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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
No. 1881cv2939

JOSEPH AND KIM TRITES

vs.

PETER CRICONES and REEDY MEADOW, LLC

(AMENDED) ORDER ON PLAINTIFFS' CHAPTER 93A CLAIMS

This action arose out of the presence of Japanese knotweed and glass and metal refuse in the yard of a single-family home at 22 Crawford Way in Pepperell (the “Property”), which the defendant developers, Peter Cricones and Reedy Meadow, LLC (collectively, “Developer”)<sup>1</sup> sold to Joseph and Kim Trites (the “Trites”) in 2017. The Trites brought claims against the Developer for breach of contract, negligence, nuisance, intentional infliction of emotional distress, and unfair or deceptive conduct in violation of G.L. c. 93A, §§ 2 and 9. On September 15, 2022, after a four day trial, the jury returned a verdict mostly in favor of the Trites. Specifically, the jury found that the Developer: i) breached the implied covenant of good faith and fair dealing, though not the express terms, of the parties’ Purchase and Sale Agreement; ii) was negligent, but its negligence did not cause the Trites’ injuries; iii) created a nuisance in connection with Japanese knotweed and other defects in the yard; and iv) did not intentionally inflict emotional distress on the Trites.<sup>2</sup> The jury awarded a total of \$186,000 in damages. It

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<sup>1</sup> Mr. Cricones testified that there is no meaningful distinction between himself and Reedy Meadow, LLC, which he wholly owns and controls. Accordingly, I refer mostly to the “Developer” throughout this decision, which encompasses both Reedy Meadow, LLC and Cricones. Judgment will be joint and several as to both defendants.

<sup>2</sup> The Trites claims for negligence and nuisance sought liability based in both: i) the Japanese knotweed and metal refuse in the Trites’ yard, and ii) a fire that allegedly occurred at or near the Trites’ property. The jury rejected any

attributed that amount to the nuisance claim and \$166,000 to the contract claim, but found that the contract damages were duplicative to the nuisance damages.

Presently before the court is the Trites' motion to enter judgment in their favor on their c. 93A claims, which I reserved for my consideration after trial. The Trites seek to recover treble damages under c. 93A, as well as attorney's fees under the statute. On October 25, 2022, I held a hearing on the Trites motion for treble damages under c. 93A (Paper No. 27). At the final trial conference, I advised the parties to expect that my decision on the c. 93A claims would conform to the jury's verdict with respect to the claims the jury considered. At the October 25, 2022 hearing, the parties agreed that, in my decision on the c. 93A claims, I could reference the jury's verdict and issue summary findings, rather than detailed findings, which is how I will approach this decision.

For the reasons set forth below and reflected in the jury's verdict, I find, first, that the Developer engaged in unfair or deceptive acts or practices, causing damages of \$186,000, the same amount of damages determined by the jury in its verdict due to nuisance and breach of contract. Thus, the damages for all the Trites' claims, now including their c. 93A claim, totals \$186,000. Second, because of Developer's unfair or deceptive conduct, the Trites are entitled to recover reasonable attorney's fees and costs pursuant to G.L. c. 93A, § 9. Utilizing Superior Court Rule 9A, counsel for the Trites shall submit a petition for attorney's fees, and the eventual award will be added to the judgment. Third, I do not find that Developer's unfair or deceptive conduct was "wilful or knowing" as required under Section 9 to award double or treble damages.

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liability based in the alleged fire. Because I agree with the jury's verdict on those fire-based claims, they are not discussed further in this decision.

Accordingly I deny the Trites motion to treble damages under c. 93A, but allow their motion insofar as judgment will enter in the Trites favor on their c. 93A claim, and will include costs and attorney's fees.

**A. Chapter 93A Liability and Treble Damages**

Section 2(a) of the Consumer Protection Act, c. 93A, makes unlawful “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Here, there is no dispute that the Developer’s sale of the Property to the Trites was in trade or commerce. Whether business conduct is unfair or deceptive turns on all the facts and circumstances of a case, *Commonwealth v. DeCotis*, 366 Mass. 234, 242 (1974), here those developed during the four-day trial. A breach of contract or breach of the covenant of good faith and fair dealing may reflect unfair or deceptive conduct, but by itself a breach of contract does not automatically translate to c. 93A liability.<sup>3</sup> Likewise, negligence may reflect unfair or deceptive conduct, but c. 93A liability is not cabined by either negligence or contract law.<sup>4</sup> Included within deceptive conduct is the failure to disclose material facts in connection with a sale. See *Commonwealth v. AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 334 (1999) (act or practice is deceptive if a representation or omission is misleading on a material matter); 940 C.M.R. 3.05(1), 3.16(2) (Attorney General regulations prohibiting misrepresentations and failure to disclose material information). A commercial act or practice is unfair in violation of c. 93A “if it falls within at least the penumbra of some common-law, statutory, or other established concept of unfairness;” is “immoral,

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<sup>3</sup> See *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 316 (2018) (“Our analysis of what constitutes an unfair or deceptive act or practice requires case-by-case analysis . . . and is neither dependent on traditional concepts nor limited by preexisting rights or remedies.”); *Anthony’s Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 471 (1991) (breach of implied covenant of good faith and fair dealing and violation of c. 93A relied on same business conduct).

<sup>4</sup> See *Meyer v. Wagner*, 429 Mass. 410, 424 (1999) (negligence by itself does not support c. 93A liability); *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. at 316.

unethical, oppressive, or unscrupulous;" and causes substantial injury to consumers. See *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593, 596 (1975).

Under Section 9(4), which applies to transactions between businesses and consumers, a successful plaintiff is entitled to recover, in addition to damages attributable to the unfair or deceptive conduct, their "reasonable attorney's fees and costs." G.L. c. 93A, § 9(4). See, e.g., *Wheatley v. Massachusetts Ins. Insolvency Fund*, 465 Mass. 297, 304 (2013) (successful plaintiff under c. 93A entitled to attorneys' fees).

Also under Section 9, a successful plaintiff may recover double to treble damages if they prove that the defendant's unfair or deceptive conduct was "a wilful or knowing violation" of the statute. G.L. c. 93A, § 9(3).

#### **B. Findings relevant to c. 93A to the Facts of this Case**

Based on the evidence introduced by the parties at trial, and following the jury's verdict on the claims considered by the jury, I find the following facts with respect to the Trites' c. 93A claim. The facts relevant to the Trites c. 93A claim fall into four categories: i) Japanese knotweed; ii) glass and metal debris in the lawn; iii) intimidating or threatening conduct by Cricones directed at the Trites; and iv) Developer's breach of the implied covenant of good faith and fair dealing.

##### **1. Japanese knotweed**

The Developer has developed several subdivisions in Massachusetts, sold a "few hundred" homes over 36 years as a developer, including the 27 residential lots and homes sold at Reedy Meadow, which straddles the Pepperell / Groton line. The Development was built on a property that was formerly home to a gravel pit. The Developer was aware of the property's prior use and, generally, was familiar with the land on which the developer built and sold homes.

As to Japanese knotweed, the developer was aware of the risk posed by Japanese knotweed—that it was invasive and could spread quickly—because one of his excavating/grading contractors told him about the weed. Namely, Dominic Cimina, a contractor who excavated and graded the foundations for the 27 lots at Reedy Meadow, informed Cricones that Japanese knotweed was growing out of a large pile of soil on the Developer's property. To prepare the residential lots, Cricones used a combination of fill purchased from third-parties like Agritech, and soil that was already on the site. The new fill, trucked to the site, was combined with the existing fill and used throughout the site. Cimina and one of his workers observed that a large pile of existing fill on the site had Japanese knotweed, about 5 feet tall, growing from the soil. Cimina informed Cricones that the knotweed was invasive and could cause problems. Neither Cimina nor Cricones were especially familiar with Japanese knotweed. Cimina had a basic understanding that it was highly invasive and could cause problems if it was distributed around the subdivision. Cimina shared this concern with Cricones, and was reluctant to mix the existing on-site loam with the trucked-in loam, which did not contain Japanese knotweed. Cricones instructed the Cimina to use the on-site loam, mix it with the trucked-in loam, and to try to screen out the knotweed. The knotweed-containing on-site loam was mixed with the trucked-in loam and used throughout the subdivision.

Japanese knotweed was present at the Property from time the property was graded, and prior to the Trites' purchase, which closed in May 2017. The Trites visited the property at least twice before buying it, once in January 2017 and for an inspection in April 2017. During the winter, the knotweed was not apparent. During the inspection, the Trites did not observe the knotweed, in part because the lawn had been hydroseeded. Shortly after moving in during May 2017, the Trites began to see the knotweed in their yard. It eventually was very prevalent and

made it difficult to use the yard in the manner the Trites anticipated. Efforts to control the Japanese knotweed in order to have an attractive and useful yard became a constant battle. The Trites enlisted the Developer in their fight against the Japanese knotweed. The Developer responded, first, by sending a landscaping contractor to the Trites property to try to pull out all the weeds. Those landscapers had little or no experience with Japanese knotweed; pulling the weeds by hand is not likely to eradicate Japanese knotweed, and it did not. Later, Cricones sent a worker with a “bobcat” small tractor to try to excavate some knotweed. That also did not work, and the Trites complained it made their yard look worse. After conducting some online research, Cricones suggested that the Trites control the knotweed by applying “Round Up,” a chemical weed-killer. However, the Trites had heard in the news media that Round Up was seriously toxic, and did not want to use the chemical on their property, where they planned for two young boys to be playing in the yard.

These unsuccessful efforts to control the knotweed occurred between May and October 2017. During that same time frame, the Trites and Cricones exchanged many email communications concerning Japanese knotweed. Cricones eventually abandoned his efforts to help the Trites with the knotweed, because i) the early efforts had failed; ii) the Trites rejected any chemical eradication; and iii) the Trites had grown combative by posting large signs on their property criticizing the Developer for the presence of the Japanese knotweed (see discussion *infra*).

Generally speaking, the Developer’s efforts to combat the Japanese knotweed were half-hearted. He did not research the problem and did not consult with landscape professionals familiar with the problem. He likewise failed to look into the issue when his excavating/grading

contractor first raised a concern about Japanese knotweed, before the residential lots were prepared.

## 2. Glass and Metal Refuse in the Yard

Separate from the presence of Japanese knotweed, the Trites also presented compelling evidence that excessive quantities of glass shards and metal refuse were present in their yard. Although the glass and metal refuse may not have been the central focus of the Trites' presentation of its case, in my view, this defect played a more prominent role in the jury's verdict finding Developer liable for nuisance and breach of contract. The glass and metal refuse in the yard interferes more directly with the Trites ability to use their yard, and poses a more significant safety risk than the Japanese knotweed.

John Trites testified that, over the first two years his family lived at the Property, he pulled from the soil copious amounts of glass shards and metal refuse. I credit this testimony. Trites presented at trial two very large buckets and a crate, filled with glass shards and metal refuse, some pieces very small and some quite large. Although there was no specific evidence at trial that the Developer was aware of the presence of this material, I find, based on the sheer quantity of the glass and metal refuse on this one property, that the Developer was aware of the glass and metal debris on the property. The presence of large quantities of glass and metal in the yard made it dangerous and, in large measure, unusable for the Trites. The presence of the glass and metal, I infer, served as the basis for the jury's nuisance and breach of contract verdict.<sup>5</sup> It also serves as the primary basis for my determination that Developer engaged in unfair or deceptive acts by: i) failing to disclose to the Trites the presence of the metal and glass; and ii)

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<sup>5</sup> See discussion of the jury's verdict *infra* at pp. 9-10.

selling the residential property with a serious defect, namely, large quantities of glass and metal in the soil.

### 3. The Developer's Threatening and Intimidating Conduct

The Trites also contend that the Developer's unfair or deceptive conduct includes his treatment of the Trites once the dispute arose over the Japanese knotweed. I find that Cricones engaged in coarse and unprofessional behavior once the dispute with the Trites arose, by:

- Making vulgar gestures to John and Kim Trites, his customers, by raising his middle finger;
- Making vulgar threats to John Trites such as words to the effect of "You're fucking with the wrong guy," and "Fuck you."
- Attempting to intimidate the Trites by revving the engine on his Harley Davidson nearby the Trites home;
- Glaring at Kim Trites in an effort to intimidate her.

The jury did not find that this conduct rose to the level of intentional infliction of emotional distress. In a similar vein, I conclude that, although it qualifies as "unfair" to direct such conduct at your customers, these improprieties are not a significant part of the Trites' claim under c. 93A.

Importantly, Cricones' conduct must be assessed in the context of all the facts and circumstances. Here, the Trites' conduct as aggrieved consumers is highly relevant to assessing the Developer's coarse conduct. After the Developer's initial efforts to mitigate the Japanese knotweed failed, the Trites engaged in a self-help campaign plainly designed to get the Developer's attention, by hurting his business, presumably to leverage a more effective response by the Developer to their complaints. The Trites conduct included:

- Aware that Developer was in the process of selling other homes in the subdivision, the Trites erected large signs and banners in the front and back of their house, plainly visible from the street, highlighting that Japanese knotweed was present in their new yard. John Trites also parked his truck, with a banner, close to the model home where the Developer was holding an open house.



- When the Developer and its realtor conducted an open house, the Trites sought to intercept potential buyers and inform them of the Japanese knotweed and their disappointment with the Developer.

John Trites characterized their efforts as “informational,” testifying that he wished someone had warned them when they visited the subdivision as potential buyers. But their purpose was plain: the Trites were unhappy that Developer was not assisting them in combatting the knotweed, so they were trying to make it difficult to sell other homes and to hurt Developer financially. The Trites removed their signs when Pepperell officials informed them that the signs violated local zoning laws. But for the zoning violation, the Trites may have had every right to post their signs, but the Developer’s unprofessional conduct toward the Trites must be considered in the overall factual context, including the Trites efforts to compel the Developer to provide the remedies the Trites wanted.

#### 4. Breach of Good Faith and Fair Dealing and Nuisance

I include this separate section of “facts” only to highlight my conclusion that the jury’s verdict supports c. 93A liability for unfair or deceptive acts or practices. Namely, the evidence at trial supported a nuisance verdict because the presence of large amounts of glass and metal, as well as the presence of Japanese knotweed in the Trites yard, caused a substantial and unreasonable interference with the Trites use and enjoyment of their property. This translates to c. 93A liability because the unsafe and defective materials in the yard, particularly the glass and metal debris, qualify as unfair, and the Developer’s nondisclosure of those defects qualify as deceptive.

Further, I interpret the jury’s breach of contract verdict as follows: The jury did not find that the Developer breached its express warranty in connection with the property because certain provisions disclaimed responsibility for the lawn and because the contract provided that buyers

took the Property "as is" following their right to inspect. However, the defects in the yard were so significant that Developer breached the implied covenant of good faith and fair dealing by not mitigating those defects, thereby depriving the Trites, as buyers, the benefits of their contract to purchase the new home. I find that the defects in the yard, in particular the glass and metal debris, were sufficiently substantial that this breach of the covenant of good faith and fair dealing rises to the level of being unfair.

**C. Application of c. 93A to this Case**

As discussed above, I conclude that the Developer engaged in unfair or deceptive acts or practices in violation of G.L. c. 93A, §§ 2 and 9 by:

- Failing to disclose to the Trites known defects on the property, namely the presence of Japanese knotweed and glass and metal refuse in the yard;
- Selling a new residential property with a substantial defect, namely large amounts of glass and metal debris in the yard, which posed an unreasonable health and safety hazard to the home buyers;
- Failing to take reasonable steps to address the risks and harm posed by Japanese knotweed and glass and metal in the yard, once the Trites brought those defects to developer's attention;
- Creating a nuisance on the property newly sold to Trites by virtue of the significant amounts of glass and metal debris in the yard;
- Breaching the implied covenant of good faith and fair dealing by depriving the Trites the benefits of the contract with Developer to purchase the residence, by providing a seriously defective and unusable yard;
- Unfairly making vulgar gestures and comments to the Trites and taking actions to intimidate them.<sup>6</sup>

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<sup>6</sup> This is a very minor aspect of Developer's unfair or deceptive conduct, and one to which only minimal damages, if any, can be attributed.

The Trites suffered damages in the amount of \$186,000 due to Developer's unfair or deceptive conduct. These damages, however, are the same as those awarded by the jury on the nuisance claim and on the breach of contract claim, so the overall verdict will not increase.

By virtue of this conclusion that the Developer engaged in unfair or deceptive acts or practices in the conduct of trade or commerce, the Trites are entitled to recover reasonable attorney's fees and costs. G.L. c. 93A, § 9(4).

I do not find that the Developer's conduct in violation of c. 93A was knowing or wilful, so as to warrant an award of multiple damages. This determination considers all the facts and circumstances concerning the relationship between the Trites and the Developer, as well as the nature of the defects that are at the heart of the case. For instance, although it is true that the developer became aware of the presence of Japanese knotweed in the on-site loam before he mixed that loam with trucked-in loam and distributed it around the subdivision, that knowledge alone does not translate into a knowing or wilful violation of c. 93A. The Trites must show that the Developer knew his actions to be unfair or deceptive in violation of the statute. As to the Japanese knotweed, the Developer was only superficially aware that Japanese knotweed posed a problem; he was not aware of the scope of the problem it posed, or just how invasive the weed could be. And, once the issue was raised by the Trites, the Developer did not ignore their complaints, although his efforts were unsuccessful. Further, in a more general sense, the law and the obligations of a developer with respect to an invasive weed like Japanese knotweed were not so developed to support the conclusion that a developer knew of their obligation to disclose its presence. Finally, as to whether the Developer's conduct was knowingly unfair or deceptive, the Developer believed he could rely on his Purchase and Sale Agreement with the Trites, which provided for an inspection, after which the buyers took the property "as is." The jury determined

the terms of the P&S did not insulate the Developer from liability, but Developer's position relying on the contract was not unreasonable.

Many of the same considerations apply to the Developer's failure to disclose the glass and metal debris in the soil at the Trites' Property. I have found, based largely on the sheer volume of the glass and metal taken from the Trites yard, that the Developer was aware of the presence of this defective, unsafe condition. The Developer, however, used a P&S agreement that allowed for buyer's inspection before closing, and placed the onus on buyer to raise issues like a defective or unsafe condition such as glass and metal in the yard. The jury found that the inspection and "as is" clauses did not displace the Developer's obligation to provide a reasonably safe and usable yard, or to at least disclose the known defect, and I agree with that determination. But the contractual context here, based in the P&S and Developer's reliance on it, prevent me from concluding that Developer's unfair or deceptive conduct was "knowing or wilful."

With respect to the Developer's vulgarity and efforts to intimidate the Trites, that conduct too must be considered in the context of the parties' overall relationship. The Trites sought to gain leverage on the Developer by posting signs and interrupting the Developer's sales efforts, to which the Developer responded in a coarse and unprofessional matter. Given their contentious relationship, the Developer's unprofessional conduct does not rise to the level of knowingly or willfully engaging in unfair or deceptive acts. In any event, there are no discrete damages that I attribute to this aspect of the Developer's unfair/deceptive acts, so there is no particular amount of damages to be doubled or trebled.

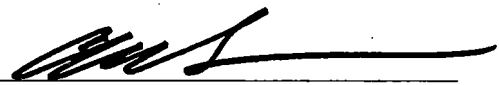
Finally, the Developer's conduct that underlies the jury's verdict on nuisance and breach of good faith and fair dealing was not sufficiently wilful or knowing to justify multiple damages, for the same reasons already discussed in this section.

## CONCLUSION AND ORDER

The Trites' motion for treble damages under c. 93A is allowed in part and denied in part, as follows:


- 1) Judgment shall enter in favor of the Trites on their claims under c. 93A, §§ 2 and 9, in the amount of \$186,000. These damages are the same as those awarded by the jury on the nuisance and breach of contract claims, so the overall damages will not increase.
- 2) The Trites are authorized to recover reasonable attorney's fees and costs as a result of judgment in their favor on their c. 93A claim. Utilizing Superior Court Rule 9A, the Trites shall serve and file a motion for attorney's fees. Once decided, judgment in this case will include an award of attorney's fees.
- 3) The Trites' motion for double or treble damages under c. 93A is denied.

So ordered.

  
Christopher K. Barry-Smith  
Justice of the Superior Court

DATE: March 2, 2023

\* This order was amended only to correct an erroneous reference to \$188,000, changing it to \$186,000 consistent with the jury verdict.

<p style="text-align: center;"><b>CLERK'S NOTICE</b></p>	<p>DOCKET NUMBER <b>1881CV02939</b></p>	<p><b>Trial Court of Massachusetts The Superior Court</b></p> 
	<p>CASE NAME: Joseph Trites et al vs. Peter Cricones, Individually et al</p>	<p>Michael A. Sullivan, Clerk of Court Middlesex County</p>
<p>TO: File Copy</p>	<p>COURT NAME &amp; ADDRESS Middlesex County Superior Court - Woburn 200 Trade Center Woburn, MA 01801</p>	
<p style="text-align: center;">You are hereby notified that on 03/02/2023 the following entry was made on the above referenced docket:</p> <p><b>AMENDED ORDER: ON PLAINTIFFS' CHAPTER 93A Claims</b>  The Trites' motion for treble damages under c.93A is allowed in part and denied in part, as follows: 1) Judgment shall enter in favor of the Trites on their claims under c.93A, §§ 2 and 9, in the amount of 186000.00. These damages are the same as those awarded by the jury on the nuisance and breach of contract claim, so the overall damages will not increase. 2) The Trites are authorized to recover reasonable attorney's fees and costs as a result of judgment in favor on their c. 93A claim. Utilizing Superior Court Rule 9A, the Trites shall serve and file a motion for attorney's fees. Once decided, judgement in this case will include and award of attorney's fees. 3)The Trites motion for double or treble damages under c. 93A is denied. This order only to correct an erroneous reference to \$188,000. changing it to \$186,000 consistent with the jury verdict</p> <p>Judge: Barry-Smith, Hon. Christopher K</p>		
<p>DATE ISSUED <b>03/02/2023</b></p>	<p>ASSOCIATE JUSTICE/ ASSISTANT CLERK <b>Hon. Christopher K Barry-Smith</b></p>	<p>SESSION PHONE#</p>