Circuit Court for Baltimore County
Case No. 03-C-17-006846

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 334

September Term, 2022

KENT MCAP HOLDINGS LP

v.

LEADTEC SERVICES, INC., *et al.*

Graeff,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: July 2, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant Kent MCAP Holdings LP ("Kent MCAP") owns and leases 420 townhome units in Baltimore County.[1] Appellees DeVeau Construction, LLC ("DeVeau") and Leadtec Services, LLC ("Leadtec") agreed to abate lead in, and inspect and certify, 304 of Kent MCAP's units. Subsequently, after lead was discovered in four of those units, Kent MCAP renovated all 420 units. This case is Kent MCAP's attempt to hold DeVeau and Leadtec liable for the costs Kent MCAP incurred in that 420-unit renovation.[2]

A jury trial was held in the Circuit Court for Baltimore County. At the close of Kent MCAP's case-in-chief, the circuit court granted judgment to DeVeau and Leadtec, concluding that Kent MCAP had failed to offer sufficient evidence of damages to send the case to the jury. Kent MCAP then noted this timely appeal.

Here, Kent MCAP presents one question for our review, which we rephrase as:[3]

[1] At times, the trial record put this figure at 419 units. Here, we use 420 units.

[2] We use "renovation" as that is the term one of Kent MCAP's witnesses used to describe what occurred. As we discuss, one of the disputes below was whether Kent MCAP's damages estimate, i.e. the cost of the "renovation," included items not related to lead abatement, inspection, and certification. The other items were the cost to replace appliances and chimney flashings in the units, among other costs.

[3] In its brief, Kent MCAP phrased its question presented as:

> Did the Trial Court err in granting Appellees' motions for judgment on the ground that Kent MCAP did not prove damages, thereby precluding the jury from considering any of the evidence in this case, when Kent MCAP presented evidence in the form of its employee's testimony that Kent MCAP suffered $1.48 million in damages due to Appellees'

> Did the circuit court err in granting judgment in favor of Leadtec and DeVeau at the close of Kent MCAP's case?

For the reasons that follow, we answer "no" and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

a. Before the Lawsuit

Kent MCAP owns Day Village Townhomes ("Day Village"), a residential community in Baltimore County that has 420 rental townhomes, among other residential units.[4] In 2011, Kent MCAP applied for and received a $1.8 million grant from Baltimore County to perform lead hazard reduction activities at Day Village.[5] Pursuant to its Grant Agreement with Baltimore County,[6] Kent MCAP agreed to retain a certified contractor to

> faulty abatement and inspection work, along with testimony as to the breakdown of that amount.

[4] In addition to the 420 units, Day Village leases 20 senior townhomes. The senior units are not part of this case. Of the 420 units, 84 are located on Parcel 2 of Day Village and 336 are located on Parcel 3. On which parcel (2 or 3) the 304 units that DeVeau and Leadtec agreed to abate, inspect, and certify is not clear.

[5] Baltimore County had received the grant from the United States Department of Housing and Urban Development ("HUD") to fund "certain lead hazard reduction activities in accordance with The Residential Lead-based Paint Hazard Reduction Act." In addition to undertaking lead hazard reduction activities, grant recipients such as Kent MCAP had to give preference in leasing to income-eligible families "where a child or children under the age of six (6) will live or spend a significant amount of time." This preference requirement applied for five years after the lead reduction activities were completed.

[6] The Grant Agreement put the number of units at Day Village's property at 419, not 420. Of the 419 units that the Grant Agreement identified, 355 were two-bedroom units, four were three-bedroom units, and 60 were four-bedroom units. The Grant Agreement did not specify which units were in Parcel 2 and which in Parcel 3. Nor did it

conduct "lead hazard reduction activities" and "required lead testing" for 304 residential units at Day Village.[7] Kent MCAP then hired DeVeau, a lead removal contractor, to abate lead-based paint in the 304 units by the end of the grant period.[8] In turn, DeVeau contracted with Leadtec to inspect and certify DeVeau's work.

Under its grant from Baltimore County, Kent MCAP was required to make the 304 units "lead-safe." This standard permits the presence of lead-based paint on walls but prohibits deteriorating paint, which commonly presents as chipping, peeling, and flaking paint. A contractor hired to render a unit "lead-safe" would have to stabilize the deteriorating paint by wet-scraping it and repainting.

To identify areas where the lead paint "was deteriorating, peeling, chipping, flaking," Baltimore County had hired KCI, a lead paint risk assessor not involved in this case. Based on its assessments, KCI prepared a scope of work for each unit in the "lead-safe" grant program. Though they shared some design features in common, "each unit was unique in where it tested positive for lead-based paint." Accordingly, the scope of

specify on which parcel the 304 units were located or whether they were two-, three-, or four-bedroom units.

[7] Before entering into the Grant Agreement, Baltimore County and Kent MCAP entered into an Initial Grant Agreement, under which Kent MCAP was obligated to undertake lead reduction activities in 35 units. It appears that the 304 units referenced above included the 35 units mentioned in the Initial Grant Agreement.

[8] Kent MCAP's contract with DeVeau was comprised of several documents, at least two of which were what appear to be standard AIA construction contracts. These were AIA Document A101-2007, Standard Form of Agreement Between Owner and Contractor Where the Basis of Payment is a Stipulated Sum; and AIA Document A201-2007, General Conditions of the Contract for Construction.

work was distinct for each of the 304 units. These scopes of work were then provided to DeVeau for its lead abatement work.

Notwithstanding Baltimore County's requirements, Kent MCAP intended to make the units "lead-free," a higher standard signifying that the unit did not have any lead on its interior and exterior surfaces, or that all such surfaces were effectively encapsulated.[9] Certifying that a unit is "lead-free" benefits the property owner and the resident because it is a certification that is valid for a longer period of time. Among those who bid on the lead abatement work under the grant, DeVeau was selected by Kent MCAP in part because DeVeau represented that it could make the units "lead-free" for the same price as the lower "lead-safe" standard. To meet the "lead-free" standard, DeVeau would replace the components that had tested positive for lead, even though the scopes of work only required wet-scraping and repainting them.[10]

Kent MCAP did not have a contractual relationship with Leadtec. Instead, through an oral agreement, DeVeau hired Leadtec to inspect its abatement work after that work was finished. DeVeau would alert Leadtec when a unit was ready for inspection. To inspect and certify DeVeau's work, Leadtec would visually inspect the unit to confirm

[9] According to Mr. Brand, surfaces are deemed "lead-free" based upon laboratory analysis or XRF analysis of paint *or* when lead paint has been fully removed and lead paint removal is verified by visual inspection before the surface is repainted or covered.

[10] According to DeVeau's managing member, Michael DeVeau, DeVeau did not "revise[]" the scope of work, but he acknowledged that DeVeau "change[d] the scope" by replacing lead-positive components and identifying additional lead-positive areas within the units, areas that KCI's risk assessments did not include.

that DeVeau had completed the work included in the scope of work for that unit.[11] Leadtec would then rely on KCI's and other previous X-ray fluorescence (XRF) testing[12] performed at Day Village. If the unit had a prior XRF testing report, Leadtec issued a certificate, certifying that the unit was "lead-free."

After 2013, neither DeVeau nor Leadtec performed any lead abatement work at Day Village. The grant program expired at the end of 2013.[13] By that time, DeVeau had completed lead abatement in 289 units; Leadtec issued lead-free certificates for each.[14] Another contractor, Professional Renovations Inc. (PRI), took over the lead abatement work for the 15 units DeVeau and Leadtec did not get to. An unidentified assessor, not Leadtec, certified those 15 units. By May 2015, according to Kent MCAP's property manager, "a hundred percent of the property, both interior and exterior [were] certified

[11] At trial, there was some dispute about whether Leadtec did conduct visual inspections of the units prior to certifying them as "lead-free." Kent MCAP's property manager, Sabrina Gendreau, testified that Leadtec's inspector, Susan Kleinhammer, admitted to Ms. Gendreau that Ms. Kleinhammer had never come out to Day Village before signing the certificates.

[12] XRF testing "measures the lead content in paint and other materials." COMAR 26.16.01.02.

[13] While the completion date set forth in the Grant Agreement was November 1, 2012, Baltimore County extended the deadline to the end of 2013.

[14] DeVeau's and Leadtec's failure to complete their work in all 304 units is not an issue in this case.

lead free[.]"[15]

In 2016, the validity of the Leadtec certificates came into question when blood testing of a Day Village child showed elevated blood lead levels. Eventually, Maryland's Department of Environment (MDE), as the agency charged with enforcing lead-safety standards, inspected 25 randomly chosen units, and then reinspected four of those units. In those four units, that reinspection revealed lead in at least two areas, the area between each interior and exterior window and "wooden components of [an] exterior shed exterior." These areas (window jambs and exterior sheds) were not listed in the original scopes of work prepared by KCI.

At any rate, in late 2016, MDE invalidated Leadtec's certificates for those four residential units,[16] concluding "that lead-based paint is present on multiple exterior surfaces. This finding is contrary to the inspections referenced by [the four units'] certificates, which certified the units as lead free." MDE told Kent MCAP to correct the problem, have the units reinspected, and submit new certificates. MDE added that "[f]ailing to have the property re-inspected may subject you to further enforcement by [MDE]." Kent MCAP took this as a "threat" by MDE to invalidate all 420 lead-free certificates that had been issued.

After the invalidation of the four Leadtec certificates, Kent MCAP took matters

[15] Apparently, this included the 116 units (420 minus 304) on which DeVeau and Leadtec never agreed to work.

[16] Those units were 112 Glenard Middleton Court, 106 Lee Lawrence Court, 116 Calvin Hill Court, and 112 Lee Lawrence Court.

into its own hands. At first, Kent MCAP trained its own maintenance staff and purchased supplies to remove lead from window jambs and exterior sheds. For each window jamb, Kent MCAP's staff had to remove the window, install wooden strips, screw in and caulk around those wooden strips, and replace the window. For exterior sheds, the staff had to affix wooden boards to windows and caulk around them. After the staff completed lead abatement in Parcel 2, Kent MCAP hired a new lead inspector, Arc Environmental Inc. Arc Environmental, however, determined that the staff's lead abatement work was "failing."

Kent MCAP then hired multiple contractors, including Annapolis Painting, for another round of lead abatement at Day Village.[17] Arc Environmental would go in, test each unit, and identify areas that needed lead abatement. Then, after Annapolis Painting performed the lead abatement work as needed, Arc Environmental would go back into the unit and re-test. This time, the lead abatement work encompassed all 420 units in Parcels 2 and 3, including units DeVeau and Leadtec had not worked in.

[17] Though Ms. Sabrina Gendreau, a contractor who managed Day Village around that time, testified that Kent MCAP also hired "numerous contractors throughout the years" to clean Day Village units, Ms. Gendreau could not "really answer" whether those contractors also performed lead abatement work at Day Village. She said:

> I mean, I know that they would have to go in and make sure that if there was some work done, like on a door jam[b], that you had to clean the floor to make sure that there was no lead dustings on the floor.

b. The Lawsuit

In July 2017, while Kent MCAP's own maintenance staff was attempting lead abatement work on Parcel 2, Kent MCAP sued Leadtec. In October 2018, after Arc Environmental determined that Kent MCAP's in-house Parcel 2 work had failed, Kent MCAP amended its complaint, adding DeVeau as a defendant. In essence, Kent MCAP alleged that Leadtec was negligent in how it conducted lead inspections (Count 1); that Leadtec's representations about the presence or absence of lead at the property amounted to negligent misrepresentations on which Kent MCAP had reasonably relied (Count 2); that Leadtec had an express contract with DeVeau to test for the presence of lead prior to certifying the property as lead-free, that Kent MCAP was an intended third party beneficiary of that contract, and that Leadtec breached that contract by failing to detect lead prior to certifying the property as lead-free (Count 3); that DeVeau breached that contract by failing to abate all of the lead at the property prior to requesting that Leadtec issue lead-free certificates (Count 7); and that DeVeau had contracted with Kent MCAP to conduct necessary abatement work so that the Property would qualify as lead-free and breached that contract (Count 4).[18] Kent MCAP sought damages for its "substantial costs, including the costs of additional inspections, abatement work, regulatory compliance and

[18] Two additional counts were included in Kent MCAP's Amended Complaint but are not the subject of this appeal. The trial court granted judgment in favor of DeVeau on Kent MCAP's unjust enrichment claim (Count 5). Kent MCAP does not challenge that decision here. In addition, at the close of Kent MCAP's case-in-chief, Kent MCAP withdrew its claim for negligence against DeVeau (Count 6).

legal fees."

C. Kent MCAP's 2019 Agreement with MDE

In July 2019, about two years after it had filed this lawsuit, Kent MCAP entered into an agreement with MDE whereby Kent MCAP agreed to obtain new lead-free or limited lead-free[19] certificates for its Parcel 3 units by the end of 2019. In the agreement, Kent MCAP acknowledged, among other things, that despite Leadtec's lead-free certificates, "certain Parcel 2 and 3 units" had components that had tested positive for lead paint. Kent MCAP and MDE also acknowledged that while exemptions from Maryland's lead-risk reduction standards could have applied to Day Village, Kent MCAP wanted to do more. Specifically, Kent MCAP and MDE agreed "[n]evertheless, [Kent MCAP] desires to accomplish supplemental work and verification of the lead-free status of [its] Properties, and [MDE] has requested that it do so[.]" Kent MCAP agreed to stipulated monetary penalties for each day past the December 31, 2019 deadline that it was out of compliance. For its part, MDE agreed that upon Kent MCAP's completion of its obligations under the Agreement, MDE would not file any enforcement actions against Kent MCAP for past violations. Kent MCAP complied with this agreement.

c. The Motions in Limine

Returning to the lawsuit, prior to trial, Kent MCAP did not designate any expert

[19] According to Lawrence Brand, Kent MCAP's testifying expert, "limited lead free" signifies the absence of lead-based paint on the interior of a property and that any lead-based paint on the property's exterior be in good condition.

witnesses on the issue of damages. Citing the "extremely technical" nature of this case, DeVeau and Leadtec moved *in limine* to preclude Kent MCAP from introducing evidence of damages during its case-in-chief. DeVeau and Leadtec emphasized that Kent MCAP's discovery materials included "thousands of pages of invoices . . . filled with technical details," requiring "construction, environmental and legal" knowledge.

In response, Kent MCAP argued that the expert testimony on damages would be "unnecessary overkill" because the "facts and circumstances . . . [were] straightforward and well within the common knowledge of laymen." In addition, Kent MCAP argued that the jury would be able to estimate the damages with ease because "all units on the property were similarly constructed." During a pre-trial hearing on the motion, Kent MCAP also indicated that it would present invoices at trial, which would "provide the information on who was hired, . . . what their certifications were, and . . . what costs were incurred associated with those hires."

The circuit court denied DeVeau's and Leadtec's motion *in limine*, commenting: "I'm not making any blanket ruling as to evidence, but we'll see how it plays out as they call each witness[.]"

d. The Trial Evidence

i. Kevin Thompson's Testimony on Damages

Despite its earlier proffer, Kent MCAP put no invoices into evidence.[20] On the

[20] One invoice from Arc Environmental, Plaintiff's Exhibit 6, was marked for identification, but Kent MCAP did not move for its admission.

issue of damages, Kent MCAP's sole evidence was the testimony of Kevin Thompson, a Senior Vice President of MCAP Advisers, LLC, Kent MCAP's New York-based affiliate. Mr. Thompson first became involved in the oversight of Day Village in 2013, then took on an increased role beginning 2016 and 2017. Mr. Thompson was not responsible for Kent MCAP's Grant Agreement with Baltimore County or its 2011 Contract with DeVeau.[21] Though "intimately involved" in reviewing invoices in this case, Mr. Thompson acknowledged that his usual work "would not entail invoices, day-to-day invoices." Throughout his testimony on damages, Mr. Thompson relied on a spreadsheet, but the spreadsheet was not admitted into evidence.[22]

According to Kent MCAP, the spreadsheet summarized invoices and other records related to the lead abatement and inspection at Day Village from late 2016 to early 2020. Based on the spreadsheet, Mr. Thompson testified that the total cost that Kent MCAP incurred for the work was "a million four-eight and change," or approximately $1.48

[21] Richard G. Corey, whom Mr. Thompson identified as the managing partner at MCAP Advisers, signed both the Grant Agreement and the contract with DeVeau. Mr. Corey was not called as a witness at trial.

[22] The admissibility of the spreadsheet as a summary is not an issue before this Court. On Sunday, March 27, 2022, the day before the second day of the trial, Kent MCAP notified DeVeau and Leadtec of its intent to enter the spreadsheet into evidence. *See* Md. Rule 5-1006 ("The party intending to use such a summary must give timely notice to all parties of the intention to use the summary[.]"). During the trial, Kent MCAP argued that the spreadsheet was nevertheless admissible because DeVeau and Leadtec had already received all the relevant invoices during discovery. The trial court reserved ruling on the admissibility of the spreadsheet, stating, "[I]f during the course of a multi-day trial there's a—another attempt to enter into [*sic*] the summary . . . , an attorney can re-visit that." Kent MCAP did not attempt again to enter the spreadsheet into evidence.

million.[23] This estimate covered "various categories[,]" including about $1 million in "contractor costs[]" for Annapolis Painting and about $350,000 to $380,000 in "inspection costs" for Arc Environmental. During his re-direct testimony, Mr. Thompson also identified a separate expense of $80,000, incurred by Kent MCAP's maintenance staff in abating lead for about 80 units. Although Mr. Thompson admitted that the staff might have included "other items outside of the scope [of]the lead abatement project" in their invoices, he said that Kent MCAP "would have no issue" distinguishing costs related to lead abatement from those that were not related, and that the spreadsheet did not reflect the unrelated costs. Besides the absence of invoices, Kent MCAP presented no receipts or other financial documents related to lead abatement or inspection work conducted at Day Village.

Mr. Thompson's estimate also included the renovation costs for the units that were not Leadtec-certified, including 15 units under the original Grant Agreement where lead abatement was completed by PRI. When asked if Kent MCAP had tried to separate the costs related to those 15 units from his estimate, Mr. Thompson replied: "[W]e know the costs involved with doing all the work." Mr. Thompson said that he was "certain" that Kent MCAP had an invoice from PRI. Therefore, according to Mr. Thompson, it would be "easy" to use those invoices to come up with the renovation costs for the 15 units subject to the Grant Agreement, which were neither completed by DeVeau nor certified

[23] At times, Mr. Thompson also put this figure at "roughly 1.5 million."

by Leadtec. Mr. Thompson did not "know or remember" whether such calculation had been done prior to the trial.

Mr. Thompson also testified about the scopes of work that Baltimore County prepared for DeVeau's lead abatement work. Mr. Thompson acknowledged that window jambs and exterior sheds, where MDE later discovered lead, were not listed in those scopes of work. Mr. Thompson also testified that "each unit had different components that could have tested positive for lead," and that that was the reason Baltimore County prepared a separate scope of work for each of the 304 units.

ii. Other Witnesses' Testimony on Damages

In addition to Mr. Thompson, Kent MCAP called Sabrina Gendreau, the property manager for Day Village beginning 2015 and Lawrence Brand, a licensed engineer who testified as an expert witness. Kent MCAP also introduced excerpts of the deposition testimony of Susan Kleinhammer, the Leadtec employee who signed the 289 Leadtec certificates at issue here, and DeVeau's Managing Member, Michael DeVeau. We recount some of the testimony of these other witnesses here, albeit in a somewhat different order than it was presented to the jury.[24]

Mr. DeVeau acknowledged that while Baltimore County required the Day Village units subject to the Grant Agreement to be lead-safe, his goal was to make the units lead-

[24] Mr. Thompson and Ms. Gendreau testified in person. Thereafter, excerpts of Ms. Kleinhammer's and Mr. DeVeau's deposition testimony were read to the jury. Mr. Brand, who testified in person, was Kent MCAP's last witness.

free. Mr. DeVeau assured John Potvin, a property manager who managed Day Village at the time, that DeVeau would "go beyond what [Baltimore] County was expecting" and make the units lead-free. Mr. DeVeau confirmed that he performed all tasks identified in the scope of work for each unit, but none made any mention of window jambs.[25] When MDE invalidated Leadtec's certificates, DeVeau was not informed.

Mr. DeVeau also confirmed that DeVeau had an oral contract with Leadtec, the goal of which was to certify the units as lead-free. Leadtec was to review the scopes of work and conduct XRF testing before issuing lead-free certificates. Mr. DeVeau stated that he did not know whether Leadtec actually conducted XRF testing at Day Village, but he had shown Leadtec the prior risk assessment reports on Day Village, which contained XRF readings by other assessors.

Ms. Kleinhammer testified that she conducted visual inspections of the 289 units in which DeVeau had completed work to confirm that DeVeau had completed everything within the scopes of work for each of those units. Once a unit passed her visual inspection, it was certified as lead-free. Though Ms. Kleinhammer acknowledged that Day Village units required testing by an XRF gun, no such testing took place. Instead, Leadtec "relied totally on the information that was given . . . by DeVeau," including prior risk assessment reports by other accredited lead assessors. [26]

[25] Mr. DeVeau was not asked, nor did he state, whether the scope of work mentioned the exterior sheds.

[26] Ms. Kleinhammer maintained that Leadtec's decision to rely on those reports,

Ms. Kleinhammer's testimony about having conducted visual inspections was contradicted by Ms. Gendreau's, however. According to Ms. Gendreau, Ms. Kleinhammer admitted that she "had never come out to inspect the work[]" before signing the Leadtec certificates.

Testifying as an expert witness, Mr. Brand opined that Leadtec "failed in their duty as an agent in issuing the certificates that were inaccurate." Mr. Brand described the typical steps in certifying properties as "lead-free." First, an assessor will conduct an initial inspection. If lead is found, then a lead removal contractor will remove the lead and test with "dust wipes to verify they cleaned up[.]" Then, the assessors will visually reinspect the properties. If the lead removal contractor has "totally removed" the lead-positive component inside a property, "a visual inspection is just fine[.]" If the contractor "put in something that looks similar" to the component that previously tested lead-positive, the assessors will "have to pull out the XRF gun[.]"Mr. Brand testified that

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rather than conducting its own XRF testing, was not unreasonable. She explained:

> We had a bunch of knowledge about Day Village. I mean, we had had some dealings with them in 2000. We knew that an exhaustive inspection report had been done in -- prior to the Baltimore County lead hazard control program. We knew that Baltimore County lead hazard control program had their own accredited risk assessors. It was a volume. We were trying to be pragmatic. We were trying to use what we -- what had already existed and be cost effective for the benefit of Day Village than to—to just recreate the wheel again. This wasn't like working in a vacuum.

under no circumstances would he issue a lead-free certificate without first conducting a lead test on the unit. Mr. Brand added that on very rare occasions, he might rely on third parties' reports instead of inspecting each unit himself, but that process would include verification testing of some units.

At the close of Kent MCAP's case-in-chief, on DeVeau's and Leadtec's motion, the trial court entered judgment in their favor on Counts 1, 2, 3, 4, and 7, concluding that Kent MCAP had failed to offer sufficient evidence of damages.[27] In support of their motion, DeVeau and Leadtec pointed out that they were only obligated to perform work on 304 of the units at Day Village, not 420**,** but that Kent MCAP "want[ed] DeVeau to pay for work to units that DeVeau was never even contracted to touch."[28] DeVeau and Leadtec argued that Kent MCAP had failed to introduce any invoices from which a jury could determine how much it would have cost to replace the four window jambs and sheds found to have tested positive for lead, let alone window jamb replacements and shed work on the 304 units DeVeau was contracted to work on or even the cost of window jamb replacements and shed work for the 420 units that Kent MCAP owned at Day Village. Instead, DeVeau and Leadtec argued, Kent MCAP simply made a business decision to renovate all 420 units.

[27] In addition, Leadtec and DeVeau both offered other grounds for judgment in their favor. With the granting of judgment in favor of Leadtec and DeVeau for insufficient proof of damages, the circuit court denied all of these other motions as moot.

[28] Leadtec adopted this argument in support of its motion for judgment.

In opposition to DeVeau's and Leadtec's motion, Kent MCAP did not deny that it had renovated all of its units or Day Village, what Kent MCAP termed "an overhaul," or that its damage evidence pertained to that renovation. Kent MCAP argued that the theory of its case was not a "unit-by-unit" identification of which units had lead in them and how much Kent MCAP should have been compensated for having corrected them. Instead, Kent MCAP argued, its theory was that "but for the lack of lead[-]free status of those four units, which DeVeau worked in and Leadtec certified, MDE would not have come to Day Village and told Kent MCAP, You must obtain new lead[-]free certificates for every single unit."

In granting DeVeau's and Leadtec's motion, the trial court concluded that Kent MCAP's damages evidence was insufficient and would have prompted the jury to speculate. The trial court said:

> [T]his case rises and falls on the lack of explanation of damages. There simply is none.
>
> * * *
>
> [I]t's not to just hang my hat on one thing, but it's one thing that just keeps on coming back to me. In the Plaintiff MCAP Holdings' response to the Defendants' February 28th motions in limine, on Page 3, one-third of the way down, While ex—this is the—the Plaintiff's pleading, While expert testimony is generally helpful to a fact finder in cases with unique and complex scientific and technical subject matters, the invoices here for construction services, remediation services, lead consultants and then attorney's fees, things that don't matter anymore, and so forth. I'm not simply hanging my hat on invoices, but those are the Plaintiff's words.
>
> I was—I frankly—and—and—and again, what would I

project to see is—is—is not evidence, there hasn't been one invoice. I—I didn't expect to—to listen to months of testimony of going through each and—you know, Unit 1, Unit 2, Unit 147, Unit 148. There hasn't been one. I don't think we have—even had an invoice as to the four that were agreed upon there was lead. I understand there is evidence—there's testimony from the—the Plaintiff's first witness, Mr.—Mr. Thompson, who generally summarized at the end of the day that there was, you know, 1.45 million—1.45 million dollars worth—worth of damages or expenses by Kent. That was—that was his testimony. I was unclear frankly, and I don't think this makes it a jury issue, I think he was including the attorney's fees that—that frankly have already been excised out of this case.

I have a distinct memory that he said he could have or it could be done, that appliances, refrigerators and so forth, could be re-analyzed and taken out of—of—of the bottom line figure, but I'm not sure that even matters. To have literally one sentence of testimony from, you know, a high-level ranking official in Kent, but someone whose job is—and—and I don't hold this against him—in—in—on—on Madison Avenue in New—in New York City, he really has nothing to do with the daily workings of—of Day Village.

I—and I'm not suggesting this was required, but—but there wasn't even a—a proposed mathematical equation of, Okay. There's 404 [*sic*] units, there's potentially 300 units that maybe had lead in them at one point, but we know there were four. And on average, each of those four costs—by way of just my explanation, let's say they each—each of those four costs $1,000. So that's $4,000. And then—and then if that's the general equation, here's how we arrive at, you know, $1,000 per unit and there were 300 units with—with lead. Cause I don't think they've proven that either, but at least there's an equation or some plausible way to spoon feed it to a jury, that this—this is a plausible, reasonable amount of money that we think will make us whole. We're not looking to punish anybody, we're just looking to be—to be made whole.

I simply don't see, even in the light most favorable to the Plaintiff, how a jury can do anything more than speculate that the 1.45 or 1.7, what—whatever it was, and I don't think

it matters for my ruling, with—with—with any amount of certainty or probability, for lack of a—a better term, I don't see how they can reach that determination that that is the—a—a—a reasonable and proven amount of damages.

And—and I haven't even gotten to causation and what units we're even talking about. I don't believe that was proven at all either. And—and—and the causal relationship, who's responsible. And—and maybe this is in reverse order, I—I simply can't get past the—the—the lack of damages evidence in this case. It would be sheer speculation to put forth on this jury the requirement or—you know, it's your decision. Come up with—with what you think's reasonable. Your—your one sentence from one witness that it was 1.45, and—and—and he didn't parse out appliances and—and so forth. And I believe he was including attorney's fees. But even—even if he wasn't, that doesn't matter for my determination.

And I realize these are just pleadings, but the Plaintiff said the—the trier of fact is going to have invoices and—and tangible things that they can rely on to pursue and decide whether these—this invoice is—is worthy of merit and that invoice is worthy of credit. The jury's not going to have one, not one. And—and again, no—no even pseudo-scientific plausible mathematical equation how you can extrapolate from four to 100 or 300 or, you know, whichever they choose to believe. There's—there's no reasonable way for them to get there.

And—and I—I do—I've listened very intently and I've taken a—a lot of notes. And I do understand the Plaintiff's initial theory about, well, there was four, and they needed to get these 300 and—and so forth, and there's nothing unique about the units. Candidly, Mr. Thompson sort of put a wrench in that theory cause he himself said, Oh, no, no, no, there were 304 scopes of work. Each unit was distinct. Each unit could have different places where there could be lead. I don't see how a jury could make that leap of faith—or make that factual leap given that change in the Plaintiff's theory of the case from one for all, all for one. They're all identical. And this place was built in 1945 so each unit is identical. Mr. Thompson, he disputed that, and he was—he was the Plaintiff's star witness.

> I mean, he—he didn't allude to it, he stated it, and—and you just can't get around that.
>
> For any sort of appellate appeal, you know, appellate future in this case, I hope I've made my reasoning clear. I am relying on the damages component. I don't see how this case goes forward cause I don't see how the Plaintiff, even in the light most favorable to it at this stage of the proceedings, I—I don't see how this case goes any further.

This timely appeal followed. We will add other facts below as needed.

THE PARTIES' CONTENTIONS

Kent MCAP argues that the trial court erred in granting DeVeau's and Leadtec's motions for judgment. Kent MCAP's "theory of damages relies on the easily understood and simple concept that when, as here, a contractor performs faulty work or fails to fulfill its contractual obligations, it will cost the client money to redo the work." Kent MCAP adds that expert testimony is not required in order to prove damages. Nor is there any "right form" of evidence to support damages. Instead, "*any* evidence, '***no matter how slight***,' is sufficient to generate a jury question." (emphasis in the original) (quoting *Webb v. Giant of Maryland*, LLC, 477 Md. 121, 136 (2021)). Thus, Kent MCAP posits that Mr. Thompson's trial testimony, where he estimated Kent MCAP's total incurred costs as $1.48 million and broke down that estimate, should suffice to raise a jury question on damages, even in the absence of any other supporting evidence. Kent MCAP adds that DeVeau and Leadtec believed that if some portion of its damages evidence was inaccurate or did not pertain to them, they were free to cross-examine Mr. Thompson on it, leaving the ultimate question of what to believe to the jury.

DeVeau and Leadtec present a different view. DeVeau argues that because Kent MCAP never offered "basic facts regarding damages[,]" or evidence of causation, the trial court was correct to grant judgment in its favor. Specifically, says DeVeau, Kent MCAP never introduced any invoices about its damages, never established what the estimate of the damages that Kent MCAP sought included, never established that there was lead in the units that DeVeau worked in but that MDE did not inspect, never established how many units were renovated (419 or 420), and never established how much it cost to renovate the four units in which DeVeau agreed lead was found. DeVeau adds that expert testimony (or the lack thereof) was not the basis for the trial court's ruling.

Leadtec focused on other deficiencies in Kent MCAP's evidence, most notably on its failure to prove that lead was actually found in all the units Kent MCAP opted to renovate. Calling Kent MCAP's approach "extrapolation," by which one could test a random sampling of some units and extrapolate that if lead were found in those units, one could extrapolate the presence of lead in all units, Leadtec pointed out that Kent MCAP's expert, Mr. Brand, essentially rejected Kent MCAP's "extrapolation" approach because random sampling, while possible, required testing of 54 units of 440 units, not four.[29] Left with a "unit-by-unit" approach, Kent MCAP failed to demonstrate what it paid to renovate the four units in which lead was found. Other deficiencies that Leadtec pointed

[29] Mr. Brand was referring to HUD guidelines and included the 20 senior units in reaching the 440 figure.

out included Kent MCAP's failure to segregate out its cost to renovate the units that Leadtec never inspected, or the units confirmed by MDE not to contain lead, or the furnace closets that Leadtec never inspected because they were locked.[30]

STANDARD OF REVIEW

In Maryland, "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party[.]" Md. Rule 2-519(a). When a party moves for judgment on the basis that the other party's evidence is legally insufficient, the trial court must ask whether a reasonable factfinder could find all elements of the cause of action by preponderance of evidence. In doing so, the court must view the evidence in the light most favorable to the non-moving party. *Giant of Md. LLC v. Webb*, 249 Md. App. 545, 560-61 (2021), *aff'd*, 477 Md. 121 (2021) (citing *Wash. Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487, 491-92 (2009)).

We review a trial court's ruling on a motion for judgment *de novo*. *E.g.*, *Wallace & Gale Asbestos Settlement Tr. v. Busch*, 238 Md. App. 695, 705 (2018), *aff'd*, 464 Md. 474 (2019); *DeMuth v. Strong*, 205 Md. App. 521, 547 (2012). In other words, "[w]e conduct the same analysis that [the] trial court should make when considering the motion for judgment." *C&B Constr., Inc. v. Dashiell*, 460 Md. 272, 279 (2018) (quoting *D.C. v. Singleton*, 425 Md. 398, 406-07 (2012)). Moreover, when considering the appeal of a final judgment, we may affirm the trial court's judgment on any ground that is apparent

[30] Leadtec asserted that there were furnace closets that DeVeau had worked in but that Leadtec could not inspect because the closets were locked.

from the record, even though that ground was " not relied upon by the trial court and perhaps not even raised by the parties[.]" *Robeson v. State*, 285 Md. 498, 502 (1979) (citing cases).

ANALYSIS

We start by identifying the counts in Kent MCAP's amended complaint that are the subject of this appeal. Of the six counts on which the circuit court entered judgment against Kent MCAP, Kent MCAP appeals five: Count 1 (negligence against Leadtec); Count 2 (negligent misrepresentation against Leadtec); Count 3 (as a third party beneficiary of Leadtec's contract with DeVeau, Leadtec's breach of that contract); Count 4 (as a third party beneficiary of Leadtec's contract with DeVeau, DeVeau's breach of that contract); and Count 7 (DeVeau's breach of its contract with Kent MCAP).

The circuit court's reasoning for granting judgment against Kent MCAP on these five counts did not differ count to count. As to all five, the circuit court agreed with DeVeau and Leadtec that Kent MCAP had failed to produce sufficient evidence of damages. In reaching this conclusion, the circuit court did not distinguish between Kent MCAP's contract-based counts (Counts 3, 4, and 5) and its negligence-based counts (Counts 1 and 2) or between Kent MCAP's counts against Leadtec (Counts 1, 2, and 3) and those against DeVeau (Counts 4 and 5). In other words, the circuit court treated the counts together.

Here, Kent MCAP treats its five counts much as the circuit court did. In other words, in its arguments, Kent MCAP does not examine the doctrinal differences between

its contract and negligence claims or argue that these differences support different outcomes.[31] Instead, Kent MCAP here argues that the circuit court was wrong to take its case from the jury for lack of sufficient damages evidence. In opposing reversal, DeVeau and Leadtec follow suit. We turn now to the legal analysis of their arguments.

Where one alleges breach of a construction contract for the contractor's failure to perform, "one of the remedies of the owner is to complete the contract, and charge the cost against the wrongdoer." *Keystone Eng'g Corp. v. Sutter*, 196 Md. 620, 628 (1951) (citing 5 Samuel Williston & George J. Thompson, *Williston on Contracts* § 1363, at 3825 (Rev. Ed. 1937); Restatement (First) of Contracts, ch. 12, § 346(1)(a)(i), at 573, 576, cmt. 1 (Am. L. Inst. 1932)). In other words, "[d]amages for breach of a contract ordinarily are that sum which would place the plaintiff in as good a position as that in which the plaintiff would have been, had the contract been performed." *Beard v. S/E Joint Venture*, 321 Md. 126, 133 (1990); *accord Ray v. William G. Eurice & Bros.*, 201

[31] Kent MCAP takes this approach, we surmise, because proof of damages for tort claims is subject to the same "reasonable certainty" standard that applies to contract claims. *See, e.g.*, *Hall v. Lovell Regency Homes Ltd.*, 121 Md. App. 1, 25 (1998) ("The homeowners were entitled to seek damages for pecuniary losses caused by Lovell's breach of contract or negligent misrepresentation and for consequential pecuniary losses that could be proven with reasonable certainty and not on the basis of speculation or conjecture." (citing *Asibem Assoc. v. Rill*, 264 Md. 272, 276 (1972); *Reighard v. Downs,* 261 Md. 26, 36 (1971) (holding that the party injured by surveyor's negligent misrepresentation was not entitled to recover lost profits that were based upon speculation and conjecture)); *Jones v. Malinowski*, 299 Md. 257, 269 (1984) ("Otherwise stated, it is the general rule of damages, applicable in tort actions in Maryland, that a plaintiff may recover only those damages that are affirmatively proved with *reasonable certainty* to have resulted as the natural, proximate and direct effect of the tortious misconduct." (emphasis added)).

Md. 115, 129 (1952). Such damages "seek to vindicate the promisee's expectation interest[,] . . . includ[ing] losses sustained, *i.e.*, 'out of pocket damages,' and gains lost, *i.e.*, 'benefit of the bargain' damages. *Hall v. Lovell Regency Homes Ltd.,* 121 Md. App. 1, 13 (citing cases).

To be compensable, however, contract damages "'must be proved with reasonable certainty, and may not be based on speculation or conjecture . . . .'" *Id.* (citing *Asibem Assoc. v. Rill,* 264 Md. 272, 276 (1972)). "'[R]easonable certainty' of contract damages means the likelihood of the damages being incurred as a consequence of the breach, and their probable amount. Losses that are speculative, hypothetical, remote, or contingent either in eventuality or amount will not qualify as "reasonably certain" and therefore recoverable as contract damages." *Hoang v. Hewitt Ave. Assocs.*, 177 Md. App. 562, 595 (2007) (citing *Stuart Kitchens, Inc. v. Stevens,* 248 Md. 71, 74–75 (1967); *Kleban v. Eghrari–Sabet*, 174 Md. App. 60, 96 (2007)). "The amount, however, need not be proven to a *mathematical* certainty; the plaintiff bears the burden of adducing sufficient evidence from which the amount of damages can be determined on 'some rational basis and other than by pure speculation or conjecture.'" *Brock Bridge Ltd. v. Dev. Facilitators, Inc.,* 114 Md. App. 144, 157 (1997) (quoting *Ass'n of Md. Pilots v. Balt. & Ohio R.R.,* 304 F. Supp. 548, 557 (D. Md. 1969)).

Where the nonbreaching party seeks recovery of expenses already incurred,[32] stricter standards of proof apply, standards that may be met "through the use of evidence such as receipts, copies of checks, or any other means of computation that would allow a factfinder to value [the plaintiff's] claimed loss." *Neal*, 599 F. Supp. 3d 270, 301 (D. Md. 2022) (internal quotations omitted); *see also Brock Bridge,* 114 Md. App. at 158 ("If the defendant's breach is one that, in the usual course of things, causes a substantial pecuniary loss of such a character that its amount cannot be proved, compensatory damages are recoverable in the reasonable discretion of the jury. *If the loss is of such a kind that its amount can, in the ordinary course of things, be proved with reasonable certainty, substantial damages will be refused unless such evidence is given.*" (quoting 5 Arthur L. Corbin, *Corbin on Contracts* § 1021, at 133–34 (1964)) (emphasis in the original).

For recovery of expenses already incurred, a lack of certainty in plaintiff's total damages estimate does not necessarily doom recovery for individual expense items about which there is reasonable certainty. *See Brock Bridge*, 114 Md. App. at 159 ("'The requirement [of reasonable certainty] does not mean, however, that the injured party is barred from recovery unless he establishes the total amount of his loss. *It merely excludes*

[32] On the other hand, where the nonbreaching party seeks recovery of lost profits, "damages can be ascertained by reference to . . . market value, established experience, or direct inference from known circumstances. " *Thomas v. Capital Medical Management Associates, LLC*, 189 Md. App. 439, 465 (2009) (internal quotations and citations omitted). Kent MCAP does not contend that what it was seeking was lost profits.

those elements of loss that cannot be proved with reasonable certainty . . . .'" (quoting Restatement (Second) of Contracts § 352 cmt. A (Am. L. Inst. 1981)) (emphasis and alterations added in *Brock Bridge*)).

Returning to this case, we agree with the trial court that Kent MCAP failed to adduce sufficient evidence of damages to warrant submitting its case to the jury. Kent MCAP introduced no invoices, receipts, or even mathematical equations from which the jury could have calculated any damages owed to a reasonable certainty. The damages evidence that Kent MCAP did adduce was not limited to the townhome units for which DeVeau and Leadtec had contractual responsibility, so the jury could not have determined what portion of the alleged damages DeVeau and Leadtec caused. Specifically, Kent MCAP offered evidence of what it paid to renovate 420 units at Day Village, but DeVeau and Leadtec only agreed to abate lead in, inspect, and certify *304* of those units, and they only got to *289* units. As a consequence, the trial court concluded, correctly, that "this case rises and falls on the lack of explanation of damages. There simply is none."

Although Mr. Thompson testified that Kent MCAP incurred $1.48 million dollars to renovate 420 units at Day Village, Kent MCAP never offered evidence that DeVeau and Leadtec had contractual responsibility for 420 units. For breach of a construction contract, damages "ordinarily are that sum which would place the plaintiff in as good a position as that in which the plaintiff would have been, had the contract been performed." *Beard v. S/E Joint Venture*, 321 Md. at 133; *accord Ray v. William G. Eurice & Bros.*,

201 Md. at 129. The Grant Agreement between Kent MCAP and Baltimore County, and thus between Kent MCAP and DeVeau, required "lead hazard reduction activities" and "required lead testing" for only 304 units. Even if DeVeau and Leadtec promised to render those units "lead-free," full performance by DeVeau and Leadtec would have left Kent MCAP with 304 (or 289) certified units, not 420. Permitting the jury to award damages corresponding to the renovation cost for 420 units (Kent MCAP's $1.48 million figure) would have placed Kent MCAP in a better position than it would have been in had the contracts been fully performed.

Nor has Kent MCAP identified anything to suggest that in the event of breach, DeVeau and Leadtec agreed to be responsible for repairs to more than the 304 units in which they agreed to work, *i.e.*, for consequential damages. Kent MCAP argues that DeVeau and Leadtec should be responsible for Kent MCAP's cost to renovate 420 units because, as Mr. Thompson testified below, "MDE threatened to invalidate all the certificates." But Kent MCAP apparently waived consequential damages against DeVeau.[33] And even without this waiver, DeVeau and Leadtec would not be responsible for consequential damages unless they were "'fairly and reasonably supposed to *have*

[33] Kent MCAP's standard form contract with DeVeau provided that, "The Contractor [DeVeau] and Owner [Kent MCAP] waive Claims against each other for consequential damages arising out of or relating to this Contract." In turn, "Claims" was defined as a "demand or assertion by one of the parties seeking, as a matter of right, payment of money, or other relief with respect to the terms of the Contract. The term 'Claim' also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract."

been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.'" *Hoang v. Hewitt Ave. Assocs.*, 177 Md. App. at 594-95 (quoting *Winslow Elevator & Mach. Co. v. Hoffman,* 107 Md. 621, 635 (1908) ("fairly and . . . reasonably supposed to *have been in the contemplation of both parties* at the time they made the contract, as the probable result of the breach of it.") (quoting *Hadley v. Baxendale*, 9 Exch. 341, 354, 156 Eng. Rep. 145, 151 (1845)) (emphasis in *Winslow*)). Here, Kent MCAP identifies no evidence that DeVeau and Leadtec contemplated, or should have contemplated, that in the event of breach, they would be liable for the cost to redo the 304 units that they agreed to abate lead in, inspect, and certify, *plus* an additional 131 units (420-304) in which they never worked or agreed to work or to inspect and certify.

Having failed to offer evidence of DeVeau's and Leadtec's liability for the cost of a 420-unit renovation, Kent MCAP offered no way for the jury to parse out, with reasonable certainty, what portion of Kent MCAP's damages DeVeau and Leadtec were responsible for.[34] To start, Kent MCAP never provided invoices or comparable records of what it spent to redo DeVeau's and Leadtec's work. *See Neal v. United States*, 599 F. Supp. 3d at 301 (where the nonbreaching party seeks recovery of expenses already incurred, stricter standards of proof apply, and may be met "through use of evidence such

[34] As the circuit court did, we view the deficiency in Kent MCAP's case as one of damages, rather than causation. For a further discussion of the distinction between damages and causation in analyzing harm, see Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DePaul L. Rev. 671 (2006).

as receipts, copies of checks, or any other means of computation that would allow a factfinder to value [the plaintiff's] claimed loss." (internal quotations omitted)). In pretrial motions, Kent MCAP had represented that it would be introducing invoices of what it had spent. When Kent MCAP failed to do so in its case-in-chief, the trial court correctly noted the failure.

> In the Plaintiff MCAP Holdings' response to the Defendants' February 28th motions in limine, on Page 3, one-third of the way down, While ex—this is the—the Plaintiff's pleading, While expert testimony is generally helpful to a fact finder in cases with unique and complex scientific and technical subject matters, the invoices here for construction services, remediation services, lead consultants and then attorney's fees, things that don't matter anymore, and so forth. I'm not simply hanging my hat on invoices, but those are the Plaintiff's words.
>
> I was—I frankly—and—and—and again, what would I project to see is—is—is not evidence, there hasn't been one invoice. I—I didn't expect to—to listen to months of testimony of going through each and—you know, Unit 1, Unit 2, Unit 147, Unit 148. There hasn't been one. **I don't think we have—even had an invoice as to the four that were agreed upon there was lead.**

(emphasis added).

Having supplied no invoices (or comparable records) of its expenses for renovating 289 units, Kent MCAP provided no way—in the trial court's words, not even a "proposed mathematical equation"—for the jury even to reasonably estimate from the evidence what Kent MCAP would have paid to redo the units. *See Asibem Assocs.*, 264 Md. at 280 (suggesting that a mathematical equation might be acceptable to assess damages for breach of real estate sales contract if there was evidence of similarity "in all

respects" in the subject tracts). Here, the trial court posited an example of a mathematical equation, but nonetheless (and correctly) recognized that an equation would not have worked given Kent MCAP's admission that the scope of work for each unit was distinct, *i.e.*, that the units were not similar in all respects. The trial court said:

> I—and I'm not suggesting this was required, but—but there wasn't even a—a proposed mathematical equation of, Okay. There's 404 [*sic*] units, there's potentially 300 units that maybe had lead in them at one point, but we know there were four. And on average, each of those four costs—by way of just my explanation, let's say they each—each of those four costs $1,000. So that's $4,000. And then—and then if that's the general equation, here's how we arrive at, you know, $1,000 per unit and there were 300 units with—with lead. **Cause I don't think they've proven that either, but at least there's an equation or some plausible way to spoon feed it to a jury, that this—this is a plausible, reasonable amount of money that we think will make us whole.** We're not looking to punish anybody, we're just looking to be—to be made whole.
>
> * * *
>
> It would be sheer speculation to put forth on this jury the requirement or—you know, it's your decision. Come up with—with what you think's reasonable. Your—your one sentence from one witness that it was 1.45, and—and—and he didn't parse out appliances[35] and—and so forth. And I believe he was including attorney's fees.

[35] Because we review the evidence in a light most favorable to Kent MCAP, we assume that the cost to replace appliances was not included in Mr. Thompson's $1.48 million estimate. Nonetheless, we agree that Mr. Thompson's testimony could support an inference that $1.48 million estimate did include the cost to replace appliances. At times, Mr. Thompson described the work Kent MCAP undertook as "renovations" and said that "[Kent MCAP] would have no issue identifying what was related to the abatement project versus otherwise." This suggested that by the time he had testified, Mr. Thompson had not yet excluded the appliance replacement cost from his estimate. At another point though, Mr. Thompson testified that "replacement of appliances [and] other construction[-]related work in the units" was not included in the estimate.

* * *

> And—and again, no—no even pseudo-scientific plausible mathematical equation how you can extrapolate from four to 100 or 300 or, you know, whichever they choose to believe. There's—there's no reasonable way for them to get there.
>
> And—and I—I do—I've listened very intently and I've taken a—a lot of notes. And I do understand the Plaintiff's initial theory about, well, there was four, and they needed to get these 300 and—and so forth, and there's nothing unique about the units. Candidly, Mr. Thompson sort of put a wrench in that theory cause he himself said, Oh, no, no, no, there were 304 scopes of work. Each unit was distinct. **Each unit could have different places where there could be lead. I don't see how a jury could make that leap of faith—**or make that factual leap given that change in the Plaintiff's theory of the case from one for all, all for one. They're all identical. And this place was built in 1945 so each unit is identical. Mr. Thompson, he disputed that, and he was—he was the Plaintiff's star witness. I mean, he—he didn't allude to it, he stated it, and—and you just can't get around that.

(emphasis added).

Here, Kent MCAP argues that it "offered unequivocal testimony, through Mr. Thompson, as to the type and amount of damages it suffered." To be sure, Mr. Thompson offered some figures for what Kent MCAP spent on lead abatement, inspection, and certification on Parcels 2 and 3 since 2016, when Kent MCAP was notified of the child's elevated lead levels. Thus, according to Mr. Thompson, Kent MCAP incurred $80,000 for its in-house staff to cover window strips and exterior sheds for 84 Parcel 2 units; "in the neighborhood of one million dollars" with Annapolis Painting for lead abatement in Parcel 2 and Parcel 3; and "in the neighborhood of 350 or $380,000" for Arc

Environmental, to enter the units, inspect, and issue certificates for Parcel 3's 336 units. However, Kent MCAP offered no way for the jury to determine how much of these costs pertained to redoing DeVeau's and Leadtec's work in the 289 units in which they worked.

Kent MCAP's next suggestion, that "*any* evidence, '***no matter how slight***,' is sufficient to generate a jury question," states only half the standard. To get to a jury, evidence must be legally sufficient. It may be slight, but it must be legally sufficient. *Bord v. Baltimore County,* 220 Md. App. 529, 543 (2014) ("The Court assumes the truth of all credible evidence on the issue and any inferences therefrom in the light most favorable to appellants, the non-moving parties. Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration."). In the realm of damages, as we discussed above, in order to be legally sufficient, evidence, if believed, must prove loss with reasonable certainty, a standard which was not met here.

Kent MCAP's reminder about the non-need for expert testimony does not help either. To be sure, "[e]xpert testimony is not required . . . on matters of which jurors would be aware by virtue of common knowledge." *CIGNA Prop. and Cas. Cos. v. Zeitler,* 126 Md. App. 444, 463 (1999) (holding that expert testimony was not needed to establish insurance broker's duty of care in procuring requested insurance coverage). But here, it was the lack of evidence, not the lack of expert testimony, that prompted the circuit court to grant judgment to DeVeau and Leadtec. Kent MCAP introduced no

invoices, comparable documents, or "proposed mathematical equation" for the assessment of its damages. As the circuit court said, "I simply can't get past the—the—the lack of damages evidence in this case."

Kent MCAP also argues that the trial court's adverse ruling was improperly based on Kent MCAP's evidence not being in the right form, *i.e.*, the evidence was presented through testimony instead of invoices. But the form of Kent MCAP's evidence is not what drove the trial court's ruling. Simply put, Kent MCAP did not adduce evidence about what it had paid to redo DeVeau's or Leadtec's faulty work. Nor did Kent MCAP supply a means by which the jury could reasonably parse out, from the evidence Kent MCAP did adduce, what Kent MCAP paid to redo DeVeau's and Leadtec's faulty work.

Finally, citing *Sifrit v. State*, 383 Md. 116, 135 (2004), Kent MCAP argues that if its damages evidence was inaccurate or did not pertain to DeVeau and Leadtec, the remedy was for DeVeau and Leadtec to cross examine Mr. Thompson and leave the matter of what to believe to the jury. In *Sifrit*, a murder case, the issue was not the sufficiency of a civil plaintiff's damages evidence. Instead, Mr. Sifrit challenged the admissibility of his prior statements about how he "would dispose of a dead body if he ever killed someone." *Id.* at 134. While our Supreme Court did acknowledge the jury's role, it was simply to indicate that because the jury could have drawn reasonable relevant inferences from Mr. Sifrit's prior statements, the prior statements were relevant and admissible. *See id.* at 135. *Sifrit* does not apply here if for no other reason than the State's case against Mr. Sifrit was not insufficient, which is distinguishable from the present case

because Kent MCAP has not even met the sufficiency standard. *See id.*

We are not unmindful of the dangers posed by the presence of lead-based paint in young children's homes. Nevertheless, we conclude, as did the trial court, that Kent MCAP did not offer reasonably certain proof of its damages. Accordingly, we affirm the trial court in entering judgment in DeVeau's and Leadtec's favor.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.