not permitted activity in the easement area. Gioiosa further testified that Christopher should not have stamped a plot plan containing a clear violation of easement rights and released it to Synakowski, and that if the plan were released, at a minimum, it should have contained an explicit warning about the easement.[12] Gioiosa's testimony was sufficient to sustain the jury's findings on the elements of duty and negligence. See Renzi v. Paredes, 452 Mass. 38, 46 n.14 (2008).

The Costa defendants' argument that they did not breach a duty of care owed to Synakowski is unavailing. First, the argument is improperly predicated on a view of the evidence most favorable to them. See Gyulakian, 475 Mass. 290, 295 n.11 (2016). Christopher and the two defense experts testified to more limited duties owed by a licensed surveyor under the standard of care and to a more limited scope of certification

[12] Thomas Hardman, the Costa defendants' expert witness, provided evidence that could have been construed as favorable to Synakowski. Hardman admitted that if he did this plan, he would have pointed out to the client there might be an issue and to consider seeking legal advice about the easement; that the failure to do either might fall below the standard of care depending on the conversations he had with the client and the client's previous knowledge; and that "perhaps" any reasonable person would understand that the goal of the contract was to allow Synakowski to build an addition.

represented by the surveyor's signature and stamp. The jury were not required to believe their testimony, and on the record before us were entitled to credit the conflicting expert testimony that the Costa defendants breached a duty of care owed to Synakowski. See Leibovich v. Antonellis, 410 Mass. 568, 573 (1991) (jury's duty "is to assess the soundness and credibility" of expert opinions); Delta Materials Corp. v. Bagdon, 33 Mass. App. Ct. 333, 335 (1992) (presented with classic battle of expert witnesses, fact finder may reject some opinions and accept others).

Next, the Costa defendants argue that the significance of an easement is a question of law and thus Christopher, a nonlawyer, could not be held to a standard requiring him to give legal advice. They argue that any duty to warn was thus limited to advising Synakowski to seek advice from a lawyer (BB:29), which they admittedly did not do. No expert witness here testified that a surveyor was required under the standard of care to give legal advice. Indeed, no such duty exists. Christopher's own expert witness, Thomas Hardman, a registered professional land surveyor, testified that "just to advis[e]" a client that her project is at risk is not a legal opinion. Regardless of the characterization of the advice, Hardman agreed that if a surveyor's client faced the prospect that her house could be torn down due to an easement, a conversation on that

subject was required as part of the professional duties owed to the client. The jury could have found that in light of the easement Christopher's release of the plan and the failure to warn Synakowski that she should seek legal advice about the easement breached his professional duty of care.

Synakowski knew about the easement on her property before starting the project, but had no technical knowledge of its meaning. Because she was concerned about the significance, she asked French about the notation on the plot plan. He assured her she could build in the easement area. The Costa defendants cannot escape liability by resort to the rule of law that there is no duty to give superfluous warnings and warnings about obvious dangers. See, e.g., Fiorentino v. A.E. Staley Mfg. Co., 11 Mass. App. Ct. 428, 436 (1981).

We conclude that there is no merit to the Costa defendants' causation arguments. Christopher knew that Synakowski intended to use the plot plan to obtain a building permit for the addition. Given the undisputed failure of all the defendants to warn Synakowski about NSTAR's exclusive rights in the easement area and the significance of the surveyor's stamp, the jury could have found that it was foreseeable Synakowski would build on the easement to her detriment, especially given French's assurances. See Psychemedics Corp. v. Boston, 486 Mass. 724, 746 (2021) ("Showing that something was a substantial

contributing factor is sufficient to establish proximate cause . . . where the result was reasonably foreseeable"). Christopher's certification on the plot plan did not put Synakowski on notice of its purported limited nature and the fact that she proceeded at her peril in building in the easement area without securing NSTAR's permission.

To the extent that the Costa defendants argue that Synakowski's own actions interrupted the chain of causation, as the trial judge noted, the defendants did not preserve the affirmative defense by pleading it in their answer (or requesting a jury instruction on it). Even if the issue were preserved, the question of intervening and superseding cause is generally one of fact for the jury. Psychemedics Corp., 486 Mass. at 746. Here, Synakowski testified that she relied on the stamped and signed plot plan and the word of French to go forward with the project. There was evidence that absent an explicit warning about the "significant encumbrance," a homeowner would reasonably rely on the stamped plot plan to indicate she could build. The jury also found Synakowski thirty percent at fault for her harm. In short, the defendants cannot show Synakowski was the cause of her own harm (or more than fifty percent at fault) without usurping the jury's fact-finding role.

Finally, the Costa defendants argue that they were entitled to a directed verdict and judgment n.o.v. because even assuming they had a duty of care to warn Synakowski not to build in the easement area, they could only have violated that duty if the declaration of easement actually barred her from constructing the proposed addition; and that here, Synakowski neither proffered an expert legal opinion on the subject nor obtained a ruling from a judge. This argument is not supported by the record. Christopher himself admitted that given NSTAR's exclusive rights, Synakowski could not have built in the easement area without NSTAR's permission. In addition, Hardman testified that based on his reading of the easement, NSTAR had the right to order the addition torn down.

c. General Laws c. 93A, § 9. The judge grounded c. 93A liability against CCAI on violations of 250 Code Mass. Regs. § 5.04 (2013),[13] a basis of liability that was not pleaded. The judge concluded that the following violations amounted to unfair and deceptive acts or practices within the meaning of c. 93A: (1) the supervision of the business by Matthew, an unlicensed individual; (2) Christopher's failure to maintain a verifiable

[13] Section 5.04 was inserted into the regulations in 2013, which is after the events at issue here. There was some dispute at trial as to whether the substance of this regulation was in the prior version of the regulations adopted in 1993. Given our resolution, we need not address the issue.

written record showing French's work was subject to regular and continuous supervision through the development process; (3) Christopher's "complete lack of supervision" of his employees; and (4) Christopher's failure to provide "constant guidance to unlicensed individuals during the development process."[14] We conclude that c. 93A liability was not warranted. See Bellermann v. Fitchburg Gas & Elec. Light Co., 475 Mass. 67, 77 n.15 (2016) ("Whether a regulatory violation amounts to an actionable unfair or deceptive act is a question of law").[15]

We start with the last alleged violation first. The judge misstated the language of the regulation, which requires that the unlicensed subordinate have "continuous" access to and guidance from the registrant. 250 Code Mass. Regs. § 5.04(7). Nothing in the regulations or the expert evidence demonstrates that "constant" guidance is required. Even Gioiosa testified

[14] We note that the judge did not issue a separate decision on the c. 93A claims, but instead wrapped his analysis into his judgment n.o.v. decision. He failed to consider, or make any findings, regarding causation, an essential element of proof in a c. 93A claim.

[15] As a threshold matter, we discern no abuse of discretion or error of law in the denial of the defendants' motions in limine to exclude the professional standard regulations and the expert testimony about them. See Palandjian, 446 Mass. at 104. See also Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 793 (1996) (regulations are admissible to show standard of care); DiBiase v. Rowley, 33 Mass. App. Ct. 928, 929 (1992) ("expert witness, in assisting a jury, may explain the basis for an opinion").

that it is "very common" to use unlicensed employees to perform the field work.

To the extent that Christopher violated the regulations by negligently supervising Matthew or French, this is restatement of Synakowski's negligence claim. A violation of G. L. c. 93A requires "more than a finding of mere negligence." Darviris v. Petros, 442 Mass. 274, 278 (2004). See, e.g., Meyer v. Wagner, 429 Mass. 410, 423-424 (1999) (no unfair or deceptive act where negligent legal representation alleged).[16]

As for the failure to maintain records (assuming the duty continued after operations ceased and could be attributed to CCAI) -- even if these acts may be deemed unfair and deceptive, they did not proximately cause the harm complained of by Synakowski. It was Christopher's release of the plan and the failure to warn that led to Synakowski's harm, and not Christopher's record keeping practices. Synakowski thus failed to show harm flowing from this violation of the record-keeping regulations. See Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc., 445 Mass. 790, 798-799 (2006) ("plaintiff seeking a remedy under G. L. c. 93A, § 9, must demonstrate that [an unfair or deceptive act or practice] caused a loss").

[16] We also note that French produced a plot plan that was technically correct.

On this record, c. 93A liability was unwarranted. Accordingly, there is no need to consider CCAI's claims of error relating to damages.

Conclusion. The second corrected judgment on the jury verdict, entered January 7, 2020, is affirmed. The second corrected judgment after judicial finding, entered on January 7, 2020, is reversed, and judgment shall enter for CCAI on count V of the amended complaint. Synakowski's request for appellate attorney's fees under c. 93A is denied.

So ordered.

By the Court (Wolohojian, Henry & Englander, JJ.[17]),

Joseph F. Stanton

Clerk

Entered: May 25, 2022.

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