UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

TITILAYO AKINYOYENU, *et al.*

v.

KESWICK HOMES, LLC, *et al.*

No. 1126, September Term, 2015

KESWICK HOMES, LLC

v.

TITILAYO AKINYOYENU, *et al.*

No. 770, September Term, 2016

Arthur,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: March 6, 2017

This case concerns a contract for the construction of a custom home that was expected to cost almost $1,200,000. After construction was complete, the builder presented the owners with a document in which the builder proposed to increase the contract price by about $477,000 as payment for additional site work performed by subcontractors. The owners refused to pay that amount, which prompted both parties to bring actions in the Circuit Court for Montgomery County. After a consolidated trial, a jury found that the owners were obligated to pay for those additional charges.

Throughout this case, the owners have contended that the builder's contract violates the Maryland Custom Home Protection Act. Among other things, that Act requires that every custom-home contract shall "[e]xpressly state that any and all changes that are to be made to the contract shall be recorded as 'change orders' that specify the change in the work ordered and the effect of the change on the price of the house." Md. Code (1974, 2015 Repl. Vol.), § 10-505(3) of the Real Property Article ("RP").

Although we conclude that the contract did not comply with RP § 10-505(3), that violation itself does not render the contract unenforceable absent proof that the owners were actually injured by the violation. *DeReggi Constr. Co. v. Mate*, 130 Md. App. 648, 665 (2000). The owners did not prove that, as a matter of law, a reasonable jury was required to find that they had sustained actual injury or loss as a result of the builder's noncompliance with the Act. Consequently, the owners were not entitled to a judgment in their favor on the builder's claims. Instead, the court was entitled to submit the builder's claims to the jury, which found against the owners.

The builder in this case has also cross-appealed from the denial of its claims under

a fee-shifting clause in the contract and under the mechanic's lien statute. We reverse those orders and remand for further proceedings at which the builder can attempt to show that it is entitled to those remedies.

FACTUAL AND PROCEDURAL BACKGROUND

A. 2011: The Contract for Custom-Home Construction

Mr. Titilayo Akinyoyenu (commonly known as "Tomi Akin") owns a one-acre lot in the Avenel neighborhood in Montgomery County. His wife, Mrs. Omosolape Akinyoyenu (commonly known as "Shola Akin"), became a co-owner of the property by a deed executed in November 2011.

On May 4, 2011, while he was the sole owner of the property, Mr. Akin entered into a contract with a custom-home builder, Keswick Homes, LLC ("Keswick"). The two parties executed a written agreement, titled the Contract for Custom Home Construction. Mr. John McDonough signed on behalf of Keswick, as president of the company.

Under the contract, Keswick agreed to build a residence on the property in accordance with certain contract documents, which included the "Plans and Specifications" for the architecture of the residence, the "Site Plan" showing the siting of the residence on the lot, and other exhibits and addendums. In exchange, Mr. Akin agreed to pay Keswick the sum of $1,500,000, plus additional amounts payable as a result of change orders.

Several contractual provisions explained the "change order" process. The contract provided: "Any changes to the Contract Documents after initial written approval of the

Plans and Specifications shall be in writing and signed by an Authorized Agent . . . of Contractor and Owner (a 'Change Order')." Both parties reserved the right to refuse changes except those authorized by approved change orders. The contract sum would increase "to include any additional sums due and owing under written authorized adjustments or Change Orders thereto signed by both parties."

Paragraph 10 of the contract, which governed "Changes in the Work," stated:

> (a) Change Orders: . . . [A]ny additions or modifications to the Work described in the Plans and Specifications after initial approval shall be subject to agreement by the parties and shall be accomplished only by written Change Orders signed by both Owner and Contractor. Each Change Order shall specify the changes in the Work being ordered and the effect of said changes on the Contract Sum . . . .

A provision that covered "Site Work" stated that hauling and filling operations were included in the contract unless otherwise stated in the Plans and Specifications or agreed to by the contractor as part of the Site Plan. The "Site Work" provision further stated that all other "such hauling and fill operations shall be agreed to by Change Order, pursuant to Paragraph 10."

In addition to signing the agreement, the parties initialed each item on an attached price sheet, which included an item for $99,590 in "Site Costs." The parties initialed a separate addendum for "Site Costs," which itemized the various charges for work such as "Dirt to Balance" and "Engineering and Soil Testing." The $99,590 in site costs represented $86,600 for labor and materials, plus a 15 percent management fee for Keswick.

The following language was included at the bottom of the addendum:

> Site costs to be part of contract change orders as an allowance. Keswick Homes to manage, coordinate, and process payments to contractors upon completion of their work during the phase of construction. Keswick to submit accounting of all paid invoices at final draw with allowance to be adjusted to final cost at final change order.

In summary, this "site-work addendum" envisioned that Keswick would "manage" and "coordinate" the site work, pay the contractors upon completion of their work, and submit the invoices for reimbursement by Mr. Akin as an "allowance" at the "final draw" as part of something called a "change order." The addendum seems to imply that, without prior approval from Mr. Akin, Keswick may select the contractors, agree to their charges and the scope of their work, pay their bills, and require reimbursement from Mr. Akin.

Shortly after the signing of the initial agreement, Mr. Akin had difficulty in financing the full contract price. In July 2011, the parties executed a change order in which they agreed to scale down the house and to reduce the contract price to $1,188,590. The first change order continued to list the "Site Costs" as $99,590.

B. Revisions to the Site Plan in 2011 and 2012

The original site concept called for the house to be located close to the rear property-line. As Keswick's engineers developed more detailed plans, they moved the proposed location of the house closer to the center of the lot.

Although Keswick submitted plans to the Montgomery County Planning Board in June 2011, Keswick was unable to obtain a building permit until 18 months later. During that time, Keswick made revisions to the site plan as a result of discussions with County officials and with the Akins. These revisions called for the location of the house to be

moved away from the rear property-line and closer to the center of the lot. The revisions also called for extensive retaining walls and storm water-management areas – features that had not been included on the initial site plan or itemized among the $99,590 in anticipated site costs on the site-cost addendum.

Initially, the relocation of the house resulted from the County's desire to conserve an expanse of trees at the rear of the Akin property. Mr. Akin resisted that requirement because it would limit the size of his backyard. Mr. Akin told Mr. McDonough of Keswick that he wanted to have a flat area behind the house large enough to accommodate a swimming pool and patio.

To satisfy the County's requirements, Keswick moved the proposed location of the house forward. As a result of the change in location, however, the area behind the house was now on a downhill slope. To satisfy Mr. Akin's desire for a large, flat backyard, Keswick planned to use off-site dirt to level the area and to support the dirt with extensive retaining walls.

Through a series of emails and in-person meetings, Mr. McDonough informed Mr. Akin about these changes to the site plans, but Mr. McDonough did not give the Akins an estimate of the cost of the additional work.

The Akins eventually reached agreements with County officials. In October 2012, Mr. and Mrs. Akin both signed a Forest Conservation Easement Agreement, which established a conservation area covering 0.237 acres along the rear property-line. In November 2012, Mr. Akin signed a Soil Erosion and Sediment Control Plan that had been prepared by Keswick's engineering consultant and approved by the Montgomery

County Department of Permitting Services. Both of those plans were based upon Keswick's revised plans for the house and backyard. The Forest Conservation Easement Agreement includes a plat that shows the proposed locations of the retaining walls; the Soil Erosion and Sediment Control Plan also shows the proposed locations of the retaining walls, as well as various storm water-management features.

C. The Approved Change Orders in 2013

In January 2013, Keswick obtained a building permit. Over the following year, Mr. Akin requested additions and upgrades to the residence through the change-order process. These change orders did not include any charges for the additional site work from the revised site plans.

In July 2013, Mr. Akin and Keswick executed a second change order that expanded the floor plan of the house and made other additions and upgrades to the structure. Change Order Number Two increased the contract price to $1,280,744.

In December 2013, the parties executed a third change order, which included additions such as a security system and sound system and upgrades for items such as the appliances, cabinets, countertops, and floors. Mrs. Akin, who was involved with selecting some of the upgrades, also signed the document.[1] Change Order Number Three increased the contract price to $1,428,989.

In early 2014, Keswick applied for permits and solicited bids from subcontractors for the remaining site work, including the extensive retaining walls and the storm water-

[1] The substantive provisions continued to define Mr. Akin as "Purchaser."

management system. Keswick did not inform the Akins about the bids it received for that additional work. Keswick and its subcontractors built about 400 feet of brick-faced retaining walls, ranging from three to 16 feet in height. Keswick paid its subcontractors for that additional work without asking Mr. Akin to sign a change order.

D. The Unsigned Final Change Order in 2014

On September 10, 2014, after the house and the related site work were substantially complete, Mr. McDonough met with the Akins to discuss the final payment. He presented the Akins with a proposed fourth change order, which stated: "Purchaser and Seller agree to change the Sales Price . . . from $1,428,989 to $1,908,072." The document listed a few more upgrades totaling $10,781, along with an item for $468,302 for "Site Costs per attached."

An attached spreadsheet listed final charges for site work alongside the original charges from the site-cost addendum. The spreadsheet included an increase of $41,706 for "Engineering and Soil Testing" and an increase of $42,318 for "Dirt to Balance." Most notably, the document included new items of $122,515 for the storm water-management system and $200,672 for the 400 feet of retaining walls that had been built during 2014.

The document listed the total site costs, after Keswick's 15 percent management fee, as $567,892. This amount represented an increase of $468,302 above the site costs from the original contract and from the first change order.

In addition to the spreadsheet and the proposed change order, Mr. McDonough presented Mr. Akin with invoices for individual items of work. The invoices confirmed

the payments that Keswick had made to subcontractors.

Upon receiving the proposed final change order, Mr. Akin became upset and said that he would not agree to pay for the price increases. Mr. McDonough told the Akins that those charges were not negotiable. Mr. Akin refused to sign the document.

Two weeks later, Mr. Akin sent Keswick a check for $15,223.90, the amount that he claimed to owe under the contract and the approved change orders. Keswick did not accept that payment.

After a few more weeks, Keswick sent Mr. Akin a revised final change order, which increased the additional site costs to $477,987 and increased the total price to $1,933,510. Mr. Akin again refused to sign.

Soon thereafter, Mr. and Mrs. Akin moved into the completed residence.

E. Actions in the Circuit Court

On October 20, 2014, Mr. Akin filed a complaint against Keswick in the Circuit Court for Montgomery County. He asked for a declaratory judgment stating that he was not obligated to pay for the additional charges from the unsigned change order. He also sought damages, alleging that Keswick had engaged in unfair or deceptive business practices by failing to disclose its charges until after completion of the work.

On November 6, 2014, Keswick commenced a separate action against the Akins by filing a "Petition to Establish and Enforce Mechanic's Lien and Complaint for Damages." Keswick alleged that, "[a]s a result of change orders and amendments to the Contract, the full contract sum [had] increased." Keswick asserted that it was entitled to a mechanic's lien and damages because Mr. Akin had failed to pay for those price

increases. Keswick's complaint included counts for unjust enrichment and quantum meruit, as alternative theories of recovery against Mr. Akin and as separate counts against Mrs. Akin.

A few weeks later, as a defendant in the original action, Keswick filed a counterclaim against Mr. Akin and what it styled as a "Third Party Complaint" against Mrs. Akin.[2] These two pleadings essentially duplicated Keswick's counts from the other action, with the exception of the mechanic's lien count.

The Akins moved to dismiss Keswick's claims. Separately, Mr. Akin moved to consolidate the two actions. The court granted their motion for consolidation, but denied their motions to dismiss.

Mr. Akin amended his complaint in March 2015. The amended complaint added eight new counts.[3] In addition, it named two new defendants: Mr. McDonough; and Brookfield Washington, Inc., a company that allegedly owned Keswick. Mr. Akin alleged that those two defendants had "conspired" with Keswick.

Among his new claims, Mr. Akin sought damages for alleged violations of the Maryland Custom Home Protection Act. The amended complaint recognized that the

[2] More precisely, Mrs. Akin was a counter-defendant under Md. Rule 2-331(c), which states that "[a] person not a party to the action may be made a party to a counterclaim . . . and shall be served as a defendant in an original action." She would be a third-party defendant only if Keswick alleged that she was liable to Keswick for all or part of Keswick's liability to her husband. *See* Md. Rule 2-332(a).

[3] The amended complaint added new counts for: violation of the Maryland Custom Home Protection Act, breach of contract, violation of the construction trust fund statute, intentional misrepresentation, negligent misrepresentation, unjust enrichment, detrimental reliance, and an accounting.

Custom Home Protection Act creates no private right of action. Instead, it defines any conduct that fails to comply with that Act as an "unfair or deceptive trade practice within the meaning of" the Consumer Protection Act. RP § 10-507(a). In turn, the Consumer Protection Act creates a right to recover damages, plus reasonable attorneys' fees, for "injury or loss sustained . . . as the result of" prohibited trade practices. Md. Code (1975, 2013 Repl. Vol.), § 13-408(a)-(b) of the Commercial Law Article ("CL"). Thus, Mr. Akin's amended complaint sought damages and attorneys' fees under the "Consumer Protection Act, as incorporated in the Maryland Custom Home Protection Act." He alleged that he had "suffered actual loss" in excess of $75,000 as a result of Keswick's statutory violations.

All parties moved for summary judgment. As one ground for opposing summary judgment, Keswick argued that the Akins had failed to identify any evidence that they had suffered damage as a result of the alleged violations. The court denied all summary judgment motions shortly before the scheduled trial date, without specifying its reasons.

F. Trial in the Circuit Court

The cases proceeded to a consolidated trial from June 29, 2015, to July 2, 2015. The two primary witnesses were Mr. McDonough and Mr. Akin, who presented conflicting accounts of their discussions during the planning process.

Mr. McDonough testified that Keswick had revised the site plan so that the plan could be approved by the County and that it would accommodate Mr. Akin's requests for a flat backyard. Throughout that process, he kept the Akins informed of the revisions and shared details about the retaining walls and storm water-management areas. Mr.

McDonough believed that the Akins had "signed off" on the additional site work in 2012 by agreeing to the forest conservation and sediment control plans during the permit application process. Keswick introduced emails showing that Mr. Akin had expressed his satisfaction with the designs for the backyard.

Neither the emails nor the various documents signed by the Akins included information about increased site costs. Mr. McDonough testified, however, that he had repeatedly informed Mr. Akin in person that the site-plan revisions would result in substantial additional charges. Mr. McDonough said that he told Mr. Akin that the contract's "original estimate" of $99,590 for site costs did not include the extra work from the revised site plans, and so Mr. Akin would owe him for any "additional costs . . . at the end of the job." Mr. McDonough did not disclose any particular dollar amount to Mr. Akin at those times, and Mr. Akin did not inquire about the costs of the extra work.

Mr. McDonough said that he did not ask Mr. Akin to execute a change order for the additional site work because he believed that the contract's site-cost addendum would require Mr. Akin to "settle up" for any additional site costs at the final draw. As a result, Mr. McDonough did not disclose the amount for the additional site costs until September 2014, when he presented the Akins with Change Order Number Four and the accompanying invoices.[4]

According to Mr. McDonough, Keswick had received about $1.35 million, and so,

[4] Mr. McDonough admitted that "[i]n retrospect, [he] made a mistake" by not disclosing the bids for the additional site work. Mr. McDonough regretted that he did not submit partial invoices to Mr. Akin as he received those bills from the subcontractors.

independent of any amounts for the additional site work, Mr. Akin still owed a balance of around $40,000 under the other change orders that he had approved.

Keswick called its engineering consultant, who recounted that he had revised the site plans to satisfy requirements from the County and the Akins' preferences for their backyard. Separately, an engineering expert opined that the site costs charged by Keswick were reasonable. During cross-examination, the expert stated that the additional site costs would have been "minimal" if the property owner had only wanted to obtain approval from the County and did not want to level out the area behind the house.

The Akins moved for judgment at the close of Keswick's case. Among other things, the Akins asserted that the Maryland Custom Home Protection Act requires every custom-home contract to "have a provision in it that says all change orders need to be in writing." They argued that the statute's protective purpose could not be accomplished if a contractor could simply "put a phrase in there somewhere" saying that "everything has to be done by written change orders" and then have "other language in there" allowing the contractor to avoid that change order requirement. The Akins argued that the statute should bar recovery on Keswick's claims because there was no evidence that they had ever agreed to increase the contract price through a written change order.

In response, Keswick argued that its contract included the language required by the statute. The court denied the Akins' motion.

Testifying on his own behalf, Mr. Akin admitted that Mr. McDonough had informed him throughout the planning process of the revised site plans that included retaining walls and a storm water-management system. According to Mr. Akin, however,

Mr. McDonough made assurances that he would seek approval in advance for any increases to the contract price, as he had done with the other three change orders. Mr. Akin acknowledged that he had received and signed a number of planning documents throughout the process, but he maintained that Mr. McDonough had never mentioned any additional charges for the site work.

Mr. Akin recalled that he was "shocked" to learn of additional site-work "costs totaling almost half a million dollars" for the first time in September 2014. Mr. Akin thought that it made no sense for Mr. McDonough to ask him to approve change orders for minor changes such as "a particular stain color" on the kitchen floor, but to expect "basically . . . a blank check" for additional site work that amounted to nearly "half of the original costs." Mr. Akin testified that he would not have asked Keswick to build a flat backyard if he had known that it would cost several hundred thousand dollars.

The Akins renewed their motion for judgment at the close of all of the evidence. Stating that he wished to "[r]epeat the same arguments" from the earlier motion, the Akins' attorney asked the court to deny Keswick's requests for relief and to grant the Akins' requests. The court denied that motion and submitted the remaining claims to the jury.[5]

In its closing argument, Keswick set forth a detailed theory of Mr. Akin's

[5] The court had granted judgment in favor of Mrs. Akin on the claims against her, except the unjust enrichment count; in favor of Mr. McDonough and Brookfield Washington on the claims against them; and in favor of Keswick on an intentional misrepresentation claim. Mr. Akin had withdrawn his counts for violation of the construction trust fund statute, unjust enrichment, detrimental reliance, and an accounting. Keswick had withdrawn a request for "summary ejectment."

contractual obligations. Keswick argued that the contract defined site work as something "separate and apart" from work on the residence. Keswick asserted that its breach-of-contract claim was based on the site-cost addendum, which states: "Keswick to submit accounting of all invoices at final draw with an allowance to be adjusted to final cost at final change order." According to Keswick, that addendum required Mr. Akin to pay for the full cost of any site work "after the work has been completed, after the invoices have been gathered." Under Keswick's theory, the contract required it to obtain Mr. Akin's approval only on change orders for "inside changes," but for changes to site work outside the residence, Keswick simply needed to "provide the invoices at final draw." Finally, Keswick argued that Mrs. Akin was "obligated to pay" as well because it would be "unjust" to allow her to benefit from the additional work on property that she owned.

In their closing remarks, the Akins argued that Keswick knew as early as 2011 that the site plan would require retaining walls and that the site costs would exceed $99,590. The Akins asserted that Keswick could have obtained an estimate for the additional site work long before it hired subcontractors to complete that work in 2014. They contended that, if Keswick had asked Mr. Akin to sign a change order in advance for the additional site work, then Mr. Akin would have "said don't build it because it's $500,000."

The jury returned its verdict on a special questionnaire. The jury concluded that Mr. Akin had breached the contract by not paying for the additional site-work costs and that Keswick was entitled to damages of $477,000.00. Because the jury expressly found that Keswick's contract governed those costs, the jury did not reach the alternative counts against Mr. Akin, such as unjust enrichment and quantum meruit. In response to a

separate question, the jury found that Mr. Akin was obligated to pay an additional $40,202.90 for amounts under the prior change orders.

The jury also found that Mrs. Akin had been unjustly enriched as a result of Keswick's work on the property. The jury determined that Mrs. Akin was jointly responsible for $517,202.90, the same damage total owed by her husband.

The jury denied Mr. Akin's claims against Keswick for violation of the Custom Home Protection Act, violation of the Consumer Protection Act, breach of contract, and negligent misrepresentation.

After the jury announced its decision, the Akins orally moved for a judgment notwithstanding the verdict. They made the following argument:

> [AKINS' ATTORNEY:] . . . [T]he jury has found that this matter was covered by this contract and in our opinion that would mean that they had to have concluded that the change order number four was acceptable. They pulled a change order number four that was unsigned. In our opinion under the Custom Home Protection Act all such change orders must be in writing and in advance, scheduling the dollar amount, that was not done. So, in our opinion there is a violation of the Custom Home Protection Act. And further the statute would be utterly ineffective if one could, you know, get parties by unjust enrichment. So, our argument as well is that [Mrs. Akin] should also not be reachable pursuant to this. . . .

The court denied the Akins' motion.

G. Post-Trial Developments

On July 13, 2015, the clerk entered a money judgment for Keswick, against Mr. Akin and Mrs. Akin separately, in the amounts of $477,000.00 for "site development costs" and $40,202.90 for "change orders." A week later, the Akins filed the first of several notices of appeal.

The Akins and Keswick both filed petitions for attorneys' fees and costs under a contractual fee-shifting clause. After a hearing and additional briefing, the court issued an order denying both petitions. The court reasoned that the contract did not authorize a fee award to either party. A few weeks after the entry of that order, Keswick filed a notice of cross-appeal, and the Akins filed a second notice of appeal.[6]

The order denying the fee petitions did not address two remaining counts from the pleadings: Mr. Akin's request for a declaratory judgment and Keswick's request for a mechanic's lien. Throughout the case, the parties and the court had agreed that the court would decide those matters after trial.

In May 2016, after the parties had filed appellate briefs, the circuit court held a status hearing at the parties' request. The court determined that Keswick was not entitled to a mechanic's lien, and it entered an order denying the petition.

The court also entered a declaratory judgment consistent with the jury verdict. The declaration stated that the contract and the site-cost addendum provided that "changes to the Site Work would be adjusted and the Site Development Costs would be paid at a final change order based on Keswick's paid invoices"; that various site-planning documents signed by Mr. Akin "are in fact Change Orders" under the contract; that Mr. Akin is contractually obligated to pay Keswick for the charges submitted to him in the final change order; and that Keswick's contract complied with the requirements of the

[6] In addition, Keswick moved for reconsideration of the order regarding attorneys' fees, which the court later denied. The Akins filed a third notice of appeal shortly after the denial of that motion.

Custom Home Protection Act.

Shortly after the entry of those orders, both Keswick and the Akins filed new notices of appeal. This Court consolidated the appeals and permitted supplemental briefing about the mechanic's lien and declaratory judgment issues.[7]

QUESTIONS PRESENTED

The Akins' initial appellate brief includes 11 separate questions.[8] As Keswick points out, however, most of those questions are duplicative. Some of those questions ask, rather abstractly, whether the circuit court erred by permitting Keswick to "enforce[e]" Change Order Number Four. Other questions ask, more concretely, whether the court erred when it denied particular motions.

Although the Akins phrase their questions in various ways, they assert that the answer to each of those questions depends on the interpretation of a single statute. In summary, they contend that "the Circuit Court denied the Akins' motions to dismiss and for summary judgment, denied the . . . motions for judgment and the motion for judgment notwithstanding the verdict, and failed to provide a declaratory judgment [in the Akins' favor], all based on an incorrect interpretation of the requirements of the Maryland

[7] In general, an appeal is premature if it is noted before the entry of a final judgment disposing of all claims against all parties. *See, e.g.*, *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 662 (2014). Here, it is unnecessary to determine whether any of the earlier notices of appeal were premature, because both parties eventually noted an appeal within 30 days after the entry of the orders resolving those remaining issues. For the sake of simplicity, this opinion continues to treat the Akins as the appellants and cross-appellees and to treat Keswick as the appellee and cross-appellant, even though those designations are actually reversed in the second appeal.

[8] The Akins' questions are reproduced in an appendix to this opinion.

Custom Home Protection Act."

The Akins offered different iterations of a single legal theory throughout the case, each time contending that they were entitled to judgment based on the provision of the Custom Home Protection Act that requires custom-home contracts to "[e]xpressly state that any and all changes that are to be made to the contract shall be recorded as 'change orders' that specify the change in the work ordered and the effect of the change on the price of the house." RP § 10-505(3). On appeal, they repeat the same theory as applied to the evidence actually presented at trial. As Keswick does in its brief, we will address the Akins' challenge in the context of the motions that the Akins made during the trial. Specifically, we will examine whether the circuit court erred in denying the Akins' motions for judgment and motion for judgment notwithstanding the verdict in light of the grounds that the Akins advanced at trial.[9]

SCOPE OF REVIEW

"The standard of review of a court's denial of a motion for [judgment notwithstanding the verdict] is the same as the standard of review of a court's denial of a motion for judgment at the close of the evidence, *i.e.*, whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Maryland Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 329 (2012) (citing *Washington Metro. Area Transit Auth. v. Djan*, 187 Md. App. 487,

[9] In a reply brief, the Akins identified the standard of review for a motion for judgment. At oral argument, the Akins agreed that, in substance, their appeal challenged the denial of their motions for judgment and for judgment notwithstanding the verdict.

491-92 (2009)). This Court's task is to decide whether the trial court's decision to deny the motion for judgment (or the motion for judgment notwithstanding the verdict) was legally correct, "while viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party[.]" *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011).

Consistent with that standard, we assume that the jury resolved all conflicts in the trial testimony in favor of Keswick. Consequently, we assume that the jury credited Mr. McDonough's testimony and rejected Mr. Akin's. *See, e.g.*, *McGarr v. Baltimore Area Council, Boy Scouts of Am., Inc.*, 74 Md. App. 127, 134-35 (1988). Mr. McDonough testified that he repeatedly disclosed that the site-plan revisions would result in substantial cost increases, but that he did not disclose the amount of the approximately $477,000 of additional charges, either orally or in writing, until after the work was complete. Our task is to consider whether the Akins were legally entitled to prevail after giving "maximum credibility and maximum weight" (*Terumo Med. Corp. v. Greenway*, 171 Md. App. 617, 626 (2006)) to that testimony.

The scope of our review does not include every legal theory the Akins could have raised. A party moving for judgment at the close of the opposing party's case or at the close of all the evidence must "state with particularity all reasons why the motion should be granted." Md. Rule 2-519(a). The purpose of this requirement is "to make the trial judge aware of the exact basis for the movant's contention that the evidence is insufficient." *Hickey v. Kendall*, 111 Md. App. 577, 603 (1996). "[A] party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at

the close of all the evidence and only on the grounds advanced in support of the earlier motion." Md. Rule 2-532(a).

In its brief, Keswick points out that the Akins' trial motions did not address all of Mr. Akins' claims. Mr. Akin never moved for judgment on his claims against Keswick for violation of the Consumer Protection Act, breach of contract, or negligent misrepresentation. The court submitted those counts to the jury, which ruled against Mr. Akin on all three counts. As a result, we have no basis to reverse that portion of the judgment. *See Hickey v. Kendall*, 111 Md. App. at 601-04 (holding that party was not entitled to judgment notwithstanding the verdict where motions for judgment raised grounds that related only to some claims and failed to distinguish among claims).

Moreover, to the extent that the Akins now seek to rely on the Consumer Protection Act as an "independent" basis for reversing the judgments against them – under the theory that Keswick failed to disclose material facts – that issue is not properly presented for our review. *See MEMC Elec. Materials, Inc. v. BP Solar Int'l, Inc.*, 196 Md. App. 318, 335-36 (2010) (holding that appellant failed to preserve contention that court should have granted judgment on particular ground where appellant did not include that ground in motion for judgment). That ground was neither raised in the Akins' motions nor decided by the trial court. On this appeal, the Consumer Protection Act is relevant only insofar as it creates a remedy for persons who have sustained actual "injury or loss" as a result of a violation of the Custom Home Protection Act. *See* RP § 10-507(a)(1) (stating that a violation of the Custom Home Protection Act is "[a]n unfair or deceptive trade practice within the meaning of" the Consumer Protection Act); CL § 13-

408(a) (authorizing a person to "bring an action to recover for injury or loss sustained by him [or her] as the result of a practice prohibited by" the Consumer Protection Act).

In one of their questions presented, the Akins have asked whether the trial court erred "by not enforcing the plain terms of the Contract[.]" That question is not properly before us, because the Akins never asked the trial court to grant a judgment on those grounds. *See MEMC Elec. Materials*, 196 Md. App. at 336. Their motions for judgment and for judgment notwithstanding the verdict relied on the requirements of the Custom Home Protection Act, not on an interpretation of the contract.

Consequently, in this opinion, we accept the premises (embodied in the jury verdict and portions of the declaratory judgment) that the contract covered the additional site costs and that the site-cost addendum required Mr. Akin to pay for those costs when Keswick presented him with invoices at the final draw. The next questions before us are whether the contract failed to comply with the Custom Home Protection Act and, if so, whether that failure to comply with the Act bars Keswick's recovery. Our review of those legal questions is *de novo*. *See, e.g.*, *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 91 (2014); *USB Fin. Servs., Inc. v. Thompson*, 217 Md. App. 500, 514 (2014).

DISCUSSION

A. Contract Requirements of the Maryland Custom Home Protection Act

In 1986 the General Assembly enacted the Maryland Custom Home Protection Act, which created sections 10-501 through 10-509 of the Real Property Article. The stated purposes of the legislation included: "providing that certain contracts be in writing; providing that a contract shall provide certain information and disclosures under certain

conditions; . . . [and] providing for penalties for certain violations of th[e] Act[.]" 1986 Md. Laws ch. 853, preamble. The Act's overall purpose is "to provide a specific remedy for custom home owners dealing with impecunious contractors." *Schwartz v. State*, 103 Md. App. 378, 389 (1995).[10]

The Act defines a "'[c]ustom home'" as "a single-family dwelling constructed for the buyer's residence on land currently or previously owned by the buyer." RP § 10-501(c). The term "'[c]ustom home contract' means any contract entered into with the buyer, with a value equal to or greater than $20,000, to furnish labor and material in connection with the construction, erection, or completion of a custom home." RP § 10-501(e). Among other things, the Act requires custom-home builders to hold contract payments in trust for the benefit of the buyer and to place certain advance payments in escrow. RP §§ 10-502, 10-504. Custom-home contracts must include certain disclosures about the builder's escrow account requirements, specific disclosures about the buyer's risks under mechanic's lien laws, and a certification from the builder about past violations of the Act. RP § 10-506.

RP § 10-507 provides a "comprehensive remedial scheme" (*Schwartz*, 103 Md. App. at 388) for Custom Home Protection Act violations. Any conduct that fails to comply with the Act is deemed to be an "unfair or deceptive practice" (RP § 10-507(a)(1)) under the Consumer Protection Act, which in turn creates a private action to recover damages for injury or loss sustained as a result of the prohibited practice. CL §

[10] The title of the statute is a misnomer. The statute does not protect custom homes as such, but rather the purchasers of custom homes.

13-408(a). In addition, any conduct not in compliance with the Custom Home Protection Act is a criminal offense. RP § 10-507(b)-(c). If a criminal violation of the Act results in financial loss to a victim, the court may prohibit the offender from seeking, entering into, or performing a contract for the construction of real property in this State. RP § 10-507(c). Moreover, if a builder is found to have violated the Act, it must disclose that violation in all custom-home contracts made within three years after the judgment. RP § 10-506(b).

In this case, there is no dispute that Keswick's contract with Mr. Akin is a "custom home contract" subject to the protections of the Act. The issue here is whether this custom-home contract satisfies the requirements of the Act, which provides:

> **§ 10-505. Contracts between custom home builders and buyers.**
>
> Every custom home contract between a custom home builder and the buyer must be in writing. The custom home contract shall:
>
> (1) Include a draw schedule that shall be set forth on a separate sheet of paper and that shall be separately signed by the buyer and the custom home builder;
>
> (2) Identify to the extent known the names of the primary subcontractors who will be working on the custom home;
>
> *(3) Expressly state that any and all changes that are to be made to the contract shall be recorded as "change orders" that specify the change in the work ordered and the effect of the change on the price of the house;*
>
> (4) Set forth in bold type whether or not the vendor or builder is covered by a warranty program guaranteed by a third party;
>
> (5) Require the vendor or builder to deliver to the purchaser within 30 days after each progress payment a list of the subcontractors, suppliers, or materialmen who have provided more than $500 of goods or services to

> date and indicate which of them have been paid by the vendor or builder; and
>
> (6) Require that the custom home builder provide waivers of liens from all applicable subcontractors, suppliers, or materialmen within a reasonable time after the final payment for the goods or services they provide.

RP § 10-505 (emphasis added).

Although the parties offer little analysis of the Act's legislative history, RP § 10-505 and its surrounding provisions confirm the Akins' general observation that the purpose of RP § 10-505 is to protect custom-home purchasers from business practices that could put them at risk. Keswick does not refute the Akins' assertions that this provision is intended to protect homeowners from builders. Indeed, Keswick does not suggest any other purpose underlying the statute.

B. The Contract's Noncompliance with the Custom Home Protection Act

The Akins contend that the contract did not comply with RP § 10-505(3) because it failed to provide that "any and all changes" to the contract would be made by executing a written change order that specifies the change in the work ordered and the effect of the change on the contract price. As it did at trial, Keswick argues that its contract complied with the Act (or at least substantially complied with it) because the contract included language that is similar to the required language.

Keswick points to Paragraph 10(a) of the contract, which states that "any additions or modifications to the Work described in the Plans and Specifications shall be subject to agreement by the parties and shall be accomplished only by written Change Orders signed by both owner and Contractor" and that "[e]ach Change Order shall specify the

changes in the Work being ordered and the effect of said changes on the Contract Sum." The parties executed the first three change orders pursuant to this paragraph. Keswick argues that this paragraph complies with RP § 10-505(3).

But Keswick's interpretation of the contract does not end there. According to Keswick, the change-order requirement in Paragraph 10 governs only some changes to the contract. Keswick asserts that the contract defined the term "Work" to include only the work on the residence. Keswick also asserts that the contract defined the term "Plans and Specifications" regarding the architecture of the residence to mean something distinct from the "Site Plans" regarding the siting of the residence on the lot. Keswick writes: "Accordingly, Paragraph 10 is limited and only applies to changes in the 'Work' related to actual construction of the house, and not to any changes in the site development work." In other words, although Paragraph 10(a) comports with the Custom Home Protection Act's requirements regarding change orders, Keswick takes the position that that paragraph does *not* apply to changes in site work.

Keswick relied on the site-cost addendum as the foundation of its breach-of-contract claim. That addendum listed the site costs as $99,590 and included the following language below that total:

> Site costs to be part of contract change orders as an allowance. Keswick Homes to manage, coordinate, and process payments to contractors upon completion of their work during the phase of construction. Keswick to submit accounting of all paid invoices at final draw with allowance to be adjusted to final cost at final change order.

According to Keswick, this addendum means that site-work costs were "subject to a compensation structure different from other costs and payments contemplated in other

parts of the Contract." Keswick argues that the site-cost addendum "provides that site work would be performed by Keswick's subcontractors, [and] be paid by Keswick and the concomitant site costs would then be reconciled in a final change order (*i.e.*, after the work was completed)." Keswick contends that, as a result, no change order was needed in advance for the additional site work.[11]

As discussed previously, we will assume that Keswick's reading of the contract is correct. Under that reading, *some* changes (related to work on the residence) must be approved by executing a written change order, but *other* changes (related to site work outside the residence) occur at the final draw when Keswick presents invoices for all completed site work.

The obvious problem with Keswick's reading is that the statute does not allow custom-home contracts to state that only "some" changes to the contract should be made through written change orders. The Act requires each custom-home contract to "[e]xpressly state that *any and all changes* that are to be made to the contract shall be recorded as 'change orders' that specify the change in the work ordered and the effect of the change on the price of the house[.]" RP § 10-505(3) (emphasis added). "[A]ny and all" does not mean "some." *See, e.g.*, *Bednar v. Provident Bank of Maryland, Inc.*, 402 Md. 532, 544 (2007). Although Keswick says that the contract treated the site work as distinct from work on the residence, Keswick has not argued that when a builder makes changes in the site-development plans relating to a custom home, those changes are

[11] Under Keswick's reading, the site-cost addendum also meant that Keswick was entitled to a 15 percent management fee on top of the total amount of the invoices.

outside the scope of the Act.

Because the site-cost addendum governs changes to the contract, the addendum must also comply with RP § 10-505(3). The Akins contend that the site-cost addendum violates the Act to the extent that it allows for undisclosed charges for additional work to "be 'adjusted to final cost,' without advance notice." The Akins assert that the purpose of RP § 10-505(3) is to protect homeowners by giving them a chance to reject increases in the contract price, especially major price increases that the homeowner might not be able to afford.

In response, Keswick asserts that RP § 10-505(3) does not expressly require a custom-home contract to state that change orders must be "presented and signed 'in advance' before the work is completed." Keswick accuses the Akins of trying to "rewrite the Act to require [a custom-home builder] to present a change order to [a homeowner] before the work is initiated."

Although the Act does not state that custom-home contracts must require "advance" change orders, the type of "change order" described in Keswick's site-cost addendum turns the basic concept of a change order on its head. In general, a change order is "[a] modification of a previously ordered item or service." BLACK'S LAW DICTIONARY 281 (10th ed. 2014). Even the language of Keswick's proposed "Change Order Number Four" reflects a basic understanding that a change order is a bilateral agreement to modify the contract terms. The document states that "Purchaser and Seller agree to change the Sales Price . . . to $1,933,511[,]" and it includes a signature line for the purchaser.

More fundamentally, a "change order" envisions that the owner has ordered a change. It may be theoretically possible for the owner and builder to execute a valid change order after the builder has begun to effectuate the change and perhaps even after the builder has completed the change. Nevertheless, a document cannot properly be termed a "change *order*" unless it concerns a change that the owner has actually *ordered*. Here, Mr. Akin knew, understood, and told the regulators that Keswick would do a considerable amount of additional site work beyond the work specified in the site-work addendum, but he never actually ordered the use of any of the professionals and subcontractors that Keswick employed to do that work. Nor did he sign off on the specific work that Keswick commissioned or the specific charges that the subcontractors imposed.

The submission of a list of paid invoices for completed work is not the same as or substantially equivalent to a "'change *order*[]' that specif[ies] the *change in the work ordered* and the effect of the change on the price of the house[.]" RP § 10-505(3) (emphasis added). The invoices mentioned in the addendum are documents that account for work that has been completed by the builder, not documents that specify changes "in the work *ordered*" by the owner. The addendum does not even include a requirement that the owner "order[]" the additional work.

It makes no difference that the addendum envisioned that Keswick would present the price increase in an instrument that it called a "change order." Keswick's contract violates the Custom Home Protection Act to the extent that the site-cost addendum authorizes changes to be made to the contract through the builder's submission of

invoices at a final draw, rather than through a written change order specifying the change in the work ordered and the effect on the price.

As a fallback argument,[12] Keswick contends that its breach-of-contract claim would prevail even without the site-cost addendum. Keswick asserts that its contract uses an expansive definition of a "change order." According to Keswick, its contract does not require a change order to "be titled 'change order'" or to "show a change in the Contract and a dollar amount to reflect said change." On that basis, Keswick theorizes that "the various site development plans and documents signed by [Mr. and Mrs. Akin] constitute 'Change Orders' within the meaning of the Contract."

Even assuming that Keswick's contract treats those documents as "change orders," however, the statute imposes its own criteria. The statute requires a custom-home contract to state that all changes "shall be recorded as 'change orders' that specify the change in the work ordered *and the effect of the change on the price of the house*." RP § 10-505(3) (emphasis added). The planning documents say nothing about any change in the price, let alone a specific amount of price increase.

As mentioned previously, Mr. and Mrs. Akin both signed a Forest Conservation Agreement in October 2012, in which they granted the Montgomery County Planning Board an easement on about one-quarter of an acre along the rear property-line. Keswick was not a party to that agreement. One exhibit to the agreement was a Forest Conservation Plan that had been prepared by Keswick's engineer, showing that the house

[12] Keswick did not rely on this argument at trial, but it did include the argument in a response to a pretrial motion.

would be located near the center of the lot and showing the locations of proposed retaining walls. That plan included a stamp of approval from the Maryland-National Park and Planning Commission and a certification from Keswick that it would "execute all features" of the approved plan.

Additionally, in November 2012 Mr. Akin signed an owners' certification on a Soil Erosion and Sediment Control Plan that had been prepared by Keswick's engineer. That plan also showed the proposed retaining walls. Mr. Akin certified to the County that "all clearing, grading, construction, and or development w[ould] be done pursuant to this plan[.]" The document included an approval stamp from the Montgomery County Department of Permitting Services. The document made no mention of Keswick.

Quite simply, these planning documents are not "change orders" within the meaning of RP § 10-505(3). Even accepting these documents as evidence of a general understanding or agreement between Mr. Akin and Keswick to change the scope of the site work, the documents did not specify the effect of those changes on the contract price. In fact, by Keswick's own admission, the cost of the additional work was unknown when the Akins signed these documents in 2012. The contract violates the Custom Home Protection Act to the extent that it authorizes changes to be made to the contract through documents that show changes in the work plans, but do not specify "the effect of the change on the price of the house." RP § 10-505(3).

In sum, even if Keswick's contract allows it to change the price by providing a summary of invoices for completed work or by obtaining the Akins' signatures on planning documents during the permitting process, those documents lacked the essential

characteristics of a "change order" set forth in RP § 10-505(3). Under the Act, Keswick's contract must "[e]xpressly state that any and all changes that are to be made to the contract shall be recorded as 'change orders' that specify the change in the work ordered and the effect of the change on the price of the house." *Id.* Keswick's contract, does not meet that requirement. The contract, therefore, violates the Act.

C. Unenforceability as Potential Consequence of Violation of the Act

Under the circumstances of this case, Keswick could not have prevailed on its breach-of-contract claim unless the contract violated the Custom Home Protection Act. The next issue is whether Keswick must forfeit its recovery as a consequence of its noncompliance with the Act.

The Akins appear to acknowledge that Maryland has rejected a "rigid rule that any contract made in violation of any statute is unenforceable." *Springlake Corp. v. Symmarron Ltd. P'ship*, 81 Md. App. 694, 700 (1990). Where a party seeks to enforce a contract that violates a statute, the court should "examine the statute at issue and the public policy behind it in an attempt to discern whether the legislature intended for contracts made in violation of the statute to be void or unenforceable." *Id.*; *see also Stitzel v. State*, 195 Md. App. 443, 453 (2010) (quoting *Springlake*, 81 Md. App. at 700).

The Akins repeatedly assert the broad (and unquestionable) proposition that the Custom Home Protection Act is intended to protect consumers. Their brief presents a survey of *Harry Berenter, Inc. v. Berman*, 258 Md. 290 (1970), and other Maryland cases involving statutes that protect consumers in various ways. The Akins argue that "the Custom Home Protection Act is in the class of protective statutes where the Court of

Appeals has aggressively stricken business efforts to avoid" statutory requirements.

The Akins' analysis of the Custom Home Protection Act at most demonstrates some generalized legislative intent to "protect" custom-home purchasers, but it does not reveal any specific legislative intent that a contract is unenforceable if it fails to comply with the Act. The Akins argue that the provision of criminal penalties for violations of the Act "evidences a public policy in favor of full enforcement of the . . . written change order[] provisions" of the Act. Yet, even when a statute prohibits conduct and imposes a penalty, it does not automatically follow that a contract is unenforceable if it violates the prohibition. *See DeReggi Constr. Co. v. Mate*, 130 Md. App. 648, 664 (2000) (citing *Beard v. Am. Agency Life Ins. Co.*, 314 Md. 235, 255 (1988)).

In *DeReggi*, one of the few reported cases involving the Custom Home Protection Act, this Court established the standard for evaluating whether a violation of that Act will render a custom-home contract unenforceable. In that case, a builder petitioned to establish a mechanic's lien, alleging that the owners had not paid for certain charges under the contract. *Id.* at 652. The circuit court dismissed the builder's petition on the ground that the custom-home contract did not include the disclosures required by the Act. *Id.* at 653.[13] On appeal, the builder conceded that its contract "d[id] not 'in any way compl[y] with the disclosure directives of the [Act].'" *Id.* at 663. Indeed, the contract

[13] As a separate ground for the dismissal, the circuit court concluded that the contract was unenforceable because the builder did not obtain a builder's license from Montgomery County until after executing the contract. *DeReggi*, 130 Md. App. at 652-53. This Court remanded the case to the circuit court to determine whether the builder had substantially complied with the licensing statute. *Id.* at 661.

met none of the requirements of RP § 10-505, and it included none of the disclosures mandated by RP § 10-506. *DeReggi*, 130 Md. App. at 662-63. The builder nevertheless argued that the Act expressly includes some enforcement mechanisms, but does not expressly provide that a contract is unenforceable if it fails to comply with the Act. *Id*.

Addressing that argument, this Court observed that if a builder violates the Act's contract and disclosure requirements, the "violation constitutes '[a]n unfair or deceptive trade practice' under the Consumer Protection Act." *Id.* at 663 (quoting RP § 10-507). The Court explained that, although "[t]he Consumer Protection Act provides both public and private remedies for consumers[,]" that Act permits an individual consumer to recover damages only "'for injury or loss sustained by [the consumer] as the result of a practice prohibited by [the Consumer Protection Act].'" *Id*. at 664 (quoting CL § 13-408(a)). For that reason, the Court of Appeals has concluded "that 'the General Assembly intended that a plaintiff pursuing a private action under the [Consumer Protection Act] prove actual injury or loss sustained.'" *Id*. at 665 (quoting *Citaramanis v. Hallowell*, 328 Md. 142, 151 (1992) (further citation and quotation marks omitted)).

Because the Custom Home Protection Act channels its remedies through the Consumer Protection Act, this Court concluded that a custom-home contract is not unenforceable against a homeowner without proof that the homeowner suffered actual injury as a result of the builder's violations of the Act. *Id*. at 665. "To hold otherwise, would potentially allow [homeowners] to be unjustly enriched by receiving protection from [the builder's claims] when [the homeowners] suffered no injury or damage." *Id.* This Court remanded that case for a determination of whether the homeowners had

suffered actual injury or loss as a result of the builder's noncompliance with the Act. *Id.*

This Court applied *DeReggi* in *Deyesu v. Donhauser*, 156 Md. App. 124 (2004). In that case, a contractor brought a mechanic's lien claim against homeowners to recover an unpaid balance under a contract to perform labor to complete construction of the exterior of a home. *Id.* at 129-30. The homeowners counterclaimed under the Custom Home Protection Act. *Id.* at 130. After a bench trial, the circuit court granted judgment in favor of the contractor even though the contract did not comply with the Act's requirements. *Id.* at 131-32. As one ground for affirming that judgment,[14] this Court concluded that the homeowners had presented no evidence that they had been harmed by the contractor's failure to comply with the Act. "Without a showing of an actual injury caused by a violation of the [Custom Home Protection Act], the [homeowners] [we]re unable to receive its protections." *Id.* at 133 (citing *DeReggi*, 130 Md. App. at 665).

Although *DeReggi* establishes a critical element of the Akins' Custom Home Protection Act defense, the Akins devote little effort to addressing the requirement of "actual injury or loss." The Akins assert that, "[i]n *DeReggi*, there was a *de minimus*" or "at most a technical" violation of the Act that was "unrelated to the harm raised by the consumer." Their description of *DeReggi* reveals more than one misapprehension of the meaning of that case. The builder's violation in that case was that the contract "d[id] not 'in any way compl[y]'" with RP §§ 10-505 and 10-506. *DeReggi*, 130 Md. App. at 663.

[14] As the primary ground for affirming the judgment, this Court concluded that the contract did not meet the definition of a "custom home contract" because it included labor only and no materials. *Deyesu*, 156 Md. App. at 132-33.

In this case, by contrast, only a portion of Keswick's custom-home contract violated RP § 10-505(3).[15]

More importantly, however, *DeReggi* did not even discuss whether the homeowners had sustained injury. This Court merely announced the standard that the homeowners would eventually need to meet: homeowners cannot use the Act as a defense to the builder's claims unless they could prove that the builder's violations of the Act caused them actual injury or loss. *DeReggi*, 130 Md. App. at 665. The Akins needed to meet that same standard. Moreover, to prevail on their motions for judgment or for judgment notwithstanding the verdict, the Akins needed to show that a reasonable jury would have been compelled to find that they had suffered actual injury or loss as a result of Keswick's violation of the Act.

Throughout this case, however, the Akins offered only an incomplete theory as to how they were injured because Keswick's contract did not comply with the Act. The amended complaint vaguely alleged that Mr. Akin had "suffered actual loss as a result

[15] Although the Akins assert that the contract violates RP § 10-505, they repeatedly suggest that Keswick's delayed disclosure of the site costs was the real violation of the Act. The Akins' suggestion is incorrect: Keswick's violation of RP § 10-505 lies in the language of the contract, not in its subsequent conduct in accordance with the contract. In fact, even if the contract had fully complied with RP § 10-505 by expressly requiring all changes to be made by a change order that contained all of the relevant statutory specifications, the statute would not prevent the parties from modifying the contract to remove that requirement. Nor would the statute prevent an owner from waiving a contractual right to a change order, from being estopped from asserting a contractual right to a change order, or from ratifying a change that occurred without a change order. In other words, even if the contract fully complied with RP § 10-505, an owner, by words or conduct, could relinquish the right to require that all changes be made by a change order that contained all of the relevant statutory specifications.

of" Keswick's statutory violation. Mr. Akin testified that he would have rejected the additional work if Keswick had informed him of the cost. Counsel for the Akins argued that, if Keswick had asked Mr. Akin to sign a change order for the additional site work, Mr. Akin would have told Keswick not to perform the work.

Yet, the Akins offered no explanation of how the jurors were supposed to assess the damages resulting from the violation. At a minimum, the Akins had the burden of producing evidence that they ended up worse than they would have had Keswick's contract complied with the Act. Otherwise, the Akins might "be unjustly enriched by receiving protection from [Keswick's claims] when [the Akins] suffered no injury or damage." *DeReggi*, 130 Md. App. at 665.[16]

In an attempt to address *DeReggi*, the Akins state that they suffered "harm" because Keswick's business practices resulted in "a surprise $450,000 bill." Throughout their briefs, they assert that the site-cost addendum unfairly gave them no "opportunity" or "chance" to reject the price increase. Under their theory of the case, however, Mr. Akin would not have been simply rejecting a price increase; he also would have been rejecting the substantial improvements to the property in the form of a storm water-

[16] It is unclear whether and how Mr. Akin could even have instructed Keswick not to build the retaining walls and install the storm water-management system: he had signed a Soil Erosion and Sediment Control Plan that envisioned that site work would be performed and had received a building permit on the condition that the work would be performed. It seems likely that if Mr. Akin had instructed Keswick not to do the site work on which his building permit was premised, the construction project would have ceased for some period of time while Mr. Akin spent some additional sum of money to obtain a new permit and different regulatory approvals. In the meantime, Mr. Akin would have had to pay interest, real estate taxes, and insurance costs to carry a property that he was unable to occupy.

management system, as well as a walkout backyard (constructed of fill that had been trucked to the property, and supported by 400 feet of brick-faced retaining walls, some up to 16 feet in height). Furthermore, Mr. Akin would have been rejecting improvements that he requested, that went far beyond the $99,500 in basic site improvements contemplated in the original contract, that he knew were being built, and that he also knew (from repeated conversations with Mr. McDonough) would result in substantial cost increases. The offending contract provision here resulted in *both* a bill and a potential windfall.

To prove their alleged damages, the Akins needed to present evidence from which the factfinder could calculate the amount of damages to some degree of reasonable certainty. *See, e.g.*, *Citaramanis*, 328 Md. at 157-58; *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 24-25 (1998). Nevertheless, the Akins presented insufficient evidence from which the jury could have quantified any alleged damages. They produced no evidence, for instance, that the charges were excessive or unreasonable, that the work was in any way defective, or that the improvements went beyond what Mr. Akin knew and understood that the regulatory authorities expected him to build. Without that kind of evidence, it could be that the Akins would receive a net benefit from the additional work even after paying the $477,000 bill. The Akins have failed to articulate any coherent theory, either in the trial court or to this Court, about how the jury could have awarded them consequential damages in any specific amount.

Under *DeReggi*, 130 Md. App. at 664-65, the trial court would have erred if it had granted the Akins a judgment in their favor on Keswick's claims solely because the

contract violated the Act. As a matter of law, the court could not have properly granted the Akins' motions for judgment or judgment notwithstanding the verdict unless a reasonable jury would have been compelled to find that they had suffered some actual injury or loss. At the very least, however, the evidence was sufficient to support a finding that the Akins had sustained no injury or loss as a result of the contract's noncompliance with the Act. Not only did the Akins know and understand that Keswick was constructing improvements that were different from and much more expansive than the limited improvements described in the original contract, but Keswick's expert testified that the charges for the improvements were reasonable, and perhaps even low.

In sum, even though Keswick "failed to abide by the provisions of the Act[,]" the Akins did not conclusively prove that "they were actually injured as a result of [Keswick's] violation of the Act." *Id*. at 665. Without the required showing of actual injury or loss resulting from Keswick's violation of the Custom Home Protection Act, the Akins "are unable to receive its protections." *Deyesu*, 156 Md. App. at 133 (citing *DeReggi*, 130 Md. App. at 665). Mr. Akin, therefore, failed to show that he was entitled to a judgment in his favor on the breach-of-contract claim. Accordingly, the circuit court did not err when it refused to grant judgment in his favor. We affirm the judgment against him for $477,000 in damages for site-work costs under the contract.

D. Other Portions of the Judgment

As explained above, Keswick's contract violates the Custom Home Protection Act, but that contract has not been shown to be unenforceable under the circumstances. The Akins' appeal naturally focuses on the $477,000 damage award, but our

determination on that issue necessarily affects the remaining parts of the judgment.

As Keswick observes, the substance of the Akins's challenge concerns the $477,000 of charges listed in Change Order Number Four. The Akins give little attention to the jury's separate determination that Mr. Akin had also breached the contract by failing to pay $40,202.90 "for other change orders not related to the site development costs." That amount represents the unpaid balance of the contract price that Mr. Akin agreed to pay when he signed Change Order Number Three. Even if the Akins had shown that the site-cost addendum was unenforceable (which they have not), Mr. Akin would still be obligated to pay the amount of $40,202.90 because that portion of the judgment did not depend on any provision of the contract that violates the Custom Home Protection Act. *See Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 33 (2008) (stating that a contract conflicting with policy set forth in a statute is invalid only to the extent of the conflict between the contract and that policy) (citations omitted); *Wilson v. Nationwide Mut. Ins. Co.*, 395 Md. 524, 538 (2006) (same) (citation omitted). Consequently, there is no reason to set aside that portion of the judgment.

The jury also found that Mrs. Akin was unjustly enriched by Keswick's work and determined that she was liable for the same amount owed by her husband ($517,202.90). The Akins argue that this recovery is inappropriate because the underlying contract is unenforceable. Because we have rejected the Akins' contention that the statute renders the contract unenforceable, we must reject their corollary argument that the statute

precludes recovery under an unjust enrichment theory.[17]

Throughout this appeal, the Akins have continued to contend that the court's declaratory judgment is erroneous. We agree in one respect. Even though there is little practical value in declaring the parties' rights in addition to settling their other claims, the declaration should be corrected to make it consistent with the outcome of this appeal. Under Md. Rule 8-604(a)(4), this Court has power to modify a judgment, including a declaratory judgment, in appropriate cases. *See Hickory Point P'ship v. Anne Arundel Cnty.*, 316 Md. 118, 136 (1989). We hereby modify the final paragraph of the declaration as follows:

> DECLARES that Maryland Code Ann., Real Property Art. § 10-505 (the Custom Home Protection Act ("CHPA"))**,** ~~only~~ requires that a custom home Contract include the items listed in § 10-505 in order to comply with the CHPA and that the Contract ~~complies~~ **does not comply** with the CHPA **and consequently violates the Consumer Protection Act**.
>
> Otherwise, we do not modify the declaratory judgment.

CROSS-APPEAL

In addition to asking this Court to affirm the portions of the judgment that resulted from the jury verdict, Keswick has cross-appealed to challenge two post-trial orders of the circuit court. Keswick contends that the court erred when it denied Keswick's petition for attorneys' fees under the contract and its petition to establish and enforce a

[17] The Akins did not argue that because the written contract covered the subject matter of the dispute between Keswick and Mr. Akin, Keswick could not pursue an unjust enrichment claim against Mrs. Akin, a third party who benefitted from Keswick's performance. *See generally Bennett Heating & Air Conditioning, Inc. v. NationsBank of Maryland*, 342 Md. 169, 182 (1996); *Richard F. Kline, Inc. v. Signet Bank/Maryland*, 102 Md. App. 727, 735 (1995).

mechanic's lien. We conclude that those orders should be reversed and that the court should conduct further proceedings to determine whether Keswick is entitled to those remedies.

A. Keswick's Petition for Attorneys' Fees Under the Contract

After the trial, the Akins and Keswick both filed petitions for attorneys' fees and costs. Keswick asserted that it had incurred a total of $266,520.16 in fees and costs and requested an award of $164,420.80 for its successful defense of the claims from Mr. Akin's complaints. The Akins asserted that they had incurred $89,881.37 in fees and costs and asked the court to award "not less than half" of that amount because Keswick had not prevailed on some of its claims.

Both petitions relied on Paragraph 22 of the contract, which states, in pertinent part:

> In the event Owner or Contractor initiates legal action against the other party arising out of or relating to this Contract and said legal action is unsuccessful, then the initiator of said legal action shall be liable for the other party's reasonable attorney's fees and costs spent to defend any such improperly brought claim. This provision shall be applied on a claim-by-claim basis and shall not depend on the overall outcome of any such litigation.

During a hearing on the dueling petitions, the court raised an issue that had not been addressed by the parties. The court asked Keswick to explain the meaning of the phrase "any such improperly brought claim" from Paragraph 22. The court remarked that an "unsuccessful" action is not the same thing as an "improperly brought" claim. Keswick responded that, in the context of the entire paragraph, the phrase "any such improperly brought claim" was equivalent to an "unsuccessful" claim. The Akins,

choosing to endorse the court's interpretation, argued that the word "improperly" did indeed impose an additional requirement.[18] At the court's request, the parties submitted supplemental memorandums about the meaning of the fee-shifting provision.

A few weeks later, the court issued an opinion and order denying both parties' fee requests. Citing dictionary definitions of the word "improper," the court concluded that none of the parties' claims "were 'improperly brought' as that term is ordinarily understood." Keswick noted a cross-appeal after the entry of that order. Keswick also filed a motion to alter or amend the order, which the court later denied.

In its cross-appeal, Keswick now presents the following question:

> Did the Trial Court err by concluding that the Contract at issue does not allow Keswick to recover its attorneys' fees as the party that successfully defended each claim that was initiated against Keswick under the Contract?

Keswick asks this Court to reverse the denial of its petition and to remand the matter "for the sole purpose of determining the amount of the attorneys' fees and costs to which Keswick is entitled[.]"

Although the Akins had the opportunity to challenge the denial of their fee petition, they did not do so. In one question presented in their original brief, the Akins asked whether the court erred by not awarding them attorneys' fees under the contract. The Akins abandoned that issue, however, by failing to include any argument about that question in their brief. *See* Md. Rule 8-504(6) (a brief must contain "[a]rgument in support of the party's position on each issue"); *see also Hartford Accident & Indem. Co.*

[18] By contrast, the Akins' fee petition had stated that Paragraph 22 required Keswick to pay fees "where it instituted legal action . . . and was 'unsuccessful.'"

v. Scarlett Harbor Assocs. Ltd. P'ship, 109 Md. App. 217, 288 n.18 (1996). Then, in a paragraph of their reply brief, the Akins simply asserted without further explanation that the court correctly construed the contractual provision to bar Keswick's request for attorneys' fees. Thus, even though the interpretation of the fee-shifting provision affects both parties, only Keswick has challenged the order denying its respective fee petition.

Like any other issue of contract construction, we review a circuit court's interpretation of a provision regarding attorneys' fees without deference. The Court of Appeals has summarized the standard as follows:

> "Contract clauses that provide for the award of attorney's fees generally are valid and enforceable in Maryland, subject to a trial court's examination of the prevailing party's fee request for reasonableness. The interpretation of a written contract is a question of law for the court subject to *de novo* review. Maryland applies an objective interpretation of contracts. If a contract is unambiguous, the court must give effect to its plain meaning and not contemplate what the parties may have subjectively intended by certain terms at the time of formation. A contract is ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning. In interpreting a contract provision, we look to the entire language of the agreement, not merely a portion thereof. When interpreting a contract's terms, we consider the customary, ordinary and accepted meaning of the language used."

Weichert Co. of Maryland, Inc. v. Faust, 419 Md. 306, 317 (2011) (quoting *Nova Research, Inc. v. Penske Truck Leasing Co.*, 405 Md. 435, 447-48 (2008)).

Keswick contends that the trial court erred by focusing only on the meaning of the word "improper[]" in isolation rather than in the context of the entire sentence. Keswick argues that the use of the word "such" before the word "improperly brought claim" expressed the parties' intent to refer back to a claim in the type of "unsuccessful" action previously mentioned in the sentence. In Keswick's view, the phrase "any such

improperly brought claim" was a shorthand reference to an "unsuccessful" claim in the type of legal action initiated by either party against the other and relating to the contract. Keswick argues that the parties did not intend to impose additional conditions for the recovery of fees by using the word "improperly" in the final clause of the sentence.

To determine the meaning of the phrase "any such improperly brought claim," the court relied on dictionary definitions for the adjective "improper." Merriam-Webster's Dictionary defines the word "improper" as: (1) "not correct"; (2) "not following rules of acceptable behavior: legally or morally wrong"; or (3) "not suitable for the situation: not appropriate." MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.m-w.com/dictionary/improper/ (last visited Jan. 4, 2017). Black's Law Dictionary defines the word "improper" as: (1) "Incorrect; unsuitable or irregular"; or (2) "Fraudulent or otherwise wrongful." BLACK'S LAW DICTIONARY 875 (10th ed. 2014).

After quoting those definitions, the court reasoned that "Md. Rule 1-341 provides guidance as to the meaning of an 'improperly brought' claim." Under that rule, "if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification," it may order a party or an attorney "to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it." Noting that the parties' claims had survived motions to dismiss and motions for summary judgment, the court concluded that none of those claims were "'improperly brought' as that term is normally understood."

We agree with Keswick that the circuit court focused too narrowly on one

potential meaning of one part of the phrase. The relevant focus was not the usual meaning of the word "improperly" in a vacuum, but in the context of this particular contract and transaction. The phrase "any such improperly brought claim" appeared at the end of a sentence that began by describing an "unsuccessful" "legal action" relating to the contract. As Keswick points out, the use of the word "such" is an important contextual clue. The adjective "such" usually refers back to something else previously mentioned. *See* MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.m-w.com/dictionary/such/ (last visited Jan. 4, 2017) ("of the character, quality, or extent previously indicated or implied"); BLACK'S LAW DICTIONARY 1661 (10th ed. 2014) ("[t]hat or those; having just been mentioned"); *see also* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 859 (3d ed. 2011) (explaining that the word "such" is "used as an adjective when reference has previously been made to a category of persons and things" and advising that the word "must refer to a clear antecedent").

As the court correctly observed, a "legal action" is not necessarily identical to a "claim." Moreover, an action or claim may be "unsuccessful" even though it was brought without violating any rules or norms. But the use of the word "such" in the phrase "any such improperly brought claim" means that the parties intended to refer to the same concept of an "unsuccessful" "legal action" mentioned earlier in the sentence. The next sentence confirms this reading, because it authorizes awards "on a claim-by-claim basis" that does "not depend on the overall outcome" of the litigation. Thus, the "[]success[]" in the word "unsuccessful" depends on the success of a "claim" and not on the success of the entire action. At the hearing, the court even recognized that the

direction to evaluate fees on a claim-by-claim basis made it "clear" that the paragraph was "referring to claims and not the action as a whole."

There is some merit to the court's comment that "whoever wrote this [contract] sort of seemed to want to use every word in the dictionary." It is apparent that the drafters of this clause made an ill-advised attempt at "elegant variation." *See generally* H.W. Fowler, *A Dictionary of Modern English Language Usage* 148-51 (2d ed. 1983); Bryan A. Garner, *Garner's Dictionary of Legal Usage*, *supra*, at 449 (commenting that the "practice of never using the same word twice in the same sentence" should be renamed "inelegant variation"). Rather than repeat the word "unsuccessful" to express an equivalent meaning, the drafters selected a near-synonym ("improper[]") with a slightly different connotation. But after reading the entire paragraph, with its internal reference to an earlier phrase, it is sufficiently clear that the parties did not intend to introduce an entirely new concept when they used the word "improperly" in the final clause of the sentence. The sentence used the word "improperly" more in the sense of the factual correctness of the claim, or suitability of the assertion of the claim to the claimant's purpose, rather than in the sense of wrongfulness. In this context, the phrase "any such improperly brought claim" can refer to a claim that may have failed for any number of neutral reasons, not merely to a claim brought in bad faith or without substantial justification.[19]

[19] Keswick further contends that the court's interpretation "nullif[ied]" the provision by making it congruent with Rule 1-341. We do not entirely agree. A contractual provision stating that a prevailing party "shall" be entitled to attorneys' fees deprives the court of discretion to deny a fee request if the conditions are satisfied. *See*

We reverse the order denying Keswick's fee petition. Mr. Akin initiated a legal action against Keswick that was related to the contract, and his claims did not succeed, with the partial exception of his declaratory judgment claim. Those unsuccessful claims were "improperly brought" within the meaning of Paragraph 22 either because the jury rejected his claims or because his assertion of those claims did not fulfill his purpose of obtaining relief. On remand, Keswick is entitled to attempt to show that it is entitled to fees and costs under Paragraph 22 of the contract.

Nevertheless, as the court recognized, the contract authorizes an award only of the fees and costs incurred in defending claims, and it does so on a claim-by-claim basis. Keswick cannot recover for fees and costs incurred in asserting its own claims against the Akins. Because the core of this case was Keswick's breach-of-contract claim against Mr. Akin, and because the Akins wielded their claims more as a shield in that action than as a sword, it may well be that Keswick would have incurred all or nearly all of its expenses anyway even if Mr. Akin had never filed suit.

In general, the party seeking an award of fees must prove the amount and reasonableness of fees to some degree of reasonable certainty. *See, e.g.*, *Bd. of Trs., Cmty. Coll. of Baltimore Cnty. v. Patient First Corp.*, 444 Md. 452, 485 (2015). To show that it is entitled to any award under the contract, Keswick must persuade the court as to

Myers v. Kayhoe, 391 Md. 188, 207-08 (2006). By contrast, a trial court may exercise its discretion not to impose sanctions under Rule 1-341 even if the court finds that those sanctions are authorized. *See Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 677 (2003) (citing *Legal Aid Bureau, Inc. v. Bishop's Garth Assocs. Ltd. P'ship*, 75 Md. App. 214, 222 (1988)).

what portion of the fees or costs it incurred in defending against Mr. Akin's claims (as opposed to pursuing its own). Because the fees are authorized only for one aspect of the case, Keswick must present "records that accurately reflect what time is expended on specific aspects of the case[] in order to meet the burden proof on that issue." *Beery v. Maryland Med. Lab., Inc.*, 89 Md. App. 81, 102 (1991); *see also Barnes v. Rosenthal Toyota, Inc.*, 126 Md. App. 97, 106 (1999).

B. Keswick's Petition to Establish and Enforce a Mechanic's Lien

In its original pleadings, Keswick sought to establish a mechanic's lien against the property as a means of ensuring payment.[20] Keswick initially consented to defer its request for an interlocutory lien, and the court declined to establish an interlocutory lien when Keswick renewed its request shortly before trial.

As mentioned previously, Keswick's complaint did not include a breach-of-contract claim against Mrs. Akin, who was not a party to the contract. At the close of its case, Keswick moved to amend its pleadings to add a breach-of-contract count against Mrs. Akin, on the theory that she became a party when she signed the third change order. The court denied that motion, reasoning that the evidence showed that Mrs. Akin had signed that document as an agent for her husband. Eventually, the jury found Mr. Akin liable for breach of contract and Mrs. Akin liable under an unjust enrichment theory.

[20] In general, "[a] mechanic's lien is a statutorily created remedy against improved property on which work has been done or materials have been supplied." *Brendsel v. Winchester Constr. Co., Inc.*, 162 Md. App. 558, 580 (2005) (citation omitted). "An action for a mechanic's lien is an *in rem* proceeding for collecting a debt against the particular property described in the lien claim." *Id.* at 580-81 (citation omitted).

After prevailing at trial, Keswick again asked the court to establish and enforce a permanent mechanic's lien on the property. The Akins argued that Keswick could not obtain the lien because it was undisputed that Mrs. Akin was a co-owner of the property and the court had determined that Mrs. Akin was not a party to any contract with Keswick. Keswick made two arguments in response. First, Keswick argued that Mrs. Akin's co-ownership of the property could not defeat its right to a mechanic's lien, because she became an owner only after the execution of the contract. Second, Keswick argued that the jury's finding that Mrs. Akin was unjustly enriched meant that Mrs. Akin had an implied contract with Keswick.

The court did not settle the mechanic's lien issue until a status hearing nearly a year after those submissions. At that hearing, the court determined that Keswick was not entitled to a mechanic's lien because Keswick had no contract with Mrs. Akin and she was a co-owner of the property. The short discussion of the mechanic's lien issue focused almost entirely on whether the finding of unjust enrichment included a finding of an "implied" contract for the purpose of the mechanic's lien statute.[21] The court characterized Keswick's decision to proceed on an unjust enrichment theory against Mrs. Akin as "a self-inflicted wound."

Since Keswick has a money judgment, which operates as a lien on all real property that the Akins own in Montgomery County (Md. Rule 2-621(a)), it is unclear why

[21] Just before the court ruled, Keswick briefly reiterated its separate argument that Mr. Akin could not defeat a contractor's right to a mechanic's lien by adding a second owner after entering into a contract. The court did not address that argument.

Keswick cares to pursue a mechanic's lien. Nonetheless, Keswick's cross-appeal presents the following question:

> Was the trial court legally incorrect to hold that Keswick was not entitled to a mechanic's lien on the property because a claim for unjust enrichment is not a claim for an implied-in-law contract and therefore one of the owners of the Property did not have a contract – either express of implied – with Keswick, as is required by the mechanic's lien act?

As used in Maryland's mechanic's lien statute, the word "'[c]ontract' means an agreement of any kind or nature, express or implied, for doing work or furnishing material, or both, for or about a building as may give rise to a lien under [the mechanic's lien] subtitle." RP § 9-101(c). The statute defines a "'[c]ontractor'" as "a person who has a contract with an owner" (RP § 9-101(d)), and an "'[o]wner'" as "the owner of the land[.]" RP § 9-101(f). Under the statute, every building erected is subject to establishment of a mechanic's lien "for the payment of all debts, without regard to the amount, contracted for work done for or about the building and for materials furnished for or about the building[.]" RP § 9-102(a).

Generally, "a person is not entitled to the establishment of a lien unless there is a contract for the performance of work and/or for the furnishing of material in connection with a project covered by the Mechanics' Lien law." *Kaufman v. Miller*, 75 Md. App. 545, 551 (1988); *see also York Roofing, Inc. v. Adcock*, 333 Md. 158, 169 (1993) (citing *Greenway v. Turner*, 4 Md. 296, 304 (1853), for the proposition that "[t]he liability of the owner under the mechanics' lien law . . . must rest solely upon the terms of the law, one of which is that there must be an active subsisting contract between the builder and the owner, before the [owner] can be made responsible for materials [or labor] furnished to

the [builder]").

"Real property held as tenants by the entirety in Maryland is not open to the establishment of a mechanic's lien where only one of the owners is obligated on a debt." *In re Slacum*, 272 B.R. 335, 338 (Bankr. D. Md. 2001); *see Blenard v. Blenard*, 185 Md. 548, 557 (1946) (holding that, to establish mechanic's lien on property owned by husband and wife as tenants by the entireties based on alleged contract made by husband alone, alleged contractor needed to show that a contract existed, that the contract purported to obligate both husband and wife, and that the husband acted as the agent of the wife); *see also Wohlmuther v. Mt. Airy Plumbing & Heating, Inc.*, 244 Md. 321, 326-27 (1966) (commenting that, because property was owned by husband and wife as tenants by the entireties, both spouses should have been parties to the construction contract, but concluding that the husband had acted as agent for the wife). This result follows from a more general principle: "[W]here property is held by the entireties neither husband nor wife, acting alone, can encumber or dispose of any part of the estate, or make the other spouse responsible for improvements to it." *Bukowitz v. Maryland Lumber Co.*, 210 Md. 148, 153 (1956) (citing *Blenard*, 185 Md. at 558; other citations omitted).

That principle is inapplicable here, however, because the Akins did not hold the property as tenants by the entireties when Mr. Akin entered into the custom-home contract and agreed to the terms of the site-cost addendum. Mr. Akin contracted for the improvements while he was the sole owner of the property. A few months later, he added his wife as an owner by executing a no-consideration deed. The *Blenard* line of cases is distinguishable because, in those cases, the second spouse was already a co-owner of the

property at the time the first spouse entered into the contract.

As Keswick emphasizes, the mechanic's lien statute is a "remedial" statute that must be "construed to give effect to its purpose." RP § 9-112. We agree that the statute would be ineffective "if a party c[ould] defeat a mechanic's lien by simply adding a spouse to the deed after the contract was entered[.]" Mr. Akin did not defeat Keswick's right to establish a mechanic's lien when he added Mrs. Akin as an owner. Instead, Mrs. Akin took the property subject to its existing obligations under the contract.[22]

In its supplemental briefs on the mechanic's lien issue, Keswick further contends that it has met all other statutory requirements for the lien. The Akins contend that Keswick failed to provide notice that they say is required under the mechanic's lien statute. The circuit court did not reach those issues, and it would be inappropriate for an appellate court to resolve those issues in the first instance. Md. Rule 8-131(a). On remand, the circuit court should determine whether Keswick has satisfied the requirements of the statute.

CONCLUSION

For the reasons discussed above, we conclude that Keswick's custom-home contract did not comply with the Custom Home Protection Act. We have modified the declaratory judgment to reflect that determination. We otherwise affirm the portions of

[22] Although their argument on this issue is limited, the Akins appear to contend that a mechanic's lien cannot be established unless the property continues to be owned by the same person who entered into the construction contract. Under Maryland law, property owned by a subsequent owner is subject to a mechanic's lien unless the subsequent owner is a "bona fide purchaser for value." RP § 9-102(d). Mrs. Akin, who received her interest in the property for no consideration, is not a bona fide purchaser.

the judgment from which the Akins have appealed. In light of the Akins' failure to prove actual injury or loss resulting from Keswick's violation, the Akins failed to show that they were entitled to a judgment on the ground that the contract was unenforceable.

In Keswick's cross-appeal, we reverse the court's denials of Keswick's petition for attorneys' fees and petition for a mechanic's lien. In further proceedings, Keswick has the burden of showing whether and to what extent it may be entitled to those remedies.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART, MODIFIED IN PART, AND REVERSED IN PART; DECLARATORY JUDGMENT MODIFIED TO STATE THAT THE COURT "DECLARES THAT MARYLAND CODE ANN., REAL PROPERTY ART. § 10-505 (THE CUSTOM HOME PROTECTION ACT ("CHPA")), REQUIRES THAT A CUSTOM HOME CONTRACT INCLUDE THE ITEMS LISTED IN § 10-505 IN ORDER TO COMPLY WITH THE CHPA AND THAT THE CONTRACT DOES NOT COMPLY WITH THE CHPA AND CONSEQUENTLY VIOLATES THE CONSUMER PROTECTION ACT." CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN APPELLANTS/CROSS-APPELLEES AND APPELLEE/CROSS-APPELLANT.

APPENDIX

1. Did the trial court err in not finding that Unsigned Change Order #4 was unenforceable as violative of the Custom Home Protection Act?

2. Did the trial court err in not finding that Unsigned Change Order #4 was unenforceable as violative of the Consumer Protection Act?

3. Did the trial court err in permitting a determination of unjust enrichment where the underlying work of Keswick Homes, LLC was unenforceable under the Custom Home Protection Act and Consumer Protection Act?

4. Did the trial court err as a matter of law in not enforcing the plain terms of the Contract that parties need not agree to unsigned change orders?

5. Did the trial court err as a matter of law in not granting the Akins' motion for summary judgment?

6. Did the trial court err as a matter of law in not granting the Akins' motions to dismiss?

7. Did the trial court err as a matter of law in not granting a "motion for judgment" in favor of Tomi Akin and Shola Akin at the close of Keswick's case?

8. Did the trial court err as a matter of law in denying Tomi Akin's and Shola Akin's motion for judgment notwithstanding the verdict?

9. Did the trial court err as a matter of law in denying Tomi Akin's request for the Court to declare the rights of the parties, in particular that Keswick Homes, LLC's violations of the Custom Home Protection Act and Consumer Protection Act barred recovery on Unsigned Change Order #4?

10. Did the trial court err as a matter of law in not awarding attorneys fees to Tomi Akin for Keswick Homes, LLC failure to prevail on its courts for mechanics lien and summary judgment and failure to prevail on all its motions to dismiss and motion for summary judgment?

11. Did the trial court err as a matter of law in not awarding attorneys fees to Tomi Akin for Keswick Homes, LLC's violations of the Custom Home Protection Act and Consumer Protection Act?