COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, SS: A.C. No. 2014-P-1062

CHRISTOPHER DOWNEY AND MAIREAD DOWNEY,

Plaintiffs-Appellants

v.

CHUTEHALL CONSTRUCTION CO. LTD.,

Defendant-Appellee

ON APPEAL FROM JUDGMENT OF THE SUPERIOR COURT

INITIAL BRIEF OF PLAINTIFFS-APPELLANTS

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Dated: October 30, 2014

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I. STATEMENT OF THE ISSUES

1. Whether the judgment must be vacated because the trial court erroneously allowed a licensed home improvement contractor that violated a safety-related requirement of the state building code to assert, as an affirmative defense to liability under G.L. c. 93A, § 2 and G.L. c. 142A, § 17(10), that the homeowners orally waived their statutory rights, even though (a) upholding such a waiver would undermine not only the consumer protection objectives of c. 93A, but also the public safety objectives of the building code and c. 142A, and (b) the building code and c. 142A impose an affirmative duty on the contractor to ensure compliance with the building code.

2. Even assuming that such a defense were available to a home improvement contractor, whether the judgment must be vacated because the alleged waiver in this case was not embodied in a signed agreement that evidenced an informed, consensual, and clear allocation of risk and responsibility for an unintentional violation of the building code done at the homeowners' request and in reasonable reliance on their representations.

3. Whether, under the Supreme Judicial Court's reasoning in *Iannachino v. Ford Motor Co.*, 451 Mass. 623 (2008, the Superior Court should be directed on remand that Downeys have established causation and injury under G.L. c. 93A, § 9, where the jury found that Chutehall violated a safety-related provision of the building code and where there was uncontested evidence at trial that curing the violation was one of the reasons the Downeys incurred the $37,800 expense of replacing Chutehall's construction with code-compliant construction.

II. STATEMENT OF THE CASE

A. Statement of the Proceedings Below

On July 2, 2010, the Downeys filed a two-count complaint against defendant-appellee Chutehall Construction Co. Ltd. ("Chutehall"), seeking $37,800 in damages for negligence and breach of contract. The Downeys alleged that in 2005 Chutehall performed roofing work on their home that was deficient and in violation of the state building code. Joint Appendix ("J.A.") 2, Dkt. #1. The relevant building code provision at issue in this appeal (hereinafter, the "multiple-roof provision"), codified in 2005 as 780

Code Mass. Regs. § 1512.3(3) (1997), Addendum ("Add.").5, states:

> Recovering vs. replacement: New roof coverings shall not be installed without first removing existing roof coverings where any of the following conditions occur:
>
> . . .
>
> 3. Where the existing roof has two or more applications of any type of roof covering.[1]

On September 9, 2011, the Superior Court allowed the Downeys to amend their complaint to add a cause of action under G.L. c. 93A, §§ 2, 9, premised on Chutehall's violation of G.L. c. 142A, § 17(10) (hereinafter, "c. 93A/c. 142A"). J.A.3, #17, J.A.8-11 (Amended Complaint). Chutehall's answer, dated October 12, 2011, denied liability and brought a counterclaim for abuse of process against the Downeys. J.A. 3, #18.[2]

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[1] The multiple-roof provision is currently codified as 780 Code Mass. Regs. § 1510.3(3) (2010).

[2] In the same pleading, Chutehall brought a third-party complaint for defamation and violation of G.L. c. 93A, § 11, against third-party defendant The Follett Company, Inc. ("Follett"). As set forth more fully in the Statement of Facts, *infra*, Follett is one of two roofing contractors that inspected the Downeys' roof in 2009 and first informed them of the presence of four roof layers. In an order dated May 16, 2012, the Superior Court granted Follett's motion for summary judgment against Chutehall's claims, J.A.4, #33; *Downey v. Chutehall Constr. Co. Ltd.*, 30 Mass. L. Rptr. 403, 2012 WL 5238782 *9 (Mass. Super. May 18, 2012, Add.23-33. Follett then successfully moved for entry of a separate final judgment. J.A.4-5, #41. As

On November 8, 2011, the Downeys moved for partial summary judgment on the multiple-roof prong of their two-pronged c. 93A/c. 142A count.[3] J.A.3, #23, J.A.12-13 (Plaintiffs' Motion for Full or Partial Summary Judgment). In opposing the Downeys' motion and cross-moving for summary judgment Chutehall argued, *inter alia*, that its principal, James "Alf" Chute, had followed Christopher Downey's oral instructions and relied on his information as to the number of existing roof layers. *See Downey*, 2012 WL 5238782 *1, Add.24.

By order dated May 16, 2012, the motion judge denied both parties' summary judgment motions. *Downey*, 2012 WL 5238782 *9, Add.33. In doing so, she accepted Chutehall's argument that a homeowner's alleged oral statements could be raised in defense against a home improvement contractor's liability for violating a

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of the date of this brief, Chutehall's appeal from that judgment was still pending. *See Downey v. Chutehall Constr. Co., Ltd.,* A.C. No. 2013-P-0819.

[3] In a separate claim that was not the subject of their summary judgment motion, the Downeys alleged that Chutehall also violated another building code provision, 780 Code Mass. Regs. § 1512.3(1) (1997), which provides: "New roof coverings shall not be installed without first removing existing roof coverings … Where the existing roof or roof covering is water soaked…." *See* Add.5. At trial, the jury found that Chutehall had not violated this provision. J.A.152 (Special Jury Verdict Form, Question 7(a)).

safety-related provision of the building code. 2012 WL 5238782 *5, citing *Reddish v. Bowen*, 66 Mass. App. Ct. 621, 625 n.10 (2006), Add.29.

The case was subsequently tried before a jury over four days: December 3, 4, 5, and 9, 2013. J.A.7. On December 3, 2013, the Downeys moved *in limine* to preclude Chutehall "from introducing into evidence, referencing, mentioning, questioning or soliciting testimony that Chris Downey purportedly told Chutehall not to strip the existing roof." J.A. 5, #56, J.A.135-136 (Plaintiffs' Motion *in Limine* as to Homeowner Waiver). In the pretrial hearing on their motion, the Downeys revived their argument that, as a matter of law, a home improvement contractor may not raise a consumer's alleged oral waiver in defense against liability under c. 93A/c. 142A for violating a safety-related provision of the building code. *Id.*, J.A.191.

In opposing the Downeys' motion, Chutehall's counsel argued that its entire defense rested on the ability to claim reliance on the homeowner's alleged oral instructions:

> MR. FITZPATRICK: … ***it's our defense and, if the Court is essentially ruling that we don't have a defense, then Judge Fabricant should have allowed summary judgment for the plaintiffs as they sought***. This is basically a backdoor way to get summary

> judgment allowed on reconsideration. [J.A.191 (emphasis added).]
>
> * * *
>
> MR. FITZPATRICK: ***If I'm not allowed to elicit that evidence, we——I mean, we're going to be directed out*** at the end of plaintiffs' case. I'm not quite sure how we put on a defense. [J.A.192 (emphasis added).]

The trial judge agreed and denied the Downeys' motion:

> THE COURT: I take this as the law of the case. This is where we are. [The motion judge] indicated what she relied upon at that point and it seems to make sense to me.
>
> 142A is a very, very strict law and it certainly can be a powerful tool. On the other hand, it seems to me that it does not become simply the contractor takes over - the homeowner vanish[es] - and everything happens in a vacuum.
>
> ***If there's a back-and-forth among the parties, that's fair game. The jury can make of it what they will, with appropriate instructions. So the defense is not precluded from bringing this, clearly, under Judge Fabricant's ruling.***
>
> And I think that Mr. Fitzpatrick is right that, otherwise, the Court——if I excluded it at this point, I'd be basically redoing the summary judgment and effectively directing him out.

Add.34 (emphasis added).

On December 5, 2013, after the Downeys closed their case, Chutehall moved unsuccessfully for a directed verdict. J.A.6, #62; *see* J.A.260-261. Before ruling on Chutehall's motion, the trial judge asked the Downeys' counsel whether the evidence established that it was only "the dampness" caused by the

violation of 780 Mass. Code. Regs. § 1512.3(1) (1997), that led them to replace their roof in 2009. In response, the Downeys' counsel reminded the court of their concerns about the multiple-roof violation of 780 Mass. Code. Regs. § 1512.3(3) (1997):

> MR. KOLBERG: Not just the dampness, Your Honor. The weight of four layers of roof on an old building –
>
> THE COURT: Uh-huh. That's right. You did mention that.
>
> MR. KOLBERG: My clients are entitled to a roof that complies with the Code. [J.A.260.]

After the close of evidence, Chutehall renewed its motion for a directed verdict, which the trial judge denied. J.A.6, #63.

On December 9, 2013, the fourth and final day of trial, in reviewing the jury instructions and the special jury verdict form, the trial judge overruled the Downeys' objections to Chutehall's proposed "Law of the case/reasonable reliance" instruction[4]:

> MR. KOLBERG: I argued this with my motion in limine, Your Honor, that I don't believe that one – an owner can waive the requirements of the Building Code and that evidence of that waiver should not come into the jury.
>
> THE COURT: So in a case like this, the Code says do X and the owner says to the person, "I don't want you to do X. I want you to do not X." You're saying

[4] J.A.6, #67, J.A.144, Chutehall Construction Co. Ltd.'s Request for Instructions to Jury, Instruction 5, dated December 9, 2013. *See generally* Add.35-42.

> that the contractor's responsibility then is either—is just to walk off the job?
>
> MR. KOLBERG: To walk off the job and refuse to violate the Code. [Add.37.]
>
> * * *
>
> THE COURT: I think ***I don't agree with Mr. Kolberg's argument that [the contractor's] choices are to somehow convince Downey to do it in conformity with the Code or to walk off the job.*** I just don't agree with that. [Add.38 (emphasis added.]

The trial judge instructed the jury on Chutehall's affirmative defense to the Downeys' c. 93A/c. 142A claim as follows:

> In this case, Chutehall is contending that, whether or not there was a violation of the Building Code, it took the action it took under the contract in specific reliance on something it was told by the Downeys. The Downeys dispute that fact. That is part of the fact finding of what you have to do in this case. [Add.44.]
>
> * * *
>
> [Y]ou have to determine, first of all, what the damages are——what damages they suffered as a result of the violation of the Building Code. Again, you're only reaching that if you determine the Building Code was violated and, additionally, that it was not done at the instance [*sic*] of the Downeys. [Add.44.]

The judge instructed the jury that its answer to Question 8 on the Special Jury Verdict Form required it to determine whether "the Downeys expressly told Chutehall to do the job in that particular way":

> . . . If you determine that there was a violation of the Building Code but it only happened because the Downeys expressly told Chutehall to do the job in that particular way, if 10 of your number agree that

> that's the way it occurred, then you would check "Yes," [to Question 8.]. [Add.45.]

A short time after the jury began its deliberations, the trial judge gave supplemental instructions in response to a question from the jury, in which he again directed that if they answered "Yes" to Question 8, then they should not proceed further. Add.45-47.

Ultimately, the jury found that Chutehall violated the multiple-roof provision of the building code, but its conduct "was the result of directions of the plaintiffs for [*sic*] the defendant." J.A.152, Questions 7(b), 8. The jury found no breach of contract or negligence on Chutehall's part and they rejected Chutehall's abuse of process counterclaim. J.A.151-153. Judgment entered on December 12, 2013. J.A.6, #69, J.154. The Downeys filed their notice of appeal on January 7, 2014. J.A.6, #70.

B. Statement of Relevant Facts

Appellants Christopher and Mairead Downey own a single-family home in the Beacon Hill neighborhood of Boston, where they have lived with their children since 1998. J.A.196-198. Their home was built in the 1860s. J.A.202.

At all relevant times Christopher has been employed full-time as an investment manager. J.A.196-197. Mairead is a homemaker. J.A.252. Neither of the Downeys has any specialized knowledge of roofing or experience doing roof construction, nor was there any evidence that they led Chutehall to believe otherwise. J.A.196-197, J.A.253.

In 2003, based on a neighbor's recommendation, the Downeys hired Chutehall to renovate their basement and a fourth-floor bathroom. J.A.146-147. Concerned about a visible water stain on the ceiling in one of the top-story bedrooms, Christopher Downey subsequently asked "Alf" Chute, Chutehall's principal, to look at the roof. J.A.197.

Chute is a professional contractor with over fifty years of experience in the construction industry. J.A.261. He holds university degrees in mechanical engineering and civil engineering and has worked on "hundreds" of construction projects, including "hundreds" of roofing jobs. J.A.261-263. The Massachusetts Office of Consumer Affairs and Business Regulation public registration online database identifies Chute as the responsible individual for J.A.C. Construction Co., a registered home improvement

contractor that was Chutehall's subcontractor for the work at issue here.[5] *See* J.A.297.

The trial record shows that Chutehall, its subcontractor, J.A.C. Construction, and at least one of the individual roof workers whom Chute supervised at the Downey jobsite all held the requisite state licenses at the time they did their work. The building permit application for the Downeys' roofing work, Trial Exhibit 3 (J.A.158), identifies Chutehall's construction supervisor ("CS") license number as "056131." Chute testified that Seamus McDevitt, who worked on the Downeys' roof, held a construction supervisor license and was a registered home improvement contractor. J.A.264, J.A.297-298.

Chute was aware that his work was required to conform to the Building Code. J.A.269 (Chute: "The first thing we -- we have to determine is how many roofs are there because it's, um it's against Code to put more than two on."); J.A.299 (Mr. Kolberg: "Now, turning to -- do you believe it's important that your work conform to the Building Code?" Chute: "Uh, yes, it's required."). He personally supervises and is

[5] *See* http://services.oca.state.ma.us/hic/licdetails.aspx?txtSearchLN=805.

involved, "hands-on," in all of the jobs done by Chutehall and J.A.C. Construction. J.A.300.

After Chute inspected the Downeys' roof, he submitted a written Proposal dated September 13, 2004, describing five itemized phases of work:

PROPOSAL 264

We hereby submit specifications and estimates for:

TO SUPPLY ALL LABOUR, EQUIPMENT & MATERIALS REQUIRED TO COMPLETE THE FOLLOWING WORK.

1. SUPPLY, INSTALL & REMOVE ACCESS SCAFFOLDING... .....$3,000.00

2. REMOVE AND DISPOSE OF EXISTING DECK.....2,300.00

3. STRIP OFF AND DISPOSE OF EXISTING ROOF SYSTEM 1,700.00

4. SUPPLY & INSTALL A NEW FULLY ADHERED .060 EPDM RUBBER ROOFING MEMBRANE ON 1in. MECHANICALLY FASTENED "ISO" RECOVERY BOARD, INCLUDING COPPER FLASHINGS & DRIPEDGES, TERMINATION BAR, PIPE BOOTS, LAP CAULK SEAMS ETC.....6,280.00

5. REPLACE THE DECK, INCLUDING P.T. SUB FRAMING, MAHOGANY DECKING, AND IRON HAND RAIL.....9,000.00

J.A.155, Trial Ex. 1 (capitalization in original); J.A.198-199.

Chute signed and submitted the Proposal to the Downeys twice: once on September 13, 2004, and again on June 13, 2005, after getting "the go ahead" from Christopher Downey to start the job. J.A.267, J.A.269-270, J.A.273; J.A.155. Neither of the Downeys

countersigned the proposal, and there was no evidence that Chutehall ever asked them to do so before beginning work.[6] *See* J.A.199.

On June 15, 2005, Chute attached the Proposal to an application for a building permit and submitted it to the City of Boston Inspectional Services Department. J.A.157-159, Trial Ex. 3; J.A.274-275. The application included Chute's signed acknowledgment that Chutehall "hereby declare[s] that the statements and information in the foregoing application are true and accurate in the best of my knowledge and belief." J.A.159. The Inspectional Services Department approved the application and issued a building permit. J.A.159 (showing executed Approval Signature dated "6/15/05"). Work on the Downeys' roof started "soon after." J.A.298.

By the end of July 2005, the job was substantially complete, whereupon Chutehall sent the Downeys an invoice. J.A.283; J.A.156, Trial Ex. 2. The first line of the invoice states: "Complete work as

[6] The motion judge incorrectly wrote in her memorandum of decision that "Christopher Downey signed the form, accepting the proposal, on June 13, 2005." *Downey*, 2012 WL 5238782 *1, Add.24. In fact, Downey denied he signed the Proposal, J.A.199, while Chute acknowledged that both signatures on the document were his. J.A.269-270.

per our proposal No.246 [*sic*].” J.A.156[7] (emphasis added). Except for item 2, the wording of every one of the itemized job descriptions differed from the Proposal. *Id.* In both documents Item 3 is the smallest expense item at $1,700, but while the Proposal states, “Strip off and dispose of existing roof system,” J.A.155, the invoice states, “Strip & slit existing roof system for ventilition [*sic*], install pressure treated sleepers to support new deck & drip edges, dispose of debris,” J.A.156.

Christopher Downey believed that Item 3 on the invoice was merely a more detailed description of the same process outlined in Item 3 on the Proposal; the words “strip” and “dispose” of the “existing roof system” appeared in both and the dollar amount was the same. J.A.201-202. He paid the invoice in full. J.A.160, Trial Ex. 4.

Four years later, in the summer of 2009, another contractor cut a 2’ x 2’ hole in the Downeys’ roof to install an HVAC unit and discovered wet insulation

[7] Like the erroneous date of July 30, 2007, the reference to “246” on the invoice appears to be a typographical error. The original Proposal (J.A.155, Trial Ex. 1) was numbered 264 and it was undisputed that Chute submitted no other written proposal for the job.

between multiple roof layers. J.A.202-204. He promptly alerted the Downeys to the problem. *Id.*; J.A.253-254. Christopher Downey then asked two roofing contractors (one of whom was Follett) to inspect the open hole and propose solutions. J.A.204-206. Shortly after that, the Downeys retained Greg Doelp, an engineer with Simpson Gumpertz & Heger, to evaluate the roofing contractors' written reports. J.A.205-206; J.A.233; J.A.163-164, Trial Ex. 7.

When Follett looked at the hole, he observed four layers of roofing and a layer of wet insulation. J.A.236-237; J.A.173, Trial Ex. 16. Upon returning to the scene on a later date, Follett made test cuts at various spots and found "[i]t was the same throughout." J.A.238-239. As reflected in his written proposal, Follett recommended to the Downeys that they remove the four layers of roofing and put a new roof on their home.[8] J.A.204-250; J.A.241; J.A.175.

Follett testified that it is a standard practice in the roofing industry to conduct test cuts on a membrane roof before proceeding to install a new roof.

[8] The other roofing contractor, J.F. Lydon, who did not testify at trial, had made similar observations and also recommended removal and replacement of all existing roof systems. J.A.206; *see also Downey*, 2012 WL 5238782 **2-3, Add.25-26.

J.A.239-240. Test cuts are performed to see the condition of the existing roofing materials, to determine how many layers of roofing there are and the thickness of those layers. J.A.240. Nothing at trial contradicted Follett's testimony that it is a standard practice in the roofing industry for the contractor, not the homeowner, to determine the number of existing layers. J.A.240.

Soon thereafter the Downeys hired Follett to remove and replace the roof. They were motivated to complete the project promptly in order to remove the wet insulation and out of concern for the structural integrity of the house and the family's safety in light of the potentially overloaded roof structure and the prospect of heavy snowloads in the coming New England winter. J.A.206-207; J.A.218; J.A.254-255. In fact, Follett removed five tons of roofing material from the Downeys' roof. J.A.242. In total, the Downeys spent $37,800 to replace their roof and deck with code-compliant construction. J.A.208; J.A.209; J.A.165, Trial Ex. 9; J.A.174, Trial Ex. 23.

On May 4, 2010, Christopher Downey sent a demand letter to Chutehall, informing it of the Downeys' discovery of the multiple-roof building code violation

and the work they paid for to bring the roof into compliance with the code and to replace the deck, which had to be removed in order to strip the roof. J.A.209[9]. On July 27, 2011, as a prelude to amending the complaint to add a c. 93A/c. 142A cause of action, the Downeys' counsel sent a demand letter expressing the same concerns. J.A.167-168, Trial Ex. 11.

In its response dated August 29, 2011, Chutehall asserted that it had no liability because the Downeys "did not inform Chutehall of multiple roof systems" on their house and "directed Chutehall to install a new roof on top of the existing roof." J.A.169, Trial Ex. 12. The response stated that the Downeys had "directed the work to be done as it was" and Chutehall had merely followed their instructions. *Id.*

At trial, Chute testified that, on an unspecified date after he signed and submitted the Proposal on September 13, 2004, he was informed by Christopher Downey that there was only one roofing system and that it was "10-12 years old." J.A.269; J.A.297. Moreover, according to Chute, Downey insisted that he "didn't want to take the roof off." J.A.269.

[9] The trial judge sustained Chutehall's hearsay objection to the admission of the May 4, 2010 letter itself into evidence. J.A.210.

On the basis of these alleged statements, Chute inferred he was "not allowed" to make test cuts, J.A.278, even though he admitted——consistent with Follett's testimony——that "the first thing" the contractor usually does is "to determine how many roofs are there because it's ... against the Code to put more than two on." J.A.269 (MR. FITZPATRICK: "Now, with regard to not stripping the roof off, is it your practice then to usually strip the roof off? CHUTE: Uh, it is.").

Chute testified that when Christopher Downey eventually called "about 10 months later" to ask him to proceed with the job, he still did not want Chutehall to strip the roof, even though this was contrary to Chute's own usual practice. J.A.269. In the course of "two, three weeks arguing back and forth," Chute told Downey he "had concerns about that" and had "told him [i.e., Downey] it was a bad idea." J.A.270. There was no evidence that Chute specifically informed Downey of the requirements of the building code, however, or the potential safety consequences of violating the code by placing a new roof over more than one existing roof system.

Chute admitted he did not know how many roof layers were on the house and made no test cuts to find out, but instead relied on Downey's assurances that there was only one layer. *See* J.A.295; 296-297; J.A.302. Eventually he capitulated to Downey's alleged orders and directed his workers to cut shallow ventilation strips in the existing roof surface, install a new rubber membrane roof, and then construct a new deck on top of that. J.A.278.

There was no evidence that the Downeys knew how many roof layers were on their house when they retained Chutehall. J.A.198; J.A.233. As of 2005, they had only owned the home for approximately seven years. J.A.198, J.A.233. Christopher Downey categorically denied ever telling Chute that the roof had already been stripped and that there was only one existing roof system. J.A.221; *see also* Add.24. He also denied that he ever refused to allow Chute to make test cuts, or that he authorized Chutehall to deviate from the original written proposal with regard to stripping off and disposing of the existing roof system. J.A.198; J.A.200; J.A.221; J.A.226. The only instructions he gave to Chutehall were to "go ahead and reroof my house." J.A.232. And until 2009, as far as the Downeys

knew, Chutehall had followed that instruction and done the job as described in the original Proposal. J.A.201-201; J.A.207.

III. ARGUMENT

A. Standard of Review

To decide whether a trial judge's decision to overrule a party's objection to a jury instruction constitutes reversible error this Court engages in a two-pronged analysis. *See Campbell v. Cape & Islands Healthcare Serv., Inc.*, 81 Mass. App. Ct. 252, 258 (2012). First, the Court must determine whether there was error in giving the jury instruction. *Id.* at 258. "It is the duty of the judge ... to give full, fair, correct and clear instructions as to the principles of law governing all the essential issues presented, so that the jury may understand their duty and be enabled to perform it intelligently." *Hopkins v. Medeiros*, 48 Mass. App. Ct. 600, 611 (2000) (citation omitted).

Second, the Court must determine "whether the [plaintiff] has made a 'plausible showing that the trier of fact might have reached a different result'" in the absence of the trial judge's error. *Campbell*, 81 Mass. App. Ct. at 258-259, *citing Grant v.*

Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990) (quoting *DeJesus v. Yogel*, 404 Mass. 44, 48–49 (1989).

As set forth in more detail below, the trial judge's overruling of the Downeys' objection to instructions regarding the alleged oral waiver of Chutehall's liability under c. 93A/c. 142A prejudicially misconstrued the relevant statutes and case law, including this Court's opinion in *Reddish v. Bowen*, 66 Mass. App. Ct. 621 (2006). The jury should not have been instructed that Chutehall's alleged reliance on the Downeys' instructions was a defense to liability under c. 93A/c. 142A. Having found that Chutehall violated the building code, the jury should have been allowed to proceed to determining whether Chutehall's conduct was willful and knowing and the damages suffered by the Downeys.

B. The Trial Judge Erred by Instructing the Jury That A Contractor May Assert, as a Defense to Liability Under c. 93A/c. 142A, that a Consumer Waived Compliance with Safety-Related Provisions of the Building Code.

The Supreme Judicial Court has stated that it "ordinarily would not effectuate a consumer's waiver of rights under c. 93A." *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 406 Mass. 369, 378 (1990) (upholding business plaintiff's waiver of G.L. c. 93A,

§ 11 claim). "A statutory right may not be disclaimed if the waiver could 'do violence to the public policy underlying the legislative enactment.'" *Id.*, quoting *Spence v. Reeder,* 382 Mass. 398, 413 (1981); *see also, e.g., Costa v. Brait Builders Corp.*, 463 Mass. 65, 72-73 (2012) (holding, on public policy grounds, that subcontractor's waiver of claims against general contractor's bond under G.L. c. 149, § 29, was unenforceable). The alleged waiver[10] of the Downeys' c. 93A/c. 142A claim is unenforceable as a matter of law. Were this Court to hold otherwise, the important public policies underlying both c. 93A and c. 142A would effectively be negated.

The *Canal Electric* opinion makes clear that the goals of consumer protection may not be thwarted by a consumer's disclaimer of his or her rights under c. 93A. In *Canal Electric*, a utility company alleged that it incurred substantial losses as a result of defects in an electric generator manufactured by the defendant. In considering whether a written limitation of liability was enforceable as a waiver of the rights

[10] Although the issue below was couched in terms of waiver, not estoppel, the outcome is the same regardless of how Chutehall's defense is labeled. *See Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 422 Mass. 318, 323-324 (1996).

afforded by G.L. c. 93A, § 11, the Court recognized that the contract before it was "a reasonable accommodation between two commercially sophisticated parties" in allocating risks and responsibilities for a "highly complex, sophisticated, and in some ways experimental piece of equipment." *Id.* at 374-375, citing, *e.g.*, *American Elec. Power Co. v. Westinghouse Elec. Corp.*, 418 F. Supp. 435, 458 (S.D.N.Y. 1976) ("the contract here in issue is not of the type entered into by the average consumer, but a commercial agreement painstakingly negotiated between industrial giants")." Where the plaintiff's c. 93A claim was duplicative of its contract claim, the Court ruled that the parties' dispute was "a purely commercial one that does not affect the public interest" and thus, enforcing the waiver would not frustrate the public policies underlying c. 93A. 406 Mass. at 379.

In this case, much more than consumer protection is at stake. Allowing a home improvement contractor to evade liability under c. 93A/c. 142A by claiming reliance on an unqualified homeowner's uncorroborated oral "instructions" or "assurances" also frustrates the public safety mandates of the building code and c. 142A. As set forth in more detail below, these

requirements are designed to protect consumers of home improvement contracting services as well as future owners of the property, guests, and visitors, including building inspectors, other contractors and their workers, firefighters, and other emergency responders.

1. The Building Code and c. 142A Reflect the Importance of Ensuring Public Safety as Well as Protecting Homeowners in Their Dealings with Home Improvement Contractors.

The declared intent of the building code as a whole is

> to establish the minimum requirements ***to safeguard the public health, safety and general welfare through structural strength***, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations.

780 Code Mass. Regs. § 101.3 (2010) (emphasis added). *Cf. Falcon v. Leger,* 62 Mass. App. Ct. 352, 360 (2004).

The multiple-roof provision of the building code at issue here——780 Code Mass. Regs. § 1513.3(3) (1997), Add.5——reflects an intent to safeguard public safety from the obvious hazards incident to placing

too many roof systems on top of each other in a region known for icy winters and heavy snowfalls.

As a further means of promoting public safety, the building code imposes extensive licensing requirements on construction supervisors such as Chutehall, who are "deemed qualified" to directly supervise persons engaged in roofing work. 780 Code Mass. Regs. § 110.R5 (2010), Add.19 (Table 110.R5.1 "CSL Roof Covering"). "The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust ***only*** to those with proven qualifications." *Leduc v. Commonwealth*, 421 Mass. 433, 435 (1995) (emphasis added), *cert. denied*, 519 U.S. 827 (1996), citing *Levy v. Board of Reg. & Discipline in Med.*, 378 Mass. 519, 527-528 (1979). Pursuant to 780 Code Mass. Regs. 110.R5 of the building code, the qualifications for a construction supervisor's license include a minimum of "at least three years of experience in [the] field," and passing an examination. 780 Code Mass. Regs. § 110.R5.2.1, Add.20.

Other provisions of c. 142A and 201 Code Mass. Regs. § 18.00 (rules promulgated under the authority

of G.L. c. 142A), protect public safety while also protecting homeowners' consumer rights:

- G.L. c. 142A, § 2(a) requires contractors to ensure that all terms are agreed to, in advance, in a writing, signed by both parties. Add.1-2. *See also* 201 Code Mass. Regs. § 18.05 (2010), Add.16-17.

- G.L. c. 142A, § 2(9), specifically prohibits a home improvement contractor from including terms in its agreement with a homeowner that "waive any rights conveyed to the owner under the provisions of this chapter." *See* Add.2. *See also* 201 Code Mass. Regs. § 18.05, Add.17.

- G.L. c. 142A, § 9[11] requires home improvement contractors to be registered with the Office of Consumer Affairs and Business Regulation, which regulates their advertising and contracting practices and administers disciplinary and enforcement proceedings against them. *See generally* 201 Code Mass. Regs. § 18.00 (2010), Add.6-18.

- G.L. c. 142A, § 13(b) discourages homeowners from engaging unregistered home improvement contractors by providing: "All building permits shall clearly state that persons contracting with unregistered contractors do not have access to the guaranty fund under this chapter." *See* 201 Code Mass. Regs. § 18.04(5)(c)(1) (2010), Add.15; *Reddish*, 66 Mass. App. Ct. at 626.

This Court has acknowledged that by expressly making a violation of any provision of c. 142A—— including a violation of G.L. c. 142A, § 17(10)——a *per*

[11] G.L. c. 142A, § 9(a) provides: "No contractor or subcontractor shall undertake, offer to undertake, or agree to perform residential contracting services unless registered therefor with the approval of the office of consumer affairs and business regulation."

se consumer protection violation, c. 142A reflects an intent to promote the public safety goals of c.142A and the building code by "facilitat[ing] a homeowner's c. 93A remedies" against home improvement contractors. *Reddish*, 66 Mass. App. Ct. at 626-627, quoting *Simas v. House of Cabinets, Inc.*, 53 Mass. App. Ct. 131, 137 (2001).

In *Reddish*, the parties' written agreement contained express disclaimers "requiring [the consumer] to verify the siting of the pool and relieving the contractor from liability with respect to the pool's location." 66 Mass. App. at 623. The contractor unintentionally violated the town setback code in reliance on the homeowner's knowing misstatement as to the location of the property line. *Id.* After a bench trial, the judge found that the contractor breached its agreement with the homeowner and its duty of care to him "[b]y constructing the pool based upon uncertain and altered pool location plans, resulting in violations of state and local building laws." *Id.* at 625. She ruled that those violations amounted to a breach of G.L. c. 93A by operation of G.L. c. 142A, § 17(10). *Id.* at 626. She concluded, however, that the express disclaimers

signed by the homeowner barred recovery on all but the G.L. c. 93A claim. *Id.* at 625-626. As to this conclusion, the Appeals Court observed:

> In ruling on the disclaimer, the judge wrote that "courts are loathe to uphold a waiver of a consumer's statutory right if it would undercut the public policy behind the legislative enactment," citing *Canal Elec. Co.* v. *Westinghouse Elec. Corp.*, 406 Mass. 369, 378 (1990). Andrews does not argue otherwise on appeal. Accordingly, we do not consider whether the contractual provisions requiring the owner to verify the site of the pool and relieving Andrews from liability with respect to its location operate as a defense to the trust's c. 93A claim against Andrews. Nor do we address whether, even in a consumer context, there may be instances where an informed, consensual, and clear allocation of risk and responsibility could preclude recovery by the consumer under c. 93A for an unintentional statutory violation by the contractor, incurred at the consumer's request and in reliance upon the consumer's representations.

66 Mass. App. at 625, n.10.

At most, therefore, in the context of a case that involved express, written disclaimers signed by both parties and actual reliance by the contractor on knowing misstatements by the owner, the *Reddish* opinion suggests——without deciding——that "there may be instances where an informed, consensual, and clear allocation of risk and responsibility could preclude recovery by the consumer under c. 93A for an unintentional statutory violation by the contractor,

incurred at the consumer's request and in reliance upon the consumer's representations." *Id.* at 625 n.10. Given the overriding public safety goal of requiring strict compliance with the building code, especially the multiple-roof provision that Chutehall violated in this case, the lower court judges both erred in relying on *Reddish* and allowing Chutehall's defense to go to the jury.

2. The Building Code and c. 142A Reflect an Intent to Burden Home Improvement Contractors with Non-Waivable Liability for Violating the Building Code.

Multiple provisions of c. 142A, 780 Code Mass. Regs. § 110.R5, and 201 Code Mass. Regs. § 18.00 make it clear that home improvement contractors have a non-waivable obligation to affirmatively ensure that their work complies with the building code. *See Reddish*, 66 Mass. App. Ct. at 627 (Section 2 of c. 142A "suggests a legislative intent to burden the registered contractor, not the homeowner, with the task of obtaining building permits and ***making sure*** that the anticipated construction complies with all obligations associated with such permits." (emphasis added)).

General Laws c. 142A, § 21, provides that "[t]his chapter shall not be construed to relieve or lessen

the responsibility of any person registered under this chapter ...." *See also* 201 Code Mass. Regs. § 18.02. Add.10.

The building code, 780 Code Mass. Regs. § 110.R5.1.3.1, Add. 20, provides:

> **Note.** Any Licensed Construction Supervisor who contracts to do work for a homeowner ***shall be responsible for performing said work in accordance with 780 CMR*** and manufacture's [*sic*] recommendations, as applicable, whether or not the licensed contractor secured the permit for said work. [Emphasis added.]

Similarly, 780 Code Mass. Regs. § 110.R5.2.12, Add.21, provides:

> **Note.** Any licensed construction supervisor who contracts to do work for a homeowner ***shall be responsible for performing said work in accordance with 780 CMR*** whether or not the licensed contractor secured the permit for said work. [Emphasis added.]

Yet another provision of the building code, 780 Code Mass. Regs. § 110.R5.2.15.1, Add.22, provides:

> **Responsibility for Work.** The [construction supervisor] license holder ***shall be fully and completely responsible for all work which he/she is supervising. He/she shall be responsible for seeing that all work is done pursuant to 780 CMR*** and the drawings as approved by the building official. [Emphasis added.]

It is settled law that under c. 93A/c. 142A, a home improvement contractor is liable to a homeowner for violating the code, even if the violation was unintentional. *See, e.g., Reddish,* 66 Mass. App. at

629. To eliminate such liability whenever a contractor claims he blindly followed a homeowner's oral directions does violence to the intent of the statutes and regulations cited to place non-waivable responsibility on the contractor to ensure that its work complies with the building code.

In the interest of public safety and legal certainty, this Court should make it clear that a home improvement contractor may not evade liability under c. 93A/c. 142A when it fails to take the necessary steps to verify that its work will comply with the building code. If a homeowner does not allow the contractor to comply with the building code, then the contractor must refuse to proceed with the work. The summary judgment record reflects that at least one licensed roofing contractor——Follett's principal Donald Follett——understood this to be the only proper course of action (J.A.51):

> [Mr. Fitzpatrick] Q. And if a client told you, no, I don't have money for you to strip off the existing roof, just put the new roof over the existing roof, is that what you would do? … [Objection omitted.]
>
> [Mr. Follett] A. Never.
>
> Q. So you would refuse to do the work for the owner?
>
> A. That's correct.

3. Chutehall Should Be Accountable to the Downeys Under c. 93A/c. 142A for Violating the Building Code.

There is nothing unfair or inequitable about holding Chutehall liable for an unintentional violation of the building code in the circumstances presented here. Alf Chute admitted at trial that he understood what the building code requires and the responsibility of a licensed construction supervisor and home improvement contractor to ensure that the work they are hired to do strictly complies with the code. J.A.269. As a matter of law, an unqualified homeowner's alleged say-so is not a reasonable basis on which an experienced, licensed construction supervisor and home improvement contractor may abandon standard industry practice and shirk its statutory duty. Even if Chute had specifically requested and was refused permission to make test cuts to ascertain the number of existing layers (although there was no evidence this happened), he simply should have refused to do the job rather than risk violating the code and overloading the roof.

Before beginning work, especially after "two, three weeks" allegedly spent arguing with Christopher Downey, Chute could have——and pursuant to G.L. c.

142A, §§ 2(a)(4), (7) and 201 Code Mass. Reg. §§ 18.05(2)(a)(4), (7), should have—revised and submitted the Proposal for Downey's countersignature. It is not clear from Chute's testimony precisely when he capitulated to Downey's instructions and agreed not to strip the roof. J.A.296 (Mr. Kolberg: "When did Mr. Downey purportedly waive item 3 of your proposal?" Chute: "... it was, uh, um, around the time we started doing the roof, around -- like 10 months later.").

At some point in June 2005, therefore, Chute knew that the building permit application that was submitted to the Inspectional Services Department did not accurately describe the work that was actually going to be done. Chute signed a sworn acknowledgment on that application that the proposed work would include stripping off the existing roof. *See* J.A.157, 159. He did not claim that the Downeys authorized him to file a false building permit application or that they prevented him from amending or resubmitting the application. As far as the Downeys and the City of Boston could discern from the Proposal, Chutehall intended to, and did, strip off and dispose of the existing roof and place a single new roof layer on the Downeys' home.

It was Chutehall's responsibility to avoid violating the building code and it was within Chutehall's power to do so. Holding Chutehall liable to the Downeys under c. 93A/c. 142A is a fair and foreseeable consequence of the uncertainty that Chutehall itself created by failing to comply with the written agreement and signature requirements of G.L. c. 142A, § 2, and 201 Code Mass. Regs. § 18.05, by failing to insist on making test cuts before placing a new roof over the existing roof, by failing to provide the City of Boston with an accurate description of the proposed work when applying for the building permit, and by proceeding with the job without otherwise "making sure" that its work complied with the building code. *Cf. Reddish*, 66 Mass. App. Ct. at 627; 780 Code Mass. Regs. § 110.R5.1.3.1 (Note), Add. 20; 780 Code Mass. Regs. § 110.R5.2.12 (Note), Add.21, 780 Code Mass. Regs. § 110.R5.2.15.1 (Responsibility for Work), Add.22.

C. A Homeowner's Oral Representations Cannot Establish an Informed, Consensual, and Clear Allocation of Risk and Responsibility for a Home Improvement Contractor's Unintentional Building Code Violation.

Prompted by the summary judgment motion judge's citation to *dicta* in this Court's decision in *Reddish*,

the trial judge instructed the jury that, to establish its waiver defense a home improvement contractor need only convince the jury that the contractor's violation of the building code "came in response and [in] reliance on something they were asked to do, specifically, by the Downeys." J.A.147. Assuming, *arguendo*, that a home improvement contractor may raise any sort of waiver defense against a consumer's c. 93A/c. 142A claim, the jury instructions were nevertheless prejudicially erroneous. Nothing in the *Reddish* opinion, including footnote 10 on which the motion judge relied, suggests that a homeowner's uncorroborated oral instructions are sufficient to relieve a home improvement contractor from liability.

A signed, written disclaimer of liability was before the Court in *Reddish*, as was undisputed evidence that the homeowner knowingly provided inaccurate information to the contractor. 66 Mass. App. Ct. at 623. In this case there was no evidence that the Downeys prevented Chutehall from submitting a revised written proposal for their signature before commencing work or otherwise documenting the statements on which Alf Chute claims to have relied. There was no evidence from which the jury could have

inferred that Christopher Downey knowingly misled Alf Chute as to the number of existing roof layers; Downey had no way of actually knowing how many roof layers were on the house before Chutehall began work. *E.g.*, J.A.233.

The minimum requirement for establishing "an informed, consensual, and clear" waiver of liability for an unintentional code violation must be, at a minimum, a writing signed or otherwise acknowledged by the consumer, which memorializes the consumer's instructions and some reasonable basis for the contractor's reliance thereon. Lacking such evidence, Chutehall's affirmative defense failed as a matter of law. Unless the judgment is vacated, the precedent created by this case will provide home improvement contractors with an irresistibly convenient, fact-intensive defense against claims that they violated the building code. Homeowners faced with the choice of incurring legal expenses that exceed the cost of the construction at issue will be effectively chilled from exercising their rights, in direct contravention of the purposes of c.142A, § 17.

D. A Contractor's Violation of Safety-Related Provisions of the Building Code Necessarily Causes Injury Cognizable under G.L. c. 93A.

There was undisputed testimony at trial that the Downeys' decision to remove and replace their roof and deck in 2009 was motivated by a well-founded concern about lack of compliance with the building code and potential overloading of their roof structure. *See supra* Section II.B. In reversing the judgment and remanding this case to the Superior Court, this Court should instruct the lower court that Chutehall's multiple-roof code violation caused actionable injury within the scope of c. 93A as a matter of law, based on the reasoning set forth in *Iannachino v. Ford Motor Co.*, 451 Mass. 623 (2008).

In *Iannachino*, the Supreme Judicial Court held that, even though the plaintiffs did not allege they actually experienced any harm caused by alleged safety defects in their motor vehicles, their complaint nevertheless established the requisite c. 93A injury. The Court reasoned that the plaintiffs "continue to own the allegedly noncompliant vehicles. Motor vehicles are inherently dangerous in operation, and safety standards play a highly significant role in relation to them." *Iannachino*, 451 Mass. at 630. In

light of this reality, the injury requirement was necessarily satisfied because "the purchase price paid by the plaintiffs for their vehicles would entitle them to receive vehicles that complied with safety standards" and thus, "the plaintiffs paid for more (viz., safety regulation-compliant vehicles) than they received." *Id.* at 630-631.

Just as federal motor vehicle safety standards protect vehicle owners and the public from the obvious dangers of vehicle safety defects, the building code protects homeowners and the public from the obvious dangers of unsafe construction. *See supra* Section III.B.1. When a home improvement contractor performs construction work that does not comply with the building code and demands payment on the basis that its work was code-compliant, the homeowner——like the plaintiffs in *Iannachino*——has paid for more than he received, regardless of whether the code violation caused any other loss or damage. In such cases, the homeowner should be entitled to recover the expenses incurred to cure the violation.

IV. CONCLUSION

The judgment below should be vacated and this case remanded for entry of judgment as to liability in

favor of the Downeys on Count III of their Amended Complaint with respect to the multiple-roof violation, and for further proceedings to determine whether Chutehall's violation was willful and knowing, and to assess the Downeys' damages and their right to multiple damages, attorneys' fees and expenses pursuant to G.L. c. 93A, § 9. Additionally, as provided by G.L. c. 93A, § 9, the Downeys request the attorneys' fees, costs, and other expenses they have incurred in connection with the instant appeal.

Dated: October 30, 2014

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH COURT RULES

The undersigned certifies that the foregoing brief, dated October 30, 2014, complies with the rules of this Court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18(appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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