Circuit Court for Cecil County
Case No. C-07-CV-18-000286

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1852

September Term, 2019

LIDL US OPERATIONS, LLC, ET AL.

v.

BUFFALO STRUCTURAL STEEL CONSTRUCTION CORPORATION

Graeff,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: August 11, 2021

This appeal involves the scope and performance of a structural and miscellaneous steel subcontract between Buffalo Structural Steel Construction Corporation ("Buffalo"), appellee, and the general contractor, Whiting-Turner Contracting Company ("Whiting-Turner"), appellant, for the construction of a grocery distribution center for LIDL US Operations, LLC ("Lidl"), appellant. Buffalo brought a mechanic's lien action against Lidl in the Circuit Court for Cecil County and, later, by consent, amended its complaint to add a breach of contract claim against Whiting-Turner. The circuit court held a seven-day bench trial over five months, decided some issues in favor of Buffalo and some in favor of the appellants, and entered a $1.4 million money judgment against Lidl and Whiting-Turner, jointly.

In this appeal, Lidl and Whiting-Turner present two questions and four questions, respectively, which we have rephrased as follows:

Questions posed by Lidl:

I. Did the trial court err by entering a money judgment against Lidl instead of imposing a mechanic's lien?

II. Did the trial court err by finding that Buffalo produced the "material papers" and other required documents necessary to support its claims?

Questions posed by Whiting-Turner:

III. Did the trial court clearly err in its finding that Supplements 9 and 10 included costs incurred by other subcontractors that exceeded Buffalo's scope of work for "touch-up" painting?

IV. Did the trial court err by not concluding that Buffalo was equitably estopped from challenging certain back charges in Supplements 9, 10, and 11?

V. Did the trial court err by permitting Buffalo to adduce testimony about records that were not produced during discovery or at trial?

VI. Did the trial court improperly allow Buffalo's president to testify in rebuttal about matters not appropriate for rebuttal testimony and because his testimony was not disclosed in discovery?

For the following reasons, we answer Lidl's first question in the affirmative and shall vacate the money judgment against Lidl and remand with instructions that the court enter a final mechanic's lien against it. Aside from two miscellaneous deductions from the judgment which we shall direct be corrected on remand by means of a modified judgment, we otherwise affirm the judgment of the circuit court.

FACTS AND PROCEEDINGS

In August 2016, Lidl contracted with Whiting-Turner to construct an 800,000 square foot food warehouse and distribution center, located in Perryville, for its grocery business operation ("the Project"). The Prime Contract, as later supplemented, obligated Lidl to pay Whiting-Turner over $100,000,000. The substantial completion date was November 1, 2017.

By contract executed July 12, 2016 ("the Subcontract"), Whiting-Turner subcontracted the fabrication, delivery, and installation of 3,000 tons of structural steel and miscellaneous metal required for the Project to Buffalo. The Subcontract price, as amended by supplements executed on July 14, 2016 and July 28, 2016, was $12,250,000. As is standard in the industry, Article 6 of the Subcontract provided that changes in the scope of work and corresponding changes in the contract price would be accomplished by supplements to the Subcontract executed by both parties.

Whiting-Turner issued twelve supplements to the Subcontract. The first eight supplements (Supplements 1 through 8) were signed by Buffalo and are not in dispute in this appeal.[1] After accounting for changes reflected in Supplements 1 through 8, the revised contract price was $13,200,983.81. The final four supplements were not signed by Buffalo (Supplements 9 through 12) and were disputed in whole or in part. The parties stipulated that, as of the date of the bench trial, Whiting-Turner had paid Buffalo $11,923,893. The parties also agreed that by the end of 2018, Whiting-Turner had been paid in full by Lidl under the terms of the Prime Contract and that Lidl was fully satisfied with the final Project.

The central issue at the trial was the scope of Buffalo's responsibility for "touch-up" painting of the installed steel components. The "Specific Scope of Work" attached to the Subcontract stated at Item 12 that the "interior girders, joists, and decking" supplied and installed by Buffalo were to be "shop primed and shop painted." Item 13 stated that the "[j]oist, and joist girders" were to be "shop primed" and the "[m]etal decking" was to be "shop primed, and ready for painting by others." Thomas Latona, president of Buffalo, testified that shop priming refers to the application of primer to the steel "inside [a] controlled facility" prior to delivery to the job site.

[1] In its amended complaint and at the bench trial, Buffalo disputed a $178,320.75 deduct for touch-up painting reflected in Supplement 8. The trial court found in favor of the appellants on those issues, however, and Buffalo did not note a cross-appeal.

At Whiting-Turner's request, by letter dated July 12, 2016, Andrew Kelkenberg, Buffalo's Project Manager, proposed an "alternative paint system to supplement the finish painting requirements for the [P]roject." Mr. Kelkenberg emphasized: "Keep in mind that this is a primer and it will require Whiting-Turner to provide a top coat finish paint system to meet the contract requirements."

By letter dated August 30, 2016, Mr. Kelkenberg confirmed with Whiting-Turner that it wished to proceed with the alternative paint system for a total price increase of $1,000,000. The letter specified the process that would be followed to prime the structural steel and included the following disclaimer:

> Please note, this paint system is not intended to be the finish paint for this project. A final top coat will need to be applied in accordance with the contract specifications. This will be required in order to prevent rust from coming through the prime coat of the joists, joist girders, and bridging in the future.

The next day, Whiting-Turner issued Supplement 1, which increased the contract price by $1 million, to $13,250,000, to account for "Shop Painting of Structural Steel" as specified. Item 4 of Supplement 1 stated that Buffalo was to "use extra precaution during erection to ensure the painted steel is not damaged or marked up by using special rigging, placing stored steel on dunnage, cleaning of boot marks and cleaning excess dirt off during erection." Item 5 specified that the price included "touch-up once erection is completed."

On September 13, 2016, Buffalo subcontracted erection of the steel and the post-erection touch-up painting to R&J Steel Erectors, LLC ("R&J") for $1.628 million

dollars. Mr. Latona explained at trial that touch-up painting consisted of applying the same primer used in the shop to cover burn marks where steel components were welded together and to cover any abrasions caused during erection by R&J. To avoid abrasions, Buffalo directed R&J to use nylon slings instead of steel cables to lift the steel components.

In February 2017, Buffalo notified R&J that touch-up painting was "becoming a critical item" in one area of the Project and directed it to "proceed immediately" with that touch-up painting.

In March 2017, Lidl raised concerns with Whiting-Turner about the "progress of the touch up paint[ing.]" Two months later, John Caine, Whiting-Turner's project manager on the Subcontract, forwarded the Lidl communication to Mr. Kelkenberg and Mr. Latona at Buffalo, who in turn forwarded it to R&J. R&J responded with an estimate that it would take 10 ½ weeks to complete the touch-up painting.

Consequently, in late May, Mr. Caine informed Mr. Latona that Whiting-Turner planned to engage its own painter as a direct subcontractor to supplement Buffalo's touch-up painting scope of work. Around the same time, Mr. Caine issued a Notice of Default to Buffalo, specifying that the default was the failure to complete the work in accordance with the schedule, including touch-up painting.

In July 2017, Whiting-Turner solicited a proposal from G.C. Zarnas & Co., Inc. ("Zarnas"), a commercial and industrial painting company, on a time and materials basis. Lee Zarnas, an assistant vice president at Zarnas, asked Whiting-Turner's project

engineer to provide a "[p]ainting specification for touch-up" and asked if touch-up included painting "nuts and bolts." Whiting-Turner responded by email attaching the "Interior Painting" specifications included by Lidl in the Prime Contract. He pointed Mr. Zarnas to the specific system selected by Buffalo within a menu of options and advised him not to worry about nuts and bolts. The painting specification identified by Whiting-Turner, entitled "Water-Based Light Industrial Coating System," indicated the application of two prime coats and two top coats.

At the same time, Mr. Caine notified Mr. Kelkenberg that there were "areas [on the steel] that [were] rusty" and asked Buffalo to direct Vulcraft, one of the companies that shop primed the steel, to touch-up those areas. Mr. Kelkenberg responded that, as explained in negotiating Supplement 1, the primer only was intended to protect the steel from the elements during the erection phase, and that Buffalo would not provide touch-up of areas with rust bleed caused by the failure to apply a top coat.

By subcontract dated July 17, 2017, Whiting-Turner engaged Zarnas on a time and materials basis. The specific scope of work included requiring Zarnas to "[p]aint weld marks and other marks on all steel within the warehouse and outbuildings"; to "[p]rotect all working surfaces" and "clean up all over spray or paint"; and to use a paint color that "match[ed] the existing white paint."

In the meantime, R&J continued to perform touch-up painting under its subcontract with Buffalo. Without notice to Buffalo and R&J, Zarnas commenced work on the Project on July 26, 2017. Within a few days of Zarnas beginning work, and, in

contradiction of its earlier directive, Whiting-Turner advised it that it should paint nuts and bolts. R&J ultimately walked off the job and was terminated by Buffalo on August 17, 2017.

On August 18, 2017, Buffalo submitted its final progress payment application to Whiting-Turner for the period ending August 31, 2017.

Effective October 5, 2017, Whiting-Turner and Buffalo executed Supplement 8 which included a deduction for "Steel Touch Up Painting" in the amount of $178,320.75, which was the amount invoiced by Zarnas for the first three weeks of work. As indicated earlier, that deduction was accepted by the trial court and is not disputed on appeal.

The next day, Whiting-Turner issued Supplement 9, which included additions and deductions netting a total deduction of $673,341.32. The largest deduction was $363,110.91 for additional "Steel Touch Up Painting" performed by Zarnas.

By letter dated October 11, 2017, Mr. Latona, wrote to Mr. Caine disputing various change requests in Supplement 9. As pertinent, Mr. Latona noted that he and Mr. Kelkenberg had made a site visit to the Project on September 13, 2017 and that the "so called 'touch up' painting" that they observed "far exceeded" what they considered touch-ups. Rather, it amounted to "finish painting of large areas of the joist girders" and was therefore outside of Buffalo's scope of work. Mr. Latona emphasized that he had "accepted the $178,320.75" deduct on Supplement 8 because "it covered the touching up of the welds at the joist girder stabilizer plates and the welds at the bridging above the Cold Storage Area that R & J failed to complete."

In an internal email, David Potts, a vice president at Whiting-Turner, wrote to Mr. Caine and Andy Lylo, the overall on-site project manager for Whiting-Turner, stating that they needed to respond to Mr. Latona's letter, adding: "As far as touch-up, we are not going down the road of finish painting vs touch-up painting. He elected not to do the touch-up, so we're doing it for him. PERIOD."

Mr. Caine replied to Mr. Latona by letter of October 17, 2017. With respect to touch-up painting, he emphasized that Buffalo had failed to perform its scope of work under Supplement 1 and, as a result, Whiting-Turner was forced to hire its own painter to complete the work. The "back charges remain and [would] continue" until the touch-up was complete.

Mr. Latona again wrote to Mr. Caine on October 25, 2017 and, with respect to the issue of touch-up painting, he maintained that Whiting-Turner was "attempting to pass the costs of the top coat on to Buffalo . . . [by] calling it touch up." He noted that he had reviewed time sheets submitted by Zarnas that were attached to Supplement 9 and discovered that between 23 and 28 painters were working at times, which "borders [on] the ridiculous for touching up welds over the first floor of the cold storage area."

Mr. Caine responded with photographs that he asserted depicted "areas which still require touching up" and areas where R&J used the wrong paint color to touch-up weld marks.

On October 26, 2017, Mr. Potts issued a "Notice of Default" to Buffalo.[2]

Mr. Latona responded by letter of October 27, 2017 that Buffalo did not intend to "take any further action with regard to the issue of painting on this project." He reiterated his position that the painting being performed by Zarnas "far exceed[ed] normal touch up painting[.]"And given that Whiting-Turner owed Buffalo over $300,000 in progress payments, had not processed Buffalo's change order requests in the amount of $239,000, and was holding over $1.3 million in retainage, Mr. Latona expressed his view that Whiting-Turner could not be trusted to act in good faith.

Mr. Potts responded that same day and proposed that Mr. Latona and a representative of his surety meet with Whiting-Turner at the job site to "review the outstanding touch-up painting." Mr. Latona accepted that offer, but suggested that a third-party inspector from the Steel Structures Painting Council attend the meeting and measure the thickness of paint at different locations to dispel any "controversy[.]"

Mr. Potts saw "no need for a third-party inspector" and responded that "this inspection" could be performed "visually." He noted that the issue was not Buffalo's performance of the shop priming, but its failure to perform the field touch-up of welds and other abrasions.

Mr. Latona responded as follows:

[2] The notice of default is not in the record, but it is referenced in a letter dated October 27, 2017 from Mr. Latona to Mr. Potts.

> I agree it's not about the paint applied in the shop it's about the paint that was applied in the field and the excessive amount of time being back[ch]arged to us for the touch up that R&J didn't complete. It is our position that much of that time was spent on top coating the shop primer and painting outside the scope of our work, things like bleed through on the joist and joist girders, touching up field bolts and abrasions from other trades.

He emphasized that the $514,000 in back charges on Supplements 8 and 9 for touch-up of a small area was excessive and an inspector could verify if the "touch up" performed by Zarnas was in fact top coating of the steel.

In an internal email, Mr. Lylo wrote to Mr. Caine and other Whiting-Turner employees to advise them that no one was to permit an "inspector/agent/representative" to enter the job site to observe the "paint on the steel" and directed them to make sure the security guards were aware that if an inspector came, he or she should be escorted out. As he saw it, Buffalo was "trying to stir up trouble."

In the meantime, Zarnas had continued painting at the job site through October 27, 2017, at which point Whiting-Turner directed it to cease work. Mr. Zarnas testified that he was "led to believe" that the reason his company was directed to stop work was "a cost thing[.]"An internal email from a Whiting-Turner project engineer to Mr. Zarnas on October 19, 2017 indicated that Whiting-Turner was concerned about "how much the touch up painting [was] costing" and directed Zarnas to "hold off on painting anything more" until a meeting could be arranged.

Cecil County issued a temporary certificate of occupancy to Lidl on October 31, 2017.

On November 7, 2017, Mr. Latona and Mr. Kelkenberg[3] walked the job site with Mr. Potts, Mr. Lylo, and a representative of Buffalo's surety. Afterwards, Mr. Latona met privately with Mr. Potts. Mr. Latona agreed that Buffalo would perform additional touch-up painting in locations that had "not been addressed" based upon a "map" provided by Whiting-Turner. According to Mr. Latona, Mr. Potts agreed to investigate the back charge for touch-up painting on Supplement 8 and determine if it could be reduced.

The next day, Whiting-Turner issued Supplement 10, which included one addition and many deductions to the Subcontract price, for a net deduction of $400,815.27. The largest deduction was $308,233.46 for touch-up painting performed by Zarnas. Buffalo did not respond to or execute Supplement 10.

The next week, Mr. Latona met on site with Mr. Zarnas and a second painting contractor, Barrett & Sons, to solicit proposals for the completion of the touch-up painting. In late November, Buffalo executed a $92,000 subcontract with Zarnas and a $163,500 subcontract with Barrett & Sons for completion of its touch-up painting scope of work. The work was completed by the end of January 2018. Buffalo did not seek reimbursement from Whiting-Turner for that work.

On January 18, 2018, Buffalo served notice upon Lidl of its intent to claim a mechanic's lien.

[3] Mr. Kelkenberg had stopped working for Buffalo at the end of September 2017 but he attended the meeting.

On April 11, 2018, Whiting-Turner issued Supplement 11, which deducted a net total of $167,982.86 from the contract price. Buffalo did not respond to or execute Supplement 11.

On June 6, 2018, Buffalo filed its mechanic's lien action against Lidl. It sought a lien in the amount of $2,153,516.80 with four categories of damages: 1) $369,986.90 in overdue payments under the Subcontract, as amended by Supplements 1 through 8; 2) $1,365,986.65 in retainage; 3) $239,222.50 in outstanding extra work for which Buffalo had submitted change requests but had not been paid; and 4) deletion of the $178,320.75 back charge for touch-up painting on Supplement 8. Buffalo attached to its complaint an affidavit of Mr. Latona and six exhibits, including the Subcontract and Supplements 1-8; all of Buffalo's applications for payment; and its list of the outstanding extra work items.

On July 26, 2018, the court held a hearing at which the parties placed an agreement on the record and submitted a proposed order with exhibits, pursuant to which the court entered an order establishing an interlocutory mechanic's lien in favor of Buffalo for $2.5 million[4] against the distribution center property owned by Lidl and that the property "shall be released from [that lien], and from any other Final Mechanic's Lien which may hereafter be established against the said improved property in this case" upon the filing of a bond by Lidl. By agreement, an "existing payment bond" issued by

[4] During the hearing the parties agreed to a $2.2 million lien, but the order submitted by the parties and entered by the court imposed a $2.5 million lien.

Whiting-Turner and its surety in favor of Lidl for $92,500,000 would operate as the "payment security within the meaning of the lien statute."

On September 28, 2018, Whiting-Turner issued Supplement 12, its final supplement to the Subcontract, which proposed adding $57,551.85 to the contract price. Buffalo did not respond to or execute that supplement.

On November 29, 2018, Buffalo, by consent, filed an amended complaint adding a breach of contract count against Whiting-Turner.

The case was tried to the court over seven days beginning in May 2019 and ending in September 2019.

In its case, Buffalo called Mr. Latona and Mr. Kelkenberg, read into the record excerpts of deposition testimony from Mr. Potts and Iacob Remus Brewstur, Lidl's director of construction, and introduced 64 exhibits. In its case, Whiting-Turner and Lidl called Mr. Caine, Mr. Zarnas, Mr. Potts, and Clint Kehres, Whiting-Turner's lead superintendent on the Project; read into the record an excerpt from Mr. Latona's deposition; and introduced nearly 150 exhibits. Buffalo recalled Mr. Latona in rebuttal.

During trial, Buffalo amended its request for damages to reflect agreed upon deductions, ultimately claiming $1,753,400.10. Defense counsel argued that the mechanic's lien against Lidl should be denied outright for failure to supply material papers and, on the breach of contract claim against Whiting-Turner, the court should enter judgment in favor of Buffalo for just $92,503.21, which was the difference between

the revised contract price reflected on Supplement 12 and the amount previously paid by Whiting-Turner.

On November 7, 2019, the court issued its memorandum opinion and order. As a threshold matter, the court found that Buffalo had "complied with all statutory and procedural requirements of the Mechanic's Lien statute." It then turned to the issues of touch-up painting and other back charges reflected in Supplements 8 through 12. The court emphasized that the parties agreed that "all work under the terms of the contract and supplements was completed; although notices of default were issued by Whiting-Turner, [Buffalo] was never terminated or discharged; all necessary occupancy and use permits were issued to Lidl[.]" The court found that the back charge for touch-up painting reflected in Supplement 8 was accepted by Buffalo and was appropriate. Buffalo does not contest that finding on appeal.

The court made findings about each item reflected on Supplements 9 through 12, by determining that some were agreed to by the parties and making a finding on the disputed items. With respect to the touch-up painting back charge on Supplement 9, the court found that "the painting performed by Zarnas on behalf of Whiting-Turner did exceed the scope of work required by [Buffalo] under the parties' contract and supplement." It reasoned, though it was arguable that "some of the painting performed by Zarnas was touch-up as required under the contract, there [was] no evidence before the Court to determine how much of this charge-back was for touch-up and how much was for the painting that exceeded the scope of work." The court declined to "guess" and

denied the back charge outright. The court made a similar finding with respect to the back charge for touch-up painting on Supplement 10.

The court credited Mr. Latona's testimony and the documentary evidence adduced by Buffalo. It rejected Whiting-Turner's evidence regarding the disputed back charges on Supplements 9, 10, 11, and 12, and the disputed additions to the contract shown on those supplements, and the outstanding extra work items for which Buffalo was seeking compensation, as summarized on Buffalo's Exhibit 35. In its findings, the court made clear that it was Whiting-Turner's burden to prove any set offs to the contract price reflected on Supplements 9, 10, 11, and 12, which were were not executed by Buffalo, and that it was often "not convinced by a preponderance of the evidence" presented by Whiting-Turner.

After accounting for additions and deductions to the Subcontract price, the court concluded that the revised contract amount was $13,336,187.11, which was $135,203.30 more than agreed upon through Supplement 8. Crediting $11,923,893 in payments made by Whiting-Turner, the court entered judgment in favor of Buffalo and against both Whiting-Turner and Lidl, jointly, in the amount of $1,412,294.11.

This timely appeal followed. Additional facts may be provided in our discussion of the questions presented.

STANDARD OF REVIEW

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." Md. Rule 8-131(c). We review the circuit court's

factual findings for clear error, "giv[ing] due regard to the opportunity of the trial court to judge the credibility of the witnesses." *Id*. We will only overturn the trial court's findings of fact that are "clearly erroneous[.]" *Torboli v. Torboli*, 127 Md. App. 666, 672 (1999) (internal citations omitted). "If there is any competent and material evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *L.W. Wolfe Enterprises., Inc. v. Md. Nat'l Golf, L.P*., 165 Md. App. 339, 343 (2005) (quotations and citation omitted). But we review a trial court's legal rulings without deference to determine whether the trial court was legally correct. *Credible Behavioral Health, Inc. v. Johnson*, 466 Md. 380, 388 (2019)

DISCUSSION

I.

Money Judgment Against Lidl

After Buffalo filed the mechanic's lien complaint against Lidl, the circuit court held a show cause hearing. The parties agreed to the entry of an interlocutory mechanic's lien against the Lidl property. They further agreed that Lidl would "bond that lien off with an existing payment bond that already relates to the [P]roject." Counsel for Lidl and Whiting-Turner represented to the court that Whiting-Turner would join the case and that it would "go forward primarily as a breach of the contract also with the mechanic's lien undertones to it."

The court entered an order establishing the interlocutory mechanic's lien in favor of Buffalo and ordered that Lidl's property "shall be released from [the lien], *and from*

any other Final Mechanic's Lien which may hereafter be established against the said improved property in this case" upon the filing of the bond. (Emphasis added.)

At the conclusion of the case, the circuit court did not enter a final mechanic's lien against Lidl, but rather entered a money judgment against Lidl and Whiting-Turner, jointly.

Lidl contends that the court erred by entering a money judgment against it because the amended complaint only made a claim against it for a mechanic's lien and because the imposition of a final lien was the only available relief.

Buffalo first contends that this issue should not be considered under Rule 8-131(a). We are not persuaded that Lidl failed to preserve its argument on appeal by not raising it before the circuit court. The only relief Buffalo requested in its amended complaint and in closing argument at the bench trial was the entry of a mechanic's lien against Lidl.[5] Lidl was not obligated to argue against relief that was not requested.

On the merits, Buffalo argues, without citations, that because an interlocutory mechanic's lien was entered against Lidl but was released subject to the existing payment bond, the entry of a money judgment was "entirely appropriate for use with respect to the posted security."

[5] In his opening statement, Buffalo's counsel requested that judgment be entered "jointly and severally [in] the principal sum of $2,103,732.10" against appellants. At the close of the case, however, he stated that "Buffalo's claim is $1,753,400.10, and we would request judgments in that amount both with respect to Count 1 *in the form of a mechanic*[*'*]*s lien against the real estate owner* and in Count 2 in the law action against Whiting-Turner." (Emphasis added.)

"A mechanic's lien is a statutorily created remedy against improved property on which work has been done or materials have been supplied." *Brendsel v. Winchester Const. Co., Inc*. 162 Md. App. 558, 580 (2005). The law "provides a remedy to unpaid contractors or subcontractors who furnish labor or materials in the improvement of real property by permitting them to establish a lien upon the property improved." *York Roofing, Inc. v. Adcock*, 333 Md. 158, 168 (1993). "An action for a mechanic's lien is an *in rem* proceeding for collecting a debt against the particular property described in the lien claim." *Brendsel*, 162 Md. App. at 580-81. "A mechanic's lien thus is only a means of receiving payment; it is not a claim upon which the lien is founded." *Id.* at 581 (quotations and citation omitted).

Here, the only claim asserted against Lidl was for a mechanic's lien. Consistent with Md. Code Ann., Real Prop. § 9-106(b), after Buffalo's petition was filed, the circuit court held a hearing, entered an interlocutory order establishing the mechanic's lien in an amount to which the parties had reached agreement; permitted Lidl to post a bond to "have the land and building released from the lien" and assigned a date for trial. At trial, the circuit court was empowered to enter "a final order . . . either establishing or denying the lien[.]" Real Prop. § 9-106(d).

Pursuant to the consent order establishing the interlocutory lien, upon the entry of the final lien, it also would be released by the existing payment bond attached as an exhibit to the interlocutory order. Under Real Prop. §§ 9-106(c) and 9-109, Buffalo was entitled to enforce a final mechanic's lien by executing upon the payment bond subject to

the Maryland Rules. Under Rule 12-305, Buffalo could execute upon that bond by filing "a motion in the original action" and, under Rules 1-404 and 1-405, upon the filing of such a motion, the clerk of the court "shall promptly notify the surety" and judgment may be entered on the bond in the amount due, not to "exceed the face amount of the bond." Thus, we shall vacate the judgment against Lidl and remand for entry of a final mechanic's lien in the amount of $1,412,294.11, *nunc pro tunc* to November 7, 2019.

II.

Material Papers

Lidl contends that Buffalo failed to satisfy the requirements for a mechanic's lien, set forth in Real Prop. § 9-105(a)(3) and Md. Rule 12-302(b), by producing all "material papers" that "constitute the basis of the lien claim" unless the absence of the papers is explained by affidavit or in the complaint. More specifically, it argues that Buffalo should not have been permitted to introduce at trial a one-page summary ("Exhibit 35") reflecting $239,222.50 in alleged "Outstanding Extra Work Items" for which it claimed payment, or to adduce testimony pertaining to those items. Lidl acknowledges in its reply brief, however, that it does not dispute $104,459.50 of that amount because those amounts were recognized by Whiting-Turner in Supplements 9 and 11.

Buffalo, noting that this issue was not raised "at all at the interlocutory hearing," responds that the trial court "properly" overruled the objections to admission of Exhibit 35 and testimony pertaining to it because Exhibit 35 referenced Lidl and/or Whiting-Turner item numbers, costs, dates, and Whiting-Turner's notes on each request. Because

Lidl and Whiting-Turner were on notice of the basis for the claims reflected in Exhibit 35, Buffalo maintains that the trial court did not err by admitting it.

Exhibit 35 was attached to Buffalo's original and amended complaint and was introduced at trial, over objection. It is dated November 3, 2017 and reflects thirteen items of additional work Buffalo alleged it had performed at the request of Whiting-Turner and/or Lidl, but for which a change order had not been issued. It also includes one deduction from the contract price that was not reflected in a change order. For each item, Buffalo provided a description of the work, along with a Whiting-Turner Change Request number or other reference to the nature of the work performed or materials supplied; the amount quoted by Buffalo for the work or materials; the date quoted; and Whiting-Turner's notes on the status of the item. Buffalo claimed that it was owed $239,222.50, over and above the revised contract price, for this work.

Buffalo introduced Exhibit 35 during Mr. Latona's direct examination because "it was easier to look at one piece of paper" than the entire complaint. Lidl objected, arguing that Buffalo had failed to supply material papers in support of the listed items, citing *AMI Operating Partners Ltd. Partnership v. JAD Enterprises, Inc*., 77 Md. App. 654 (1989). Counsel for Buffalo responded that Exhibit 35 was "quite specific and detailed" and that he did not believe that Buffalo was required to produce every paper supporting its calculations. He maintained that Exhibit 35 put Lidl on notice of the outstanding work for which Buffalo sought compensation.

The trial court, determining that Exhibit 35 gave Lidl "sufficient notice with regard to additional work items[,]" overruled Lidl's objection.

Mr. Latona testified that the backup documentation for every item on the list was supplied to Whiting-Turner at the time the work was quoted, and that Whiting-Turner never asked Buffalo for any additional documentation. Lidl renewed its objection, emphasizing that the supporting documents were supplied to Whiting-Turner, not Lidl. The court again overruled Lidl's objection.

Mr. Kelkenberg also testified about Exhibit 35, explaining that though the document was prepared after he left Buffalo's employment, he assisted in compiling the list of outstanding items that preceded his departure.

During the defense case, Mr. Caine testified about Supplements 9, 11, and 12, cross-referencing the items that appeared on Exhibit 35 and explaining Whiting-Turner's position on discrepancies between the prices Buffalo quoted and the amounts Whiting-Turner proposed. In sum, Whiting-Turner agreed upon seven items on Exhibit 35, totaling $42,661.[6] It disputed the amount quoted by Buffalo on five deductions and one addition to the contract price, maintaining that Buffalo was entitled to an additional

[6] Those items are: CR05-001B Condenser Platform Rail & Stairs ($14,855); Bulletin #8 ($4,715); CR05-017 7/A304 Approval Changes ($4,158); Bulletin #11 Out Buildings ($14,010); Field Mod. to Stair/Rail @ Storage Area ($959); Mod. to Storage Mezzanine Stairs ($2,768); Mod. to Wall Rails @ GI/GO Office ($1,196).

$65,409 on those items.[7] Buffalo claimed $184,703.50 for the same six items, a difference of $119,294.50. Mr. Caine testified that one charge appearing on Exhibit 35 for a cost incurred by Buffalo for an erection schedule delay had been rejected outright by Whiting-Turner and did not appear on any supplements.

During his rebuttal testimony, Mr. Latona likewise identified the items on Exhibit 35 that later appeared on Supplements 9, 11, and 12 as proposed additions to the revised contract price.

Under Real Prop. § 9-105, "[i]n order to establish a [mechanic's] lien," the claimant must file a petition setting forth, in pertinent part,

> [t]he nature or kind of work done or the kind and amount of materials furnished, the time when the work was done or the materials furnished, the name of the person for whom the work was done or to whom the materials were furnished, and the amount or sum claimed to be due, less any credit recognized by the petitioner[.]

Real Prop. § 9-105(a)(1)(iii). The petition must be supported by an "affidavit by the petitioner or some person on his behalf, setting forth facts upon which the petitioner claims he is entitled to the lien in the amount specified" and "[e]ither original or sworn, certified, or photostatic copies of material papers or parts thereof, if any, which constitute the basis of the lien claim, unless the absence thereof is explained in the affidavit." Real Prop. § 9-105(a)(2) & (3). This Court has reasoned that the "material papers" provision of

[7] Those items are: CR05-001C Added Material; CR05-001I Stair Channel, Ladder; CR05-001J Door Channel; CR05-016 Fall Protection (Final Rental-Sunbelt); Extra Deck – CO Request; and Guardrail Deduct.

Section 9-105 is "obviously a 'notice' provision" and is intended to furnish an owner with "an opportunity to examine the principal evidence upon which the claimant intends to rely in order to ascertain and prepare any available defense." *AMI Operating Partners*, 77 Md. App. at 669.

In *AMI Operating Partners*, Fairmount, a sub-subcontractor, orally contracted with a subcontractor, MJY, to perform work on a hotel in Anne Arundel County. 77 Md. App. at 659. After MJY "walked off the job and apparently 'disappeared,'" Fairmount filed for a mechanic's lien against AMI, the owner of the hotel, for the unpaid debt. *Id*. The court held a full evidentiary hearing and entered a final mechanic's lien in favor of Fairmount in the total amount requested, plus prejudgment interest. *Id*. at 660.

On appeal, AMI argued that Fairmount had not attached nine material invoices to its petition and that the absence of the invoices, which were not explained in the affidavit, barred any entitlement to a lien or, alternatively, required that the amount of the missing invoices be deducted from the amount of the lien. *Id.* at 666-67. We explained that Fairmount attached to its petition a "running account billing . . . referring, by date and invoice number, to 55 charges and four credits, and showing [the] net amount due[.]" *Id*. at 666. In addition, it attached copies of 46 delivery tickets, 46 corresponding invoices, and one credit ticket. *Id*. Nine invoices referenced in the account billing summary were not attached to the petition, but were introduced at trial, over AMI's objection. *Id*. The amount of the lien entered by the trial court included amounts reflected on the missing invoices. *Id*.

Fairmount responded, in part, that it had provided copies of the invoices and delivery tickets to the general contractor, a sister company to AMI. *Id*. at 668. This Court noted, however, that the invoices were not provided to AMI in discovery. *Id*. Turning to whether the invoices were material papers, we reasoned that where there was "*no written contract or other document specifying the work done or materials furnished*," invoices may be the only proof of the underlying claim. *Id*. at 669 (emphasis supplied). "An account summary that merely refers by date and number to other documents is not a substantial equivalent" because "it does not describe the work done or materials furnished and does not really establish when the work was done or materials were furnished but only when the debit or charge was created." *Id*. For these reasons, the missing invoices were material papers required to be attached to the petition. *Id*. at 670.

This Court concluded, however, that AMI received "more detailed information" about two of the nine missing invoices during discovery that was sufficient to put it on notice of the nature of the claim for those amounts. *Id*. at 671. With respect to the remaining seven invoices, we held, citing *Whicher Development Corp. v. Ross*, 142 Md. 522 (1923), that the omission of those invoices did not "deprive [Fairmount] entirely of its right to claim a lien." *Id*. at 672-73. We remanded for the entry of a modified judgment that did not include the amounts reflected in the seven invoices. *Id.* at 676.

Here, unlike in *AMI Operating Partners*, there was a written contract between the subcontractor and the contractor engaged by Lidl and Exhibit 35 pertained to extra work items requested by Whiting-Turner and was detailed, including a description of the work

performed, *e.g.*, "CR05-001B Condenser Platform Rail & Stairs"; the amount Buffalo quoted Whiting-Turner for the work; the date it supplied the quote; and its understanding of the status of approval of the change request. As was the case with respect to two of the missing invoices in *AMI*, Lidl clearly was on notice of the nature of the work performed. Whiting-Turner and Lidl put on a joint defense and introduced Supplements 9, 11, and 12, which included 13 of the 14 items appearing on Exhibit 35 and the backup documentation relative to Buffalo's requests. Though some of the amounts claimed to be owed were disputed, there can be no serious question that Lidl was on notice of the basis for the claims. As in *Whicher*, which this Court relied on in *AMI*, Exhibit 35 provided Lidl with fair notice of "the object of the payment" and the "nature and time of the service rendered" or "materials furnished." 142 Md. at 524. The circuit court did not clearly err or abuse its discretion by admitting Exhibit 35 and permitting Mr. Latona and Mr. Kelkenberg to testify about it.

III.

Touch-Up Painting Back Charges

Whiting-Turner contends the trial court erred by rejecting two back charges reflected on Supplements 9 and 10, totaling over $800,000, for touch-up painting that was within Buffalo's scope of work and which Whiting-Turner was forced to subcontract to Zarnas. It maintains that the trial court clearly erred by accepting the "uncertain and speculative" testimony of Mr. Latona and rejecting the "substantial, competent evidence" it presented to the court through Zarnas.

As discussed in more detail in our recitation of the facts, Buffalo's responsibility for touch-up painting stems from Supplement 1 to the Subcontract, which added $1 million to the contract price. It required Buffalo to provide an alternative shop priming system for all the non-galvanized steel and to touch-up that steel after erection. Buffalo subcontracted with R&J to erect the steel and to perform the touch-up painting. Subsequently, Whiting-Turner engaged Zarnas to take over the touch-up scope of Buffalo's work and submitted three back charges to Buffalo: $178,320.75 (Supplement 8), $363,110.71 (Supplement 9), and $308,233.46 (Supplement 10), for a total of $849,665.12.

As was discussed, Buffalo no longer challenges the $178,320.75 back charge on Supplement 8 and it was accepted by the trial court. In rejecting the two other back charges, the trial court reasoned that it could "be argued that some of the painting performed by Zarnas was touch-up as required under the contract, there was no evidence before the Court to determine how much of this charge-back was for touch-up and how much was for the painting that exceeded the scope of work." This finding was not clearly erroneous.

Buffalo put on evidence that the $1 million addition to the Subcontract reflected in Supplement 1 was primarily for the alternative shop priming system and that "touch up" was an insignificant part of that amount. In addition, Buffalo made clear to Whiting-Turner throughout the Project that the shop primer was not intended to be a finish coat and would not protect the steel from exposure to the elements. And there was evidence

that deficiencies noted by Whiting-Turner that it believed warranted touch-up actually were caused by rust bleeding through the primer because a finish coat had not been applied. Mr. Latona testified that this was "natural progress of the primer" if Whiting-Turner failed to apply a top coat.

Ample evidence in the record supported a finding that Zarnas performed more than touch-up painting under its time and materials subcontract with Whiting-Turner. Mr. Latona testified that R&J, Buffalo's subcontractor, had done seventy-five percent of the touch-up painting when it left the job in late July 2017 and that the specifications supplied to Zarnas when it was engaged far exceeded touch-up painting. Whiting-Turner's witnesses provided conflicting testimony about how many coats of paint Zarnas was applying to the steel. Mr. Kelkenberg testified that at some point prior to October 2017, he observed "top coating being performed on the steel." Specifically, he observed painters in basket lifts using "sprayers . . . to coat everything."[8] Mr. Latona testified that he and Mr. Kelkenberg did a "head count of people" on September 13, 2017 and counted "thirty-two to thirty-three" painters, which far exceeded what he considered a reasonable

[8] Whiting-Turner maintains that the evidence supports an inference that what Mr. Kelkenberg observed was Zarnas fireproofing steel components pursuant to another subcontract, for which Buffalo never was back charged. Credibility findings and the drawing of inferences are for the factfinder, which in this case was the trial court. An appellate court does not reject an inference drawn by the trial court when competing inferences are supported by the evidence. *See Grady v. Brown*, 408 Md. 182, 198 (2009) (Where, as here, the "'interplay of circumstances is susceptible of different interpretations by rational minds, . . . [t]he choice between conflicting facts and the weighing and assessing of competing inferences radiating therefrom is . . . [the] province [of the factfinder].'") (quoting *Rea Constr. Co. v. Robey*, 204 Md. 94, 100 (1954)).

number to complete the touch-up painting. This evidence supported a reasonable inference that Zarnas was performing finish coating and the trial court was free to reject Mr. Zarnas's testimony to the contrary.

And it was consistent with other evidence that Whiting-Turner expected a "uniform white finish" on the non-galvanized steel components but had not engaged a painter to perform finish painting on the shop primed steel. Rather, it contracted with a painter, Jamestown, to paint non-steel elements of the project, only directing it to paint some steel columns as an extra item at the end of the Project.

That Zarnas misapprehended the breadth of Buffalo's scope of work relative to touch-up painting also was underscored by its initial proposal to Buffalo, after Zarnas was directed by Whiting-Turner to cease work on the Project due to cost concerns. Zarnas proposed a price of $390,000 to Buffalo to complete the touch-up painting. Mr. Latona called Mr. Zarnas and advised that that proposal was way outside the scope of Buffalo's work. According to Mr. Latona, Mr. Zarnas responded, "Tom, what you're asking me to do is different than what Whiting-Turner instructed me to do." Zarnas submitted a revised proposal for $92,000 to complete the touch-up, less than a quarter of its initial proposal. As discussed, Buffalo engaged Zarnas and Barrett & Sons to perform touch-up painting, paying them an additional $255,500 for that work.[9]

[9] Whiting-Turner argues that Buffalo's payment of "over $250,000" after Zarnas stopped its work further supports a reasonable inference that all the touch-up performed by Zarnas was within Buffalo's scope of work. But again, inferences are not for us to draw.

Whiting-Turner's reliance on *MAS Associates, LLC v. Korotki*, 465 Md. 457 (2019), is not persuasive. That case involved a dispute between former business associates about whether they formed a general partnership. *Id.* at 462-63. The circuit court found as a fact that the parties did so intend, and the Court of Appeals reversed, reasoning that the "least ambiguous" evidence showed that the parties intended to negotiate membership in an existing limited liability company and never abandoned that intent. *Id*. at 472-73, 482. Because the parties' "unabandoned intent," reflected in their written correspondence and other documentary evidence, was inconsistent with the intent to form a partnership, the Court of Appeals held that the trial erred in finding that such intent was supported by competent and material evidence in the record. *Id*. at 482.

Whiting-Turner contends that the "least ambiguous" evidence here came from its witnesses' testimony based upon "firsthand knowledge" of the touch-up painting performed by Zarnas under its subcontract with Whiting-Turner and that Mr. Latona's testimony was insufficient as a matter of law to support the trial court's findings. Of course, the trial judge was free to "accept – or reject – *all*, *part*, or *none* of the testimony of any witness, including testimony that was not contradicted by any other witness[.]" *In re Gloria H.*, 410 Md. 52 (2009) (emphasis in original). It is clear from the facts emphasized by the trial court, which include the internal Whiting-Turner emails reflecting a decision not to engage with Mr. Latona on the issue of touch-up painting versus finish painting, that the court did not credit the testimony that Zarnas performed only touch-up painting under its subcontract with Whiting-Turner. Mr. Latona's contrary

testimony, which drew upon his firsthand observations, his discussions with Mr. Kelkenberg, his review of the timesheets supplied by Zarnas, and his experience, was competent and material evidence and the trial court did not err by relying upon it.

On this evidence, the court did not clearly err by finding that Zarnas had performed painting for Whiting-Turner outside of Buffalo's scope of work under Supplement 1 and that it was impossible to determine what amounts of the back charges reflected on Supplements 9 and 10 were within Buffalo's scope of work. It is apparent from the trial court's lengthy memorandum opinion, as well as its questions during the seven days of trial, that it was intimately familiar with the facts of the case. Whiting-Turner's argument that Mr. Latona's testimony was "uncertain and speculative" goes to weight and we will not second-guess the trial court's decision to credit Mr. Latona's testimony and to reject, in whole or in part, testimony offered by Whiting-Turner's witnesses.

IV.

Waiver and Estoppel

Whiting-Turner contends that Buffalo was estopped from challenging back charges for supplementation of its touch-up painting and miscellaneous metals scopes of work because it had waived any dispute about those charges by its conduct. As we recently explained:

> Waiver is the "intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." *Creveling v. Gov't Employees Ins. Co.*, 376 Md. 72, 96 (2003). Waiver,

> therefore, hinges on the intent of the party and requires an unequivocal demonstration that waiver was intended. *Taylor v. Mandel*, 402 Md. 109, 135–36 (2007). Whether a party has waived its right to assert a claim is a question of fact, which this Court will not disturb unless clearly erroneous. *Hoskins v. Warden of Md. House of Correction*, 235 Md. 613, 615 (1964) "[T]he sufficiency of the waiver is a question of fact.").

Anderson v. Great Bay Solar I, LLC, 243 Md. App. 557, 607 (2019), *cert. denied sub nom Bd. of Comm'rs of Somerset Cnty. v. Anderson*, 468 Md. 224 (2020) (some citations omitted).

A. Touch-Up Painting Back Charges

Whiting-Turner contends that Buffalo "abandoned the touch-up painting scope" of the subcontract and was on notice that Whiting-Turner had contracted with Zarnas to complete that work. Because Buffalo did not challenge Whiting-Turner's decision to engage Zarnas or attempt to engage another subcontractor to perform the scope after R&J left, it argues that Buffalo was estopped from "later rejecting the charges."

Buffalo clearly acceded to Whiting-Turner engaging Zarnas to supplement its scope of work and acknowledged that it might pay "three times what it was worth." But it did not agree to be back charged for work outside of the scope of its work. And, as already explained, the evidence supported, and the trial court found as a fact that the back charges included payments for work outside of Buffalo's scope of work. In short, the trial court did not clearly err by rejecting the waiver, acquiescence, and estoppel arguments advanced by Whiting-Turner.

B. Miscellaneous Metals Back Charges

Whiting-Turner also contends that Buffalo is estopped from challenging back charges for supplementation of its miscellaneous metals scope of work. Buffalo subcontracted that work, which included installation of handrails and walkways, to The Chowns Group ("Chowns"), but terminated Chowns for default in the spring of 2017. On June 2, 2017, Whiting-Turner notified Buffalo that it would be hiring a miscellaneous metals subcontractor to supplement Buffalo's scope. By June 9, 2017, Buffalo had engaged a new miscellaneous metals subcontractor, Raulli & Sons and provided a tentative schedule to complete outstanding items within its scope of work.

Supplements 5 through 8, all of which were executed by Buffalo, included numerous back charges for supplementation of the miscellaneous metals scope of work. Whiting Turner asserts that by accepting Supplements 5 through 8, Buffalo established a "course of dealing" relative to Whiting-Turner's supplementation of its scope of work, "confirmed the legitimacy of Whiting-Turner's supplementation," and established that Buffalo was on notice that the supplementation was ongoing. For those reasons, it maintains that Buffalo was estopped from challenging similar back charges on Supplements 9 and 10.

The trial court credited Mr. Latona's testimony and found persuasive his October 11, 2017 letter detailing his objections to Supplement 9. It found that some of the back charges for the miscellaneous metals scope of work on Supplements 9 and 10 were outside Buffalo's scope of work or, to the extent that some charges were for work within

its scope of work, that it was impossible to determine what portion of the back charge was for that work. As already discussed, Buffalo did not waive its right to challenge deductions for work performed by other contractors that was outside of its scope of work.

V.

Admission of Exhibit 35 Against Whiting-Turner

Whiting-Turner contends, citing Md. Rule 5-106,[10] that the trial court erred by permitting Buffalo's witnesses to testify about the extra work claims reflected on Exhibit 35. We conclude that this argument is unpreserved because it was not included in Whiting-Turner's specific objection to the admission of Exhibit 35. *See Stevenson v. State*, 222 Md. App. 118, 141 (2015) (when an objection is based on specific grounds, "[a]ll other grounds for the objection . . . are deemed waived") (emphasis omitted) (quoting *Anderson v. Litzenberg*, 115 Md. App. 549, 569 (1997)); Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").The only specific ground raised by defense counsel was that the documentation supporting the items reflected in Exhibit 35 were "material papers" under the mechanic's lien statute,

[10] Rule 5-106 provides: "When part or all of a writing or recorded statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

and did not apply in the breach of contract count. Whiting-Turner did not object to Exhibit 35 when Mr. Kelkenberg was questioned about it.

VI.

Mr. Latona's Rebuttal Testimony

A. Background

In its amended complaint and at trial, Buffalo's claim for damages was premised upon a revised contract price reflected on Supplements 1 through 8, plus the $239,222.50 in extra work items on Exhibit 35, less one disputed back charge on Supplement 8. In its case in chief, Buffalo adduced evidence bearing upon its entitlement to payment in full. It did not directly address any of Whiting-Turner's claimed setoffs in Supplements 10 through 12,[11] which were never made a part of the Subcontract because Buffalo refused to execute them.

During Buffalo's case-in-chief, Mr. Latona and Mr. Kelkenberg were not questioned in direct examination about Supplements 10, 11, and 12 except to confirm that they were not executed. On cross-examination of Mr. Latona, defense counsel asked him if he had had time to review Supplements 10, 11, or 12 since his deposition, when he had stated that he had not reviewed them in depth. Mr. Latona replied that he had not reviewed Supplements 10 and 11 "in detail" or "spent any time analyzing" them, and that

[11] As discussed, Mr. Latona provided Whiting-Turner with a detailed response to each addition and deduction on Supplement 9 and his letter setting forth that response was introduced during Buffalo's case in chief.

he had not reviewed Supplement 12, which was issued after the instant lawsuit was filed, at all. Defense counsel did not ask Mr. Latona about any specific back charges reflected in those supplements or question him about any of the supporting documents attached to them.

In the defense case, Whiting-Turner asserted that Buffalo was only entitled to $92,503.21 based upon the set-offs reflected in the unexecuted Supplements 9, 10, 11, and 12. It introduced into evidence, through Mr. Caine, Supplements 9, 10, 11, and 12, along with the backup documentation. Mr. Caine testified generally that the charges appearing on Supplement 10 were properly allocated to Buffalo and were fair and reasonable. He testified in more detail about Supplements 9, 11, and 12, cross-referencing the items appearing on Buffalo's Exhibit 35 and, to the extent that he was able to do so, explaining discrepancies in the amounts. Mr. Kehres testified about some of the work tickets and other documents supporting back charges appearing on Supplements 9, 10, 11, and 12.

The defense read into the record excerpts of Mr. Latona's deposition in which he was questioned about discrepancies between the amount Buffalo quoted for extra work items on Exhibit 35 and the amounts Whiting-Turner proposed as additions on Supplement 11. Mr. Latona testified that he did not know the basis for and had not formed an opinion about the amounts proposed by Whiting-Turner. Defense counsel offered to give Mr. Latona an "opportunity . . . to review each one of [the disputed extra

work items reflected on Supplement 11] and make a decision." Mr. Latona replied that that would involve an "extensive review" and would "take[] some research."

Buffalo recalled Mr. Latona in rebuttal on the final day of trial, seven weeks after he had last testified. He confirmed that as of the date of his deposition, he had not "looked at [S]upplements 10, 11, or 12." When counsel asked him whether he had since reviewed those supplements, defense counsel objected and "move[d] in limine" to exclude any testimony about Supplements 10, 11, or 12. He emphasized that Mr. Latona had been identified as Buffalo's corporate designee and that the notice of deposition directed him to be prepared to testify about Supplements 9 through 12, but that he was not prepared to do so. Defense counsel argued that permitting Mr. Latona to offer opinions about those supplements now amounted to "sandbagg[ing]."

Buffalo's attorney responded that Supplements 10, 11, and 12 were "not part of [Buffalo's] case" and that there was no pending motion in limine to exclude any testimony based upon an alleged discovery violation. He added that Whiting-Turner's defense was to "try to chisel down Buffalo's claim" and it was appropriate for Mr. Latona to respond to that in rebuttal. Buffalo's counsel emphasized that Mr. Potts had acknowledged at his deposition, a portion of which was read into the record, that the supplements all build upon each other and, consequently, once Buffalo rejected Supplement 9, further supplements could not be agreed to until the Supplement 9 dispute was resolved, which did not occur.

The court overruled Whiting-Turner's objection and permitted Mr. Latona to answer counsel's question. He replied that he had reviewed Supplements 10, 11, and 12 after his deposition and explained why he disputed Whiting-Turner's back charges on each supplement and the monetary discrepancies between the supplements and Exhibit 35.

During that testimony, defense counsel objected that Mr. Latona lacked personal knowledge of certain of the work tickets supplied by Whiting-Turner. The court overruled that objection, concluding that it went to the weight and not the admissibility of Mr. Latona's testimony. At the conclusion of Buffalo's examination of Mr. Latona, defense counsel stated that at the end of cross-examination, he would be requesting a continuance to permit him to recall Mr. Kehres and Mr. Caine in sur-rebuttal to "go back through every single one of these things[.]"But it did not occur.

During cross-examination, Whiting-Turner asked Mr. Latona to identify and introduced into evidence a copy of the "Notice of Rule 2-412(d) Deposition" served upon Buffalo, which directed Mr. Latona to be prepared to testify about "All facts supporting [Buffalo's] rejection of proposed Subcontract Supplements 009 through 011 for the Project Subcontract" and "All facts supporting [Buffalo's] acceptance or rejection of each portion of Subcontract Supplements [sic] 012[.]"It also introduced into evidence Buffalo's answers to interrogatories, which were signed by Mr. Latona, in which he was asked "to identify each and every other Subcontract Supplement issued by Whiting-Turner which you dispute" and "a detailed description of . . . [the] specific basis of any

dispute that you have with respect to the Supplement" "[t]he person or persons with knowledge of the factual basis for disputing the Supplement" and to "[i]dentify each and every document supporting your dispute of the Supplement." Buffalo responded that Supplements 10 and 11 were "disputed in total on the same basis and in furtherance of the disputes raised as to Subcontract Supplement No. 009" and that Supplement 12 was "under review."

B. Contentions

Whiting-Turner contends the trial court erred for two related reasons by permitting Mr. Latona to testify in rebuttal about the specific back charges set out in Supplements 10, 11, and 12. First, because Mr. Latona did not express the opinions offered at trial when he testified at his deposition or in his interrogatories, he should not have been permitted to offer them at trial. Second, this testimony was not appropriate for rebuttal because the issue of the set offs in Supplements 10, 11, and 12 were part of Buffalo's case-in-chief.

C. Analysis

As set out above, defense counsel did not argue to the trial court that Mr. Latona's testimony was not appropriate rebuttal and, for that reason, that contention is not preserved for our review. And with respect to the argument that Buffalo should not have been permitted to offer testimony about Supplements 10, 11 and 12 because the opinions were not disclosed in discovery, the only clear argument presented to the trial court was that Mr. Latona had not offered any testimony about those supplements at his deposition.

Aside from a vague reference to the court that Buffalo had not "supplemented answers to interrogatories[,]" defense counsel made no proffer about the substance of the answers to interrogatories. When defense counsel later introduced the answers to interrogatories into evidence, the objection to Mr. Latona's testimony was not renewed and no further argument to the court relative to that issue was presented.

Ordinarily, we will not address non-jurisdictional issues that were not "raised in or decided by the trial court." Md. Rule 8-131(a). A central purpose of that Rule is to require a party to make known to the trial court his or her position, "'so that the trial court can pass upon, and possibly correct any errors in the proceedings[.]'" *Robinson v. State*, 404 Md. 208, 216 (2008) (quoting *Fitzgerald v. State*, 384 Md. 484, 505 (2004)). Here, because defense counsel did not bring Buffalo's answers to interrogatories to the court's attention and request any relief, the trial court was deprived of an opportunity to consider and rule on the matter.

We turn to the only argument that we believe to be properly before us: that Mr. Latona's rebuttal testimony was not disclosed during his deposition. Whiting-Turner, citing *Saxon Mortgage Services, Inc. v. Harrison*, 186 Md. App. 228, 256 (2009), contends that Mr. Latona, as a Rule 2-412(d) corporate designee, was obligated to prepare for his deposition and could not "'proffer new or different allegations that could have been made at the time of [his deposition]'" unless the information was not "'known []or accessible at the time.'" (quoting *Rainey v. Am. Forest & Paper Ass'n, Inc*., 26 F.Supp.2d 82, 94 (D.D.C. 1998)).

Whether a discovery violation has occurred is a question of law which we review *de novo*. *Cole v. State*, 378 Md. 42, 56 (2003). On the other hand, we review the trial court's decision "to impose, or not impose, a sanction for a discovery violation" for abuse of discretion. *See Dackman v. Robinson*, 464 Md. 189, 231 (2019).

In overruling defense counsel's objection to Mr. Latona's testimony about Supplements 10, 11, and 12, it is not clear whether the court found that Buffalo had violated a discovery obligation. Nor is it clear that Whiting-Turner provided the court with a sufficient factual basis to conclude whether a discovery violation had occurred and, consequently, erred in not finding a violation. We explain.

The excerpt of Mr. Latona's deposition testimony admitted into evidence reflects that Mr. Latona was unprepared to answer some questions about Supplement 11. He answered the only question asked of him about Supplement 10, pertaining to the touch-up painting back charge, and was not asked about Supplement 12. And, in responding to questions about Supplement 11, Mr. Latona twice referenced discussions "earlier" at his deposition. He made clear that he could not offer an opinion about the basis for Whiting-Turner's quotes to the extent they differed from Buffalo's quotes for the same work. Whiting-Turner's counsel made no attempt to question Mr. Latona about the backup documentation supporting Whiting-Turner's figures. On this record, we are not persuaded that Mr. Latona proffered new allegations or opinions in his rebuttal testimony. He continued to assert that the amounts quoted by Buffalo on Exhibit 35 were correct and that Whiting-Turner's differing quotes for those items should be rejected. Because

Whiting-Turner did not supply the trial court with evidence supporting the finding of a discovery violation, the trial court did not err by overruling the objection.

But had a discovery violation occurred, Whiting-Turner would fare no better. To the extent that Mr. Latona failed to adequately prepare for his deposition, Whiting-Turner could have moved to continue the deposition or filed a pretrial motion to compel discovery. It did neither. In addition, any prejudice to Whiting-Turner occasioned by the belated disclosure of Mr. Latona's opinions about Supplements 10, 11, and 12 was minimal given that the subject of Mr. Latona's testimony was materials prepared by Whiting-Turner that were in Whiting-Turner's possession throughout the discovery period and Whiting-Turner already was on notice that Buffalo rejected the deductions appearing on those supplements. On this record, we perceive no abuse of discretion by the trial court's decision not to exclude Mr. Latona's rebuttal testimony about Supplements 10, 11, and 12 as a sanction for a discovery violation. *See State v. Alexander*, 467 Md. 600, 620 (2020) ("An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' 'when the court acts without reference to any guiding rules or principles,' or when the court's 'ruling is clearly against the logic and effect of facts and inferences before the court.'") (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)).

VII.

Miscellaneous Back Charges

Whiting-Turner contends that the trial court committed clear error or "ignored the weight of [the] evidence" with respect to three other back charges. We will address each in turn.

First, the trial court denied Whiting-Turner's deduction of $31,789 for charging rails on Supplement 9. Whiting-Turner points out that Mr. Latona agreed that Whiting-Turner was entitled to this deduction in his October 11, 2017 letter responding to Supplement 9. At oral argument in this Court, Buffalo conceded that the judgment in favor of Buffalo should be modified to reflect this deduction. We agree and shall direct the court to enter a modified judgment on remand.

Second, the trial court awarded Buffalo $63,750 for an additional stair and ladder requested by Whiting-Turner. Whiting-Turner proposed paying $9,878 for this item on Supplement 11. Whiting-Turner contends that Buffalo provided no evidence supporting its amount beyond listing it as an extra work item on Exhibit 35. And it maintains that it supplied documentation supporting its lower figure. Mr. Latona testified that it quoted Whiting-Turner the $63,750 figure in September 2016 for a "change to the design documents made by the owner and the architect" and that Whiting-Turner's backup documentation did not supply any reason for the differential between its figure and the figure quoted by Buffalo. In other words, there was evidence supporting the trial court's finding.

Third, the trial court found that Buffalo was entitled to a $30,144 credit for the redesign of door frames on the Project. Whiting-Turner maintains that it adduced evidence that the correct credit was $8,200, calculated by multiplying 20 doors at a cost of $410 each. Whiting-Turner mistakenly only credited Buffalo for $4,100 on Supplement 11 for this item but added an additional $4,100 credit on Supplement 12.

The trial court rejected Whiting-Turner's lower figure, concluding that Buffalo was entitled to the full amount it invoiced Whiting-Turner on October 4, 2016. This finding was not clearly erroneous as it was supported by the invoice attached to Supplement 11. We agree with Whiting-Turner, however, that the trial court double-credited Buffalo for $4,100 of that amount by also crediting it for that figure on Supplement 12. Thus, on remand, we shall direct the trial court to modify the judgment to reflect this deduction.

In sum, the judgment should be reduced by $35,889 to correct these two errors.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED IN PART, REVERSED IN PART, AND REMANDED TO THAT COURT FOR THE ENTRY OF A MODIFIED JUDGMENT AGAINST WHITING-TURNER AND THE ENTRY OF A MECHANIC'S LIEN CONSISTENT WITH THIS OPINION. COSTS TO BE PAID 3/4 BY APPELLANTS AND 1/4 BY APPELLEE.