Circuit Court for Montgomery County
Case No. 472329V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1707

September Term, 2022

HSU CONTRACTING, LLC

v.

HOLTON-ARMS SCHOOL, INC., ET AL.

Berger,
Beachley,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: September 28, 2023

*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).

HSU Contracting, LLC ("HSU") filed a complaint in the Circuit Court for Montgomery County against the Holton-Arms School, Inc. ("Holton") alleging breach of contract, conversion, and other related claims. Holton filed a counter-complaint, also alleging breach of contract. After a fifteen-day bench trial, the circuit court awarded $2,579,366 to Holton on its breach of contract claim and $9,550 to HSU on its conversion claim.

HSU noted this timely appeal and presents the following questions for our review, which we have slightly rephrased and renumbered to set forth the questions as we shall address them:

I. Did the circuit court err in permitting the testimony of Holton's experts, whose reports were disclosed after the close of discovery?

II. Did the testimony of expert Lawrence Smith satisfy the requirements of *Daubert v. Merrell Dow Pharm., Inc.*?

III. Did the circuit court err in awarding liquidated damages in addition to actual damages and despite the contract provision that barred liquidated damages once the project had reached "Substantial Completion"?

IV. Did the circuit court err in awarding Holton's damages based on estimates of costs despite a contractual provision limiting damages to costs incurred?

V. Did the circuit court err in failing to require Holton to mitigate its damages?

As to the third question, we agree that a portion of the damages must be remitted. We answer the remaining four questions in the negative. Accordingly, we shall modify the damages award and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2018, the parties entered into a contract for HSU to renovate one of Holton's classroom buildings (the "Lower School") and to upgrade Holton's HVAC system in all of its buildings. The contract required that HSU substantially complete the Lower School renovation by August 24, 2018, and substantially complete the HVAC work by January 18, 2019.[1] If substantial completion was not timely achieved, the contract provided for liquidated damages of $500 per day for the Lower School renovation, and a lump sum of $5,000 for the HVAC work.

Holton alleged that HSU did not substantially complete either the Lower School renovation or the HVAC work on time. Classes for the 2018/2019 school year began on September 4, 2018. Because the Lower School renovation was not completed by that time, Holton had to temporarily hold classes in "the library, the theater, a dance studio, and a couple of other classrooms and common spaces." On September 5, 2018, HSU notified Holton that it could begin holding classes in the Lower School. Holton hired movers to set up the classrooms for immediate use and began holding classes in the Lower School on September 6, 2018.

In September of 2018, Holton noticed warping and buckling in the newly installed bamboo flooring in the Lower School. Neither HSU nor its subcontractor, Capital City

[1] The substantial completion deadline for the HVAC work was originally August 25, 2018, but the parties later agreed to change the deadline to January 18, 2019.

Flooring, attempted to repair the bamboo flooring during the winter or spring break, when the Lower School was not being used.

On May 31, 2019, Holton sent HSU a letter notifying HSU that Holton was terminating the contract for cause. The letter noted several material breaches of the contract, including failure to achieve substantial completion, failure to submit certain schedules as required by the contract, and defects in the work performed.

HSU filed a complaint on September 11, 2019, against Holton and Capital Projects Management, a company hired by Holton to act as its project manager.[2] HSU alleged, *inter alia*, that Holton breached the contract by failing to pay HSU for work it had performed, and alleged that Holton converted certain materials and tools belonging to HSU by not allowing HSU to enter the school grounds to retrieve the items after terminating the contract. Holton filed a counter-complaint alleging breach of contract against HSU for failing to complete the project and providing defective work.

The circuit court originally set the discovery deadline for May 21, 2020. After several agreements between the parties to extend the scheduling order, the final discovery deadline was set for February 28, 2021. However, the parties continued to conduct discovery after this date, including the taking of several depositions.

In April 2020, Holton requested that HSU produce the Daily Reports that were generated by HSU while the construction project was ongoing. HSU failed to provide the

[2] The trial court entered judgment in favor of Capital Projects Management at the close of HSU's case-in-chief. HSU has not appealed that ruling.

Daily Reports, despite its employees' deposition testimony that the Daily Reports existed. After further requests for the Daily Reports were unsuccessful, Holton filed a motion to compel HSU to produce the Daily Reports, or to explain why they could not be produced. In its motion, Holton alleged that HSU's failure to produce the reports "made it impossible for Holton's experts to complete their work." As a result of the circuit court's March 22, 2021 order granting the motion to compel, HSU produced "several hundred pages of Daily Reports." Holton provided HSU with expert reports on May 5, 2021, slightly more than a month before trial was scheduled to begin on June 14, 2021.

On May 25, 2021, HSU filed a motion seeking to continue the trial. Trial was originally scheduled for five days, but it had become apparent to both parties that it would require at least ten days to try the case. In addition to representing that trial "will require ten (10) days, if not more," HSU also sought a continuance based on the late disclosure of Holton's expert reports. HSU stated: "Because of [Holton's] production of expert reports only weeks before the trial date, [HSU] has not had an opportunity to depose [Holton's] expert[s] regarding the substance of their reports, nor the opportunity to adequately review the report[s] and consult with [HSU's] expert." HSU further noted that "a postponement of the trial date in this matter will prevent further prejudice to [HSU] as a result of [Holton's] belated production of expert reports." The court granted the continuance, rescheduling the trial for ten days beginning December 6, 2021. After the continuance was granted, HSU never attempted to depose Holton's expert witnesses.

On October 13, 2021, Holton served deposition notices for two of HSU's witnesses. In an email exchange, HSU explained that it would not produce any witnesses for deposition, reasoning: "As the discovery deadline has long since passed and no party has moved for leave to reopen discovery, no further depositions are permitted." Holton filed an Emergency Motion to Compel HSU's Cooperation in Scheduling Depositions, which noted that Holton "also offered to produce their own experts for deposition." HSU filed an opposition to Holton's motion, in which it stated that Holton "had the option of requesting the scheduling of depositions at any time from late-May 2021 through the entire summer of 2021, or alternatively moving to reopen discovery during that period, but [Holton] elected not to do so." HSU additionally requested the court to "issue a protective order stating that no further discovery be had prior to the commencement of trial." On November 9, 2021, the court denied Holton's motion and granted HSU's motion, barring any further discovery.

After a second postponement, the trial began on February 28, 2022, and lasted fifteen days. HSU produced nine witnesses, including one expert witness and HSU's Director of Operations for this project, Steven Smith. Holton produced seven witnesses, including its two experts, the lead architect, and Holton's Director of Facilities. We shall recount relevant portions of the testimony of these witnesses as necessary to our analysis.

After closing arguments, the court requested that the parties file post-trial memoranda. On October 12, 2022, the court issued a written opinion, finding that HSU breached the contract, and awarding $2,579,366 in damages to Holton. The court also

found that Holton converted certain property belonging to HSU and awarded $9,550 to HSU. Holton has not appealed the court's conversion award.

On October 24, 2022, HSU filed a motion to alter or amend, presenting many of the same arguments that it raises on appeal. The court denied the motion.

We shall provide additional facts as necessary to resolve the issues raised on appeal.

DISCUSSION

The issues HSU raises in this appeal can be grouped into two categories: 1) those concerning Holton's expert witnesses; and 2) those concerning the trial court's calculation of damages. Because the court relied heavily on expert testimony for its damages calculation, we shall first consider HSU's arguments concerning the expert witnesses.

Issues Related To Expert Witnesses

HSU raises two challenges related to Holton's expert witnesses. First, HSU argues that the trial court erred by denying its motion to preclude the testimony of both experts due to Holton's late disclosure of the expert reports. Second, HSU argues that the court erred by admitting the testimony of Lawrence Smith,[3] Holton's damages expert, because his methodology did not meet the *Daubert*/*Rochkind* standard. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Rochkind v. Stevenson*, 471 Md. 1 (2020). We shall discuss each argument in turn.

[3] To avoid confusion between witnesses Lawrence Smith and Steven Smith, we shall refer to Lawrence Smith as "Expert Smith."

I. The Alleged Discovery Violation

Holton disclosed its two experts, Wayne Deflaminis and Expert Smith, on February 6, 2020, more than a year before the close of discovery on February 28, 2021. However, it did not provide HSU with copies of the experts' reports until May 5, 2021, after the discovery deadline. HSU argues that this late disclosure of the reports made it impossible for HSU to depose the experts, causing it prejudice that required preclusion of the experts' testimony.

Holton responds, first, that the reason for the late disclosure of the reports was HSU's own late disclosure of the Daily Reports needed by the experts to develop their opinions. Second, Holton asserts that HSU was not prejudiced by the late disclosure because the experts' reports were disclosed nearly ten months before trial began, and HSU never attempted to depose the experts in that time. We agree with Holton that the court did not abuse its discretion in admitting the expert testimony because HSU was not prejudiced by the late disclosure of the expert reports.

The trial was originally scheduled for five days, starting on June 14, 2021. On May 25, 2021, HSU moved to continue the June 14 trial. In its motion, HSU stated that "[b]ecause of [Holton's] production of expert reports only weeks before the trial date, [HSU] has not had an opportunity to depose [Holton's] expert[.]" HSU further asserted that the parties needed at least ten days for trial. The court granted the motion and set the trial for December 2021. After a second postponement, the case was tried over fifteen days in late-February and early-March 2022.

A fair reading of HSU's motion for continuance reveals that HSU sought a postponement, in part, because it intended to depose Holton's experts. Nevertheless, at no point did HSU attempt to depose Holton's expert witnesses. HSU argues that it was unable to depose the experts because the discovery deadline had passed. HSU's argument is disingenuous for several reasons. First, HSU deposed several other witnesses after the discovery deadline without any resistance from Holton. Thus, there is nothing in the record to suggest that Holton would have objected to HSU deposing their experts even in the absence of a formal extension of the discovery deadline. Second, to the extent that HSU believed the formal discovery deadline presented an impediment, HSU never requested the court to extend the discovery deadline. Third, in October 2021 Holton proposed deposition dates for several witnesses, but HSU refused to agree to the witness depositions, asserting that Holton "had the option of requesting the scheduling of depositions at any time from late-May 2021 through the entire summer of 2021," but elected not to do so. Indeed, HSU sought and was granted an order barring further discovery. Aside from the continuance, which was granted, the only cure HSU requested for Holton's discovery violation was preclusion of the expert testimony.

A trial court's decision on discovery sanctions is reviewed for abuse of discretion. In deciding whether to impose sanctions, the court should consider the *Taliaferro* factors: "(1) whether the disclosure violation was technical or substantial; (2) the timing of the ultimate disclosure; (3) the reason, if any, for the violation; (4) the degree of prejudice to the parties respectively offering and opposing the evidence; (5) whether any resulting

prejudice might be cured by a postponement; (6) and, if so, the overall desirability of a continuance." *Watson v. Timberlake*, 251 Md. App. 420, 434 (2021) (citing *Taliaferro v. State*, 295 Md. 376, 390–91 (1983)). Courts may also consider "any other relevant circumstances." *Thomas v. State*, 397 Md. 557, 571 (2007). "[I]n fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* "[T]he more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice[.]" *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 545 (2000).

Applying these factors to the present case, nearly every factor weighs heavily in Holton's favor. Although the disclosure was made only slightly more than a month before trial was originally scheduled to begin, the delay in disclosure was at least partially caused by HSU's refusal to provide the Daily Reports needed by Holton's experts. Any prejudice that may have existed when the reports were first produced was cured when the June 2021 trial was ultimately postponed to late February 2022, giving HSU ample time to conduct depositions. Indeed, in its motion to continue, HSU stated that "a postponement of the trial date in this matter will *prevent further prejudice* to [HSU] as a result of [Holton's] belated production of expert reports." (emphasis added). "Other relevant circumstances" include HSU's strong resistance to discovery after the trial was rescheduled, contrary to HSU's suggestion in its motion to continue that a continuance would afford HSU the opportunity to depose Holton's experts.

In two cases, *Giant Food Inc. v. Satterfield*, 90 Md. App. 660, 669–71 (1992), and *Thomas*, 397 Md. at 572–75, parties disclosed witnesses one week before trial and the opposing parties sought exclusion of those witnesses. In both cases, the opposing parties did not seek either to depose the witnesses or to continue the trial. This Court and the Supreme Court of Maryland held that the trial courts did not abuse their discretion by allowing the witnesses to testify. In *Thomas*, the Supreme Court of Maryland noted that opposing counsel had "an opportunity to interview the witness and to prepare for cross-examination. Significantly, petitioner requested only that the trial court exclude the evidence. He was not interested in a continuance nor an opportunity to talk to" the witness. *Thomas*, 397 Md. at 572. Instead, he sought only the "windfall" of excluding the witness. *Id.* at 573, 75. The same is true in the present case.

It is apparent that in the nearly ten months between the May 2021 disclosure of the expert reports and the start of trial, HSU never showed an interest in deposing Holton's experts. Although the discovery deadline had passed, it is not true, as HSU seems to claim, that the deadline made deposition of the experts impossible. HSU acknowledged that expert depositions could be taken when it requested a postponement of the trial based in part on its need to depose the experts. Indeed, HSU deposed other witnesses after the discovery deadline. HSU's recognition that Holton "had the option" to take depositions between "late-May 2021 through the entire summer for 2021" applied equally to HSU. HSU simply chose not to depose Holton's experts. Moreover, Holton provided no

resistance to any potential deposition, instead attempting to work with HSU to complete the outstanding depositions.

We reject HSU's argument that the court should have precluded Holton's experts where HSU was at least partially responsible for the delay and the record amply demonstrates that the experts could have been deposed had HSU made a reasonable effort to do so. Under these circumstances, the trial court did not abuse its discretion in allowing Holton's experts to testify.

II. Challenges To Expert Smith's Testimony

HSU makes three discrete arguments concerning Expert Smith's testimony: 1) "Experts Cannot Merely Parrot the Statements of Others"; 2) "Experts Cannot Ambush Parties with New Opinions at Trial"; and 3) "Experts Cannot Provide 'Expert' Testimony on Subjects They Know Nothing About." We shall address each argument in turn.

A. *"Parroting" opinions of others*

Expert Smith was accepted by the court as an expert in "construction, construction bidding, construction cost management and construction cost estimating." HSU did not challenge Expert Smith's qualifications or the court's acceptance of him as an expert in the designated fields. Although we shall discuss Expert Smith's opinions in more detail below, he stated that he substantially formed his opinion concerning the "base damages" resulting from HSU's breach of contract by relying on 1) the architect's assessment of the scope of work necessary to complete the project, and 2) competitive bids Holton received from two contractors to complete the project in accordance with the architect's "scope of work"

assessment. Expert Smith confirmed that the documents he relied on were "definitely" the type of data that an expert in his field would rely on to form an opinion as to construction costs.

HSU claims that Expert Smith's testimony should have been excluded because he merely "parroted" statements of others. On the fifth day of trial HSU argued for the first time that Expert Smith's opinion should be excluded because it did not satisfy the *Daubert*/*Rochkind* standard for the admissibility of expert testimony. Specifically, HSU argued that Expert Smith's opinion was "not reasonably limited to the remaining scope of work on the project," and "merely adopted the calculations and bids of the third-parties without any meaningful analysis." HSU next raised this issue on the thirteenth day of trial, shortly before Expert Smith's testimony began. HSU did not move to exclude Expert Smith's testimony at that time, but expressed its belief that "all we're basically having this expert do is parrot whatever it is that was contained" in bids Holton received to complete the work. HSU raised the issue again on the last day of trial, just before closing arguments. The entirety of HSU's argument at that time was that "the predicate for the opinion [was] based on work that was done apparently by somebody else."

On appeal, HSU reiterates that Expert Smith improperly "parroted" the opinions of others by unquestioningly relying on the architect's assessment of the work that needed to be done to complete the project and the two responsive competitive bids. In HSU's view, the trial court improperly admitted Expert Smith's testimony because his testimony did not satisfy the *Daubert*/*Rochkind* standard for admissibility.

In *Rochkind*, the Supreme Court of Maryland adopted the *Daubert* analysis for determining admissibility of expert testimony, and added several factors from other cases. 471 Md. 1, 35–36 (2020). The factors for determining reliability of an expert witness's methodology are:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether a theory or technique has been subjected to peer review and publication;
>
> (3) whether a particular scientific technique has a known or potential rate of error;
>
> (4) the existence and maintenance of standards and controls; . . .
>
> (5) whether a theory or technique is generally accepted[;]
>
> [. . .]
>
> (6) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
>
> (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
>
> (8) whether the expert has adequately accounted for obvious alternative explanations;
>
> (9) whether the expert is being as careful as he [or she] would be in his [or her] regular professional work outside his [or her] paid litigation consulting; and
>
> (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience & Spine Institute, LLC, __ Md. __, No. 30, Sept. Term 2022 slip op. at 27–28 (filed August

30, 2023) [hereinafter *Parkway Neuroscience*] (alterations in original) (quoting *State v. Matthews*, 479 Md. 278, 310–11 (2022)). "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute ground for reversal." *Rochkind*, 471 Md. at 10 (alteration in original) (quoting *Roy v. Dackman*, 445 Md. 23, 38–39 (2015)).

In denying HSU's request to preclude Expert Smith's testimony, the court noted that "we didn't hear anything about" many of the *Daubert*/*Rochkind* factors, and that if the motion had been raised prior to trial, there would have been a full hearing on the issue.[4] As to the factors concerning testing of the methodology, peer review, and rate of error, the court noted that "neither side really question[ed] that witness about these matters." Instead, the only factor that HSU focused on was "whether there's an unjustifiable extrapolation," also known as an "analytical gap." The court concluded:

> In this case, we do have [Expert] Smith, who told us exactly what he did. He told us what he thought was reliable. He told us about the two bids that he reviewed, that two competitive bids, in his view, were a better standard of market value for costs than him just going out and doing it.
>
> Now [HSU], as they are able to and can, can attack some of the data that he received. In fact, that is a very viable challenge to an expert's opinion is to claim the data that you're relying on is faulty; but that does not mean that the analysis is the gap there; that means that you might have been operating from a bad premise initially.

[4] Although we have not found any decisional law that mandates a pre-trial *Daubert* hearing, we agree with the trial court's observation that raising a *Daubert* issue "for the first time during trial" is "generally not . . . the best practice." That HSU first raised *Daubert*/*Rochkind* on the fifth day of trial and substantively argued only one of the ten relevant factors evinces its feeble (and ultimately unpersuasive) attempt to preclude Expert Smith's testimony.

> So, in this particular case, that goes more to the weight than whether it goes to the admissibility of the expert's opinion. So, for that reason, I am going to deny the motion of counsel to exclude the testimony of [Expert] Smith.

We begin our analysis with *State v. Matthews*, 479 Md. 278 (2022), our Supreme Court's first post-*Rochkind* decision applying the new standard. In *Matthews*, the State requested the FBI's assistance to determine the height of a suspect captured in a video carrying a shotgun. *Id.* at 288. An FBI scientist, using "reverse projection photogrammetry," determined that the suspect in the video was approximately 5'8" tall, plus or minus two-thirds of an inch. *Id.* That opinion was significant because Matthews was approximately 5'9" tall. *Id.* at 300. However, the forensic scientist's report noted that several variables could cause "the degree of uncertainty in this measurement" to be "significantly greater." *Id.* at 288–89. At a pre-trial hearing, the FBI scientist "acknowledged that she could not quantify the overall margin of error based on the variables that were not calculable." *Id.* at 295. The trial court admitted the scientist's testimony, and the jury convicted Matthews of murder. *Id.* at 297, 303–04.

This Court reversed Matthews's conviction, concluding that there was an "analytical gap" between the underlying data and the expert scientist's conclusion. *Id.* at 304. On *certiorari*, the Supreme Court reinstated Matthews's conviction, holding that the expert's methodology was reliable and that no analytical gap existed in the expert's opinion. *Id*. at 313. The Court concluded: "The unknown degree of uncertainty concerning the accuracy of [the FBI scientist's] height estimate went to the weight the jury should give to the expert testimony, not to its admissibility." *Id.* The Court held that the trial court acted within its

discretion in determining that the expert testimony would be helpful to the trier of fact under Rule 5-702. The Court reasoned:

> First, [the FBI scientist] explained in detail how she conducted her analysis, which allowed the trial court to assess the rigor and care with which [she] approached her work. . . .
>
> Second, [the FBI scientist] explained . . . why, despite the unknown degree of uncertainty attributable to certain variables, she nevertheless was comfortable with her height estimate of 5'8" plus or minus two-thirds of an inch. . . .
>
> Third, given [the FBI scientist's] known height of between 5'9" and a half and 5'10", and the fact that she ensured that she stood in the same spot and position as the subject in the questioned image, [the FBI scientist] was able to opine that the subject appeared to be slightly shorter than [the FBI scientist] herself.

Id. at 319–320. These factors allowed the trial court to reasonably conclude that the expert's opinion would assist the jury despite the expert's acknowledged uncertainty. *Id.* at 320.

The Supreme Court reaffirmed these principles recently in *Parkway Neuroscience*, __ Md. __, No. 30, Sept. Term 2022. That case involved an expert accountant's opinion as to a medical practice's lost profits. In light of the trial court's specific, articulated concerns about the expert's "speculative, insufficiently substantiated judgment calls that were central" to the expert's methodology, the Court held that "it was within the trial court's discretion to admit or exclude" the expert's testimony.[5] *Id.*, slip op. at 42, 48. The

[5] The Court did send the case back to the circuit court for a limited remand involving a matter not relevant to the instant case.

Court made clear that the admissibility of expert testimony in the vast majority of cases will be left to the discretion of the trial court, stating that "[d]etermining whether a dispute concerning expert testimony implicates the soundness of data or soundness of methodology is precisely the type of matter that calls for the exercise of a trial court's discretion." *Id.*, slip op. at 42.

Applying these principles to the case at bar, we conclude that the trial court here likewise did not abuse its discretion in admitting Expert Smith's testimony. Although Expert Smith's report was not entered into evidence, his testimony and an accompanying PowerPoint presentation indicated the methodology Expert Smith used to develop his opinion. Expert Smith testified that he reviewed all of the relevant contract documents and change orders, visited the site, and viewed photographs of the work. In addition, he reviewed two responsive bids Holton received in 2020 to complete the work, and a report from the architect as to the scope of the remaining work. As previously noted, he testified that these documents were "definitely" the type of data relied on by experts in his field to form an opinion.

Expert Smith testified that his calculations began with the 2020 competitive bids to complete the work. He focused almost exclusively on the lower of the two bids. He then "did a reconciliation" of the bid by comparing it to the higher bid and to the remaining scope of the work. He determined the scope of the remaining work by reviewing reports from the architect and Holton's Director of Facilities, as well as doing his own analysis. This reconciliation was done "for the comparison purpose of coming up with what [he]

thought would be the best reasonable cost for the owner that would be a true reflection of the market cost at the time the proposal was tendered." Because his report was done a year after the bid was submitted, he adjusted the bid upward by 5% to account for inflation. He concluded that the fair market value of the portion of the work HSU failed to complete that was covered by the 2020 bid was $3,121,446.

Next, Expert Smith added the cost to complete the smaller tasks that were not included in the 2020 bids. These costs were based on quotes Holton received for the work. He then increased the cost by 5% to account for inflation. He also added to his damages calculation liquidated damages and money that Holton had already expended for services HSU should have rendered under the contract. The total cost to correct and complete the work, by Expert Smith's calculation, was $4,103,509. He then subtracted from these "gross damages" the amount HSU was owed for work it had completed, $1,524,142, to reach a "net damages" conclusion of $2,579,366.

In its cross-examination of Expert Smith, HSU tried to elicit testimony that Expert Smith's opinion merely amounted to him accepting the costs reflected in the 2020 bid and adding 5% for inflation, but his testimony belies that assertion. Expert Smith testified:

> I took the two proposals, looked at the scope that they were quoted on, that they gave a guaranteed quote for, looked at the adjustments that needed to be made in order for them to conform to my interpretation of what remained to be done to correct and complete the work that was left by HSU, and I selected the low number of the two responsive bidders that have essentially at that time committed to entering into a contract to perform that work.

HSU's counsel questioned Expert Smith about why he did not calculate damages by assigning his own estimate of the fair market value of completing each item of remaining

work. Expert Smith responded that HSU's suggested method could be valid, but countered, "I don't consider that to be the best way." Concerning his use of the lower of the two 2020 bids, Expert Smith testified, "[W]hen two contractors, two reputable contractors tender a proposal . . . and guarantee to stand behind that proposal to enter into a contract to perform the work, I consider that to be a true and clear indication of what the present market value is for that scope of work." He opined that using the 2020 bids, with adjustments, would be "the most accurate way of determining a fair market value to estimate the damages." He explained,

> if I sit down and come up with the cost, unless I'm going to do the work, it really has no value to compare with someone who has given a proposal to do the work and will stand behind the proposal and do it. That is . . . how you determine fair market value.

In *Rochkind*, the Supreme Court of Maryland noted that "[t]rained experts commonly extrapolate from existing data." 471 Md. at 36 (alteration in original) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Moreover, the law is clear that experts "may give an opinion based on facts contained in reports, studies or statements from third parties if the underlying material is shown to be of a type reasonably relied upon by experts in the field." *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 121 Md. App. 100, 120 (1998) (quoting *U.S. Gypsum v. Baltimore*, 336 Md. 145, 176 (1994)), *aff'd,* 354 Md. 264 (1999). Here, Expert Smith prepared his own report and described the methodology he used to determine the fair market value of the remaining work. In admitting the testimony, the circuit court noted that Expert Smith "told us exactly what he did" and "what he thought was reliable." The court recognized that there was an alternative

methodology, but credited Expert Smith's testimony that using "two competitive bids, in [Expert Smith's] view, were a better standard of market value for costs than him just going out and doing it." The trial court obviously found Expert Smith's opinion persuasive and helpful in its role as the trier of fact, and we discern no abuse of discretion in admitting the testimony.

B. *"Ambushing" HSU with new opinion*

HSU next argues that Expert Smith improperly "ambushed" HSU with a new opinion by adding $141,688 to his damages calculation. Expert Smith testified that he altered his calculations during the course of the trial by adding a $141,688 expense that he had mistakenly omitted from his report. Because HSU never objected to the admission of this evidence, it has waived this argument. *See Patriot Constr., LLC v. VK Elec. Servs., LLC*, 257 Md. App. 245, 268 (2023) ("The failure to object as soon as the . . . evidence was admitted, and on each and every occasion at which the evidence was elicited, constitutes a waiver of the grounds for objection." (alteration in original) (quoting *Berry v. State*, 155 Md. App. 144, 172 (2004))).

C. *Providing expert testimony on unfamiliar subject*

Third, HSU argues that Expert Smith improperly provided expert testimony on a subject with which he was unfamiliar. Specifically, HSU argues that Expert Smith was unable to explain a $37,420 line item in his damages calculation for "Engenium expenses for HSU Failures." During cross examination, HSU asked Expert Smith "what components went into" that expense, and Expert Smith responded that he could not provide further

information about that expense "without looking back further at backup documentation." We do not interpret Expert Smith's response as meaning that he was "unfamiliar" with that component of damages. In any event, we note that HSU did not pursue this issue further during this lengthy trial. *See Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 603 (2022) ("[A] passing reference to an issue, without making clear the substance of the claim, is insufficient to preserve an issue for appeal, particularly in a case with a voluminous record.").

Issues Related To Damages

III. Liquidated Damages

HSU makes two separate arguments concerning the liquidated damages award. First, HSU argues that the court "failed to apply the contractual limitation on liquidated damages, which bars liquidated damages after the project reaches 'Substantial Completion.'" Second, HSU argues that "the court impermissibly awarded Holton redundant liquidated and actual damages" for the same loss. We shall address each argument in turn.

A.

The contract provided for liquidated damages of "Five Hundred Dollars ($500.00) for each calendar day that expires after the time specified for Substantial Completion until the Work is substantially complete for the Lower School Renovation Project." The "time specified for Substantial Completion" of the Lower School project was August 24, 2018. The court found that HSU never substantially completed the work, and calculated

liquidated damages from August 24, 2018, to May 31, 2019, the date Holton terminated the contract.[6] This 280-day delay resulted in a liquidated damages award of $140,000.

HSU argues that it achieved substantial completion of the Lower School project on September 6, 2018, thereby limiting a liquidated damages award to 13 days, totaling $6,500.

There are several contract provisions relating to substantial completion:

- § 8.1.3: "The date of Substantial Completion is the date certified by the Architect in accordance with Section 9.8."

- § 9.8.1: "Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. As a condition precedent to Substantial Completion, the Owner shall receive all unconditional permits, approvals, licenses, and other documents from any governmental authority having jurisdiction over the Project. Under no circumstances shall the Work or any portion thereof be deemed to be Substantially Complete unless and until unconditional certificates of occupancy and completion governing that portion of the Project have been issued by all appropriate governmental authorities having jurisdiction over the Project thereby allowing the intended use of the portion of the Work."

- § 9.8.1.1: "The Work will not be considered suitable for Substantial Completion review until all Project systems included in area of the Work are operational as designed and scheduled, all designated or required governmental inspections and certifications, including certificates of occupancy, have been made and posted, designated instruction of the Owner's personnel and the operation of systems and equipment completed, and all final finishes within the Contract Documents are in place. In general, the only remaining Work shall be minor in nature, so that the Owner can occupy the portion of the building on that date for its intended use and the

[6] The contract also provided for a lump sum of $5,000 in liquidated damages for delayed substantial completion of the HVAC project. HSU does not challenge the court's decision to award this amount to Holton.

completion of the Work the Contractor would not materially affect, or hamper the normal business operations or intended use of Owner."

- § 9.8.4: "When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion . . . . Warranties required by the Contract Documents shall commence on the date of Substantial Completion . . . ."

HSU avers that the only section of the contract relevant to a determination of whether substantial completion has been achieved is § 9.8.1. According to HSU, substantial completion is achieved under the contract when Holton is able to "occupy or utilize the Work for its intended use," with a singular precondition that Holton receive the necessary documents for occupancy from governmental authorities. Because Holton received a certificate of occupancy and began holding classes in the Lower School on September 6, 2018, HSU argues that it achieved substantial completion of the project on that date. HSU argues that the court improperly focused on the lack of an architect's certificate of substantial completion and failed to consider "the contract's actual definition of Substantial Completion," *i.e.* the first sentence of § 9.8.1.

The trial court found that HSU had not achieved substantial completion, stating in its written opinion:

> The Contract stated that the work would not be considered suitable for Substantial Completion review until "all Project systems included in area of the Work are operational as designed and scheduled." [§ 9.8.1.1]. The lighting control system is still not operational as designed. Further, [Holton's] personnel were not instructed on operating the system and the final finishes specified in the Contract documents were not in place. There is a substantial amount of work on the Project still outstanding.

> [HSU] completely ignored the Substantial Completion provisions of the Contract. The evidence established [HSU's] failure to achieve Substantial Completion. [HSU] never submitted a request to the architect for certification of Substantial Completion. It is a reasonable inference therefrom that [HSU] was aware that it had not achieved Substantial Completion.

The court made detailed findings of fact concerning HSU's defective performance and concluded that HSU "made little or no effort to cure the defects, complete the work or respond to the demands in the Second Cure Notice" dated May 1, 2019.

In support of its argument that the architect's certificate does not determine the date of substantial completion, HSU cites an Illinois case applying New Jersey law, *In re Liquidation of Lumbermens Mutual Cas. Co.*, 127 N.E.3d 719 (Ill. App. Ct. 2018). *Lumbermens Mutual* involved three contracts between D&D Associates, Inc. and the North Plainfield Board of Education (the "Board") for the renovation of five schools.[7] *Id.* at 724. These projects were separated into three contracts: Contract 1A, Contract 1B, and Contract 1C. *Id.* The substantial completion issue only involved Contracts 1A and 1B. The architect issued a certificate of substantial completion for Contract 1A on December 8, 2004, and a certificate of substantial completion for Contract 1B on November 17, 2004. *Id.* at 730. The Board argued that these dates should be used to calculate liquidated damages for delayed completion of the project. *Id.* at 727. However, in April 2003, the

[7] Notably, the parties in *Lumbermens Mutual* used form contracts developed by the American Institute of Architects similar to the contracts in the present case. *See id.* at 730. In both cases, § 9.8.1 is substantively identical. *See id.* However, there is no indication in *Lumbermens Mutual* that the contracts at issue there contained a provision similar to § 9.8.1.1.

Board applied for a state grant related to Contract 1A from the New Jersey Economic Development Authority ("EDA"), and submitted architect's certifications as part of that application that stated:

> A. The essential requirements of the Contracts have been fully performed so that the purpose of the Contracts is accomplished.
>
> B. The Punchlist has been created.
>
> C. There are no important or material omissions or technical defects or deficiencies regarding the School Facilities Project.
>
> D. The temporary certificate of occupancy, continued use or completion has been issued.
>
> E. The School Facilities Project is ready for occupancy in accordance with its intended purpose.

Id. at 730–31. The Appellate Court of Illinois noted that "[t]he language of the EDA certification tracks the language of substantial completion in the contracts. Thus, the architect . . . at one point declared Contract 1A substantially complete well before the dates" in the 2004 certificates of substantial completion. *Id.* at 731. The court further held that "the architect's arbitrary conduct as to Contract 1A undermines the integrity of the architect's date of substantial completion for Contract 1B." *Id.* The Appellate Court of Illinois therefore agreed with the trial court's finding that the 2004 certificates of substantial completion were not a reliable measure of the date of substantial completion. *Id.* The trial court referred to the certificates of occupancy issued in September 2002 to determine the substantial completion date as defined in the contract, which the Appellate Court of Illinois noted "can be an appropriate benchmark for substantial completion." *Id.* "Because the Board could use the buildings for teaching children, it was not an abuse of

discretion for the court to find that the buildings were substantially complete in September 2002." *Id.* The Board argued that use of the buildings in September 2002 "should be classified as 'partial occupancy,' which per the General Conditions 'may commence whether or not the portion [is] substantially complete.'" *Id.* The Appellate Court of Illinois rejected this argument:

> [T]he circuit court's written order indicates that the court considered the evidence of allegedly incomplete work that the Board points to on appeal. We see no error in the court's thorough analysis and its finding that there was no delay. The circuit court's conclusion was not unreasonable, and so the court did not abuse its discretion in denying liquidated damages for contracts 1A and 1B.

Id. at 731–32.

HSU's reliance on *Lumbermens Mutual* is unavailing. The trial court in *Lumbermens Mutual*, faced with a situation where there was no reliable architect's certificate to determine the date of substantial completion, instead looked to other relevant evidence to determine substantial completion. The Appellate Court of Illinois held that the trial court did not abuse its discretion in doing so and affirmed the trial court's "thorough analysis."

We likewise see no clear error in the trial court's detailed findings of fact in this case. Contrary to the argument HSU advances, the court did not focus solely on the lack of a certificate of substantial completion from the architect. The court noted that HSU "never submitted a request to the architect for a certificate of Substantial Completion," but also considered other contract language to conclude that HSU never achieved substantial completion. The court properly applied the restriction in § 9.8.1.1, which provides that

"The Work *will not be considered suitable* for Substantial Completion review until all Project systems included in area of the Work are operational as designed and scheduled, . . . designated instruction of the Owner's personnel and the operation of systems and equipment completed, and all final finishes within the Contract Documents are in place." (Emphasis added). Relevant to this provision, the court found that HSU did not ensure that the lighting control system was operational, did not instruct Holton's personnel on how to operate the system, and did not complete final finishes. The court also found that HSU "made little or no effort to cure the defects" or "complete the work," and "completely ignored the Substantial Completion provisions of the Contract." HSU does not challenge these findings of fact, and our independent review of the record confirms that the court's findings were not clearly erroneous. Thus, pursuant to § 9.8.1.1, HSU did not attain "substantial completion" of the Lower School, regardless of Holton's use of the building.[8]

We hold that the trial court did not err in its determination that HSU never achieved substantial completion. Accordingly, except for the $23,812.15 duplication of damages

[8] HSU attempts to bolster its position by noting that § 9.8.4 provides that "[w]arranties required by the Contract Documents shall commence on the date of Substantial Completion." HSU points to several letters from subcontractors to Holton representing that warranties on their work began on September 6, 2018. Although HSU attached these letters to its motion to alter or amend, none of the letters were entered into evidence at trial. The only evidence produced at trial concerning when the warranties began was testimony from Steven Smith that the warranty from Capital City Flooring began on September 6, 2018. The circuit court found that Steven Smith "was not a credible witness." Even if further evidence about the warranties had been admitted at trial, the existence of warranties beginning on September 6, 2018, does not render meaningless the requirements of § 9.8.1.1.

that we discuss in the next section, we conclude that the court did not err in assessing liquidated damages from August 24, 2018, to May 31, 2019.

B.

The liquidated damages clause of the contract provides: "Contractor and Owner recognize that time is of the essence and that Owner will suffer financial loss if the Work is not completed within the times specified for completion of the Work." The contract states that the liquidated damages are "for delay."

HSU argues that the court improperly awarded both liquidated damages for delay and also actual damages incurred because of delay. Specifically, HSU argues that the liquidated damages provision acted as an "impermissible penalty" because it overlapped with actual damages. HSU provides two examples of actual damages that the court improperly awarded because they are duplicative of liquidated damages for delayed performance: $63,687 listed in "Bulletin 26," and $168,473 in "escalation fees."

Generally speaking, "if a plaintiff receives liquidated damages, then a claim may not be made for actual damages." *Gonsalves v. Bingel*, 194 Md. App. 695, 714 (2010) (quoting *Ecology Servs., Inc. v. GranTurk Equip. Inc.*, 443 F. Supp. 2d 756, 773 (D. Md. 2006)). "Where the parties to a contract have included a reasonable sum that stipulates damages in the event of breach, that sum replaces any determination of actual loss." *Barrie Sch. v. Patch*, 401 Md. 497, 513 (2007). Because Holton's school year begins in September, the parties ostensibly included the liquidated damages provision to cover all costs the school might incur due to a delay in reopening the school.

First, we reject HSU's argument as to the escalation costs because these are not expenses related to Holton's inability to use the school as a result of HSU's failure to accomplish substantial completion on time. Rather, the escalation costs were adjustments made by Expert Smith to account for inflation in determining the fair market cost of the work necessary to complete the project as a result of HSU's breach.

This leaves us with HSU's argument concerning Bulletin 26, a document created by the architect that modified the contract by reducing the amount paid to HSU because of additional expenses incurred by Holton. The trial court included the entire amount reflected in Bulletin 26 in its damages calculation, in addition to awarding liquidated damages. Bulletin 26 lists $63,687.54 in expenses Holton incurred either because of HSU's delay in completing the project, or to prevent further delay. A large portion, $23,812.15, of Bulletin 26 is for "Moving Services," which is described:

> Moving services were to be provided by Owner and were arranged based on the contractor schedule for August 25, 28, and 29. Due to work not being completed additional moving time was required as work could not be completed in all areas. Owner contracted to have work done directly as base contract was with owner. i. Initial plan was for teachers to perform unpacking, but due to schedule teachers were teaching and could not perform unpacking concurrently, requiring additional assistance. . . .

Michael Joyce, the Director of Facilities at Holton, testified that the "Moving Services" charge came about "because we were late moving into the lower school and really didn't have a lot of time" to set up the classrooms. "[W]e expected to have time that the teachers could put things back where they wanted to . . . in their classrooms. And that didn't happen."

Julianna von Zumbusch, the principal architect for the project, testified about Bulletin 26: "So some of these had to do with costs that were not directly related to the repair of defective work, but due to schedule delays from the work. So the moving services would be one of those, where movers had to deploy for multiple days and the school wasn't able to get a refund due to short notice for their original scheduled move date."

The "Moving Services" described in Bulletin 26 are clearly expenses resulting directly from the delay. Ms. von Zumbusch's testimony conceded as much. The court's award should not have included the $23,812.15 for the moving services because that sum represents actual damages contemplated by the liquidated damages provision of the contract. We shall therefore reduce the court's award by that amount.

The remaining expenses listed in Bulletin 26 were not expenses that arose solely because of the delay. Rather, they primarily represent the cost for Holton to hire another company to expeditiously complete work that HSU was obligated to perform.[9] Additionally, prior to its motion to alter or amend, HSU did not argue before the trial court that the remaining expenses listed in Bulletin 26 were duplicative of the liquidated damages; HSU's only argument concerned duplication of the moving services expense.

[9] For example, the second-largest expense in Bulletin 26 is "Johnson Controls costs" totaling $11,626.38. This expense is described as: "HSU agreed for the Owner to have work performed directly due to the Electricians inability to perform work and in effort to maintain schedule and campus-wide fire alarm functioning." Unlike the moving services, an expense Holton would not have had if HSU had performed in a timely manner, the electrical work described as "Johnson Controls costs" is work that HSU was contractually obligated to perform and therefore had no relationship to the liquidated damages clause related to the delay in having the school ready for occupancy.

HSU accordingly waived any argument concerning the expenses listed in Bulletin 26 other than for moving services. *See Morton v. Schlotzhauer*, 449 Md. 217, 232 n.10 (2016) ("A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should have, been made earlier, and consequently was waived.").

While we otherwise affirm the circuit court's judgment, we shall modify the judgment to remove the $23,812.15 cost of moving services, thereby reducing the award from $2,579,366.00 to $2,555,553.85.

IV. Limitation of Damages

HSU next argues that the contract limited Holton's damages to costs Holton *actually incurred* to complete the work. HSU bases its argument on the following contractual provisions:

- §14.2.2, providing that, if there is cause to terminate the contract, Holton "may without prejudice to any other rights or remedies of the Owner . . . terminate employment of the Contractor and may, subject to any prior rights of the surety: . . . Finish the Work by whatever reasonable method the Owner may deem expedient. Upon written request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work."

- § 14.2.4, providing: "If such costs and damages incurred by the Owner exceed the unpaid balance, the Contractor shall pay the difference to the Owner. This obligation for payment shall survive termination of the Contract."

HSU first raised this "limitation of damages" argument in its Motion to Alter or Amend. "A circuit court does not abuse its discretion when it declines to entertain a legal argument made for the first time in a motion for reconsideration that could have, and should

have, been made earlier, and consequently was waived." *Morton*, 449 Md. at 232 n.10. This well-established principle forecloses HSU's limitation of damages argument on appeal.[10]

Even if this argument were preserved, we fail to see how §§ 14.2.2 and 14.2.4 operate to limit Holton's damages. Another section of the contract, § 13.4.1, provides that, "[e]xcept as expressly provided in the Contract Documents, duties and obligations imposed by the Contract Documents and rights and remedies available thereunder *shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.*" (Emphasis added). Furthermore, § 2.6 states, "[t]he rights stated in this Article and elsewhere in the Contract Documents are cumulative and not in limitation of any rights of the Owner (1) granted in the Contract Documents, (2) at law, or (3) in equity." We see nothing in §§ 14.2.2 and 14.2.4 that creates an express limitation on the remedies available to Holton. Indeed, consistent with §§ 2.6 and 13.4.1, § 14.2.2 gives Holton the right to terminate the contract and finish the work "without prejudice to any other rights or remedies." "[A] contract will not be construed as taking away a common-law remedy unless that result is imperatively required." *O'Brien & Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 408 (2016) (quoting *Mass. Indem. & Life Ins. Co. v. Dresser*, 269 Md. 364, 369–70 (1973)). The *O'Brien & Gere* Court further stated:

[10] HSU also briefly argues that the court improperly awarded consequential damages, despite a provision in the contract expressly waiving consequential damages. Because HSU never made this argument before the circuit court, it has not been preserved for our review.

"Reviewing our case law, we discern that the parties must at least use clear language to show their agreement to limit available remedies." *Id.* at 407. Here, the express contractual provisions create a remedy that is "in addition to" the remedies available by law for breach of contract.

Under the common law, a party prevailing on a breach of contract claim "may recover the amount of damages 'which will place the injured party in the monetary position he would have occupied if the contract had been properly performed.'" *Yaffe v. Scarlett Place Residential Condo., Inc.*, 205 Md. App. 429, 445 n. 5 (2012) (quoting *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 12 (1998)). In this case, damages would include not only the amount that Holton has already spent as a result of HSU's breach, but also any additional funds reasonably necessary to complete the work required by the contract. *See Andrulis v. Levin Constr. Corp.*, 331 Md. 354, 371 (1993) (In cases involving breach of a construction contract, the proper measure of damages is the "reasonable cost of reconstruction and completion in accordance with the contract[.]" (quoting A. Corbin, *Corbin on Contracts* § 1089, at 485–87 (1964))). In conclusion, we reject HSU's argument that Holton's contractual damages were limited to amounts Holton had "actually incurred."

V. Mitigation of Damages

Finally, HSU argues that Holton "failed to present any evidence of properly mitigated damages." Holton initially responds that this argument was not raised below and is therefore waived. However, HSU briefly raised its mitigation argument in the following two sentences in HSU's 45-page post-trial memorandum:

> One purpose of a liquidated damages provision is to obviate the need for the nonbreaching party to prove actual damages but was required [sic] to mitigate any damages resulting from the breach and minimize its losses prior to seeking any monetary relief in contract. Holton advanced no proof that it sought to mitigate its alleged damages, and because it failed to accept any of the proposals or perform any alleged remedial work since HSU's termination, it is limited at best to the liquidated damages provision.

(Citation omitted). Because HSU has minimally preserved this argument for our review, we shall address it.[11]

To the extent that the mitigation of damages doctrine applies in this case, we note that HSU had the burden of proof on this issue. "When it is determined that the [mitigation of damages] doctrine applies, the burden is necessarily on the defendant to prove that the plaintiff failed to use 'all reasonable efforts to minimize the loss he or she sustained.'" *Cave v. Elliott*, 190 Md. App. 65, 96 (2010) (quoting *Schlossberg v. Epstein*, 73 Md. App. 415, 422 (1988)). The burden is on the party alleging failure to mitigate "[b]ecause it is aimed primarily at benefitting" that party, and the damages were caused by that party's breach of contract. *Id.* (quoting *Schlossberg*, 73 Md. App. at 422). "Thus, it is clear that

[11] We note that the court did not explicitly discuss the mitigation issue in its written opinion. However, during closing arguments, the court questioned Holton's counsel about its obligation to mitigate. We can unequivocally state that mitigation was not at the forefront of HSU's defense—it never mentioned it at trial and raised the issue only in its post-trial memorandum. As mentioned above, HSU's entire mitigation argument consisted of two sentences in its 45-page memorandum. In light of (1) the minimal attention HSU gave to its mitigation argument, (2) the court's questioning during closing arguments concerning mitigation, and (3) the principle that judges are presumed "to know the law and apply it, even in the absence of a verbal indication of having considered it[,]" *Sinclair v. State*, 214 Md. App. 309, 325 (2013) (quoting *Wagner v. Wagner*, 109 Md. App. 1, 50 (1996)), we infer that the court was convinced that HSU fell far short of meeting its burden of proof on this issue.

the doctrine does not place any duty on a plaintiff or create an affirmative right in anyone." *Id.* (quoting *Schlossberg*, 73 Md. App. at 422). HSU's argument that "Holton failed to present any evidence" on this issue is therefore misplaced, as Holton had no burden to produce such evidence.

On appeal, HSU specifically argues that Holton failed to mitigate its damages by either (1) making use of the warranties of the subcontractors, or (2) completing the work earlier, before the cost of construction significantly increased due to the Covid-19 pandemic. We shall discuss each of these arguments in turn.

A. *Warranties*

HSU argues that "nearly all the allegedly defective work was under warranty and could have been repaired or replaced at no expense to Holton." By failing to use the warranties, HSU argues that Holton "artificially inflat[ed] the damage assessment." HSU first specifically discusses the warranty on the bamboo flooring, which it argues would have allowed Holton to have the flooring repaired at no cost. HSU then states: "The same is true of most of the remainder of Holton's alleged damages for 'cost to correct' work, all of which was covered by warranty[.]"

The only evidence produced at trial concerning subcontractor warranties was testimony from three witnesses about Capital City Flooring's one-year warranty on the bamboo flooring. Steven Smith, HSU's Director of Operations, who the circuit court found was not a credible witness, testified that the flooring warranty began on September 6, 2018. Ms. von Zumbusch testified that she could not recall any agreement that the warped

flooring would be covered by the warranty. Holton's Director of Facilities testified that the subcontractor had taken the position that the warping of the flooring was not a warranty issue and would not be covered by the warranty, although he admitted that Holton never made a warranty claim for the flooring. On this record, we have no hesitation in concluding that HSU failed to demonstrate that the flooring warranty would have fully (or even partially) covered the damaged bamboo floors.

There was no evidence produced at trial concerning the other warranties that HSU mentions in passing in its brief. The letters that HSU references were not admitted into evidence, but were attached as exhibits to HSU's motion to alter or amend. The trial court did not abuse its discretion by refusing to consider these letters. *See Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002) ("With respect to the denial of a Motion to Alter or Amend, . . . the discretion of the trial judge is more than broad; it is virtually without limit. What is, in effect, a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. The trial judge has boundless discretion not to indulge this all-too-natural desire to raise issues after the fact that could have been raised earlier but were not or to make objections after the fact that could have been earlier but were not.").

Furthermore, there was affirmative evidence that Holton attempted to mitigate its damages. The court found that Holton attempted to take an assignment of one of the subcontracts, a mechanism that should have been available under the contract, but that HSU's subcontractor agreement provided for assignment to Holton only upon termination

for convenience. The contract between Holton and HSU provides that, when the Owner terminates for cause, the Owner has the option to "[a]ccept assignment of subcontracts." However, HSU's subcontract agreement with Kent Island Mechanical—the only subcontractor discussed at trial with relation to assignment—provides: "The Constructor's [sic] contingent assignment of this Agreement to the Owner, as provided in the Prime Contract, is effective when the Owner has terminated the Prime Contract for its convenience." Three witnesses testified that Holton sought an assignment of the Kent Island Mechanical contract after termination of its contract with HSU. Steven Smith, HSU's Director of Operations for the Holton project, testified that HSU's subcontract agreement with Kent Island Mechanical did not match the assignment requirement in its prime contract with Holton. He further testified that Holton attempted to obtain an assignment of the Kent Island Mechanical subcontract. Kent Island Mechanical's president confirmed that Holton discussed the possibility of an assignment of the subcontract. Additionally, William Koch, a senior project manager for Kent Island Mechanical, testified that he received a letter from Holton attempting to accept assignment of the subcontract.

The evidence supports the trial court's finding that HSU's actions prevented Holton from exercising its right to assignment of the subcontracts, which may have allowed it to mitigate its damages. In short, the record is clear that HSU failed to satisfy its burden of proof on this issue.

B. *Completing the Work in 2019*

HSU argues that Holton should have mitigated its damages by having the remaining work completed before the Covid-19 pandemic caused construction prices to significantly increase.

Part of this argument involves issues related to HSU's "limitation of damages" argument, discussed above. HSU avers that "[u]nder Maryland law, 'contract damages are measured *at the time of breach*.'" (Quoting *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387, 405 (2012)). This statement is not accurate in this context, as the Supreme Court of Maryland made clear in the very case HSU cites:

> Tenants would have us apply this "time of breach" rule across the board, to every kind of damages claim. Yet as Corbin explains, there cannot be one rule for every kind of breach, because different kinds of damages require different kinds of calculations. *See* [11 Corbin on Contracts] § 55.11 [(Rev. ed. 2005)] ("There are many rules of damages for particular kinds of contracts, such as contracts for the sale of goods, construction contracts, employment contracts, etc." (footnotes omitted)); *see also Great Atlantic & Pacific Tea Co. v. Atchison, T. & S. F. R. Co.*, 333 F.2d 705, 708 (7th Cir. 1964) ("Since the market value rule is merely a method, it is not applied in cases where it is demonstrated that another rule will better compute actual damages.").

CR-RSC Tower I, LLC, 429 Md. at 410. HSU has not cited a case for the proposition that damages are measured at the time of breach for construction contracts. In *Andrulis v. Levin Constr. Corp.*, the Supreme Court of Maryland stated that the proper measure of damages for breach of a construction contract is the "reasonable cost of reconstruction and

completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste." 331 Md. 354, 371 (1993).[12]

Concerning HSU's argument that Holton should have hired a new contractor to complete the work in 2019 before prices substantially increased, there was testimony that Holton, being a non-profit, had limited funding. "The party who is in default may not mitigate his damages by showing that the other party could have reduced those damages by expending large amounts of money or incurring substantial obligations. Since such risks arose because of the breach, they are to be borne by the defaulting party." *Wartzman v. Hightower Prods., Ltd.*, 53 Md. App. 656, 667 (1983) (citation omitted). In light of HSU's estimate that the cost to complete the work in 2019 would have been over $800,000, it would be unreasonable to require Holton to immediately expend such a large amount of money to mitigate its damages, especially once it became clear that funds would be needed for litigation.

Additionally, HSU did not present evidence indicating that Holton could have predicted the steep rise in the cost of construction a year before the Covid-19 pandemic. In *Blumenthal Kahn Elec. Ltd. P'ship. v. Bethlehem Steel Corp.*, this Court stated:

> It is axiomatic that, before the doctrine of mitigation of damages or avoidable consequences will operate to impose a duty upon a plaintiff to minimize a loss that he has incurred by virtue of the defendant's breach of contract, the plaintiff must be aware that he has sustained a loss; to require a plaintiff to mitigate damages that he does not know he has suffered would be patently unreasonable.

[12] HSU has not made an economic waste argument.

120 Md. App. 630, 644 (1998). We see nothing in the record to support any argument that Holton could have reasonably predicted that deferring corrective work until the following summer would have resulted in a substantial increase in costs. Holton's delay in hiring another contractor to complete the work does not amount to a failure to mitigate.

CONCLUSION

For the reasons stated, we shall modify the judgment in favor of Holton by removing the cost of the moving services, thereby reducing the award to $2,555,553.85, and affirm the judgment as modified.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY MODIFIED IN ACCORDANCE WITH THIS OPINION AND AFFIRMED AS MODIFIED. CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY TO ENTER A REVISED JUDGMENT IN FAVOR OF APPELLEE IN THE AMOUNT OF $2,555,553.85. IN LIGHT OF THE RELATIVELY MINIMAL REDUCTION IN THE DAMAGES AWARD, COSTS ARE TO BE PAID BY APPELLANT.