Circuit Court for Baltimore City
Case No. 24-C-07-005603

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1660

September Term, 2017

TELOS CORPORATION

v.

SETH W. HAMOT, et al.

Nazarian,
Fader,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, J.

Filed: November 27, 2018

This appeal is the culmination of years of bitter litigation between appellant Telos Corporation and appellees Seth W. Hamot[1] and Andrew R. Siegel. The circuit court found that Messrs. Hamot and Siegel had tortiously interfered with Telos's contractual relationship with one of its prior auditors and awarded Telos $278,922.50 in damages. The sole issue on appeal is whether the circuit court erred by not awarding Telos additional damages attributable to the increase in fees it had to pay its new auditor over and above what it would have paid had its prior auditor not resigned. The circuit court rejected the methodology of Telos's expert for calculating such damages and concluded that Telos failed to introduce any other evidence from which it could calculate the amount of such damages with reasonable certainty. We affirm.

BACKGROUND

A detailed recitation of the complex background facts underlying this dispute is not necessary nor would it be helpful in light of the narrow issue remaining. We thus confine our background discussion to a summary of the facts necessary to provide context for the sole remaining issue.

General Factual Background

Telos issued different classes of securities, including, as relevant here, a class of 12% Cumulative Exchangeable Redeemable Preferred Stock (the "Redeemable Stock"). Subject to certain conditions, holders of the Redeemable Stock were entitled to receive semi-annual dividends and, beginning in 2005, Telos was required to redeem the shares in

[1] Mr. Hamot passed away during the litigation and his estate was substituted as a party on his behalf. For consistency, we use his name to refer to both him and his estate.

five annual increments. Although issued as non-voting shares, the terms of the Redeemable Stock provided that its holders would be entitled to elect two shareholders to the Telos Board of Directors (the "Class D Directors") if the company did not pay dividends for three consecutive semi-annual periods. As a result of Telos's nonpayment of those dividends, the Board had two Class D Directors beginning in 1998 and continuing throughout the relevant time period.

Messrs. Hamot and Siegel, directly and through their investment hedge fund Costa Brava Partnership III, L.P. ("Costa Brava"), purchased approximately 16% of Telos's outstanding Redeemable Stock. That purchase laid the groundwork for the big picture dispute between the parties that gave rise to this litigation, which is whether Telos would pay the dividends and redeem the shares as scheduled. Although Messrs. Hamot and Siegel wanted Telos to do both, Telos took the position that the terms of the Redeemable Stock precluded it from doing either until it satisfied higher priority debt obligations. The more specific dispute underlying this action concerns the proper accounting treatment of Telos's obligations with respect to the Redeemable Stock: (1) Telos and its auditors took the position that because its dividend and redemption obligations were not due unless and until the higher priority obligations were satisfied, the dividend and redemption obligations were non-current liabilities; and (2) Messrs. Hamot and Siegel took the position that those obligations had to be treated as current liabilities. The efforts of Messrs. Hamot and Siegel to get the auditors to see the issue their way gave rise to Telos's claims in this action.

In 2005, Costa Brava sued Telos's then-auditor, Goodman & Company, LLC, in Fairfax County, Virginia. Among other claims, Costa Brava alleged that Goodman had

conspired with Telos by submitting fraudulent financial statements, which Costa Brava alleged enabled Telos to avoid its fiduciary duty to pay dividends on the Redeemable Stock.

In June 2007, while that lawsuit was still pending, Messrs. Hamot and Siegel were elected to be the Class D Directors to Telos's Board. Goodman then took the position that its "audit independence" had become impaired by the presence on the Board of the two new directors, who, through Costa Brava, were actively litigating claims against it based on its audit work for Telos. Effective July 24, 2007, Goodman resigned.

On September 14, 2007, Telos engaged another auditor, The Reznick Group, P.C., to begin working on the company's 2007 financials. By the following month, Messrs. Hamot and Siegel began copying Reznick personnel on letters to Telos and Goodman personnel that made a variety of complaints, accusations, and demands. Although all communication with Reznick was supposed to go through the Board's audit committee, Messrs. Hamot and Siegel copied their letters directly to Reznick. By the following spring, Reznick was interpreting certain communications from Messrs. Hamot and Siegel as threatening litigation against Reznick if it did not adopt their view as to the proper accounting treatment of Telos's obligations on the Redeemable Stock.[2]

[2] In the Virginia litigation, a jury found that Goodman had aided and abetted breaches of fiduciary duty by Telos. On March 25, 2008, a Virginia trial court denied a motion to set aside that verdict. Costa Brava then sent a letter to Goodman enclosing the ruling and demanding "that Goodman immediately withdraw its audit opinions for 2004, 2005 and 2006 to the extent that Telos continues to misclassify the [Redeemable Stock] as a long-term liability and understates the dollar amount owed to the [Redeemable Stock] shareholders." Costa Brava also "reserve[d] its right to bring claims against Goodman for any damages resulting from clean audit opinions relating to past or future financial statements." Mr. Siegel sent a copy of the letter to Reznick, which interpreted that act as

Reznick ultimately concluded that the letters, and the perceived threats they contained, impaired its independence. Effective April 16, 2008, Reznick resigned. At the time of its resignation, Reznick's work on the 2007 audit, for which it had billed Telos $377,247,[3] was "principally complete."

On September 5, 2008, Telos hired BDO Seidman, LLP to replace Reznick and complete Telos's 2007 audit. To satisfy its professional obligations, BDO could not rely on any of Reznick's work and had to redo the entire 2007 audit itself. In light of the timing of its engagement, the necessity of completing the 2007 audit on an expedited timeframe, and the high-risk profile resulting from the ongoing litigation and auditor resignations, BDO devoted more resources to the engagement than it ordinarily would have. Those extra resources included adding a third partner to the engagement team, generally involving more people than otherwise would have been necessary, and performing more testing and additional procedures. BDO ultimately billed Telos $767,513.56 for its work on the 2007 audit. It also performed audits for Telos for 2008 through 2012, for which it billed a combined total of $2,532,312.80.[4]

a threat of litigation against it. Although it is not relevant to the claims in this appeal, in 2009 the Supreme Court of Virginia vacated the verdict against Goodman.

[3] Telos identifies the amount Reznick billed it for the 2007 audit as $377,447, a $200 difference from the total amount of the invoices in the record. No party has explained or raised any issue as to this discrepancy and it does not affect our analysis.

[4] BDO billed Telos $554,160.12 for the 2008 audit, $574,189.62 for the 2009 audit, $465,423.20 for the 2010 audit, $469,842.36 for the 2011 audit, and $468,697.50 for the 2012 audit. BDO apparently continued to serve as Telos's auditor after 2012, but these were the only audits that had been completed by the time of trial.

This Lawsuit

In August 2007, Messrs. Hamot and Seigel filed a complaint against Telos in the Circuit Court for Baltimore City alleging that Telos had refused their request to inspect certain corporate books and records. Those claims, which are not themselves at issue in this appeal, gave rise to counterclaims by Telos that included, in its operative third amended counterclaim, tortious interference with its contractual relations with Goodman and Reznick (Counts One and Two, respectively) and tortious interference with its economic or business relations with Goodman and Reznick (Counts Three and Four, respectively).[5] The parties tried these claims in a seven-day bench trial that took place in 2013. The trial was not bifurcated as between liability and damages.

In a thorough, well-reasoned, 93-page opinion, the circuit court concluded as to liability that (1) Telos had enforceable contracts with both Goodman and Reznick and, therefore, that Telos's viable claims were for tortious interference with contract, not tortious interference with a non-contractual economic or business relation;[6] (2) Messrs. Hamot and Siegel had not tortiously interfered with Telos's contractual relationship with

[5] Telos also sought a declaratory judgment that it did not owe a duty to indemnify Messrs. Hamot and Siegel for attorney's fees. That claim is not at issue in this appeal.

[6] The elements of a claim for tortious interference with contractual relations are: "(1) The existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom." *Brass Metal Products, Inc. v. E-J Enter., Inc.*, 189 Md. App. 310, 348 (2009) (quoting *Blondell v. Littlepage*, 185 Md. App. 123, 153-154 (2009), *aff'd*, 413 Md. 96 (2010)).

Goodman because the cause of Goodman's resignation was the combination of Messrs. Hamot and Siegel's election as Class D Directors and their pre-existing litigation against Goodman, neither of which was wrongful; but (3) Messrs. Hamot and Siegel had tortiously interfered with Telos's contractual relationship with Reznick, which had resigned as a result of the unauthorized letters Messrs. Hamot and Siegel sent to Reznick. The court thus awarded judgment in favor of Telos on Count Two and in favor of Messrs. Hamot and Siegel on Counts One, Three, and Four. No party has appealed from any aspect of the court's liability rulings.

At trial, Telos sought the same four categories of damages with respect to all of its tortious interference claims: (1) the monies billed by Reznick for its work on the 2007 audit, none of which was ultimately usable; (2) certain default waiver fees and expenses incurred by Telos; (3) the difference between what Telos paid BDO for its 2007 through 2012 audits and what it would have had to pay "but for Hamot and Siegel's wrongful conduct"; and (4) fees Telos had to pay Goodman to reissue earlier audit opinions. The court awarded a total of $278,922.50 in damages under categories (1) and (2), and no damages under categories (3) and (4). No party has appealed from any aspect of the court's rulings as to damages categories (1), (2), and (4).

Telos's Claim for Excess Audit Fees

The sole issue raised on appeal is the circuit court's decision to reject in its entirety Telos's claim for its third category of damages, which the parties refer to as "excess audit fees." Those fees are the difference between what Telos paid BDO to perform its 2007 through 2012 audits and what it would have paid if not for the tortious interference of

Messrs. Hamot and Siegel. The amounts actually paid to BDO in each of those years was readily ascertainable.[7] The rub came in figuring out what amount to subtract from that, which involved two separate questions: (1) what number to start with; and (2) how, if at all, to adjust that number to arrive at the projections.

To answer those questions, Telos presented the testimony of John McGrath, who the court accepted as an expert in accounting and auditing. In a decision that was consistent with Telos's liability claims, but not ultimately consistent with the court's resolution of those claims, Mr. McGrath focused on the fees that had been charged by Telos's first auditor, Goodman. As his starting number, he chose the average audit fee charged by Goodman for its 2004, 2005, and 2006 audits, which was $196,097.39.[8]

To project forward from his starting point, Mr. McGrath used data compiled by a firm called Audit Analytics to track "year-to-year percentage changes" in audit fees charged divided by total revenue among companies that file with the Securities and Exchange Commission.[9] Although Telos was not itself an SEC filer and he acknowledged

[7] BDO's invoices to Telos in each year totaled $767,513.56 for 2007, $554,160.12 for 2008, $574,189.62 for 2009, $465,423.20 for 2010, $469,842.36 for 2011, and $468,697.50 for 2012, for a total of $3,299,826.36.

[8] Mr. McGrath testified that he chose to use a three-year average, instead of the fees charged in 2006, as his starting point because of the variability in the Goodman fees during those three years. Because the fee Goodman charged for 2006 was higher than the fee it had charged in 2004 and 2005, that choice increased the damages calculation.

[9] The Audit Analytics auditor fee database "contains all fee data disclosed by SEC registrants" in the electronic filings of 2,507 publicly traded companies over the period from 2002 to 2011. The percentage yearly changes in the ratio of audit fees to total revenue for these companies as calculated by Mr. McGrath was -7.13% for 2007, -0.93% for 2008, 8.41% for 2009, -12.52% for 2010, and -7.75% for 2011. Because the data were not available for 2012, Mr. McGrath assumed no change for that year.

that the data did not account for "different factual circumstances" that may have affected Telos's contractual claims with its auditors, Mr. McGrath testified that the Audit Analytics data set was "the most objective source to identify what was going on" with respect to audit fees paid during that time period. Applying the yearly percentage changes from the Audit Analytics data for 2007 through 2012 to the Goodman 2004-2006 average, Mr. McGrath calculated that Telos would have paid Goodman $1,044,932.23 for those six audit years. Subtracting that from the amounts paid to BDO during the same period, Mr. McGrath calculated Telos's excess audit fees damages to be $2,254,894.13.

Notably for our purposes, Mr. McGrath did not perform a calculation of the difference between the fees BDO charged and what Reznick would have charged during the years in question. He testified that he was not asked to offer such an opinion and did not have one.

In assessing the claim for excess audit fees, the trial court observed that Telos bore the burden of proving damages and of convincing the court that Mr. McGrath's methodology was sound. The court was not convinced. With respect to the Audit Analytics data, the court did not believe that the yearly changes in the ratio of audit fees to revenue among public companies was "a convincing proxy" for Telos's projected fees. Among other causes for concern, the court observed that although that ratio increased by 8.41% in 2009, the audit fees paid by the surveyed companies went down during that year. The increase in the ratio was wholly attributable to a decline in the companies' revenue. Using Mr. McGrath's methodology would thus result in a presumed increase in fees during a year in which the companies on which the ratio is based saw their fees decrease.

To further assess whether its skepticism was warranted, the court performed some calculations of its own. The court compared the yearly changes Mr. McGrath extracted from the Audit Analytics data to actual data regarding Telos's experience concerning: (1) yearly percentage changes in BDO's actual audit fees charged for 2008 through 2012; (2) yearly percentage changes in the ratio of BDO's audit fees charged compared to Telos's total revenue for those years; and (3) yearly percentage changes in Goodman's actual audit fees charged for 2004 through 2006. In each case, the court found that there were "significant differences" between the Audit Analytics data and actual experience. For example: (1) where the Audit Analytics data showed a yearly *decrease* of approximately 8% for 2011, BDO's fees that year *increased* by approximately 1%; (2) where the Audit Analytics data showed an *increase* of approximately 8% for 2009, the ratio of BDO's fees charged to Telos's revenue for that year showed a *decrease* of approximately 18%; and (3) where the Audit Analytics data showed a *decrease* of approximately 3% for 2006, Goodman's fees that year *increased* by approximately 36%. Based on these and other unexplained differences, the court was "not convinced that the Audit Analytics data is a reasonable basis for projecting Goodman's fees for the period in question." The court "reject[ed] Mr. McGrath's opinion" and declined to award any excess audit fees.

At trial, Telos's evidence of excess audit fees damages focused exclusively on a comparison of amounts paid to BDO for 2007 through 2012 and projected Goodman fees during those years. Reflecting that, the court's initial ruling also focused almost exclusively on that comparison. In a footnote, the court noted two alternative arguments Telos had made as to how such fees could be calculated in the event the court were to find,

as it ultimately did, that Messrs. Hamot and Siegel had tortiously interfered with Reznick, but not Goodman. First, Telos argued that it would still be appropriate to use projected Goodman fees, rather than the higher Reznick fees, as the baseline for comparison because Reznick's fees were inflated by the greater risk associated with the engagement in light of ongoing litigation filed by Messrs. Hamot and Siegel. Second, Telos argued that if the court disagreed with using Goodman as the baseline, the court could itself calculate damages by using Reznick's 2007 billings as the starting point and projecting forward using the Audit Analytics data. In light of its rejection of Mr. McGrath's methodology, however, the court found it unnecessary to address these backup arguments.

The court thus entered a total damages award in favor of Telos in the amount of $278,922.50, based on its rulings as to Telos's other damages categories.

Reconsideration

In a motion to alter or amend the judgment, Telos argued that even if the court rejected use of Goodman fees as a baseline, it still had ample evidence in the record from which to award excess audit fees damages based on Reznick's billings. With respect to the 2007 year itself, Telos argued that even though Reznick's audit was not fully complete, the evidence was that it was "principally complete" and so could be used to establish the Reznick baseline.

The court, however, concluded that it could not "make a determination based on the evidence adduced at trial as to what the final number would've been for Re[z]nick had it completed all of its services for 2007 without being interrupted." The court acknowledged "the testimony at trial that Re[z]nick was close to completion or almost completed," but

did not think that provided a sufficient basis for it to determine "how much more they would've billed." As an example of how being close to finished did not necessarily mean that additional billings would be negligible, the court observed that although BDO had stated on December 8, 2008 that its billings for 2007 were then approximately $600,000, its final bill, submitted less than a month later, reflected total billings of more than $767,000. The court thus did not think it "would be prudent . . . to try to take a guess at how much more Re[z]nick would've charged." However, the court also observed that whatever the additional amount Reznick would have charged would have been, "it certainly would've been less than [$]767[,000]. But I just don't know how much less." The court believed that the reason it did not know that was a failure of proof resulting from Telos's focus at trial on proving a different measure of damages.

The court denied the motion to alter or amend. Telos appealed.

DISCUSSION

"When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Rule 8-131(c). Factual findings are not clearly erroneous if "any competent material evidence exists in support of the trial court's factual findings[.]" *Bontempo v. Lare*, 444 Md. 344, 363 (2015) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)).

We review a trial court's decision on the reliability of an expert's methodology for an abuse of discretion. *MEMC Elec. Materials, Inc. v. BP Solar Intern., Inc.*, 196 Md.

App. 318, 355-56 (2010) (discussing the court's "wide discretion in evaluating expert testimony"). An abuse of discretion occurs "where no reasonable person would take the view adopted by the [trial] court" or where the court acts "without reference to any guiding rules or principles." *Powell v. Breslin*, 430 Md. 52, 62 (2013) (internal quotation marks and citations omitted).

I. TELOS'S CLAIMS FOR CALCULATING EXCESS AUDIT FEES DAMAGES BASED ON THE DIFFERENCE BETWEEN FEES PAID TO BDO AND FEES IT WOULD HAVE PAID TO REZNICK HAVE BEEN PRESERVED.

Before addressing the merits of Telos's appellate arguments we must first confront Messrs. Hamot and Siegel's contention that those arguments were not preserved. On appeal, Telos has abandoned its contention that the trial court should have calculated excess audit fees damages using the fees it would have paid Goodman as a baseline. Telos now argues that the court erred in not calculating and awarding those damages based on the fees Telos would have paid Reznick as a baseline. According to Telos, the record supports numerous different ways the court could have chosen to make such a calculation. Messrs. Hamot and Siegel contend that Telos has not preserved that argument for our review. We disagree.

Ordinarily, we "will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court." Rule 8-131(a). It is true that Telos's focus at trial was on its preferred calculation of excess audit fees based on its projection of what Goodman would have charged using the Audit Analytics audit fees-over-revenue data. Nonetheless, as is clear from footnote 7 in the circuit court's opinion, Telos made an alternative argument that excess audit fees damages could also be calculated using

Reznick's fees, as projected forward using the same Audit Analytics data. Telos further explained that alternative contention in its motion to alter or amend, arguing that Mr. McGrath's methodology for projecting forward "remains the same regardless of whether Goodman's or Reznick's fees are used as the baseline." The court addressed the merits of that argument in denying the motion. We therefore conclude that Telos preserved its argument that the circuit court should have awarded damages based on the difference between BDO's actual audit fees for 2007 through 2012 and what Telos would have paid Reznick during that same period.

That, however, does not end our preservation analysis. Although Telos argued that the trial court should have calculated its excess audit fees damages using Reznick as a baseline, the only method Telos offered the trial court for projecting those fees forward in years 2008 through 2012 was that offered by Mr. McGrath—applying percentage yearly changes extracted from the Audit Analytics fees-over-revenue data. Now, for the first time, Telos argues that in addition to that method, the court also could have projected Reznick fees forward using: (1) the percentage yearly change in gross audit fees paid by SEC filers as compiled by Audit Analytics; (2) the percentage yearly change in fees actually paid by Telos to BDO; (3) Reznick's 2007 billings as a constant, without adjustment in subsequent years; or (4) an average of multiple proxies. Telos contends that its failure to identify any of these alternative calculations to the trial court does not present a preservation problem because they all support the same theory of damages, which is the difference between fees paid to BDO and those that would have been paid to Reznick.

Although it is true that the alternatives now presented by Telos represent different ways of arriving at a calculation to support the same general theory of damages (i.e., the difference between BDO actual fees and Reznick projected fees), the implications of its argument that the circuit court committed reversible error in not locating and adopting one of those alternatives are troubling. In effect, Telos contends that it is of no moment whether it presented the trial court with a reasonable methodology by which the court could have calculated damages for the 2008 through 2012 audit years as long as there was information somewhere in the record that the court, with exceptional diligence, could have uncovered and seized upon to make such a calculation. Although it was within the province of the trial court to have done that, we would be very reticent to rule that it was required to do so when the only methodology put forward by the plaintiff was deficient. *See generally Howell v. State*, 56 Md. App. 675, 685 (1983) (observing that a trial court did not err when it "was never called upon" to make an evaluation of the evidence). We conclude, however, that that issue is better addressed as part of our determination of whether the court clearly erred in making its findings based on the evidence and arguments that were before it, rather than as a matter of preservation.

II. THE TRIAL COURT DID NOT CLEARLY ERR BY NOT AWARDING EXCESS AUDIT FEES DAMAGES TO TELOS FOR 2007.

A. Damages Must Be Proven with Reasonable Certainty.

"Damages must be proven with reasonable certainty, or some degree of specificity, and may not be based on mere speculation or conjecture." *Zachair v. Driggs*, 135 Md. App. 403, 427 (2000) (quoting 8 Maryland Law Encyclopedia, *Damages* § 193 at 159

(1985)). That requirement of reasonable certainty applies not just to the fact, but also to the amount, of damages. Thus, "[t]o recover compensatory damages, the amount must be proved with reasonable certainty and may not be based upon speculation or conjecture." *Brock Bridge Ltd. P'ship v. Dev. Facilitators, Inc.*, 114 Md. App. 144, 157 (1997). A plaintiff need not prove the amount of damages "to a *mathematical* certainty," but it is the plaintiff's burden to "adduc[e] sufficient evidence from which the amount of damages can be determined on 'some rational basis and other than by pure speculation or conjecture.'" *Id.* (quoting *Ass'n of Maryland Pilots v. Balt. & Ohio R.R. Co.*, 304 F. Supp. 548, 557 (D. Md. 1969)). Thus, a plaintiff must not only show that she or he "has sustained some injury," but she or he must also "establish sufficient data from which the court or jury can properly estimate the extent of damages." *Zachair*, 135 Md. App. at 427 (quoting 8 Maryland Law Encyclopedia, *Damages* § 193 at 159 (1985)). "One may recover only those damages that are affirmatively proved with reasonable certainty . . . ." *Roebuck v. Steuart*, 76 Md. App. 298, 314 (1988).

In *Zachair*, this Court discussed in some detail the evolution of the modern standard for proving damages. 135 Md. App. at 426. Although our courts originally required "certainty," the Court of Appeals modified that rule into the "more flexible one of 'reasonable certainty.'" *Id.* at 427 (quoting *M&R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 348 (1958)). In *M&R Contractors*, the Court identified a number of changes to the common law resulting from this modification:

> (a) if the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference; (b) where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the

> resulting uncertainty; (c) mere difficulty in ascertaining the amount of damage is not fatal; (d) mathematical precision in fixing the exact amount is not required; (e) it is sufficient if the best evidence of the damage which is available is produced; and (f) the plaintiff is entitled to recover the value of his contract as measured by the value of his profits.

215 Md. at 349. Thus, damages may be based on "liberal inferences" drawn from opinion evidence and on proof of "estimated costs." *Zachair*, 135 Md. App. at 427 (quoting *M&R Contractors*, 215 Md. at 348). However, reasonable certainty still requires that the evidence "lay[s] some foundation enabling the fact finder to make a fair and reasonable estimate of the amount of the damage." *Thomas v. Capital Med. Mgmt. Assocs., LLC*, 189 Md. App. 439, 465 (2009) (quoting *Della Ratta, Inc. v. Am. Better Cmty. Developers, Inc.*, 38 Md. App. 119, 143 (1977)). Where a "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." *Brock Bridge*, 114 Md. App. at 158 (quoting 5 Corbin on Contracts § 1021 at 133-34 (1964)) (emphasis removed).

Where expert testimony is involved, the expert's opinion must be supported by a "reliable methodology" that "'provide[s] a sound reasoning process for inducing its conclusion from the factual data'" and presents "'an adequate theory or rational explanation of how the factual data led to the expert's conclusion.'" *Exxon Mobil Corp. v. Ford*, 433 Md. 426, 481 (2013) (quoting *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 202-03 (2004)).

We will first turn to Telos's contention at trial, then consider Telos's revised contention on appeal with respect to projecting forward to years 2008 through 2012 using Reznick's fees as a baseline, and conclude with its contention that, at a minimum, it should

receive an award of excess audit fees damages based on the difference between the amounts Reznick and BDO actually billed for 2007.[10]

B. The Trial Court Did Not Abuse Its Discretion in Rejecting Mr. McGrath's Proposed Methodology for Determining Excess Audit Fees Damages.

We find no abuse of discretion in the circuit court's rejection of Mr. McGrath's methodology of using Audit Analytics fees-over-revenue data to project forward the amount Telos would have paid Goodman for the 2007 through 2012 audit years. "Broad discretion is vested in the trial court with regard to expert testimony, and that discretion will not be disturbed on appeal absent an error of law or fact, a serious mistake, or clear abuse of discretion." *Johnson & Higgins of Pennsylvania, Inc. v. Hale Shipping Corp.*, 121 Md. App. 426, 444 (1998) (quoting *Braxton v. Faber*, 91 Md. App. 391, 396 (1992)); *see also Omayaka v. Omayaka*, 417 Md. 643, 659 (2011) (The court is "entitled to accept—or reject—*all*, *part*, or *none* of" a witness's testimony). Even setting aside the obvious problem of choosing to begin with Goodman's fees, rather than Reznick's fees, the methodology selected to project those fees was problematic. As amply demonstrated in the circuit court's opinion, that methodology was counterintuitive, Mr. McGrath never explained satisfactorily why it should be expected to be an accurate predictor of Telos's audit fees, and the methodology was demonstrably poor at predicting actual changes in billings for Telos's audit fees based on available data. It appeared to the trial court that the methodology was chosen primarily to maximize the amount of Telos's claim without

[10] As discussed above, the court awarded Telos damages to cover the entire amount it paid Reznick with respect to its incomplete 2007 audit.

sufficient attention to its reasonableness or reliability. On this record, we find no abuse of discretion in that determination.

In short, the trial court acted within its broad discretion in determining that Mr. McGrath's analysis did not "reflect the use of reliable principles and methodology in support of [his] conclusions," *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003), nor did it "rise[] above speculation or conjecture," *John D. Copanos & Sons, Inc. v. McDade Rigging & Steel Erection Co., Inc.*, 43 Md. App. 204, 208 (1979).

C. The Trial Court Did Not Abuse Its Discretion in Failing to Identify on Its Own Any of the Alternative Methodologies Telos Now Proposes for Calculating Excess Audit Fees Damages.

Telos now contends that the circuit court abused its discretion not only in rejecting Mr. McGrath's methodology, but also in not salvaging Telos's damages claim by taking the initiative to cull out of the record other available information that could have been used to project forward Telos's fees.[11] As an initial matter, we reject the notion that the trial court was obligated, upon rejecting the only methodology to determine damages that Telos presented, to fish through the record to find some other way of proving what Telos had not. Telos, not the court, bore the burden of proving its damages. *See Thomas*, 189 Md. App. at 464; *Della Ratta, Inc.*, 38 Md. App. at 138-39.

[11] This argument assumes that the court could have settled with reasonable certainty on an appropriate starting number from which to project forward. Telos contends that starting number should have been the 2007 fees actually billed by Reznick. That issue is addressed below in Part D.

Moreover, because Telos never advocated using any of the alternative methods of calculating a baseline it now advocates before the trial court, the record is lacking any explanation of why they would have been good or appropriate proxies for discerning what Reznick's fees would have been going forward. Although the record contained Audit Analytics data regarding percentage yearly changes in gross audit fees for SEC filers for those years,[12] Telos does not identify any testimony that such changes would have provided an accurate way of estimating the trajectory of Reznick's own fees. Similarly, although the record contained information about what BDO charged in those years,[13] Telos fails to identify any testimony that the variation in BDO's fees would have mimicked or approximated the variation in Reznick's fees. We do not know, for example, whether the scope of work BDO performed in those years varied in any substantial measure from the scope of work Reznick would have performed. Either or both of those data sets (gross audit fees paid by SEC filers or BDO billings) may have been perfectly good proxies for how Reznick's fees may have changed (or not) over the relevant time period, but no one presented evidence that they were. In short, the circuit court acted within its discretion in concluding that the evidence and arguments presented at trial did not provide a basis on

[12] These data were in the record only as part of the raw data from which Mr. McGrath drew his calculations. Telos never called attention to these data or argued that they should be used independently.

[13] The record does not contain data regarding the percentage yearly change in BDO's fees. Telos argues that the court could have made that calculation if it concluded that this information was the best proxy for projecting Reznick fees forward.

which to calculate any non-speculative measure of damages incurred for audit years 2008 through 2012.

In support of its contention that the trial court erred in not utilizing any of these alternative methodologies for assessing its excess audit fees damages, Telos relies on cases that it cites for the proposition that "Maryland courts routinely engage in estimation, inference, and approximation in determining damages to injured parties." Although undoubtedly true as a general proposition, the cases on which Telos relies involved a court estimating, inferring, or approximating based on evidence presented and arguments made in those cases. In *John B. Robeson Assocs., Inc. v. Gardens of Faith, Inc.*, 226 Md. 215 (1961), the Court of Appeals reversed a trial court's judgment that the defendant had not breached a sales agency contract. *Id.* at 227-28. In addressing whether the record contained a "sufficient basis for estimating [the amount of damages] in money with reasonable certainty," the Court concluded that it did based on "the figures agreed upon by the parties" with respect to sales figures before and after the breach. *Id.* at 225-27. The Court thus directed the trial court to calculate damages by applying the commission owed under the contract to the average of sales made over a period of three years. *Id.* at 227. In doing so, the Court stressed that this was not based on a "precise or general rule" applicable "in all cases," because "each case must be determined on its own facts." *Id.*

Similarly, in *Quality Discount Tires, Inc. v. Firestone Tire & Rubber Co.*, 282 Md. 7 (1978), the Court of Appeals held that damages could be awarded based on witness testimony estimating within a range of five or six percent the price the plaintiff would have paid for tires but for an anti-trust violation. *Id.* at 27-28. Estimates approved in other cases

on which Telos relies all similarly originated with witness testimony or other record evidence supporting the estimates. *See, e.g.*, *Thomas*, 189 Md. App. at 439 (accepting use of estimates based on pre-termination average collection rates testified to by a witness "well-acquainted with" appellant's business for purposes of calculating damages); *GAI Audio of New York, Inc. v. Columbia Broad. Sys., Inc.*, 27 Md. App. 172, 196-201 (1975) (affirming damages award derived from calculation using average cost figures rather than actual cost figures where estimates were provided by the plaintiff).

Telos also relies on other cases which it contends stand for the proposition that "Maryland appellate courts do not hesitate to reverse where the trial court fails to award damages because of purported uncertainty as to the proper amount of damages." In each of those cases, however, the trial court's error was in refusing to consider or give proper credit to a party's damages claim, not in declining to come up with its own method for calculating damages after properly rejecting the party's methodology. In *M&R Contractors*, for example, the issue was a home builder's claim for lost profits attributable to a canceled contract to build a home. 215 Md. at 343. The home builder calculated its anticipated lost profits by subtracting from the negotiated price for the completed home the total of the estimated costs of the subcontractors the builder had planned to use in the construction. *Id.* at 343-44. Although the trial court had rejected this evidence as insufficient, the Court of Appeals found it "not so speculative as to be wholly non-compensatory." *Id.* at 345.

In *Macke Co. v. Pizza of Gaithersburg, Inc.*, the Court of Appeals determined that the trial court had erred in rejecting as speculative a vending company's damages claim

when the company had introduced evidence from which it had extrapolated two different estimates of lost profits. 259 Md. 479, 490-91 (1970). Although extrapolations from the two sets of evidence produced significantly different estimations, the Court held that they nonetheless provided evidence from which an award of lost profits might be ascertained with reasonable certainty.[14] *Id.* at 490-92. And in *Brock Bridge*, although the plaintiff had introduced evidence of costs it claimed it had incurred as a result of a breach of contract, the trial court rejected the evidence without evaluating its credibility on the record. 114 Md. App. at 158. We held that while the trial court might ultimately determine that the evidence was insufficient to prove damages with reasonable certainty, it could not do so without first evaluating its credibility on the record. *Id.*

None of these cases stands for the proposition that a trial court that has properly evaluated and rejected the only methodology for determining a particular category of damages that has been presented to it is required to comb through the record in an attempt to identify evidence that might support an alternative methodology or an alternative calculation. Nor do those cases support Telos's view that the trial court here erred in failing to award damages based on any of its alternative methodologies even in the absence of any testimony supporting them. We conclude that the trial court did not clearly err in declining to award excess audit fees damages for audit years 2008 through 2012.

[14] The Court of Appeals also suggested in *Macke* that the trial court could take additional evidence of damages on remand. 259 Md. at 491-92. We do not understand that suggestion to be indicative of a view that plaintiffs who fail to prove the amount of their damages at trial are generally entitled to a second chance. Instead, the Court apparently found the taking of evidence appropriate in that case in light of the trial court's concerns with the varying damages estimates produced by the two extrapolations before it.

D. For the 2007 Audit Year, the Trial Court Did Not Clearly Err in Concluding that Telos Proved the Fact, but Not the Amount, of Excess Audit Fees Damages with Reasonable Certainty.

Finally, Telos contends that, at a minimum, it was entitled to an award of excess audit fees damages attributable to the 2007 audit year. As to that year, says Telos, there was no need to resort to the Audit Analytics data or, indeed, to project forward at all, because the amount of Reznick's actual billings for that audit were in the record. To the extent some minor amount of additional work would have been required to complete the audit, the circuit court "easily could have made a reasonable estimate of the amount." Moreover, Telos notes, the circuit court found that Telos had "certainly" suffered excess audit fees damages for the 2007 audit year; the only question was the amount.

When Telos made this argument in its motion to alter or amend the judgment, the circuit court disagreed, finding that the record lacked evidence from which the court could have estimated with reasonable certainty the amount Reznick would have charged to complete the audit and, therefore, that it could not estimate with reasonable certainty the amount of Telos's damages for the 2007 audit year. We cannot say on this record that the court clearly erred in making that finding.

As Telos notes, the circuit court agreed with it that, "based on the evidence at trial," the amount Telos would have paid Reznick to complete the 2007 audit was "certainly" less than the amount it paid BDO for that audit. The court thus found, and Messrs. Hamot and Siegel do not contest here, that Telos sustained excess audit fees damages for the 2007 audit year. Evidence in the record supports that finding:

- Reznick billed $377,247 for its work on the 2007 audit.

- According to minutes of an April 2, 2008 meeting of Telos's audit committee, which was attended by four Reznick representatives, "all field work had been completed" for the audit and Reznick "was in complete agreement with the Telos financial management team relative to the representation of the financial performance of the company for FY 2007." There were no open accounting issues to resolve. Of the three then-outstanding issues, only one—concerns raised over the actions of Messrs. Hamot and Siegel—seemed to involve Reznick directly.[15] Minutes of a meeting of Telos's Board of Directors on the same date are to the same effect.

- Telos's Executive Vice President and Chief Financial Officer, Michele Nakazawa, testified that as of April 2008, they "were concluding the conduct of the audit . . . had gone through all of the work and the diligence that's typically involved in an audit and had proceeded to close out most all of the accounting issues with regard to the audit." A number of drafts of the 10-K had already been circulated and, she believed, the audit was "close to the finish line."

- Reznick's Kurtis Wolff testified that they were "days away" from filing the 10-K, that they were then at the stage of "basically reviewing the overall document," and that the audit was "principally complete."

- BDO, which both charged higher rates and had to dedicate additional personnel to this engagement because of the short turnaround time and the higher risk profile, ultimately charged $767,513.56 for the 2007 audit.

The trial court nonetheless declined to award damages because it concluded that it could not identify without "guesswork" and "speculation" "how much more Re[z]nick would've charged had it finished its work." In making its oral ruling, the court acknowledged "the testimony at trial that Re[z]nick was close to completion or almost completed," but stated that it could not infer from that testimony any way to "determine,

[15] The other two remaining issues, according to the meeting minutes, were final ratification of a credit agreement with Wells Fargo, which had to be accompanied by an opinion from outside counsel, and Goodman's certification of its 2005 and 2006 financial statements.

with any precision, how much more they would've billed." The court thus determined that that testimony did not provide "sufficient data to be able to conclude what the balance of [Reznick's] billings would've been." One factor the court considered in coming to that conclusion was evidence in the record that in a period of less than a month leading up to BDO's final bill for the 2007 audit, it apparently billed more than $167,000. The court thus concluded that Telos had not proven with reasonable certainty how much Reznick's final bill would have been.

Telos argues that the trial court clearly erred in not either (1) using the amount Reznick billed for the 2007 audit, even though incomplete, or (2) adding some "very modest amount of additional time by Reznick" to what had already been billed. The trial court did not clearly err in declining to take the first approach, as the evidence established that Reznick certainly would have billed more. What gives us greater pause is Telos's contention that the trial court should have found some other way to establish a baseline for that year based on the evidence that: (1) the audit was "principally complete"; (2) few tasks remained; and (3) there was a large gap between what Reznick had billed so far and what BDO ultimately billed. In our view, the circuit court *could* have inferred from that evidence that Reznick would have billed only a modest additional amount to complete the audit and, therefore, added some amount or percentage to the amount already billed to come to a reasonable baseline. The question, however, is whether the circuit court was *required* to draw that inference based on the record.

The problem with that inference from the perspective of the trial court, and Telos's problem on appeal, is that Telos failed to introduce even an estimate of what Reznick would

have charged to complete the audit.[16] Telos argues that it need not have done so because any lack of certainty as to what Reznick's final bill would have been is due to the tortious interference of Messrs. Hamot and Siegel, who should not be able to benefit from that uncertainty under the principle that "where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty." *M&R Contractors*, 215 Md. at 349. Here, however, the most direct cause of this particular uncertainty is that witnesses who could have resolved it did not. Reznick's Mr. Wolff testified, but he did not provide an estimate of how much more Reznick would have billed to complete the audit. Indeed, as the circuit court identified, Mr. Wolff's testimony that the audit was "principally complete" seems to have been offered not to prove Telos's damages, but instead to explain that Reznick had already reached a conclusion as to the proper accounting treatment for the Redeemable Stock and to demonstrate the degree to which the conduct of Messrs. Hamot and Siegel had interfered. Telos also presented testimony from one of its executives who was involved in the audit, Ms. Nakazawa, and from its accounting expert, Mr. McGrath, but neither provided such an estimate. Indeed, Mr. McGrath expressly disclaimed having reached any conclusions with respect to Reznick's billings.

To be sure, Mr. Wolff and Ms. Nakazawa testified, and contemporaneous meeting minutes seem to support, that the audit was "principally complete," "close to the finish

[16] As discussed above, the lack of any such estimate in the record distinguishes this case from the cases on which Telos relies for the proposition that Maryland courts may rely on estimates, approximations, and inferences in awarding damages. The trial court's disagreement with Telos was not based on a reticence to accept estimates or make inferences, but on an absence of a reliable evidentiary basis in this record for doing so.

line," and that most tasks had been completed. On a cold record that evidence seems compelling. But the trial court—whose consideration of this case both in its initial opinion and in its ruling on Telos's motion to alter or amend was both thoughtful and thorough—reached a different conclusion. The court concluded that Telos failed to offer any evidence from which it could, with reasonable certainty, estimate how much Reznick would have ultimately charged Telos for the 2007 audit. In doing so, the court acknowledged the testimony of Mr. Wolff and Ms. Nakazawa, but was not persuaded. The trial court's assessment of the weight to give that testimony is entitled to significant deference. And although the record is devoid of any evidence that would refute the current claim that Reznick would not have billed much more to complete its audit, that may be because the claim itself was never actually made, at least not expressly.

The trial court took note of Telos's failure to present direct evidence of how much more Reznick could be expected to bill in spite of having multiple opportunities to present that evidence, and found that failure significant. We do not think the court clearly erred in doing so. Indeed, where a "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." *Brock Bridge*, 114 Md. App. at 158 (quoting 5 Corbin on Contracts § 1021 at 133-34 (1964)) (emphasis removed). Is it true that Reznick would usually finalize a "principally complete" audit for a first-time client with less than, say, $20,000 in additional billings? Or are there frequently last-minute issues that might cause significant additional billings? Are the issues that led BDO to bill an additional $167,000 in the final weeks of its audit ones that had already been resolved by Reznick? What is a

reasonable estimate of the amount Reznick would have billed to complete the audit? We do not know.

Unlike cases in which a court was presented with evidence estimating costs that it disregarded, *see, e.g.*, *Quality Discount Tires*, 282 Md. at 27-28; *Robeson*, 226 Md. at 227-28, or failed to weigh adequately, *see, e.g.*, *M&R Contractors*, 215 Md. at 344-45; *Brock Bridge*, 114 Md. App. at 158, here the trial court considered and weighed the evidence it had. Here, no witness or document introduced into evidence identified an amount, or even a range of amounts, calculated with estimation or approximation, that it would have been reasonable to add to Reznick's existing billings for the purpose of calculating Telos's excess audit fees damages. As a result, Telos now argues that the trial court should have added either nothing or just chosen its own amount, perhaps based on its own gut instinct of how much more work would have been required. Without direct evidentiary support to guide its choice of an amount, we do not think the trial court was compelled to do so.

Telos also makes an equitable argument, claiming that where the trial court found that Telos "certainly" suffered some excess audit fees damages, not awarding damages is "[u]njust," and allows "[w]rongdoers to [p]rofit" from their misdeeds. However, although the law favors awarding damages where they have been suffered as a result of the tortious interference of another, *Rite Aid Corp. v. Lake Shore Inv'rs*, 298 Md. 611, 621-22 (1984) (adopting the measure of damages set forth in Restatement (Second) of Torts, § 774a (1984)), it still places on plaintiffs the burden of proving not only the fact, but also the amount, of their damages with reasonable certainty, *David Sloane, Inc. v. Stanley G. House & Assocs.*, 311 Md. 36, 40-41 (1987).

We think that the trial court is likely correct that the reason Telos failed to introduce into evidence even an estimate of what Reznick would have charged to complete the audit is because Telos went through the entire trial pursuing a different measure of damages. The amount of audit fees Telos would have paid to Reznick to complete the 2007 audit was entirely irrelevant to that damages theory, so it is not hard to see why Telos ignored it. Without that evidence, however, we cannot say that the trial court clearly erred in concluding that Telos failed to carry its burden of proof to show with reasonable certainty the amount of excess audit fees damages it incurred with respect to the 2007 audit.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.