Circuit Court for Baltimore City
Case No. 24-C-16-004931

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1172

September Term, 2018

STANDARD CONSTRUCTION &
COATINGS LLC, ET AL.

v.

CHRYSSO C. PLATO TRUST, ET AL.

Fader, C.J.,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: February 7, 2020

The appellants, Standard Construction & Coatings LLC ("Standard") and Chung Yi (together, the "Contractors"), challenge several rulings made by the Circuit Court for Baltimore City during a jury trial of two consolidated cases. The parties' competing claims concerned a dispute over unfinished home renovation services that one of the Contractors was to perform for the appellees, Chrysso Plato and the Chrysso C. Plato Trust.[1] As relevant to this appeal, the jury found that Mr. Yi breached the contract with Plato and awarded damages of $58,915.46.

The Contractors contend that the circuit court committed numerous errors, including with respect to the admission of exhibits, jury instructions, the denial of a motion for judgment, the failure to deem Plato to have made binding factual admissions, allowing damages evidence, and allowing a damages claim to go to the jury. The Contractors also claim prejudice arising from alleged deficiencies in the trial skills of Plato's counsel. We agree with the Contractors that the circuit court erred in submitting Plato's claim for non-economic damages to the jury, and so will reverse the judgment on that issue, but will affirm in all other respects.

At the outset, we observe that several of the Contractors' challenges concern exhibits offered for admission at trial, some of which were admitted and others not. None of those exhibits appear in the record or in the record extract, however, because (1) they were destroyed by the circuit court before the record was transmitted to this Court, and

[1] With few exceptions, we will refer collectively to appellees Chrysso Plato and the Chrysso C. Plato Trust as "Plato." Where a distinction is relevant, we will refer to Chrysso Plato as "Ms. Plato" and to the Chrysso C. Plato Trust as "the Trust."

(2) the Contractors, although aware of the problem, made no effort to supplement the record with copies of the missing documents. We emphasize both numbered points because it is only as a result of both that this Court lacks the ability to review adequately several of the Contractors' claims of error. To be clear, the Contractors appear to bear no responsibility for the destruction of the exhibits. It was, however, within their power to remedy the deficiency that resulted from that destruction, and they failed to do so. Instead, they filed an exhibit-less record extract accompanied by an appendix-less brief. Furthermore, that brief discusses exhibits as though they were properly before the Court, with no explanation of why they are not. When the Court raised the issue during oral argument, it was clear that no effort had been made to supplement the record with copies of the destroyed documents. As discussed below, the Contractors' failure to supplement the record will prove fatal to several of their challenges.

BACKGROUND[2]

Mr. Yi owns Standard, which is in the business of commercial and residential renovations. In November 2015, Mr. Yi contracted with Plato to perform construction and demolition services as part of a home renovation project at Ms. Plato's condominium.

The parties never executed a formal written contract. Instead, Mr. Yi provided Plato with four written estimates, one covering demolition, a second covering most of the renovation work, a third covering recessed lighting, and a fourth covering built-in

[2] In reviewing a jury's verdict, "we view the evidence in the light most favorable to the prevailing party." *Univ. of Md. Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 335 (2001). The following factual summary is presented accordingly.

bookcases. The parties treated those documents as establishing the terms of the contractual relationship and introduced copies of each estimate into evidence at trial. None of them are in the record or the record extract.

The parties agreed that Mr. Yi would complete the work in or about February 2016, but he did not. When the project remained incomplete that April, Plato terminated Mr. Yi. Each party blamed the other for the breakdown. The Contractors contended that Plato's numerous (and sometimes inconsistent) change requests, as well as damage from an unforeseeable flood, delayed the project. Plato argued that the delay resulted from some combination of incompetence, inattention, and fraud by Mr. Yi. Mr. Yi also contended that the project was mostly complete when Plato terminated the contract, whereas Plato argued that a considerable amount of work remained unfinished and that much of the finished work needed to be redone.

Before termination, Ms. Plato had written multiple checks for the renovations, totaling $51,239.30. Ms. Plato made the first check payable to Standard and the remaining checks payable to Mr. Yi. She testified that she gave all of the checks to Mr. Yi, who cashed or deposited them. All of the checks were admitted into evidence at trial, but none are included in the record or record extract.

In mid-May, Plato contracted with David Kennard, a general contractor, to complete the renovations.

Procedural History

On June 24, 2016, Plato filed a complaint against Mr. Yi, "trading as Standard Construction, LLC." As later amended, Plato's complaint sought damages for breach of

contract, intentional misrepresentation, and violation of the Maryland Consumer Protection Act. Plato claimed, among other things, that Mr. Yi had failed to complete certain work, failed to complete other work "in a proper and workmanlike manner," and "intentionally . . . made false statements regarding the status of the Project to induce [Plato] to give him more money." Plato alleged that it had suffered damages in the form of, among other things, loss of use of the condominium, additional expenditures required to complete the project and "bring[] the house to a safely []habitable condition," and emotional distress.

On September 2, 2016, Standard filed a complaint against Plato for breach of contract and unjust enrichment. In its breach of contract count, Standard alleged that it had entered a contract with Plato for Standard to perform demolition and renovation services at Plato's condominium and that Plato had breached that contract by "wrongfully terminating Standard" and failing to pay for work performed. In its unjust enrichment count, Standard incorporated all of the same factual allegations—including as to the existence of the contract governing the relationship between Standard and Plato—and alleged that Plato "unjustly retained the benefit" of Standard's work without payment.

The circuit court consolidated the actions and held a seven-day jury trial during which the jury heard testimony from Ms. Plato; her two adult children, Meropi Plato and Chris Plato; Mr. Yi; and Mr. Kennard. Mr. Kennard testified both as a fact witness and as an expert qualified "in construction, including home improvements."

On October 23, 2017, the jury (1) found that Mr. Yi (and not Standard) had entered and then breached the contract with Plato and (2) awarded Plato $55,915.46 in economic

damages and $3,000.00 in non-economic damages. However, the judgment was erroneously entered against Standard, rather than against Mr. Yi.

Collectively, the parties filed four post-trial motions in November 2017. The Contractors filed a motion for new trial, motion for remittitur, and motion for judgment notwithstanding the verdict, and Plato moved to correct the judgment to reflect that it was entered against Mr. Yi, not Standard. For reasons that are not clear from the record, the court did not rule on any of the motions until the summer of 2018.[3] The court eventually denied all three of the motions filed by the Contractors and granted Plato's motion to correct the judgment.[4] The Contractors appealed.

DISCUSSION

I. THE CONTRACTORS HAVE NOT PROVIDED A SUFFICIENT RECORD TO PERMIT THIS COURT TO ASSESS THEIR CHALLENGE TO THE CIRCUIT COURT'S FAILURE TO PROVIDE A LIMITED ADMISSIBILITY INSTRUCTION.

The Contractors first challenge the circuit court's denial of their request to instruct the jury that certain emails and text messages were not admitted as substantive evidence. "We review the denial of a proposed jury instruction under the highly deferential abuse of discretion standard . . . ." *White v. Kennedy Krieger Inst.*, 221 Md. App. 601, 623 (2015). "The complaining party must demonstrate both prejudice and error from the grant of or

[3] It appears that the destruction of the exhibits may have occurred during this period of inactivity, notwithstanding the four pending post-trial motions.

[4] Although the court ruled on all three motions filed by the Contractors in the summer of 2018, the clerk's office initially docketed only the order denying the motion for judgment notwithstanding the verdict. The remaining orders were docketed on November 8, 2019, after this Court remanded the case, without affirmance or reversal, to allow those orders to be docketed.

refusal to provide a jury instruction." *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 371 (2011), *aff'd*, 429 Md. 387 (2012).

According to descriptions in the parties' briefs, the emails and text messages at issue reflect the course of dealings between Plato and Mr. Yi regarding the renovation work, including complaints made by Plato and explanations given by Mr. Yi. In admitting the documents over objection, the court ruled that they were not hearsay because they were not offered for the truth of the matters asserted. The Contractors then requested that the court instruct the jury as to the limited purpose for which the documents were being admitted. The court denied the request for a contemporaneous limiting instruction, stating that "[t]he jury will be properly instructed at the end."

At the close of evidence, the Contractors requested that the court include in its instructions to the jury an "evidentiary advisory comment" that the emails and text messages between the parties could not be considered as "substantive evidence." The court declined to do so, stating that the documents at issue were "substantive evidence" and that the jury "will be instructed repeatedly throughout the jury instructions that it's their job to determine what the facts are."

The Contractors now argue that the trial court erred in failing to instruct the jury that the email and text messages at issue could not be considered as "substantive evidence." Plato responds that the documents were properly admitted into evidence and that a limiting instruction was not required.

Because the documents themselves are missing from the record, we cannot resolve the merits of the Contractors' claim that the court committed reversible error in not

providing a limiting instruction to guide the jury's review of the exhibits. Even if the trial transcript alone provided a sufficient basis for us to conclude that the court should have given some form of limiting instruction,[5] the absence of the documents precludes our ability to assess whether any such error was harmless. *See Malik v. Tommy's Auto Serv.*, 199 Md. App. 610, 617-18 (2011) ("A party complaining about the denial of a requested instruction must not only establish error, but also show prejudice resulting from that error."); *see also Barksdale v. Wilkowsky*, 419 Md. 649, 670 (2011) (in considering alleged errors in jury instructions, "[t]he reviewing court . . . should engage in a comprehensive review of the record").

It is an appellant's obligation to provide us with the necessary record to resolve his or her challenge to the trial court's rulings. Rule 8-501(c) thus requires the appellant to prepare a record extract that "contain[s] all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal." *See HEK Platforms & Hoists v. Nationsbank*, 134 Md. App. 90, 98 (2000) (deeming a record extract insufficient where "it contain[ed] no testimony," "none of the pleadings," and "no docket entries"); *Silverman v. Ruddle*, 234 Md. 353, 354 (1964) (per curiam) (holding that a record extract did not comply with the predecessor to Rule 8-501 because it "contain[ed] no copy of the judgment appealed from, the motions for a directed verdict allegedly made,

[5] Rule 5-105 provides: "When evidence is admitted that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." A committee note further provides: "This Rule is silent on the timing of limiting instructions. Ordinarily, if requested, such instructions should be given when the evidence is received and repeated as part of the court's final instructions to the jury."

[or] the charge to the jury . . . , and no testimony upon which we could pass upon the sufficiency of the evidence as requested"). "The responsibility of preparing a proper record extract rests squarely on the appellant." *HEK Platforms & Hoists*, 134 Md. App. at 101.

Here, the Contractors failed to include in the record extract any of the trial exhibits, including the emails and text messages that are the focus of their first challenge. At oral argument, the Contractors contended, in effect, that they should not suffer for the circuit court's improper destruction of the exhibits. Although we do not lack sympathy for that position—and certainly do not condone the entirely unacceptable destruction of exhibits during the pendency of post-trial motions—it does not save the Contractors' challenge here. That is because it was reasonably within the Contractors' capacity to fix the problem, and they failed to make a reasonable effort to do so. Tellingly, more than five months before oral argument, the Contractors filed a motion in this Court stating that the trial exhibits had not been included in the record and that it was possible that they may be lost. They requested that this Court order the circuit court to transmit the exhibits, which we did. In their motion, the Contractors also stated that "[i]f the exhibits are not located, [they] expect that the parties may be able to substitute documents for the exhibits."

Although clearly aware of the problem, and having already identified a potential need to "substitute documents for the exhibits," the Contractors neither communicated any further with this Court nor made any attempt to supplement the record with copies of the missing exhibits. Indeed, this Court only discovered the destruction of the exhibits when, acting on its own initiative, it reached out to the circuit court clerk's office in advance of oral argument to inquire as to why the exhibits were not present.

"Of necessity, the appellate process is tightly constrained. Appellate judges are not knights errant, scanning the horizon for issues in distress that call out for rescue or remedy." *Campbell v. State*, 235 Md. App. 335, 337 (2017). "It is incumbent upon the appellant claiming error to produce a sufficient factual record for the appellate court to determine whether error was committed . . . ." *Mora v. State*, 355 Md. 639, 650 (1999). Here, if the destruction of the exhibits had somehow made it impossible to reproduce that factual record, or if the Contractors had engaged in reasonable but unsuccessful efforts to supplement the record, our decision might be different. But that is not the case.

At oral argument, the Contractors claimed that they did not have copies of the full sets of emails and text messages compiled in precisely the same manner as they were admitted at trial. For three reasons, that does not excuse their inaction. As an initial matter, this claim pertains only to the exhibits that were comprised of collections of emails and text messages. The Contractors make no claim that it would have been even a little bit difficult to recreate other missing exhibits relevant to their appellate claims, including, for example: (1) the four written estimates that they contend established the contractual relationship with Plato; (2) the checks Ms. Plato wrote to the Contractors; (3) Mr. Kennard's contract; and (4) the invoices that the court did not admit, but that were used to refresh Meropi Plato's recollection. Yet the Contractors made no attempt to do so.

Second, the fact that the Contractors did not have copies of every exhibit in precisely the same format in which it was introduced does not excuse the failure to ask Plato's counsel if she had or could recreate copies of the exhibits. In such a situation, we expect

that counsel would cooperate fully with each other as officers of the court in an effort to rectify the problem.

Third, even if the parties, working together, were somehow unable to recreate precise copies of the email and text message exhibits, there were other alternatives available. For example, the parties could have agreed upon a representative sample of the relevant emails and text messages to include in the record and filed a stipulation identifying any areas of disagreement. The parties could also have enlisted the assistance of the circuit court to help work through any disputes about the content of any particular exhibit.

In sum, although they did not create the problem, it was still the Contractors' responsibility to make reasonable efforts to comply with their obligation to ensure that the record was complete and to produce a record extract containing the materials necessary to decide the appeal. *See Fields v. State*, 172 Md. App. 496, 513 (2007) ("An appellant has the burden of producing a record to rebut the general presumption that a trial court's actions are correct."). Their failure to do so has deprived us of the ability to review effectively their claim that the trial court committed reversible error in failing to provide a limited admissibility instruction with respect to certain missing exhibits. We must therefore reject that challenge.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADOPT THE CONTRACTORS' NON-STANDARD JURY INSTRUCTION ON DAMAGES.

The Contractors raise two challenges to the court's jury instructions with respect to damages. As to both, the Contractors contend that the court's instructions were not sufficiently specific as to the proper measure of damages. "We apply the abuse of

discretion standard of review when considering a trial judge's denial of a proposed jury instruction." *Collins v. Nat'l R.R. Passenger Corp.*, 417 Md. 217, 228 (2010); *see Sidbury v. State*, 414 Md. 180, 186 (2010) ("The decision of whether to give supplemental instructions is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion."). "[S]o long as the law is fairly covered by the jury instructions, reviewing courts should not disturb them." *Copsey v. Park*, 453 Md. 141, 170 n.8 (2017) (quoting *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 465 (2013)).

A. The Court Did Not Abuse Its Discretion in Using a Pattern Jury Instruction for Breach of Contract Damages.

In instructing the jury, the trial court used the following pattern jury instruction as to breach of contract damages relevant to Plato's claim against Mr. Yi:

> In an action for damages for breach of contract, the plaintiff is entitled to be placed in the same situation as if the contract had not been broken. . . .
>
> In an action for breach of contract, the plaintiff may recover those damages that naturally arise from the breaking of the contract if the defendant had reason to foresee those damages at the time the contract was made.
>
> A party harmed by breach of contract by another party may recover any expenses or losses incurred. This amount should be reduced by any expenditures that the breaching party can show the wronged party would have incurred if the contract had been performed.

Md. Civ. Pattern Jury Instructions 10:30-10:32 (5th ed. 2019). The Contractors objected and requested that the court instead use the following non-pattern instruction, which they argued was more specifically tailored to claims against contractors: "[I]f you find that the contractor breached the contract, then the measure of damages is the cost of completing the contract in accordance with the original contract." The circuit court asked counsel to

provide legal authority for the instruction, which counsel did not do. The court then stated that it found the pattern instruction to be adequate and declined to provide their requested instruction. The court remarked that the Contractors were free to "mak[e] any argument with regard to what constitutes the adequate and fair compensation in this case."

The Contractors contend that the court's "generic" pattern jury instruction as to breach of contract damages "did not adequately equip the jury to decide damages in a breach of construction contract setting." That is particularly significant in this case, they argue, because Plato failed to present evidence to compare the scope of work the Contractors contracted to perform with the scope of work that Mr. Kennard later performed. As a result, they claim, the jury could not perform the proper comparison and required more specific instructions to "evaluate the hodge-podge of 'damages' presented."

Setting aside for the moment the Contractors' criticisms of the damages evidence presented by Plato—a subject to which we will return below—we conclude that the circuit court did not abuse its discretion in instructing the jury as to damages using the pattern instruction. Rule 2-520(c) provides that "[t]he court may instruct the jury, orally or in writing or both, by granting requested instructions, by giving instructions on its own, or by combining any of these methods. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given." "Thus, simply because a requested instruction is an accurate statement of the law and supported by the evidence does not mean the trial judge is required to give it to the jury." *Farley v. Allstate Ins.*, 355 Md. 34, 47 (1999). "So long as the trial judge has covered the applicable law in another instruction, . . . he or she does not have to give [the requested instruction] to the jurors." *Id.*

In determining whether the court erred in denying the Contractors' requested instruction, we review "whether the substance of the requested instruction was fairly covered by the instruction actually given." *Wegad v. Howard Street Jewelers*, 326 Md. 409, 414 (1992). Here, the pattern jury instruction informed the jury that if it found a breach of contract, the non-breaching party (1) "is entitled to be placed in the same situation as if the contract had not been broken," Md. Civ. Pattern Jury Instructions 10:30, and (2) "may recover any expenses or losses incurred" as a result of the breach, *id.* 10:32. Although the instruction requested by the Contractors may have been more specifically tailored, the pattern instruction fairly covers the relevant law. And, as the court pointed out, the Contractors were free to argue to the jury—as, in fact, they did—that Plato failed to carry its burden to prove its damages because it did not establish that the work the Contractors were hired to perform was identical in scope to the work for which Plato ultimately paid others. We identify no abuse of discretion in the court's decision to give the pattern jury instruction.

B. The Court Did Not Abuse Its Discretion in Instructing the Jury Regarding Damages Available Under the Maryland Consumer Protection Act.

The Contractors also assert that the court abused its discretion in issuing a non-pattern jury instruction regarding the damages available for Plato's Maryland Consumer Protection Act claim. The court, using an instruction provided by Plato, instructed the jury as follows:

> Chrysso Plato and the Chrysso C. Plato Trust have made a claim under the Maryland Consumer Protection Act. . . . A person may recover for injuries

> or loss sustained by him or her as the result of a practice prohibited by the Maryland Consumer Protection Act.

The instruction tracks closely the language of the statute, which provides that "any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Ann., Com. Law § 13-408(a) (Repl. 2013; Supp. 2019).

The Contractors objected and argued that the instruction should specify that any damages under the Consumer Protection Act must be limited to reliance damages. The court disagreed, stating that because the instruction's language was "taken directly from the [Consumer Protection Act] statute," it was an accurate statement of law that did not require "any further qualification."

As discussed, a trial court has discretion not to "grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 2-520(c). In this case, the court's instruction was a correct statement of the law that is nearly identical to the statutory language. Moreover, the instruction informed the jury that Plato could recover only for losses sustained "as the result of" a prohibited practice. In the context of the damages claimed, and "reviewing the instructions as a whole," *Woolridge v. Abrishami*, 233 Md. App. 278, 306 (2017), we discern no abuse of discretion in the court's instruction.

III. THE COURT DID NOT ERR IN DENYING THE CONTRACTORS' MOTIONS FOR JUDGMENT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The Contractors next argue that the court erred in denying their motions for judgment and for judgment notwithstanding the verdict because Plato "failed to prove the elements of a fraud claim." They further assert that the court erred in not ruling that Plato

entered a contract with Standard, and not with Mr. Yi individually. Neither argument has merit.

A. The Court Did Not Err in Denying Judgment in Favor of the Contractors on Plato's Claims for Intentional Misrepresentation and Violation of the Consumer Protection Act.

We review the trial court's denial of a motion for judgment or motion for judgment notwithstanding the verdict for legal correctness, "viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party." *Cooper v. Rodriguez*, 443 Md. 680, 706 (2015). We "consider[] whether there is any evidence adduced, however slight, from which reasonable jurors, applying the appropriate standard of proof, could find in favor of the plaintiff on the claims presented." *Id.* (brackets in *Cooper* omitted). The motion should be denied "if the nonmoving party offers competent evidence that rises above speculation, hypothesis, and conjecture." *Barnes v. Greater Balt. Med. Ctr.*, 210 Md. App. 457, 480 (2013).

The elements of a claim of intentional misrepresentation are:

> (1) that a representation made by a party was false; (2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him; (3) that the misrepresentation was made for the purpose of defrauding some other person; (4) that that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if it had not been made; and (5) that that person suffered damage directly resulting from the misrepresentation.

B.N. v. K.K., 312 Md. 135, 149 (1988) (quoting *Suburban Mgmt. v. Johnson*, 236 Md. 455, 460 (1964)).

At trial, Plato elicited evidence that Mr. Yi had falsely represented when the work would be completed to induce it to enter the contract, and then falsely represented the progress of the work to induce Ms. Plato to pay him for unfinished work. Plato also introduced evidence, through testimony of Ms. Plato and her adult children, from which the jury could have found intent to defraud, reliance, and resulting damages. Viewing the evidence and all of its permissible inferences in the light most favorable to Plato, we determine that there was "competent evidence" from which a jury could find in favor of Plato on its intentional misrepresentation claim.

The Contractors also contend that they were entitled to judgment on the Consumer Protection Act claim "as there was no legally sufficient evidence of reliance damages." Plato responds that Mr. Yi's misrepresentations are themselves violations of the Consumer Protection Act and that they suffered damages when they paid Mr. Yi for work that was not performed or that was performed inadequately. *See* Md. Code Ann., Com. Law § 13-301(1) (proscribing "any [f]alse . . . or misleading . . . representation of any kind which has the . . . effect of deceiving or misleading consumers" as an "[u]nfair, abusive, or deceptive trade practice[]"). For the same reasons discussed above, viewing the evidence and all of its permissible inferences in the light most favorable to Plato, we determine that there was "competent evidence" from which a jury could find in favor of Plato on its Consumer Protection Act claim.

B. The Court Did Not Err in Allowing the Jury to Decide that Mr. Yi, and Not Standard, Contracted with Plato.

The Contractors also argue that the court erred in not deciding, as a matter of law, that the contract at issue was between Standard and Plato, not Mr. Yi and Plato. They base this argument on the four written estimates introduced as exhibits at trial, which, they assert, identified the contracting party as "Standard Construction." Notably, however, the Contractors have failed to provide us with copies of the written estimates. We therefore hold that the Contractors have failed to demonstrate that the trial court erred.

Moreover, even if the documents do identify "Standard Construction" as the party providing the estimates, we would be inclined to agree with the circuit court that the identity of the contracting party remained ambiguous on this record. That is not because of the absence of the words "& Coatings" from the name of the business, as the Contractors contend, but because (1) based on the available descriptions, the documents were not a formal contract; (2) witnesses testified that they believed Mr. Yi was the contracting party; and (3) according to testimony, all but one of the checks for the work were written to Mr. Yi individually and cashed by him without any protest that he was not the proper party to be paid. Under the circumstances, we agree with the circuit court that the identity of the contracting party was a question of fact properly submitted to the jury.

IV. THE COURT CORRECTLY RULED THAT PLATO'S ANSWER TO STANDARD'S COMPLAINT DID NOT CREATE BINDING ADMISSIONS.

The Contractors next contend that the circuit court erred in not deeming Plato to have entered binding admissions as to certain facts by failing to respond specifically to allegations Standard made in its complaint. We disagree.

In paragraphs 7 through 20 of its two-count complaint, Standard made several factual allegations that it claimed were "common to all counts." (emphasis removed). These included, among others, allegations that: (1) "Standard contracted with the Trust and/or Plato" for demolition and construction work on the property; (2) Standard "completed [the work] in a good and workmanlike fashion and in accord with all industry standards"; (3) Plato made changes that "extended the time of completion of the work"; and (4) Plato wrongfully terminated Standard without cause. In Count I, for breach of contract, Standard alleged again, in paragraphs 22 and 23, that Standard contracted with Plato for the demolition and renovation work and that Plato breached that contract. In Count II, for unjust enrichment, Standard first "incorporate[d] paragraphs 1-24 by reference as if fully set forth herein." Standard then alleged that it had "conferred a benefit upon" Plato by performing the renovations, and that Plato "unjustly retained th[at] benefit" without paying fully for the work.

In its answer, Plato "generally den[ied] the allegations of the Complaint and den[ied] any liability to Plaintiff." Plato also identified 12 specific legal defenses. Plato did not deny specifically any of the factual allegations in the complaint.

The Contractors acknowledge that Plato was not required to deny specifically its factual allegations in response to Standard's breach of contract claim. However, they argue that Plato was required to do so in response to the unjust enrichment count and, because all prior factual allegations in the complaint were incorporated by reference into that count, Plato's failure to deny specifically those allegations should have been deemed an admission

of all of them. The Contractors' contentions are based on their interpretation of Rule 2-323, which provides in relevant part:

> (c) *Specific Admissions or Denials*. Except as permitted by section (d) of this Rule, a party shall admit or deny the averments upon which the adverse party relies. A party without knowledge or information sufficient to form a belief as to the truth of an averment shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. A party may deny designated averments or paragraphs or may generally deny all the averments except averments or paragraphs that are specifically admitted.
>
> (d) *General Denials in Specified Causes*. When the action in any count is for breach of contract, debt, or tort and the claim for relief is for money only, a party may answer that count by a general denial of liability.
>
> (e) *Effect of Failure to Deny*. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted unless denied in the responsive pleading or covered by a general denial. . . .

The Contractors' logical path through the Rule proceeds as follows: (1) an unjust enrichment count is not a "count . . . for breach of contract, debt, or tort" for purposes of Rule 2-323(d); (2) specific denials of the factual allegations of the complaint were therefore required, pursuant to Rule 2-323(c), because those allegations were incorporated by reference into the unjust enrichment count; and, therefore, (3) the failure to make specific denials means that the "[a]verments" in the complaint "[we]re admitted," under Rule 2-323(e).

For three reasons, we reject the Contractors' contention. First, to the extent it purported to incorporate by reference the factual allegations that are now at issue—specifically the allegation that Standard's relationship with Plato was governed by a contract—Standard's unjust enrichment claim was intrinsically frivolous. This Court

recently summarized the well-established rule that quasi-contractual claims for monetary damages are impermissible when the subject matter of the claim is covered by a contract:

> More than three decades ago, this Court recognized "[t]he general rule" that "no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests." *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 776 (1984) (quoting *Industrial Lift Truck Serv. Corp. v. Mitsubishi Int'l Corp.*, 432 N.E.2d 999, 1002 ([Ill. App. Ct.] 1982)). "It is," now, "settled law in Maryland, and elsewhere, that a claim for unjust enrichment may not be brought where the subject matter of the claim is covered by an express contract between the parties." *County Com'rs of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. [83,] 96 [(2000)] (quoting *FLF, Inc. v. World Publ'ns, Inc*., 999 F. Supp. 640, 642 (D. Md. 1998)).

AAC HP Realty v. Bubba Gump Shrimp Co. Rest., 243 Md. App. 62, 70-71 (2019) (internal quotation marks and brackets omitted). We explained the logic underlying that doctrine:

> When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated. As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery. This the law will not allow.

Id. at 71 (quoting *Granite Constr.*, 57 Md. App. at 776).

As noted, Standard incorporated into its unjust enrichment count not only the general allegations of the complaint that were "common to all counts," but also the allegations contained specifically within its count for breach of contract. The unjust enrichment count was thus made not as an alternative theory of relief in the event the jury were to find that there was no express contract, but instead was premised explicitly on factual allegations that there *was* an express contract. In other words, one of the very factual allegations that the Contractors claim should be deemed admitted *because* it was

incorporated by reference into its unjust enrichment count would, if true, render that same count frivolous. We reject the notion that allegations that are clearly primary to a breach of contract count, and that have been denied properly as to that count through a general denial, may nonetheless be deemed admitted through incorporation by reference into a tag-along unjust enrichment count.

Second, in arguing that allegations concerning an unjust enrichment count are not susceptible to a general denial because an unjust enrichment count is not a "count for breach of contract, debt, or tort" that is "for money only," *cf.* Rule 2-323(d), the Contractors misapprehend the nature of a claim for unjust enrichment. A claim for unjust enrichment "is based on a quasi-contract or an implied-in-law contract."[6] *Alternatives Unltd. v. New Balt. City Bd. of Sch. Comm'rs*, 155 Md. App. 415, 461 (2004). "[A] 'quasi-contract' is a '[l]egal fiction invented by common law courts to permit recovery by contractual remedy in cases where, in fact, there is no contract, but where circumstances are such that justice warrants a recovery as though there had been a promise.'" *AAC HP Realty*, 243 Md. App. at 70 (quoting *J. Roland Dashiell & Sons*, 358 Md. at 94). The relief for such a quasi-contract claim—"restitution in the form of a money judgment for unjust enrichment"—is "clearly a remedy at law." *Alternatives Unltd.*, 155 Md. App. at 461-62 (stating further that "[a]lthough [quasi-contract and implied-in-law contract] may be 'equitable' claims in

[6] Three elements comprise a claim for unjust enrichment: "1. A benefit conferred upon the defendant by the plaintiff; 2. An appreciation or knowledge by the defendant of the benefit; and 3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." *Hill v. Cross Country Settlements*, 402 Md. 281, 295 (2007).

the bright and celestial sense that they seek fairness and justice, both invoke remedies that are universally recognized as legal remedies, not equitable remedies" (internal footnote omitted)); *see also Md. Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 709 (2015) ("The measure of damages in an unjust enrichment claim is the value of the goods or services rendered by the plaintiff in the hands of the defendant."). It is, therefore, appropriate to treat Standard's quasi-contractual claim for money damages as fitting within Rule 2-323(d), and thus allowing for a general denial.

Third, as the circuit court identified, the requirements of Rule 2-323 are "primarily for the purpose of putting the parties on notice as to which claims are denied and which are admitted." *See also Campbell v. Lake Hallowell Homeowners Ass'n*, 157 Md. App. 504, 526-27 (2004) (stating that compliance with Rule 2-323 "is not a mere nicety; it is designed to give notice to the plaintiff of the defenses asserted to his complaint" (quoting *Gooch v. Md. Mech. Sys.*, 81 Md. App. 376, 384-85 (1990))); *Liberty Mut. Ins. v. Ben Lewis Plumbing, Heating & Air Conditioning*, 121 Md. App. 467, 479 (identifying the "general philosophy of the Court of Appeals with regard to pleadings" as being that "appropriate notice must be given to the opposing party so as to comply with the requirements of due process"), *aff'd*, 354 Md. 452 (1999). The court found no "ambiguity as to the denial [in Plato's Answer] of unjust enrichment." We agree, especially in light of (1) the lack of complexity of Standard's complaint, (2) the clarity of Plato's general denial of Standard's allegations, (3) the fact that Plato had previously set forth its own (contradictory) factual allegations regarding these same events in its complaint against Mr. Yi, and (4) the absence of merit in the unjust enrichment claim as it was pled. The absence of a more specific

denial of the factual allegations "upon which [Standard] relie[d]," *see* Md. Rule 2-323(c), for its unjust enrichment claim thus hardly denied Standard a full understanding of Plato's factual defense.

V. THE CONTRACTORS HAVE NOT ESTABLISHED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING DAMAGES TESTIMONY.

The Contractors contend that the trial court erred in numerous ways in admitting Plato's damages evidence. We understand the Contractors' objections generally to be: (1) Plato failed to provide testimony supporting the reasonableness of costs incurred; (2) the court erred in allowing Meropi Plato to testify regarding amounts Plato expended by reading those amounts off of invoices; (3) Plato's expert, Mr. Kennard, did not expressly offer each of his opinions to a reasonable degree of professional certainty; (4) Mr. Kennard did not make a comparison between the scope of work he performed and the scope of work Mr. Yi was to perform; and (5) the court erred in admitting into evidence Plato's contract with Mr. Kennard.

A circuit court's "determin[ation] whether a particular piece of evidence is relevant . . . is a legal conclusion," which we "review[] without deference." *Williams v. State*, 457 Md. 551, 563 (2018). "However, the circuit court's decision to admit relevant evidence is reviewed for an abuse of discretion. An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court." *Id.* As we will explain, some, but not all, of the Contractors' contentions face the fatal problem of relying upon exhibits that are absent from the record and without which we cannot rule in the Contractors' favor.

Regarding their remaining contentions, we find no abuse of the substantial discretion afforded to the trial court's evidentiary rulings.

A. Meropi Plato's Testimony

The Contractors first argue that the circuit court erred in allowing Meropi Plato to testify regarding amounts Plato paid for storage fees attributed to the delay in completing the renovation work and for new materials needed to complete and redo the work. The Contractors assert that the court should have precluded this testimony both because Plato did not present expert testimony as to the reasonableness of the expenses and because Meropi Plato read the amounts off of invoices that already had been found inadmissible.

At trial, Plato attempted to introduce as exhibits several invoices for moving and storage expenses and for amounts paid to third-party vendors for items needed to complete the renovation. Those items included, among other things, a mirror, garbage disposal, bathroom sink, cabinetry, lighting, tiling, a range, and paint. The court ruled that the invoices themselves were inadmissible hearsay, but allowed Meropi Plato to testify as to the amounts Plato spent on the various items. Because Meropi Plato was unable to recall the amount of any specific charge, Plato's counsel was permitted to refresh her recollection by showing her the invoices.

"Present recollection refreshed or revived is the use of a writing or object to refresh a witness'[s] recollection so that person may testify about prior events from present recollection." *Farewell v. State*, 150 Md. App. 540, 576 (2003). Whether counsel may refresh a witness's memory "depends upon the particular circumstances present in each case," and is a determination "committed to the sound discretion of the trial judge." *Oken*

v. State, 327 Md. 628, 672 (1992). In its discretion, the court may allow "any memorandum or other object [to] be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness, or time of making." *Askins v. State*, 13 Md. App. 702, 711 (1971). A document used to refresh memory "is only an aid in the giving of testimony," and so "it is the testimony of the witness, not the memory stimulant, that is admitted into evidence." *Newman v. State*, 65 Md. App. 85, 94 (1985).

Here, after consulting each invoice, Meropi Plato identified the amount Plato had spent on that specific item. Examples of the relevant testimony are:

> Q: [Meropi] Plato, can you tell the jury what your – well, let me ask first. Were you aware of your mother's general expenditures?
>
> A: Yes.
>
> Q: And why were you aware of your mother's general expenditures?
>
> A: Because I was the one who was making a lot of the arrangements.
>
> Q: Okay. And did you assist her with writing checks?
>
> A: Yes.
>
> . . .
>
> Q: Okay. Now, did your mother also have to pay additional rent?
>
> A: She did, yes.
>
> Q: Okay. And do you remember exactly how much she paid? Well, let me let you answer that question.
>
> A: I don't remember, I'd have to look at the invoices.
>
> Q: Okay. Let me show you the invoices which are also part of Exhibit 24. Does that refresh your recollection?
>
> A: Yes.

Q: And how much did your mother –

[THE CONTRACTORS' COUNSEL]: Objection, Your Honor.

Q: – pay for rent, additional rent?

THE COURT: Overruled.

[A]: So we were renewing it in two week increments because we kept being told it would be two more weeks, two more weeks, so it was $1,407.60 and then it was another – make sure they're not duplicates. Then there was another $1,313.76, and then it was another $563.04.

. . .

Q: Now, the last time you testified that Mr. Yi's work was terminated –

A: Yeah.

Q: – on or around April 17, 2016.

A: Yes.

Q: Did you have another contractor come in and redo and perform work?

A: Yes.

Q: And who was that?

A: David Kennard.

. . .

Q: And how were materials purchasing handled when it came to Mr. Kennard's work?

A: He would refer us to other vendors and then we would place the orders and then they would deliver it and he would install it.

. . .

Q: Okay. Do you remember how much you spent or how much your mother spent in replacing that mirror that Mr. Yi's workers had broken?

A: No.

[THE CONTRACTORS' COUNSEL]: Objection.

THE COURT: Overruled.

Q: Did you know at the time that your mother made that expenditure?

A: Yes.

Q: Okay. Let me show you what's been marked as Exhibit No. 25. Does this refresh your recollection as to how much your mother spent?

A: Yes.

Q: And how much was that?

[THE CONTRACTORS' COUNSEL][7]: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: So it's $1,099.95 plus tax . . .

. . .

Q: Okay. Did she – did your mother also incur some expenses at Home Depot?

A: Yes.

Q: Do you recall what that was?

A: I don't remember off the top of my head, but I believe it might have been the garbage disposal and maybe some other things.

Q: Okay. Let me show you what's been marked as Exhibit 27. Let me also ask you, did you know how much that expenditure was at the time?

A: I don't – I know how much it was because I was with her, but I don't remember how much.

Q: Okay. Let me show you what's been marked as Plaintiff's Exhibit 27. Does that refresh your recollection?

A: Yes.

[7] The transcript identifies this line as spoken by Plato's counsel, objecting to her own question. We assume that is an error in the transcription, and so have identified the speaker as the Contractors' counsel.

Q: And how much was that?

[THE CONTRACTORS' COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

[THE CONTRACTORS' COUNSEL]: I get foundation on this one in addition to the ground previously asserted.

THE COURT: Okay.

THE WITNESS: It was $223.60.

Q: Okay. And do you recall how much your mother paid for one of the bathroom sinks?

A: I don't remember off the top of my head.

Q: Okay. Did you know at the time?

A: I did.

Q: Okay. Let me show you Exhibit 28, which is an invoice from Faucet.com. Does that refresh your recollection?

A: Yes.

Q: And how much did your mother pay?

[THE CONTRACTORS' COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: $518.74.

The Contractors challenge this testimony on several grounds. To the extent they argue that the circuit court erred "when [it] allowed [Meropi Plato] to 'refresh her recollection' by simply reading dollar amount[] numbers from a series of over 20 inadmissible invoices," we disagree. As reflected in the passage excerpted above, Plato's counsel laid the predicate that Meropi Plato was familiar with the amounts Plato had expended at the time they were paid but could not recall the amounts at the time of her

testimony. Upon being shown the invoices, she confirmed that they refreshed her recollection, and she testified to the amounts. The court did not abuse its discretion in permitting Plato's counsel to refresh Meropi Plato's recollection.

The Contractors, relying on *Sail Zambezi, Ltd. v. Maryland State Highway Administration*, 217 Md. App. 138 (2014), also argue that this testimony should not have been permitted absent expert testimony that the expenses at issue were fair and reasonable. That case is inapposite. In *Sail Zambezi*, the plaintiff attempted to introduce into evidence a spreadsheet identifying expenditures made for boat repairs. *Id.* at 153. The plaintiff claimed that the spreadsheet was admissible under the hearsay exception for business records. *Id.* We affirmed the circuit court's determination that the spreadsheet did not meet the requirements of the business record exception because it was "prepared for litigation and not an original business record." *Id.* at 156. Moreover, even if it qualified under that exception, the trial court had not abused its discretion in denying admission of the spreadsheet because the circumstances of its creation suggested that it was unreliable and, moreover, the plaintiff had presented no evidence that it had provided the defendant with the source documents from which the spreadsheet was created. *Id.* at 156-57. Finally, we determined that the trial court had correctly concluded that those source documents were themselves inadmissible, and a compilation of inadmissible evidence is not itself admissible. *Id.* at 157 ("[W]hen information in a business record is not admissible, the compilation is not admissible.").

Meropi Plato's testimony bears no similarity to the spreadsheet at issue in *Sail Zambezi*. Her testimony was not a business record (or a summary compilation of otherwise

inadmissible evidence), but her personal knowledge of Plato's expenditures, refreshed by reference to the invoices. The record also contains no suggestion that her testimony was unreliable as to the amounts at issue.

The Contractors also rely on one other aspect of *Sail Zambezi*, which is this Court's reference to § 10-105 of the Courts and Judicial Proceedings Article. In the concluding paragraph of that opinion, we stated: "In the absence of applicability and compliance with C.J.P. § 10-105, Sail Zambezi would have needed the testimony of the provider of the invoice to admit it as a business record or expert testimony explaining the reasonableness of the expenses." 217 Md. App. at 157. Section 10-105, which is applicable only in District Court and in cases in which the District Court has exclusive original jurisdiction, provides, in relevant part, that "a paid bill for goods or services is admissible without the testimony of the provider of the goods or services as evidence of the authenticity of the bill . . . and the fairness and reasonableness of the charges of the provider of the goods or services." Cts. & Jud. Proc. § 10-105(a), (b)(1). The Contractors contend that because § 10-105 was not applicable to this case, Plato was required to present expert testimony that the charges at issue were fair and reasonable before they could be offered into evidence.

We again find *Sail Zambezi* inapplicable to the facts before us. Here, the issue is not the admissibility of the invoices. The circuit court sustained the Contractors' objection to the admissibility of the invoices and Plato has not challenged that ruling on appeal. Instead, the issue is the admissibility of Meropi Plato's testimony regarding the amounts paid for moving expenses and items purchased to complete the renovations. We disagree that expert testimony about the fairness and reasonableness of the charges at issue here was

required as a matter of law. Unlike medical expenses, or even the expenses for boat repairs at issue in *Sail Zambezi*, these were not expenses that "require[] knowledge of complicated matters [and that] . . . should not be resolved by laymen without expert assistance." *Orkin v. Holy Cross Hosp. of Silver Spring*, 318 Md. 429, 433 (1990). Instead, the charges at issue were for items that the court properly concluded do not "require any kind of expertise to determine the reasonableness." *See Sewell v. State*, 239 Md. App. 571, 635 (2018) ("Expert testimony is not required 'on matters of which the jurors would be aware by virtue of common knowledge . . . .'" (quoting *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 257 (1996), *aff'd*, 346 Md. 122 (1997))). The Contractors have not identified any caselaw to the contrary.

Moreover, even if we would otherwise have been inclined to agree with the Contractors, Plato later presented expert testimony as to the reasonableness of these expenses through Mr. Kennard. Although Mr. Kennard did not add that all of the expenses were also "fair," his testimony fairly reflects that assessment as well.

Finally, an undercurrent of the Contractors' argument as to all of Plato's damages testimony is that it erroneously included elements of damages that were not actually attributable to Mr. Yi's breach. For example, the Contractors contend that Plato was permitted to introduce evidence of additional expenses involved in completing the renovation that were not within the scope of what Mr. Yi had originally contracted to do.

That contention may have provided fertile ground for cross-examination, but we do not think the circuit court acted beyond its discretion in allowing the testimony to be admitted in the first place. The parties presented evidence as to the scope of Mr. Yi's

contractual obligations and the work that Mr. Kennard performed later.[8] Plato presented evidence of expenses it claimed as damages resulting from Mr. Yi's breach. The Contractors argued that many of them were not attributable to their breach. Deciding who to believe was an issue for the jury. *See Sifrit v. State*, 383 Md. 115, 135 (2004) ("[T]he jury [is] free to believe some, all, or none of the evidence presented . . . ."). In any event, we observe that the jury did not award Plato all of the amounts it requested, which suggests that the jury in fact exercised discretion in determining that some of the amounts sought were not attributable to Mr. Yi's breach. *See, e.g.*, *Turner v. Hastings*, 432 Md. 499, 515 (2013) (in discussing whether a court erred in revising a jury verdict, observing that the award "revealed a deliberate thought process by the jury in awarding a specific amount of damages . . . based on the evidence"); *see also, e.g.*, *First Union Comm'l Corp. v. GATX Capital Corp.*, 411 F.3d 551, 557-58 (4th Cir. 2005) (explaining the "substantial evidence" that supported a jury's decision to award less than the full amount of claimed damages).

B. Mr. Kennard's Testimony and Contract

The Contractors also present several complaints regarding Mr. Kennard's testimony and the admission of the contract he entered with Plato to complete the renovation. First, they complain that the circuit court erred in admitting into evidence Mr. Kennard's contract with Plato. By failing to ensure that the record and record extract contain a copy of that

[8] To the extent that the Contractors contend that the four written estimates identified the scope of work Mr. Yi contracted to perform, and that we should hold that the circuit court erred in allowing testimony that concerned work clearly outside that scope, the absence of the estimates from the record precludes us from reaching that contention.

contract, however, the Contractors have deprived us of information necessary to consider that issue. The Contractors have thus failed to demonstrate any error by the circuit court.

Second, the Contractors complain that Mr. Kennard did not make a comparison between the work he performed and the work Mr. Yi had contracted to perform to permit the jury to discern whether the scope of work was similar. Plato responds that Mr. Kennard did make that comparison and, furthermore, that the jury also could have made the comparison from (1) the contract documents between Mr. Yi and Plato, (2) the contract between Mr. Kennard and Plato, and (3) descriptions of work performed by each. Ultimately, the Contractors' failure to provide us with the various contractual documents prevents us from resolving this issue as well. Without those documents, we simply have no way of assessing comprehensively whether the jury had sufficient information to compare the extent of any overlap between Mr. Kennard's scope of work and the original scope of what Mr. Yi was supposed to do.[9]

[9] We also observe that although Mr. Kennard's testimony on this point was not a model of clarity, he did eventually testify that the scope of work he performed was similar to the scope of work Mr. Yi agreed to perform. For example, when asked if there was "any portion of" the scope of his work at the condominium "that was not what Mr. Yi was to do or did," he answered, "No." And when asked about Mr. Yi's scope of work, Mr. Kennard replied that "[i]t was basically my contract as going by what I saw there that needed to be redone and done properly."

At one point, Mr. Kennard, in comparing the scope of the two sets of contractual documents, testified that "my opinion is some of it's close and some of it isn't close." The Contractors treat that testimony as an acknowledgment that the scope of work was, in some ways, not close. But when asked "in what way [they we]re [] close," Mr. Kennard responded, "Not costs close. . . . By scope, they're okay, but they're not price-wise." He then provided additional testimony as to the similarity in the scope of the projects.

Third, the Contractors complain that throughout most of Mr. Kennard's testimony, he did not state expressly that he was providing opinions to a reasonable degree of professional certainty, though he confirmed at the end of his direct testimony that all of his opinions had been provided "to a reasonable degree of certainty in [his] field." The court overruled an objection to the question that produced that summary statement and then denied a motion to strike the statement. On redirect, Mr. Kennard reiterated several of his opinions, this time including the "reasonable certainty" language. The Contractors argue that the court abused its discretion in allowing Mr. Kennard's testimony because each of his opinions was not initially identified as having been provided to a reasonable degree of professional certainty. We disagree.

"[T]rial courts have 'wide latitude in deciding whether to qualify a witness as an expert or to admit or exclude particular expert testimony[.]'" *Basso v. Campos*, 233 Md. App. 461, 477 (2017) (quoting *Lewin Realty III v. Brooks*, 138 Md. App. 244, 276 (2001), *abrogated on other grounds by Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594 (2011)). Because "[t]he admissibility of expert testimony is within the discretion of the trial court, . . . the circuit court's decision to admit expert testimony 'will seldom constitute a ground for reversal.'" *Stevenson v. State*, 222 Md. App. 118, 136 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 742 (2014)). We "require[] expert opinions to be established within a reasonable degree of probability . . . to make sure that the expert's opinion is more than speculation or conjecture." *Reiss v. Am. Radiology Servs.*, 241 Md. App. 316, 334 (2019) (quoting *Karl v. Davis*, 100 Md. App. 42, 51-52 (1994)). In the context of medical expert testimony, for example, this Court observed that "[t]here is no appellate court opinion in

Maryland that has held that the mantra 'within a reasonable degree of medical probability' is absolutely required before each and every medical expert opinion." *Karl*, 100 Md. App. at 52. Rather, we explained, such expressions are "wooden phrases . . . required to make sure that the expert's opinion is more than speculation or conjecture." *Id.* (quoting J. Murphy, *Maryland Evidence Handbook*, § 1404 (2d ed. 1993)); *see also Armacost v. Davis*, 462 Md. 504, 533 n.17 (2019) (observing that the "precise meaning[]" of the phrase "reasonable degree of medical certainty" has "elude[d] many judges and litigators" but is understood "to signify that an expert opinion is based on more than conjecture or speculation").

That Mr. Kennard did not state expressly that he was testifying to a "reasonable degree of certainty" before each of his answers does not suffice to show that the court abused its discretion in refusing to strike that testimony. Mr. Kennard ultimately stated that his opinions were provided within a "reasonable degree of certainty." Although it would have been preferable had he used that phrase specifically before offering each of his opinions, the record provides no basis for us to conclude that his failure to do so detracted from the jury's ability to consider properly his testimony. Nor do we have any basis to conclude that the failure to qualify his opinions with that language interfered with the Contractors' ability to cross-examine him effectively about his opinions. Viewing Mr. Kennard's testimony as a whole, we conclude that the circuit court did not abuse its substantial discretion in allowing that testimony. *See Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 99 (2007) (stating that the trial court's "decision to admit or exclude 'expert'

testimony . . . will be sustained on appeal unless it is shown to be manifestly erroneous" (quoting *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 520 n.8 (2000))).

VI. THE CONTRACTORS HAVE NOT IDENTIFIED ANY ERROR BY THE TRIAL COURT REGARDING EVIDENCE AND JURY INSTRUCTIONS AS TO ALLEGED HOME IMPROVEMENT STATUTORY VIOLATIONS.

In a section of their brief consisting of less than a page, the Contractors argue that the court erred in (1) allowing evidence regarding their alleged violations of the Maryland Home Improvement Law ("MHIC"), Md. Code Ann., Bus. Reg. §§ 8-101 – 8-802 (Repl. 2015; Supp. 2019), and (2) instructing the jury regarding that law. The Contractors contend that "the jury was wrongfully provided evidence and instructed as to MHIC regulations concerning allowable deposits and contract provisions, which did not have 'any part to play' in the dispute."

The Contractors identify the offending evidence and instructions only by reference to pages in the record extract, without elaboration. The evidence at issue is testimony from Mr. Kennard concerning deposits a contractor is permitted to require in Maryland. Specifically, Mr. Kennard testified that a contractor can require no more than one-third of the total project cost as a down payment and may not receive final payment until the work is complete. The jury instruction at issue provides, in full:

> A contractor performing a home improvement must present to a homeowner a written contract. The contract must be signed by all parties. The contract must list all the documents [that] it incorporates. The contract must list the date – I'm sorry, the approximate dates of start of performance of the contract and approximately when it will be substantially completed.
>
> A contractor cannot accept more than one-third of the price as a deposit, and may not accept any money until a contract is signed. The agreed upon price must be clearly stated for the homeowner. The contract must include a notice

> of the protections available to consumers through the Maryland Home Improvement Commission.

The Contractors contend that "[t]here was no evidence that any of the alleged MHIC non-compliance issues proximately caused the alleged losses at issue" and, therefore, that Mr. Kennard's testimony and the associated jury instruction were prejudicial and denied them a fair trial. As an initial matter, Standard and Yi's argument is wholly conclusory. They provide no explanation or factual support for *why* they think the evidence and jury instruction were unconnected to Plato's losses. Similarly, they fail to identify any prejudice beyond the conclusory statement that "[t]he evidence was unduly prejudicial—presented only to disparage Appellants, which was exacerbated when given the Court's imprimatur by being included in the instructions." For that reason alone, their contention fails. *See Mills v. Galyn Manor Homeowner's Ass'n*, 239 Md. App. 663, 684 (2018) (determining not "to address the merits of [a] perceived error on appeal" where the defendants failed to "provide any argument explaining how the circuit court erred"), *aff'd sub nom. Andrews & Lawrence Prof'l Servs. v. Mills*, ___ Md. ___, 2020 WL 427876 (Jan. 28, 2020); *see also Catler v. Arent Fox, LLP*, 212 Md. App. 685, 712 (2013) ("Because they have failed to brief us appropriately, . . . appellants have waived their right to appeal from this portion of the court's order.").

Moreover, to the extent we can discern the substance of the Contractors' argument, it is without merit. Two core aspects of Plato's claims against Mr. Yi were: (1) Mr. Yi extracted money from them for work that was either not performed or performed inadequately; and (2) Mr. Yi failed to complete the work on a timely basis. Plato claimed

it was damaged by having paid amounts it should not have been required to pay and by the delay in completion. We can identify no error or abuse of discretion in the trial court's admission of the testimony or in its jury instruction on this issue.

VII. THE CONTRACTORS' COMPLAINT REGARDING THE CONDUCT OF PLATO'S COUNSEL DOES NOT IDENTIFY ANY VIABLE APPELLATE CLAIM.

The Contractors next contend that they were denied their right to a fair trial as a result of Plato's counsel's "failures to comply with basic trial practice." (emphasis removed). In essence, they claim that Plato's counsel's alleged deficiencies required them to object at trial with such frequency that it appeared they (the Contractors) must be attempting to "block[] the evidence." That contention fails to identify any alleged error by the trial court and, therefore, is not reviewable by us. *See Walls v. State*, 228 Md. App. 646, 668 (2016) ("It is a basic precept that our function as an appellate court is to review the rulings of *the trial court* for error. Our function is not to review conduct of counsel[.]" (internal citation omitted)); *Cason v. State*, 140 Md. App. 379, 400 (2001) (stating that the "function [of] an appellate court is to review the decisions, rulings, and actions of the circuit court"); *DeLuca v. State*, 78 Md. App. 395, 397-98 (1989) ("Lawyers do not commit error. . . . Only the judge can commit error, either by failing to rule or by ruling erroneously when called upon . . . to make a ruling."); *Braun v. Ford Motor Co.*, 32 Md. App. 545, 546 (1976) ("[E]rror in a trial court may be committed only by a judge . . . .").

VIII. THE AWARD OF NON-ECONOMIC DAMAGES UNDER THE MARYLAND CONSUMER PROTECTION ACT MUST BE VACATED.

Finally, the Contractors assert that the jury's award of $3,000.00 in non-economic damages must be vacated because Plato failed to adduce sufficient evidence of an "objectively ascertainable physical injury or manifestation." Plato disagrees, asserting that the award was proper because the Consumer Protection Act "provides for broad injury for unfair or deceptive trade practices." We agree with the Contractors.

The Consumer Protection Act prohibits "[u]nfair, abusive, or deceptive trade practices includ[ing] any . . . [f]alse, falsely disparaging, or misleading oral or written statement . . . which has the capacity, tendency, or effect of deceiving or misleading consumers." Com. Law §§ 13-301(1) & 13-303. In addition to enforcement mechanisms made available to the Attorney General and the Consumer Protection Division, "any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited" by the Act. *Id.* § 13-408. "[A] private party suing under the Consumer Protection Act must establish 'actual injury or loss.'" *Lloyd v. Gen. Motors*, 397 Md. 108, 143 (2007) (quoting *Citaramanis v. Hallowell*, 328 Md. 142, 153-54 (1992)). "[I]n determining the damages due the consumer, we must look only to his actual loss or injury caused by the unfair or deceptive trade practices." *Citaramanis*, 328 Md. at 157-58 (quoting *Golt v. Phillips*, 308 Md. 1, 12 (1986)).

Plato is correct that non-economic damages are recoverable under the Consumer Protection Act. *See, e.g., Green v. N.B.S., Inc.*, 409 Md. 528, 541 (2009). However, Plato goes beyond that in arguing that "[t]he CPA is a statute, not a tort, and tort damages

standards cannot be imputed upon the CPA." In essence, Plato argues that because the Consumer Protection Act is a statute, damages available under it are entirely untethered from the limitations on the same damages measures that have been developed in tort law. Plato points to no authority for that position.

A plaintiff seeking an award of non-economic damages in tort must prove a "physical injury" that is "objectively ascertainable." *Hoffman v. Stamper*, 385 Md. 1, 34 (2005); *see also Exxon Mobil Corp. v. Albright*, 433 Md. 303, 352 (2013) (a "physical injury" must be "capable of objective determination"); *Vance v. Vance*, 286 Md. 490, 498-501 (1979) (recovery for mental distress exists if it results in "physical injury"). To recover non-economic damages, that physical injury must also be "clearly apparent and substantial," more than something merely distressing. *Roebuck v. Steuart*, 76 Md. App. 298, 315-16 (1988) (plaintiff failed to show "some clearly apparent and substantial physical injury" where the sole evidence of her "mental anguish" was her testimony that she saw a psychologist); *see also Faya v. Almaraz*, 329 Md. 435, 455-56 (1993) (recovery of damages was limited to the period when plaintiffs had reasonable "fear and its physical manifestations").

Moreover, and contrary to Plato's assertion, "a [Consumer Protection Act] violation is in the nature of a tort action; it is a legal wrong that is not equivalent to a breach of contract." *State of Md. Cent. Collection Unit v. Kossol*, 138 Md. App. 338, 348 (2001) (quoting *Hartford Acc. & Indem. Co. v. Scarlett Harbor Assocs. Ltd. P'ship*, 109 Md. App. 217, 265 (1996)); *see also Consumer Prot. Div. v. Morgan*, 387 Md. 125, 177 (2005) ("While Consumer Protection Act violations are not tortious acts, we again look for

guidance from the law . . . developed in the tort context."). Indeed, the Court of Appeals has held that the statutory cap for non-economic damages applies to all personal injury claims, regardless of whether they arise in tort or "as a result of a Consumer Protection Act violation." *Green*, 409 Md. at 541.

To be sure, the General Assembly could choose to make non-economic damages available for violations of the Consumer Protection Act in circumstances in which they are not available for common law torts. Indeed, the General Assembly has done just that with respect to violations of the Maryland Consumer Debt Collection Act. *See* Md. Code Ann., Com. Law §§ 14-201 – 14-204 (Repl. 2013; Supp. 2019). Section 14-203 of the Commercial Law Article makes a debt collector who violates that Act "liable for any damages proximately caused by the violation, *including damages for emotional distress or mental anguish suffered with or without accompanying physical injury*." (emphasis added). That provision, however, is limited expressly to debt collectors who violate Subtitle 2 of Title 14 of the Commercial Law Article. It does not apply to other violations of the Consumer Protection Act, which resides in Title 13 of the Commercial Law Article. "It is a common rule of statutory construction that, when a legislature uses different words, especially in the same section or in a part of the statute that deals with the same subject, it usually intends different things." *Drew v. First Guar. Mortg. Corp*., 379 Md. 318, 332 (2003) (quoting *Toler v. Motor Vehicle Admin*., 373 Md. 214, 223 (2003)); *see also Md.-Nat'l Capital Park and Planning Comm'n v. Anderson*, 395 Md. 172, 189-90 (2006) (observing that where, based on language of a related statute, the General Assembly

"certainly knew how to include the same or similar language," its decision not to do so in a different provision showed it "intended otherwise").

Plato has failed to identify any authority to support its contention that a claim for non-economic damages under the Consumer Protection Act need not satisfy the ordinary prerequisites for proving such damages in tort. In the absence of an expression of statutory intent to deviate from established standards for such damages, we will apply those well-established standards.

Here, Plato identified no "objectively ascertainable" physical injury, *Hoffman*, 385 Md. at 34, as a consequence of Mr. Yi's violations of the Consumer Protection Act, instead asserting only that Ms. Plato was "upset [by] the chain of events." That, alone, is insufficient to support an award of non-economic damages. As a result, the court erred in allowing the jury to consider that element of damages, *see Roebuck*, 76 Md. App. at 315-16, and we will vacate the award of non-economic damages.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED AS TO THE AWARD OF NON-ECONOMIC DAMAGES AND AFFIRMED IN ALL OTHER RESPECTS. CASE REMANDED TO ENTER A REVISED JUDGMENT CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLANTS.