UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2180

September Term, 2014

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STEWART LEVITAS, ET AL.

v.

TAJAH JEFFERS, ET AL.

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Hotten,
Berger,
Nazarian,

JJ.

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Opinion by Nazarian, J.

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Filed: December 21, 2015

This is a lead-paint case brought by two plaintiffs who lived for part of their childhood in a house in West Baltimore. After a jury in the Circuit Court for Baltimore City awarded them over five million dollars, the court reduced the award to conform to Maryland's cap on non-economic damages, but denied a motion for remittitur as to economic damages. Their landlord raises nine issues on appeal, all relating to asserted errors in legal and evidentiary rulings during trial. As we will detail, some of the trial court's rulings, both in manner and substance, further muddied an already complicated case. Ultimately, though, we find no reversible error and affirm.

## I. BACKGROUND

Tajah Jeffers, born on July 9, 1992, moved to 2116 Hollins Street ("the Property") with her parents, Damien and Kimberly Jeffers (whom we will refer to as "Father" and "Mother"), on March 17, 1994. Her sister Tynae Jeffers was born on November 8, 1996 and also lived at the Property from the time she was born and until Father moved out on March 26, 1998. (We refer to the two together as "the Children" or individually by first name.) Although Mother moved out before then, the Children continued to visit Father and stay with him occasionally at the Property until he moved.

Both Children had elevated blood lead levels during the time they lived at the Property. They produced expert testimony at trial to establish that the Property was the source of these elevated levels, and that each child lost IQ points as a result of her lead exposure, which in turn diminished her chances of graduating from high school and finding full-time employment.

On August 23, 2012, the Children filed a complaint alleging negligence, violations of the Maryland Consumer Protection Act, Md. Code (1975, 2013 Repl. Vol., 2015 Supp.), § 13-301 *et seq.* of the Commercial Law Article, and negligent misrepresentation. They named as defendants Stewart Levitas, who owned the Property during the relevant time period, State Real Estate, Inc., which managed the Property, and Bricks Fifty, LLC, which was dismissed at trial. (We refer to Mr. Levitas and State Real Estate collectively as the "Landlord.") After a five-day trial in November 2014, the jury returned a verdict in the Children's favor on the negligence claims and awarded them a combined sum of over $5 million in economic and non-economic damages. The trial court reduced the damages to a total of just over $4 million after the Landlord filed a motion for remittitur.

Because the issues on appeal all flow from the circuit court's evidentiary and legal decisions during the trial, we will fill in the rest of the story as we address them.

## II. DISCUSSION

Every trial is different, and the trial court here made certain rulings that other trial courts in similar cases might not have made the same way. That alone does not mean they were legally incorrect. Some of these errors are difficult to discern because they were addressed in perfunctory fashion by the trial court, or because counsel did not make a specific enough objection. We have reviewed carefully the many rulings that the Landlord

challenges,[1] both individually and for their cumulative effect, and find no reversible error.

[1] The Landlord's brief lists nine issues:

> I. Whether the trial court committed legal error and/or abused its discretion when it granted Appellees' motions *in limine* pertaining to "notice" and prevented Appellants from presenting evidence to the jury that Appellants' actions were reasonable under all of the circumstances?
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> II. Whether the trial court committed legal error and/or abused its discretion when it prohibited testimony regarding the assessment of "lead-based paint hazards" as defined by the Code of Maryland Regulations?
>
> III. Whether the trial court committed legal error and/or abused its discretion when it permitted Appellees to present cumulative expert opinion testimony as to "substantial factor" causation with the testimony of Steven E. Caplan, M.D.?
>
> IV. Whether the trial court abused its discretion when it permitted Appellees to refer to dust sampling that was excluded by the trial court upon agreement of the parties that it would not be referred to, or introduced, at trial?
>
> V. Whether the trial court abused its discretion with comments and questions that stripped Appellants of their right to a fair and impartial trial?
>
> VI. Whether the trial court committed legal error and/or abused its discretion by allowing Appellees to introduce photographs depicting housing components at 2116 Hollins Street which were not tested for the presence of lead-based paint?
>
> VII. Whether the trial court abused its discretion when it denied Appellants' motion for remittitur, in part, and refused to reduce the economic damages awarded to [Tajah Jeffers] to an award substantiated by the evidence presented at trial?

(continued…)

### A. The Trial Court Did Not Err When It Granted The Children's Motion *In Limine* To Exclude Evidence Of Lack Of Notice.

The Landlord argues *first* that the trial court should not have granted the Children's motions *in limine* to exclude "any arguments regarding, or mention of, alleged lack of notice to the defendants regarding defects and code violations." Citing *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70 (2003), and *Polakoff v. Turner*, 385 Md. 467 (2005), the Landlord argues that he was entitled to try and prove that he acted reasonably in addressing any lead that was present at the Property while the Children lived there. That proposition is true, but the dispute at trial seems to have morphed into a battle over whether the Landlord could introduce and argue from a boilerplate notice provision in the lease stating that tenants are required to notify him of any chipping, peeling, or flaking paint. Put another way, the Landlord sought to use the notice provision itself as evidence of reasonableness, and contends that the court's refusal to allow it thwarted his defense.

This is well-trod legal ground. In *Brooks*, the Court of Appeals held that a plaintiff is not required to show that property owner had notice of a violation of the Baltimore City Housing Code to establish a *prima facie* case of negligence, only that the violation occurred and proximately caused her injury. *Brooks*, 378 Md. at 72, 79. The Court further refined

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> VIII. Whether the trial court abused its discretion when it denied Appellants' motion for new trial?
>
> IX. Whether the trial court committed legal error by interpreting the Housing Code as having not made Appellants' notice of a defective condition a factor with regard to the Appellants' duty to Appellees?

that doctrine in *Polakoff* to explain that a landlord's liability "will depend on the fact-finder's determination regarding whether the landlord acted reasonably under all the circumstances." *Polakoff*, 385 Md. at 480 (citing *Brooks*, 378 Md. at 85 n.5). The question of a landlord's "reasonableness" can be answered by looking to *how* the landlord attempts to comply with the statute, and *Polakoff* offered a number of examples:

> One surefire way of avoiding lead-paint poisoning liability is to remove lead paint from the rental property. We recognize, however, that the current law does not require this action. *Less extreme options may include*: notifying the tenant in writing and orally of the possible presence of lead paint in the property and its potential danger*; asking the tenant to notify the landlord or property manager immediately if flaking, loose, or peeling paint occurs*; and inspecting the property at the inception and at regular intervals throughout the tenancy to ensure that there is no flaking, loose, or peeling paint. This list is by no means exhaustive nor is it a guarantee that a jury will find the landlord's actions reasonable. Our point is simply to show that there are reasonable ways of attempting to satisfy one's duty pursuant to the Code.

385 Md. at 481 (emphasis added).

Evidentiary rulings such as motions *in limine* lie within the trial court's discretion. "When weighing the probative value of proffered evidence against its potentially prejudicial nature, an abuse of discretion in the ruling may be found 'where no reasonable person would share the view taken by the trial judge.'" *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219 (2011) (quoting *Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009)). "Whether there has been an abuse of discretion depends on the particular circumstances of each individual case." *Pantazes v. State*, 376 Md. 661, 681 (2003). Even if we find an abuse of discretion, we will not reverse if the error is harmless,

and the burden to demonstrate that prejudice accompanied the error lies with the appellant. *Crane v. Dunn*, 382 Md. 83, 91 (2004) ("It is not the possibility, but the probability, of prejudice which is the object of the appellate inquiry." (internal quotation marks and citation omitted)).

In the hearing on the motions, the court and counsel for the Landlord argued broadly over "notice," but it seems that they were talking past each other. The colloquy resulted in the trial court granting the motions brusquely (the court used the word "denied," but the parties agree that the court meant to grant them and did so for all practical purposes):

> [COUNSEL FOR THE CHILDREN]: Yes, Your Honor. 77 and 80 are both my motions and they are both the same. It is to preclude the Defendants from asserting that they were entitled to notice of chipping, peeling, flaking, deteriorated paint at 2116 Hollins Street.
>
> THE COURT: And you don't say that, do you? You don't use those words, do you?
>
> [COUNSEL FOR THE LANDLORD]: That they were entitled to notice—
>
> THE COURT: To notice. Notice. You know, the old Housing Authority notice that they should have had and you had a right to respond to the notice and fix very quickly before they allowed to sue him and you go back to the first cases—
>
> [COUNSEL FOR THE LANDLORD]: I understand, Your Honor.
>
> THE COURT: Thank you. *Let your client know that you tried but that battle has been fought and died.*
>
> [COUNSEL FOR THE LANDLORD]: Okay. I do believe, Your Honor, that if the motion is to preclude evidence of notice from the tenants as to the condition of the property. If the—

> THE COURT: Well, they use here is report to require [sic] is what he just argued.
>
> [COUNSEL FOR THE LANDLORD]: Okay.
>
> THE COURT: It's—if you're going to argue that your client's argument is, is that he didn't receive the notice in ample time to make the repairs and therefore he's not liable, that's not the law is what he's arguing. All right?
>
> [COUNSEL FOR THE LANDLORD]: That's what—
>
> THE COURT: *And that motion is denied.*
>
> [COUNSEL FOR THE LANDLORD]: Okay.
>
> THE COURT: Okay?
>
> [COUNSEL FOR THE LANDLORD]: Thank you, Your Honor.
>
> THE COURT: Please let your client know as that while he may feel that way is that he's 30 years behind the time, okay?

(Emphasis added.)

Putting aside the commentary, the court ruled properly on the question actually presented in the motions, *i.e.*, in barring evidence that the Children *failed to notify* the Landlord about problems with the paint at the Property. That ruling comes straight out of *Brooks*. The Landlord would, of course, have been entitled to offer evidence demonstrating that he had acted reasonably in managing the Property during the time the Children lived there. But he never offered any, and nothing about this ruling prevented him from doing so.

Instead, the Landlord tried to create an inference of reasonableness through a provision of the lease that required tenants to notify the Landlord of defective conditions in the Property:

> *If any defective condition of the premises comes to the Tenants [sic] attention, it shall be the duty of the Tenant to immediately notify the Owner of such defective condition by Certified Mail. The Tenant shall be responsible for any liability or injury resulting to the Owner as a result of the Tenants failure to so notify the Owner of such defective condition.* If the need to repair is caused by Tenants or their invitees, Owner may make repairs, the cost of which will be treated as additional rent to be paid by the Tenants upon notification of amount. Any repairs made by the Owner without request by Certified Mail by Tenants shall not be construed as a waiver of the obligation of Tenants to notify Owner of any requested repairs by Certified Mail.

(Emphasis added.)

The Landlord (correctly) stopped short of arguing directly that this provision shifted to his tenant the duty to notify him of dangerous lead paint conditions—again, that argument would fly in the face of *Brooks* and *Polakoff*. But he tries instead to make the same point indirectly. Again, the trial court didn't parse it out (and neither did the parties), but the Landlord posits two points of potential relevance: *first*, that the provision could qualify as a measure of "reasonable efforts" on his part; and *second*, that the parents' compliance (or not) with the Lease bears on his ability to act reasonably. The second theory is clearly out of bounds; the first is closer, but it appears that the Landlord didn't object to admission of the Lease with the relevant language redacted at the time it was offered into evidence, and only raised the issue after the defense rested and instructions had been read to the jury:

> [COUNSEL FOR THE LANDLORD]: [T]he lease, which was marked as one of the Plaintiff's exhibits and admitted into evidence, had a redaction that was not redacted in any black ink.
>
> * * *
>
> *I did not see the redaction in the document before it was admitted. The document was given to me, but the redaction was just simply whited out so I couldn't see the redaction, it wasn't blacked out.*
>
> * * *
>
> THE COURT: Well, what do you want me to do about that you didn't know what you didn't know, that you now know, that after the document has been submitted?
>
> [COUNSEL FOR THE LANDLORD]: I would ask Your Honor to strike [the Lease] and put in the unredacted version of this.

(Emphasis added.)

The court declined to replace the redacted version of the Lease, reasoning that the Landlord should have objected timely to that version, and found that any violation of the Lease provision had no relevance in any event. Whether or not the Lease might have been admissible to show that the Landlord made "reasonable efforts" under *Brooks* (and we don't decide that question either way), we agree that the request came too late in the game. Maryland Rule 2-517 requires that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *Id.*; *see also Halloran v. Montgomery Cty. Dept. of Pub. Works*, 185 Md. App. 171, 201-02 (2009) (holding that a party must make timely objections in the trial court or "make[] his feelings known" to the

trial court, or the objection is waived). So because the Landlord failed to object at the time the document was admitted (and indeed, at any time that the trial court could have remedied the situation), any objection was waived.

*Finally*, the Landlord claims that he was barred improperly from introducing evidence about the "involvement" of the Kennedy Krieger Institute ("KKI") with the Property. We put the term in quotes, because "involvement" doesn't really capture that relationship. More precisely, the trial judge foreclosed the Landlord from introducing evidence about measures that KKI took, with the Landlord's agreement, to improve the Property:

> [COUNSEL FOR THE LANDLORD]: After Kennedy got involved with the property, what happened next?
>
> [MR. LEVITAS]: Well Kennedy came to the property and I believe perform a level, what they called a level two intervention.
>
> THE COURT: Excuse me. Approach. I do apologize for the interruption.
>
> * * *
>
> (All Counsel approach the bench, where the following ensues:)
>
> THE COURT: You want this case transferred to or bringing Kennedy Krieger as a defendant? I'm not interested, it is not relevant, it does not relieve your client.
>
> [COUNSEL FOR THE LANDLORD]: I understand.
>
> THE COURT: It is of no import other than that there was lead in the property, there was notice of the property in his terms of knowledge that it was there, and that the flaking, he keeps calling it chips, he won't call it flaking and peeling paint, that's entirely up to him, all right. And that there was an infant in the

property and that there was lead levels found afterwards. Now whether or not there was an agreement between him and Kennedy Krieger, or whoever, does not relieve him as the owner of the property, does it?

[COUNSEL FOR THE LANDLORD]: *I understand that, Your Honor, but it goes to whether or not he acted reasonabl[y] in making the property safe.*

THE COURT: Let me try this again. What case that says whether or not he acted reasonably is the issue?

[COUNSEL FOR THE LANDLORD]: I think it's [*Polakoff*], Judge Bell specifically says that it's not strict liability.

THE COURT: But you, let me try this again.

[COUNSEL FOR THE LANDLORD]: It's right after *Brooks*.

THE COURT: It is if in fact they're assuring us of the lead in the property is not enough is what the case is dealing with. It is to show that lead was in the property, there's flaking and peeling, and that a child was injured as a result of it is the issue. He is not stopping before that. You're trying to make it as if he stopped before that.

* * *

So all I'm saying to you is that if you want to consolidate it with Kennedy Krieger, that's not before me. I'm saying to you is you're confusing my jury and confusing the facts of this case. That's all I'm interested in.

I'm saying to you again, the mere fact that he made contact with Kennedy Krieger, his reliance may be detrimental to him. Is that the reality of it is it does not absolve him.

[COUNSEL FOR THE LANDLORD]: It doesn't absolve him, I guess my point with this, Your Honor, is that it gives the jury an understanding of the scope—

> THE COURT: No it isn't, you're polluting the air and I'm not going to breathe it. Let's move along, please.

(Emphasis added.)

This too was a discretionary decision. And although, again, the trial court could have expressed the legal bases for its decision more clearly, we read the transcript to articulate two grounds: *first*, that KKI's "involvement" was not relevant to the question of Landlord's liability, and *second*, that the information about KKI would have suggested, prejudicially, that KKI's involvement somehow relieved or mitigated the Landlord's duty to these tenants.[2] The Landlord has pointed to no case suggesting that any duty held by KKI could somehow relieve him of his duties vis-à-vis the Property, and indeed, *Brooks* and other cases suggests the opposite—that a landlord's duty to the tenant is not delegable in any event. *See Brooks*, 378 Md. at 89; *Council of Co-Owners Atlantis Condo. Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18, 39-40 (1986) (holding a party who has a statutory duty responsible for the negligence of a contractor retained by it).

[2] The reference to KKI related to a study, undertaken as far back as 1993, in which KKI measured and monitored lead paint levels in homes known to contain lead paint: "[i]n return for permitting the properties to be used and in return for limiting their tenants to families with young children, KKI assisted the landlords in applying for and receiving grants or loans of money to be used to perform the levels of abatement required by KKI for each class of home." *Grimes v. Kennedy Krieger Instit., Inc.*, 366 Md. 29, 52 (2001). The *Grimes* case analyzed whether a duty arose on the part of KKI to inform the children and parents of the hazards associated with the children continuing to live in properties containing lead paint. *See id.* at 47-48; *see also White v. Kennedy Krieger Inst., Inc.*, 221 Md. App. 601, *cert. denied*, 443 Md. 237 (2015) (adhering to *Grimes*). There is no claim against KKI in this case, however.

The Children also point out, correctly, that Mr. Levitas never suggested in his testimony that he *in fact* relied on any information from KKI, or on its involvement at the Property, to guide him on maintenance or painting decisions. His testimony revealed, if anything, a detached relationship with KKI:

> [COUNSEL FOR THE LANDLORD]: You knew during the time the Jeffers family lived at [the Property] that [KKI] would come back out periodically and inspect it. Correct?
>
> [MR. LEVITAS]: That was the plan, yes.
>
> [COUNSEL FOR THE LANDLORD]: And how many times did you ask to review the results of the inspection by [KKI]?
>
> [MR. LEVITAS]: *I have no idea.*

(Emphasis added.)

The same was true of his interest in their investigation:

> [COUNSEL FOR THE LANDLORD]: Do you recall contacting [KKI] to inquire as to the results of their sampling in 1996?
>
> [MR. LEVITAS]: *I don't remember if I called them or I didn't.*

(Emphasis added.)

And finally, he admitted that he played no active role in checking on or maintaining the condition of paint at the Property:

> [COUNSEL FOR THE LANDLORD]: You have no memory of any repairs done to the painted surfaces inside the house from 1994 to 1998. Correct?
>
> [MR. LEVITAS]: I don't have any specific memory about those repairs. No.

> [COUNSEL FOR THE LANDLORD]: And you never inspected the house for deteriorated paint unless the tenants called you to complain.
>
> [MR. LEVITAS]: That's correct.

Counsel for the Landlord contended at oral argument that the trial judge's rulings with respect to KKI and the Lease provision deprived him of the opportunity to argue in closing that Mr. Levitas was part of a "team effort" to keep the Property in good condition, a team that included him, the tenant, and KKI (and impliedly required them all to follow). But we see nothing in Mr. Levitas' testimony to support this theory, and he hasn't identified any. And whether this "team effort" approach would work—it still seems to impose some responsibility on the tenant, which would seem inconsistent with *Brooks*—is a question for another day.

### B. The Trial Court Properly Prohibited A Defense Expert From Discussing Federal Regulations Relating To Lead Paint Evaluation.

The Landlord's *second* argument focuses on his attempt at trial to present expert testimony relating to the Environmental Protection Agency's Toxic Substances Control Act, 40 C.F.R. 745.61 *et seq.* (2013). If it sounds far afield, that's because it is; the gist of the argument goes to whether the parties could introduce evidence of certain (arguably) applicable federal regulations regarding lead-based paint hazards. The Children sought to preclude the testimony of the Landlord's environmental expert, Patrick Connor, "regarding certain alleged alternative sources of lead." At the motions hearing, court and counsel had the following colloquy about that motion:

THE COURT: As to [the Landlord's] motions to preclude testimony of [Mr. Connor] regarding certain alleged alternative sources of lead.

[COUNSEL FOR THE LANDLORD]: Your Honor, briefly, [Mr. Connor] testified at deposition he had no evidence and ergo no opinions as to exposure from soil, water, occupation, hobbies, food or environmental lead dust. I'd move the Court to preclude him in advance from offering testimony.

THE COURT: I'll hear from you.

[COUNSEL FOR THE LANDLORD]: Your Honor, this goes to the alternative sources that we'd talked about with Mr. Scheller—

THE COURT: Well, Patric—and Patric Connor has made himself into a—somewhat of an expert. The problem is twofold. He will not be allowed to testify as to what the law is. All right?

[COUNSEL FOR THE LANDLORD]: Understood, Your Honor.

THE COURT: What he thinks the law is, what the law was, what he drafted the law to be, what his cousin thinks the law is. Other than that is that he will be allowed to testify.

[COUNSEL FOR THE CHILDREN]: Thanks, Your Honor.

[COUNSEL FOR THE LANDLORD]: Thank you.

THE COURT: Got my drift?

[COUNSEL FOR THE LANDLORD]: Yes, Your Honor.

THE COURT: Tell him I said it. He's not here to tell me or my jury what the law is. Otherwise he will leave immediately. He will understand.

From this exchange, we can see that the trial judge had had some experience with Mr. Connor and ruled that Mr. Connor couldn't "testify as to what the law is," a broad and non-controversial principle.

The issue next arose in the course of counsel for the Landlord's cross-examination of Appellees' environmental expert, R. Shannon Cavaliere, who testified about the testing performed by his company, Arc, which is in the business of assisting "private clients and government agencies comply with environmental regulations that govern issues like lead-based paint, asbestos, and mold." He testified that the Property contained "areas of deteriorated leaded paint" (counsel's words on direct examination), and testified in detail about the inspection Arc performed at the Property. On cross-examination, counsel for the Landlord asked about "lead-based paint hazards," a question that seemed to set the stage for questions about the regulations relating to inspections of sites such as the Property where lead is suspected to be present:

> [COUNSEL FOR THE LANDLORD]: Okay. And in trying—so your goal was to try to establish the identity of any lead-based paint hazards at [the Property] at the time—
>
> [COUNSEL FOR THE CHILDREN]: Objection.
>
> THE COURT: Approach.
>
> (Counsel approached the bench, and the following ensued:)
>
> [COUNSEL FOR THE CHILDREN]: Your Honor, I interpose an objection. This is exactly what you said not to do. 40 C.F.R. 745 definition of a lead-based paint hazard is not the Plaintiff's standard. It has no relevance to this case. I was—
>
> THE COURT: What are you doing?

[COUNSEL FOR THE LANDLORD]: *I haven't even mentioned it.*

THE COURT: You're falling into a trap that you wanted to use later and you just fell into through yourself.

I have to sustain the objection. I'm not interested as to what they consider as the lead-paint hazard by that standard. It is as through that which existed and the harm that may have been caused to these Plaintiffs.

[COUNSEL FOR THE LANDLORD]: I understand, Your Honor. Just for the record, 45 C.F.R. 75 was adopted by the state of Maryland as being the appropriate standard for lead-based paint hazard, *but I understand your objection or your ruling.*

THE COURT: And the curve comes back to you. I'm interested in the existing housing law and the actual law in Baltimore City that applied to itself. Okay?

[COUNSEL FOR THE LANDLORD]: Okay. Thank you.

THE COURT: Chapter 7.

[COUNSEL FOR THE LANDLORD]: Okay.

THE COURT: So if you want to redirect your question, it may have both. Let's move along.

[COUNSEL FOR THE LANDLORD]: Thank you, Your Honor.

(Counsel returned to the trial table, and the following ensued:)

THE COURT: Counsel is going to restate his question. What we understand is that the lead hazard is not the issue here by the Federal definition.

Let's move along please.

(Emphasis added.)

The Landlord argues that the trial court deprived him of the opportunity to cross-examine Mr. Cavaliere about the factual basis for his testimony, and argues that "pursuant to federal regulations, HUD guidelines [citing 745] are an appropriate methodology for conducting lead-based paint inspections." He also claims that Mr. Connor should have been permitted to respond more broadly to Mr. Cavaliere's opinions. But we can't see where that logical path was ever presented to the trial court, and so again, we find that the Landlord waived his opportunity to raise this objection.

When the issue came up at the motion *in limine* stage, the trial court's broad ruling that Mr. Cavaliere could not testify to "what the law is" was, concededly, not particularly helpful to the parties. But during the trial, it was evident that the trial court would not permit mention of the federal regulations, and while counsel for the Landlord made a perfunctory attempt to *explain* its position, it never *objected* with any clarity to the court's prohibition. Counsel for the Landlord went out of his way to be accommodating ("I understand, Your Honor."), but didn't make a record about what he wanted to ask the witness, which leaves us with no decision on this issue to review.

Maryland Rule 5-103 governs rulings on evidence and requires a party to make a record of what evidence he wants to elicit:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was requested by the court or required by rule; or

> (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered. The court may direct the making of an offer in question and answer form.

"The purpose of Rule 5–103(a)(2) is to allow adequate review by the appellate courts. Without a proffer, it is impossible for appellate courts to determine whether there was prejudicial error or not. *See Merzbacher v. State*, 346 Md. 391, 416 (1997)." *University of Md. Medical Sys. Corp. v. Waldt*, 411 Md. 207, 235 (2009). We, in turn, can review only what has been preserved. We normally will not consider a question on appeal "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a).

> The purpose of this Rule is two-fold:(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation. *Fitzgerald v. State*, 384 Md. 484, 505 (2004).

*Md. State Bd. of Elections v. Libertarian Party of Md.*, 426 Md. 488, 517 (2012).

The ambiguities that we can see in the proceedings at the trial court level (granted, with the benefit of hindsight) demonstrate all too well the need for the rules. The trial court should have been clearer on what it was granting at the motion *in limine* stage, but if the ruling was unclear, it was counsel's responsibility to seek clarification and, more to the point, to ensure that the record reflected what he wanted to pursue but couldn't. The same was true during Mr. Cavaliere's testimony—counsel yielded to the court when counsel for the Children objected, and although he made some reference to the (purportedly) applicable

federal regulation, he did not try to explain on the record what he was attempting to show, nor did he ask the trial court for the basis of its ruling. We can see from the transcript that the court was not inclined to allow much dialogue here, and the court's handling of this and other rulings stymied counsel's efforts to make a record. Unfortunately, though, we can't review an argument and ruling that weren't made to the circuit court, even if we might well be able to imagine how the proffer counsel describes now might have come out.

### C. The Trial Court Did Not Abuse Its Discretion When It Permitted Two Experts To Testify As To Causation.

The Landlord argues, *third*, that the trial court improperly allowed the Children to present similar expert opinion testimony from more than one expert, which, he claims, causing unfair prejudice under Maryland Rule 5-403. He had moved *in limine* to exclude the expert testimony of Dr. Steven E. Caplan and Dr. Charlene Sweeney on the grounds that it was "cumulative and inherently prejudicial and must be excluded from presentation to the jury." The trial court denied that motion, and also allowed Dr. Caplan to testify after Dr. Sweeney at trial and over defense counsel's objection.

Maryland Rule 5-403 governs the question, and states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The decision not to exclude cumulative evidence rests with the trial court, and we will reverse only "upon finding that the trial judge's determination was both manifestly wrong and substantially injurious." *Lomax v. Comptroller of Treasury*, 88 Md. App. 50, 54 (1991) (citations and

internal quotations omitted). The Landlord points out, correctly, that here the trial court permitted two physicians with very different backgrounds to testify about the same causation issues. That is, Dr. Sweeney testified in her capacity as a neurologist and epidemiologist, and discussed at length the effects of lead poisoning on the brain. Dr. Caplan offered a pediatrician's view of the diagnosis, treatment, and prevention of lead poisoning. Although a trial court *may* exclude evidence of "marginal relevancy," *see* Maryland Evidence Handbook 506(A) at 181 (3d ed. 2007), we do not see how this was marginal in the first place.

The Landlord availed himself of a similar opportunity, presenting testimony both from an environmental medicine expert and a pediatric neurologist. The trial court also instructed the jury that the number of witnesses should not affect the weight the jury gave to any particular evidence.[3] We see neither error nor prejudice in these rulings.

[3] The instruction read as follows:

> [T]he weight of the evidence in this case is not necessarily determined by the number of witnesses testifying on either side; it isn't the question of, he brought in five; she brought in three; she brought in nine; he brought in 16; *the number of witnesses is not the determining factor. Therefore, you should not give any consideration to the number of witnesses testifying for either side.* You should consider all of the facts and circumstances in evidence, to determine which of the witnesses are worthy of greater credence. You . . . may find that the testimony of a smaller number of witnesses on one side, is more worthy of belief than the testimony of a greater number of witnesses on the other side. Also, you may find that a smaller number of witnesses on one side may supply sufficient
>
> (continued…)

### D. The Trial Court Did Not Erroneously Permit Expert Testimony That Relied On Prohibited Evidence.

The Landlord contends, *fourth*, that the trial court abused its discretion when it permitted Dr. Sweeney to refer to "dust sampling" by KKI after the court previously had forbidden references to KKI's involvement at the Property. The parties again dispute what happened at trial, and from there disagree about what may be appealed.

At the motions hearing, the following colloquy took place regarding the Landlord's motion *in limine*, which was styled a motion *in limine* (number 68, no less) "to exclude Kennedy Krieger Records as Evidence of Lead-Based Paint at [the Property]":

> THE COURT: Fill me in on [Motion *in Limine* No. 68] quickly.
>
> * * *
>
> [COUNSEL FOR THE LANDLORD]: This property is part of the R&M Study which was a study brought up by Kennedy Krieger.
>
> * * *
>
> —what they did was, they went in, and they did this dust-wipe sampling. And they used a process that no one really knows about, which is the vacuum-sampling process—
>
> THE COURT: No one knows about it?
>
> [COUNSEL FOR THE LANDLORD]: No. In fact, the EPA had tried to interpret the data, and said it was insignificant.

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> testimony to prove the facts in this case. And as you were told, is that you should consider all of the testimony and evidence regardless of who supplied the witnesses or evidence.

(Emphasis added.)

> [Appellees'] property expert—the environmental expert, [Mr. Cavaliere]—said he can't decipher the information.
>
> All we're seeking to do—
>
> THE COURT: Who did?
>
> [COUNSEL FOR THE LANDLORD]: —[Mr.] Cavaliere.
>
> THE COURT: And where's Cavaliere from?
>
> [COUNSEL FOR THE LANDLORD]: Mr. Cavaliere is ARC Environmental; that's [Appellees'] environmental expert. And he said he wasn't going to rely on the data [sic] in his deposition. And all we're trying to do here—
>
> THE COURT: *Do you plan to introduce something that your expert is not going to rely on.*
>
> * * *
>
> [COUNSEL FOR THE CHILDREN]: *No.* I wish they'd just ask; I would have said that—
>
> * * *
>
> THE COURT: Oh, thank you very much. Let's not play games with this. The answer is as moot. You can put a star next to it, and go, huh; all right? Sixty-eight is, well I'm going to say, granted as moot; so that we know what happened.

(Emphasis added.)

This constituted the entirety of the discussion of the motion *in limine*. Then, at trial, the issue came up on *voir dire*, when counsel for the Landlord asked Dr. Sweeney whether the lead in the case was "obtained through XRF testing," and she gave what appears to have been a non-responsive answer: "In part, Kennedy Krieger also found high levels of lead in the dust." When counsel for the Landlord objected, he actually argued that Dr.

Sweeney was referring to the "Kennedy dust vacuum samples." After some discussion, the court noted the objection and overruled it "in reliance to the question as asked," an admittedly cryptic ruling.

The issue came up again in the course of cross-examination of Dr. Sweeney, when counsel for the Landlord sought to clarify the scope of the information on which she had relied in forming her opinion that the Property was a substantial factor in causing the Children's elevated blood lead levels:

> [COUNSEL FOR THE LANDLORD]: And you're also relying on the information with respect to some chipping paint in the Property while they were there, correct?
>
> [DR. SWEENEY]: Yes. *The Kennedy Krieger records document paint chips in the window wells and also the Kennedy Krieger records, they have to send letters stating that there were higher-than-normal lead content in the dust after they tested.*
>
> [COUNSEL FOR THE LANDLORD]: Your Honor, can we approach?
>
> THE COURT: Yes, of course.
>
> (Counsel approached the bench and the following ensued:)
>
> THE COURT: Yes, sir.
>
> [COUNSEL FOR THE LANDLORD]: She's mentioning the vacuum reports again.
>
> THE COURT: I haven't heard it.
>
> [COUNSEL FOR THE LANDLORD]: The only Kennedy Krieger dust sampling was the vacuum sample.
>
> THE COURT: Well that would send this—that there's dust sampling, but not vacuum samples being discussed. That's the

> debate you two have had all the way through since the time that I met you. Okay. My understanding is, is that that which she refers in dust sampling is a proper sampling for lead, is that there was none that was a vacuum sample and she's not attempting to submit vacuum samples. Is that correct?
>
> [COUNSEL FOR THE CHILDREN]: Yes, Your Honor. There's letters that indicate the amount of lead in the dust. *They don't say anything about vacuum samples.*
>
> THE COURT: Dust swipes are a different thing than vacuum sampling.
>
> [COUNSEL FOR THE LANDLORD]: Your Honor, there are no dust swipe samples.
>
> THE COURT: Let me try this again. The person who does the testing that comes in, you may utilize that for cross examination. That's all I can tell you at the moment.

(Emphasis added.)

Counsel for the Landlord and the court talked past each other for an additional page of transcript, and counsel returned to the trial tables. At that point, counsel had no further questions for Dr. Sweeney.

Again, we find ourselves with nothing to review. *First*, it is altogether unclear, between the motions hearing and the exchanges during Dr. Sweeney's testimony about "dust samples," whether Dr. Sweeney was referring to some previously prohibited content or not. It never really was made clear at the motions hearing, where counsel for the Landlord responded "No" when the court asked whether he "plan[ned] to introduce something that your expert is not going to rely on." *Second*, when the issue came up at trial, counsel asked to approach when Dr. Sweeney mentioned Kennedy Krieger "records" and "letters." Counsel did not *object* or *move to strike*, and by the time the colloquy with the

court finished, and the parties returned to the trial tables, we see no ruling of the trial court to which counsel ever objected, or any thwarted follow-up with the witness.

### E. The Trial Court's Comments During *Voir Dire* Of The Landlord's Expert Did Not Give Rise To Reversible Error.

The Landlord's *fifth* complaint relates to comments the trial judge made in the course of *voir dire* of the Children's expert neuropsychologist, Robert Kraft, Psy.D. The court cautioned Dr. Kraft in the following discussion, after Dr. Kraft explained the meaning of the term "neuropsychology":

> [COUNSEL FOR THE CHILDREN]: Does one need special training to be a neuropsychologist?
>
> [DR. SWEENEY]: One does need special training to be a neuropsychologist, yes.
>
> [COUNSEL FOR THE CHILDREN]: Are you a neuropsychologist?
>
> [DR. KRAFT]: *Well, I prefer to consider myself a—a forensic psychologist that uses neuropsychology as a tool.*
>
> [COUNSEL FOR THE CHILDREN]: Okay.
>
> THE COURT: What is forensic psychology?
>
> [DR. KRAFT]: It's the use of psychology inn the intersection between the law and mental health.
>
> THE COURT: Okay. And would you tell us what neuropsychology is that you don't consider yourself?
>
> [DR. KRAFT]: Well, *I think I am qualified to consider myself a neuropsychologist*, but the majority of my work does not involve neuropsychology.
>
> THE COURT: *Yeah, well, you're going to get her in trouble if you're not a neuropsychologist. I'll tell you that.*

[DR. KRAFT]: *Okay. I am a neuropsychologist.*

THE COURT: Proceed.

(Emphasis added.)

We appreciate counsel's frustration with the trial judge's decision to interject himself in the *voir dire*. At the same time, though, Dr. Kraft's testimony *was* oddly ambiguous—when he said that he "preferred to consider" himself a forensic psychologist, he left unanswered questions about his area of expertise. And importantly, when he was offered as an expert in the areas of psychology, counsel for the Landlord declined to conduct any *voir dire*, although he objected to Dr. Kraft's admission in the area of neuropsychology. Thereafter, the court accepted Dr. Kraft "to testify as an expert as offered."

We see no basis on which to review or reverse. *First*, counsel for the Landlord never objected to the court's questioning or sought a curative jury instruction. *See W. Md. Dairy Corp. v. Brown*, 169 Md. 257, 268 (1935) ("Ordinarily, a caution to the jury that it should disregard any expression of opinion by the court, and the advice to them that they are the judges of all questions of fact, will be sufficient . . ."). *Second*, we see no prejudice in the court's question (or the off-handed comment that followed), given Dr. Kraft's oddly phrased answer. The trial court did not say anything suggesting that Dr. Kraft was not qualified, and the way the testimony unfolded, some clarification to aid the jury was in order. *See Smith v. State*, 182 Md. App. 444, 492 (2008) (explaining that "trial court questioning 'should be achieved expeditiously . . . if at all, for a protracted examination

has a tendency to convey to a jury a judge's opinion as to the facts or the credibility of the witnesses.'" (quoting *Bell v. State*, 48 Md. App. 669, 678 (1981))). It obviously would have been better if the court had allowed counsel the opportunity to clarify himself, but the result this time was not prejudicial.

*Third*, the Landlord's citation to *Kowaleski v. Carter*, 11 Md. App. 182 (1971), highlights the harmless nature of the trial court's comments. In *Kowaleski*, the trial court commented during jury instructions that a State trooper, "by his own experience and work, has to be given some credence." *Id.* at 192. The defense took exception to the remark, and the trial judge later *conceded* that this was probably error, given that witness credibility was a matter for the jury to decide. *Id.* On review, we concluded that it was not just error, but reversible error:

> Considering the importance of the trooper's testimony in the case, to tell the jury that because of his experience and work his statements had to be given some credence, that is some acceptance as true or valid, and to leave that remark unfollowed by any further discussion with respect to the jury's duty as to credibility and otherwise completely unexplained, was prejudicial error.

*Id.* at 193.

The Court in *Kowaleski* viewed the comments as extremely important to the issues in the case (in a criminal context that, of course, carried with it constitutional concerns not raised here). Even assuming that the comment here harmed the Landlord (and we do not agree that it did), we see no way that this brief detour in the course of *voir dire* of a witness who ultimately was accepted for the purposes offered could have caused any prejudice to the Landlord in the end.

### F. The Trial Court Did Not Err In Admitting Photos of The Property.

The Landlord complains, *sixth*, that the trial court erred when it admitted photographs of "components [of the Property] that were not tested for the presence of lead-based paint," arguing that the photos were prejudicial and misled the jury "into presuming that those components [pictured] contained lead-based paint." Unfortunately, they cite to no parts of the trial transcript in which such an objection was made. It seems that when counsel for the Landlord objected, he did so by arguing that the Children had not established a chain of custody—who took the pictures or when they were taken. Counsel did not object at any point to admission of the pictures as unduly prejudicial, and so we do not consider the question here. Md. Rule 8-131(a).

### G. The Trial Court Did Not Err In Denying The Landlord's Motion For Remittitur.

The Landlord's *seventh* argument challenges the court's denial of his motion for remittitur. He contends that the Children's expert, Michael Conte, projected Tajah's loss of income at $687,576, and that the trial court should have reduced the economic damages that the jury awarded her from $2,063,134.33 down to Mr. Conte's figure. He claims that in denying the motion for remittitur, the trial judge relied incorrectly on what he believed to be reference in closing argument, by counsel for the Landlord, to the fact that the figure for economic damages could have been higher than the economic loss figure to which Tajah's expert testified. In response, the Children argue that there is no basis upon which to find this verdict excessive because it fell within the range of damages the evidence could support.

> We review a trial court's decision to reduce a jury verdict (or not) for an abuse of discretion. Maryland Rule 2-533 gives the trial court broad discretion, and []it is for the trial judge to determine whether a verdict "shocked his conscience," was "grossly excessive," or merely "excessive." . . . [T]he bar is a high one: "[A]ll of these formulae mean substantially the same thing, that the damages are 'such as all mankind must be ready to exclaim against, at first blush,' [so that] the trial judge should extend the fullest consideration possible to the amount returned by the jury before it concludes that it shocks his conscience, is 'grossly excessive' or is 'excessive.'"

*Brooks v. Jenkins*, 220 Md. App. 444, 474 (2014) (citations omitted). When the jury's verdict is based upon evidence in the record, we will not disturb it. *UBS Fin. Servs.,, Inc. v. Thompson*, 217 Md. App. 500, 535 (2014), *aff'd*, 443 Md. 47 (2015); *S. Mgmt. Corp. v. Mariner*, 144 Md. App. 188, 197 (2002) ("We will not question the jury's determination where there is ample evidence in the record to support the award.").

Mr. Conte placed Tajah's "expected earnings given her exposure" at $1,495,648, and her "expected earnings absent her exposure" at $2,183,224, in a report that was admitted into evidence at trial. This meant that the difference between the two was, at least as Mr. Conti saw it, the wages that Tajah had lost. But the jury could also have concluded from the evidence in the case that Tajah would not earn any income going forward, in which case the ceiling on recoverable damages would be $2,183,224—a figure above the jury's award. The jury was free to deviate from Mr. Conte's projections, in either direction, of course, so long as its verdict is supported by the evidence the parties presented, which this verdict was.

We do note, though, that the trial judge should have been clearer in explaining his reasoning. The trial court's stated bases for denying the motion included its recollection

that counsel had argued in closing that Tajah could earn three or four times her projected earnings:

> But it dawned on me it was really, in the latter part, is that there was a distinct argument by defendants to the jury as to how the jury should view the expert conclusions as to dollar amounts. If I am not mistaken, I don't have the full transcript, there was an argument by Mr. Hale that not only questioned the findings of what which is the expert, but then went on to say that he believed Tajah Jeffers would not be limited to that as an earning potential, but could and did have the ability to earn three or four times the amount suggested by her expert.

Counsel didn't recall arguing this, and we agree that the transcript doesn't contain it. That said, the trial court was correct that counsel *did* stress that both Children had a "long promising life ahead of them," in which, according to the Landlord, they could "work, they can go to school, they can do anything they want to." We cannot say how that might have played into the jury's calculations, and the trial court acted within his discretion in pointing it out. The court also acknowledged having no basis on which to conclude that the jury "relied on guesswork," and we agree.[4] Notwithstanding the trial judge's mistaken recollection of the transcript, the court would not have been required to remit this verdict so long as the verdict fell within the range of numbers in evidence. So we do not see a basis for directing remittitur, when the trial judge correctly declined to examine a verdict

[4] Although no one pointed it out, the ultimate figure the jury awarded to Tajah in economic damages ($2,063,134.33) was exactly twice the figure of (the later reduced) non-economic damages ($1,031,567.67). Interestingly, the jury also tied the two sets of damages together with Tynae; its award of non-economic damages of $851,714.50 is exactly 75% of the figure it awarded her for economic damages—$1,135,619.33. While these figures might not relate to the *economist's* figures, they do appear to have been reached not arbitrarily, and with some rationale that it is not our place to explore.

that had *some* rationale, even if not the one forwarded by the expert. As the Children point out, the jury was not required to believe the expert, *see Edsall v. Huffaker*, 159 Md. App. 337, 343 (2004) (noting that a jury is "free to accept or reject all or any part of any witness's testimony or reports of experts"), and it was not bound by the specific number that he viewed as Tajah's loss of income.

### H. The Trial Court Properly Denied The Landlord's Motion For New Trial.

The Landlord claims, *eighth*, that the court erred in denying his motion for a new trial, although that argument appears to rely on our finding that one or more of his first seven arguments is legally correct. We review the trial court's denial of a motion for new trial for an abuse of discretion. *University of Md. Medical Sys. Corp. v. Gholston*, 203 Md. App. 321, 342 (2012). Having affirmed the other rulings, we see no basis for concluding that the trial judge abused his discretion in denying a new trial.

### I. We Decline To Ignore *Brooks v. Lewin Realty, III, Inc.*

*Finally*, the Landlord argues the Housing Code has no effect on the common law requirement that a plaintiff must establish that a defendant had *notice* of a Housing Code violation to establish a *prima facie* case. But the Court of Appeals held unequivocally to the contrary in *Brooks*, *i.e.*, that violation of the relevant statute could constitute evidence of negligence—*i.e.*, breach of a common-law duty—whether or not a landlord had notice of a violation. 378 Md. at 78. Although obvious, it bears repeating that we are bound by the decisions of the Court of Appeals as the highest court in our state, *Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft, Inc.*, 17 Md. App. 646, 659 (1973), and it is not our place to

revisit that holding here, even if we thought that *Brooks* was wrongly decided (and we don't).

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.**