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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HAROLD LEE,

Plaintiffs/Respondents

vs.

DWP GENERAL CONTRACTING,
INC. a Washington corporation,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE DANIEL STAHNKE

BRIEF OF APPELLANT

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INTRODUCTION

A party injured by a breach of contract is entitled to be placed in as good a position as that party would have been in if the contract had been performed. Conversely, a party is not entitled to a damages award that places him or her in a better position than if the contract had been performed.

In this case, the jury rendered a verdict that allowed Plaintiff Harold Lee (Dr. Lee) \$323,195.00 in lost net profits when the undisputed evidence was that he would have received at most \$84,994.00 if DWP General Contracting, Inc. (DWP) not breached the contract in question. For that reason, the trial court erred by not granting DWP's motion for a new trial or remittitur and entering judgment on the jury verdict.

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Trial Court Erred by Entering the Order on Defendant's Motion for new Trial or Remittitur and Plaintiff's Countermotion for CR 11 Sanctions.

ASSIGNMENT OF ERROR NO. 2: The Trial Court Erred by Entering the General Judgment Awarding Money Damages.

ISSUES PRESENTED

1. Is a party injured by a breach of contract entitled to recover in damages more than the net profits he would have earned had there been no breach?
2. Does the evidence show that the loss of net profits did not exceed \$84,994.00?
3. Should the Court grant remittitur to reduce the amount of the judgment to reflect the maximum amount that Dr. Lee can recover for loss of net profits?

STATEMENT OF THE CASE

By 2015, Dr. Lee intended to build apartments and town homes on land he owned in Vancouver. He planned to finance the construction through a loan with Bank of the Pacific and then convert the construction loan to a permanent loan when the buildings were completed. The amounts and interest rates of each loan were to be the same. (RP 33-34; CP 122, p. 31¹) Dr. Lee had been presented with a pro forma for the

¹ A transcript of the testimony of Laura Markee was attached to Dr. Lee's response to DWP's Motion for a New Trial and Remittitur. That transcript is in the four page per page or "mini" format. The first citation to the transcript will be the page's number in the Clerk's papers. The second page reference will be to the transcript page. Portions of Ms. Markee's testimony were also submitted in support of the motion. This will be referred to by their number in the clerk's papers.

project in April of 2015. It made reference to the permanent loan. (Ex. 40)

In August of 2015, Dr. Lee contracted with DWP to perform the construction. The contract required DWP to begin construction within one week of the closing of the construction loan and to complete the project within six months thereafter. Completion was to be achieved by the issuance of a certificate of occupancy. (Ex. 4, paragraph 5) The completion date was reckoned to be in March of 2016. (CP 117, p. 9) For reasons not relevant to this appeal, construction was delayed for fourteen months. After completion, Dr. Lee conveyed the project to Familee Properties, LLC, an entity that he controlled.

On January 20, 2018, Dr. Lee and Familee Properties, LLC, filed suit against DWP. (CP 1-3) The complaint sought damages for, among other things, failing to “complete the project on a timely basis.” (CP 2) DWP answered. (CP 4-6) In April of 2018, Familee Properties, LLC, sought and obtained voluntary dismissal of its claims. (CP 8-10) Dr. Lee then filed the First Amended Complaint for Breach of Contract on May 11, 2018. Its allegations were substantially the same as those contained in the initial complaint. (CP 11-14) DWP again answered. (CP 15-16)

The matter was tried to a six person jury beginning on February 11, 2019. Dr. Lee claimed various types of damages including lost profits.

(CP 48) Dr. Lee did not give testimony on this damage element. (RP 91-92) He submitted the testimony of Laura Markee, to give that testimony. Ms. Markee considers herself a business appraiser and a damages expert. (CP 115, p. 4)

Ms. Markee gave an initial analysis of damages including lost profits. (Ex. 65; CP 187) She revised that analysis less than one week before trial and after she was deposed. The revisions were based at least in part on issues raised at her deposition. The revised analysis was contained in Exhibit 64 which was admitted into evidence. (Ex. 64, CP 122-23, pps. 29-34; CP 187)

The revised analysis of lost profits that Ms. Markee gave was based on rentals lost during the period of delay. It began with average monthly rental income. This was based on rents that had been charged after the project was completed in 2017. This sum was then reduced by 4.4% because rents were 4.4% higher in 2017 than they were in 2016. Ms. Markee then subtracted for what she termed variable operating expenses. This was computed based on an average of what was expended to manage the project once it was completed. She then made two adjustments. One was based on a delay encountered in obtaining permits for the two townhouses. The other was based on her recognition that property taxes would likely have been higher in 2017 if the project had been completed

in May of 2016. (Ex. 64; CP 117-19, pps. 11-20) Ms. Markee set out the following summary on Schedule 2 of Exhibit 64:

Rental Income	\$34,655 Average results for Sept.2017-May 2018
Less: Rental Rate Adjustment	(1,531) Rental rates were 4.4% higher in 2017 vs. 2016
Less: Variable Operating Expenses	(7,696) average variable expenses for Sept 2017 - May 2018
Monthly Lost Profits	25,428
Multiplied by: # of months of stabilized occupancy	14 Number of month delayed
Equals: Lost Profits	\$355,985
Less: Adjustment for Townhouse Permitting Delay	(20,043)
Less: Property Tax Savings	(12,747)
Equals: Adjusted Lost Profits	\$323,195

There were some expenses that Ms. Markee did not include in her analysis. First of all, she did not include property taxes that would have been levied on the property with the buildings completed. She also did not include flood insurance because, in her view, this would have had to have been paid regardless of whether there were buildings on the property. (CP

118, p. 14) While Dr. Lee had conceded that he would have taken out the permanent loan when the project was finished, Ms. Markee did not include this expense in her calculation of lost profits. She gave the following as her reason:

A: Dr. Lee isn't going to—if he had \$3.2 million, he is not going to have any loan payments or any interest to pay at all. So if you want to calculate the damages in that situation, obviously wouldn't have that loan and interest payment because they wouldn't exist.

And then let's imagine that you have—that he decided to make a not great decision and get a pay-day loan to finance this thing. And in reality, once he's paid off the interest rate on that and the principal payments, he wasn't going to have any profit at all. You, know, from the perspective of what happened to him as a result of the delays, it's not a different scenario. But if you start to think about his own personal decision about his own financing, then you're going to get a different answer. And that's why you don't want to take into account the debt and the payments and that kind of thing. You just want to look at what happened to him, not what did he do as a result of it.

Q: I see. Let me give you a hypothetical and see if this is kind of what you are talking about. If you own a house and somebody drives a car through your living room and it causes \$100,000 of damage to your house, let's assume one person has \$100,000 and they pay \$100,000 and get it fixed. And there's another person and they have any insurance, I guess, okay. And another person doesn't a \$100,000, they have to borrow \$100,000 to get it fixed. Have you suffered \$100,000 in damages?

A: Yes, I mean, that's—that's why you don't want to take into account the debt piece of it.

(CP 121, pps. 26-28)

On cross examination, Ms. Markee was questioned about her calculations. In her first iteration which is Exhibit 65, her variable expenses were \$8,208.00. She conceded that the difference represented the cost of flood insurance that she claimed Dr. Lee would have to pay regardless of whether there were buildings on the property. (CP 123, p.

36) The following exchange then occurred:

Q: I think what you told us is that \$34,655 is the average monthly rent, right? I'm just looking at your chart.

A: That's what I calculated.

Q: . . .Okay. And then I think you said something about there being a \$1,531 as a deduction for the fact that rents increased during this period. Did I get that math right, ma'am? Is that right?

A: Yes.

Q: Okay. And then I think you said there would be \$8,208 of expenses if we include the property tax. .
(rest inaudible or indecipherable)

A: Yes.

Q: And how much was the permanent loan—how much was the costs that was being paid—I think you have that in your original report—on a monthly basis? And I'll help you out. It's schedule 7.

A: The payment is \$16,714.10.

Q: Okay. \$16,714. Obviously, forget the 10 cents. By my calculation, that shows \$6,071 monthly. Now if we are

asked to put Dr. Lee in the position that he would have been but for the breach of contract that the plaintiff is alleging, wouldn't this be the amount monthly that would put him that position, ma'am? Dr. Lee, not some hypothetical other person.

A: I mean, if—if you want to calculate—if you want to include the debt payments in that calculation, then that's what you end up with, but I think I have already explained why that would not be the right way to do it.

Q: Well, this is his cash flow, right?

A: That's what he would have—that's what he would have had.

Q: That's what he would had—that's what he would have had if my client had built the building on the time that my client allegedly promised, right? He would get \$6,071 per month, right, net? Is that true? I mean, just, that's a yes or no, ma'am.

A: It—I mean, based on your calculations, that is correct. That's not the right way to do financial damages, however.

Q: Well, you're an expert on financial damages but the jury's going to be instructed by the Court on the appropriate measure of damages to consider. So if—so I don't know what the judge is going to do or not do, but if they're instructed that they have to put Dr. Lee in the position that he would have been but for the breach, that puts him that position; isn't that true, ma'am?

A: It—that's right. If you—if you deduct the debt payment, it does.

Q: I am. But—okay. But deducting—the debt payment was a reality and is a reality for Dr. Lee, isn't it? This is not somebody who paid cash?

A: That is true.

Q: . . .And, of course, if he did pay cash, there wouldn't be—you know, if had just taken \$3.2 million to build a place, of course, he wouldn't have any debt. You know, he might have a lost time value of money, but he wouldn't have the, you know, the construction interest? He would just be paying cash, so that would be out the window, too. But that's not what we have.

A: Right.

(CR 124, pps. 36-39; CP 149-53)

Cross examination continued with discussion of why Ms. Markee's calculation did not include the entire amount of property taxes levied on the property when the buildings were completed. That amount of property taxes had been included in the exchange set out above. Ms. Markee ultimately conceded that Dr. Lee would have had to bear those taxes if the buildings had been completed when he claimed they should have been completed. (CP 126, pps. 46-48)

The trial court instructed the jury on damages in Instruction No.

11. The instruction included the following language adapted from WPI 303.01 and WPI 303.04:

In calculating the plaintiff's actual damages, you should determine the sum of money that will put the plaintiff in as good a position as he would have been in if both plaintiff and defendant had performed all of their promises under the contract.

In this case, Harold Lee claims lost profits. Harold Lee's damages may include net profits if Harold Lee proves with reasonable certainty that net profits would have been earned, but were not earned because of the breach of DWP General Contracting, Inc.

(CP 77) The jury returned a verdict on February 14, 2019. The verdict included an award of \$323,195.00 for lost profits, the precise amount contained in Exhibit 64.

DWP then moved for a new trial and for remittitur on the basis that the verdict that the damages award was excessive, too large, and not supported by the evidence. (CP 87-94) The motion was supported by excerpts of Ms. Markee's testimony on cross examination set out above verbatim. (CP 145-56) Dr. Lee opposed the motion and submitted the entirety of Ms. Markee's testimony. (CP 95-129)

The trial court denied DWP's motion. On March 25, 2019, it entered the Order on Defendant's Motion for new Trial or Remittitur and Plaintiff's Countermotion for CR 11 Sanctions. (CP 164-65) On the same day it also entered the General Judgment Awarding Money Damages. The judgment included the \$323,195.00 that the jury awarded for lost profits. (CP 166-67) DWP then appealed.

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ARGUMENT

I. Standard of Review.

DWP moved for a new trial on the basis of CR 59(a)(6) and CR

59(a)(7). (CP 87-88) The rule provides as follows in pertinent part:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law. . .

The grant or denial of a motion for a new trial is addressed to the trial court's discretion and is reviewable for abuse. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 720 P.2d 847 (1997); *Mutual of Enumclaw Insurance Company v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 727, 315 P.3d 1143 (2013) The denial of a motion for a new trial is reviewed more critically than the granting of the motion because a new trial places the parties where they were before, while a decision denying a new trial concludes

their rights. *Collins v. Clark County Fire District No. 5*, 155 Wn.App. 48, 81, 231 P.3d 1211 (2010)

A motion based on CR 59(a)(6) or CR 59(a)(7) requires the appellate court to review the record to determine whether there was sufficient evidence to support the verdict. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 316-17, 372 P.3d 111 (2016) If the verdict is contrary to the evidence, it is an abuse of discretion to deny the motion for new trial. *Palmer v. Jensen, supra*; *Mutual of Enumclaw Insurance Company v. Gregg Roofing, Inc., supra*.

DWP also sought remittitur of the verdict based on RCW 4.76.030.

That statute provides as follows:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as

unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

A trial court's denial of a request for remittitur is reviewed for abuse of discretion based on, among other things, whether the jury's verdict is supported by substantial evidence in the record. *Bunch v. Department of Youth Services*, 155 Wn.2d 165, 176, 179, 116 P.3d 381 (2005) Substantial evidence is defined as the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 277 (2012) An appellate court also has the authority to apply remittitur and reduce a verdict although this authority should be rarely exercised. *Bunch v. Department of Youth Services, supra*, 155 Wn.2d at 171-72, 175

In this case, the jury's verdict on lost profits was clearly at odds with the facts and with the applicable law and was not supported by substantial evidence. A new trial should have been granted on these damages. In the alternative, the trial court should have reduced the award to conform to the evidence. The trial court's failure to do so was error. Finally, and given the clarity of the issue, the Court should reduce the damage award.

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II. The Jury's Verdict Was Not Supported by the Undisputed

Evidence.

a. Introduction.

Dr. Lee was entitled to be placed in the same position he would have been in if there had been no breach. As Ms. Markee—the only witness on this damage element—conceded, he would have realized net profits of \$6,071.00 per month for fourteen months, or \$84,994.00 if the project had been completed when Dr. Lee claimed it should have been completed. Nonetheless, the jury awarded \$323,195.00. The latter amount did not account for three items that Dr. Lee would have had to pay from gross rentals. These are monthly payments on the permanent loan, payments for flood insurance, and payments for property taxes. The jury's verdict was therefore too large. It was also not supported by the evidence. Finally, it was contrary to law because it allowed Dr. Lee more in net profits than he would have received had there been no breach. Therefore, the trial court should have granted a new trial on the issue of lost profits or granted remittitur to reduce the verdict and the subsequent judgment.

It must also be pointed out that any recovery for loss of net profits is somewhat artificial. The profits for the first fourteen months of operation of the apartment business were not lost. They were merely delayed. The damage would consist of the lost time value of the money

that would be those profits, not the loss of the profits themselves. Furthermore, Dr. Lee's loss of the profits for the first fourteen months of the operation of the apartment business was due to his conveying his interest in the apartments to Familee Properties, LLC, not any act of DWP.

b. The Legal Standard.

A party aggrieved by a breach of contract is entitled to damages that will put that party in the same economic position the party would have been in had there been no breach. *Rathke v. Roberts*, 33 Wn.2d 858, 865-66, 207 P.2d 716 (1949); *TMT Bear Creek Shopping Center v. PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 210, 165 P.3d 1271 (2007) The aggrieved party is not, however, entitled to be placed in a better position by a damage award. As the Court stated in *Rathke v. Roberts, supra*, 33 Wn.2d at 865-66:

In accordance with the general principle governing the allowance of damages, a party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, in so far as this can be done by money, in the same position he would have occupied if the contract had been performed. Moreover, his recovery is limited to the loss he has actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken. Otherwise stated, the measure of damages is the actual loss sustained by reason of the breach, which is the loss of what the contractee would have had if the contract had been performed, less the proper deductions. Another statement of the rule is that the measure of damages for the breach of a contract is the

amount which would have been received if the contract had been kept, which means the value of the contract, including the profits and advantages which are its direct results and fruits.

(Emphasis Added)

The loss of net profits is a recognized damage element in breach of contract claims. 22 Am.Jur.2d *Damages* § 472 (2013) This element was discussed in *Rathke v. Roberts, supra*, 33 Wn.2d at 879-880. In our case, the trial court instructed the jury that it could consider net profits as an element of damages. No objection was taken to that instruction. (CP 183) It therefore became the law of the case. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001)

The term “net profits” has been defined to mean the gross amount that would have been received, less the cost of running the business. It is determined by computing the difference between the gross profits and the expense that would be incurred in acquiring such profits. 22 Am.Jr.2d *Damages* § 472 (2013) It has also been defined to mean the profits after deduction of all expenses. Black’s Law Dictionary, Fifth Edition, p. 939 (1979). A later version of Black’s Law Dictionary has defined profit, gross profits, and net profits in the following way:

Profit: The excess of revenues over expenditures in a business transaction. . .

Gross Profit: Total sales revenue less the cost of the goods sold, no adjustment being made for additional expenses and taxes. . .

Net Profit: Total sales revenue less the cost of goods sold and all additional expenses—Also termed *net revenue*. . .

Black's Law Dictionary, Tenth Edition, p. 1404 (2014) The Supreme Court of Utah has given a similar and concise definition of net profits by stating that net profits are determined by computing the difference between the gross profits and the expenses incurred in acquiring such profits. *Sawyers v. FMA Leasing Corp.*, 722 P.2d 773, 774 (Utah 1986)

Where the net profits of an entire business are concerned, Courts have required that all expenses be deducted from gross revenue to obtain profits. See, e.g. *Victoria Cruises, Inc., v. Yangtze Cruises, Inc.* 630 F.Supp.2d 255, 263 (E.D.N.Y. 2008)—trademark infringement; *Olcese v. Davis*, 124 Cal.App.2d 58, 63, 268 P.2d 175 (1954)—breach of contract to deliver agreed upon quantity of onions; *Resort Video Ltd v. Laser Video, Inc.*, 35 Cal.App.4th 1679, 1700, 42 Cal.Rptr.2d 136 (1995)—breach of contract to produce vacation resort videos; *Turner v. P.V. International Corp.*, 765 S.W. 2d 455, 465 (Tex.App. 1988)—breach of contract to raise capital.

And in this context, Courts have not been reluctant to fault profit calculations that did not include expenses for everything necessary

to earn revenue. For example, in *Southern Bell Telephone and Telegraph Co., v. Kaminester*, 400 So.2d 804 (Fla.App. 1981), the jury awarded a dermatologist lost profits due to an incorrect yellow page listing. The Court reversed the denial of a motion for a new trial on the basis that the evidence was insufficient to support the verdict because the lost profit calculation did not include any reduction for the doctor's compensation. And in *Gordon v. Indusco Management Corp.*, 164 Conn. 262, 320 A.2d 311 (1973), the plaintiff was awarded lost profits in his suit against a contractor for failing to construct a building for his fast food franchise. The Court reversed and held that the damage award could not be sustained because there was no reduction for the salary for a store manager. 164 Conn. at 275

Washington does not diverge from the general rule. Our Courts have long required expenses to be deducted in reaching the amount of damages for lost profits. *Sedro Woolley Veneer Co. v. Kwapil*, 62 Wash. 385, 389, 113 P. 1100 (1911)—damages for failure to deliver egg case shooks included net profits, defined as the price the aggrieved party had contracted to resell them “less the expense incident to the delivering of them to his customers;” *Sanders v. Pinney*, 103 Wash. 162, 168-69, 174 P. 471 (1918)—damage award appropriately reduced by costs that would have been incurred to harvest timber where contract logger's access to the

land was breached; *Ketchum v. Albertson Bulb Gardens*, 142 Wash. 134, 139, 252 P. 523 (1927)—grower’s profits must include cost of the bulbs; *Berg v. General Motors Corporation*, 87 Wn.2d 584, 595, 555 P.2d 818 (1977)—noting that lost profits for loss of use of a ship is computed by deducting from gross receipts for freight the “expenses in earning it.”

Furthermore, the deduction of all expenses is consistent with the notion stated in *Rathke v. Roberts, supra*, that a party injured by a breach of contract must not be placed in a better position by a damage award than if the contract had been performed. As the Court in *Olcese v. Davis, supra*, 124 Cal.App.2d at 63:

To allow plaintiff to recover a judgment based in part on his gross profits would result in his unjust enrichment. If he is entitled to recover at all, because of his loss of profits, such recovery must be confined to his net profits. Net profits are the gains made from sales "after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed." (citations omitted) . . .

Very simply stated, then, the question presented in this case is, was, and has been how much net profit Dr. Lee would have recovered if there had been no breach and the project had been completed by March of 2016. This would be the difference between gross rentals and all expenses that would have been incurred. The goal, once again, is to put Dr. Lee in the same position he would have been in without the breach—no worse, but certainly no better.

c. Monthly Payments on the Permanent Loan Must Be Deducted to Obtain Net Profits.

There is no doubt that Dr. Lee would have had to make his monthly payment on the permanent loan each and every month. When Dr. Lee embarked on this project, he intended first to take out a construction loan and then convert it to a permanent or take out loan when construction was completed. The latter loan required monthly payments of \$16,714.00. Ms. Markee conceded that a deduction for the payment would be required to put Dr. Lee in the same position he would have been in if there had been no breach.

Dr. Lee, through Ms. Markee, argued that this amount should not be included because Dr. Lee would have the damages whether he financed the construction or not. She stated that the damage calculation should be the same whether the person in Dr. Lee's position paid for construction from his or her own funds or decided to obtain financing. She likened the situation to a person suffering a casualty loss to his or her home.

That argument makes no sense under the situation we have here. Dr. Lee planned to finance the construction of the project from the outset. He intended to use the rentals to make the monthly payments on the permanent loan as well as to pay other expenses. The loan was an

anticipated expense that would reduce the amount of money that would be left over—the net profit—for Dr. Lee to enjoy. It was necessary for Dr. Lee to recover any profit at all. In fact, it was the most basic expense that Dr. Lee would incur in connection with the whole project. Without the loan, there would have been no construction. Without construction, there would have been no buildings to rent. And without buildings to rent, there would be no gross rentals.

The cost of purchasing and installing equipment or other items as well as the amortization of any capital investment is a necessary deduction from gross revenues in any claim for lost profits. In *Gerwin v. Southeastern California Conference of Seventh Day Adventists*, 14 Cal.App.3d 209, 92 Cal.Rptr. 111 (1971), the defendant breached its contract to deliver equipment to plaintiff for use in plaintiff's hotel. Plaintiff had discussed entering into a lease with others to operate a coffee shop and cocktail lounge in the hotel. The arrangement required him to furnish the equipment and required his tenants to pay him \$1,500.00 per month as rent. He did not buy equipment elsewhere and did not enter into the lease. He claimed lost profits based on the rental that he would have received. The Court held that his proof of lost profits was insufficient. It stated:

Moreover, there was no showing that the rental income from the lease would have constituted net profit to plaintiff. Under the terms of the proposed lease plaintiff was required to provide and install the necessary equipment, furniture and furnishings. Amortization of such costs as well as interest on his capital investment, taxes, and cost of maintenance should have been deducted. When loss of anticipated profits is an element of damages, it means net and not gross profits.

14 Cal.App.3d at 222

If the cost of acquiring and installing equipment must be deducted from revenue to obtain net profits, then certainly the cost of constructing apartments for rental must also be a necessary deduction. Dr. Lee chose to pay and finance that cost through the permanent loan. The monthly payments made on the permanent loan must therefore be deducted to obtain the award of net profits.

The analogy to a casualty loss shows the weakness in Dr. Lee's position that the loan payment should not be deducted. A loss coming from someone driving into a person's home is unanticipated. No one can plan for how repair costs from such an event will be paid.² Such an event also has nothing to do with attempting to make a profit.

At the end of the day, not requiring the deduction of the loan payment places Dr. Lee in a better position than he would have been in

² The only way to plan for such a scenario is to obtain property insurance to pay for needed repairs.

had there been no breach. Since it gives him damages without deducting for the loan payment, it gives him more money than he would have realized if there had been no breach. As the Court stated in *Rathke v. Roberts, supra*, a party aggrieved by a breach of contract is not entitled to be put in a better position than he or she would have been in had there been no breach.

d. Property Taxes and Insurance Must Be Deducted.

Through Ms. Markee, Dr. Lee argued that the whole of property taxes and insurance should not be deducted because they were “fixed expenses.” Under the circumstances presented here, those expenses have to be deducted.

Claims for lost profits often arise when a business experiences a breach of one among many of its contracts. In the calculation of lost profits in such a context, the question of whether deductible costs are “fixed” or “indirect” on the one hand or “variable” or “direct” on the other sometimes arises. “Fixed” or “indirect” costs are the continuous costs of the business that are incurred regardless of the loss of a portion of the business. “Variable” or “direct” costs are costs linked directly to the project at issue. 22 Am.Jur.2d *Damages* § 475 (2013) Some cases have held that such continuous costs need not be deducted because they would not be directly related to the contract at issue. See, e.g. *Vitex*

Manufacturing Co., v. Caribtex Corp., 377 F.2d 795, 798-99 (3rd Cir. 1967), cited with favor in *Coast Trading Co. v. Parmac, Inc.*, 21 Wn.App. 896, 910, 587 P.2d 1071 (1978). Expenses that are tied to the production of the lost income, however, are deducted from the estimated lost revenue. *American Eagle Waste Industries, LLC v. County of St. Louis*, 279 S.W.3d 813, 833 (Mo. 2012)

The dichotomy between “fixed” and “variable” expenses has no place in the calculation of lost profits in this case. Dr. Lee’s claim is for the entire business—the rental of the apartments and townhomes. Since his claims relate to the whole of the business, all expenses of the business must be deducted to obtain his net profit. As the California Court of Appeals stated in *Gunter v. City of Stockton*, 55 Cal.App. 3d 131, 149, 126 Cal.Rptr. 690 (1976):

In limited situations, loss of profit may be fairly computed without reference to overhead. In a suit for profit lost by reason of the defendant's failure to supply or accept materials or services, the plaintiff's fixed or overhead costs might be totally unaffected by the breach, justifying the court in disregarding overhead as a portion of the cost; the gross profit would then be the equivalent of the net profit the plaintiff would have earned under the agreement. (Citations omitted) Where as here an entire business is injured or interrupted, the measure of recovery must be the net loss, not the gross profits. Fixed or overhead costs then become an essential element in computing the lost profits forming the basis for the damage award. If overhead costs are not increased by the breach, it is error to allow them as damages. (Citations omitted) To award the plaintiff not

only lost profit but also the cost of producing the profit causes a double recovery.

(Emphasis added)

The situation might be different if Dr. Lee sued a contractor for breach of a contract to make repairs to a single unit resulting in his inability to rent that unit for several months. Dr. Lee would have a claim for lost profits that would consist of the expected rental revenue less management fees related to the rent achieved. The remainder of his expenses—for insurance, taxes, and even for his mortgage payment—would not be deducted because they would be “fixed” expenses that would be paid in any event.

At the end of the day, Ms. Markee conceded that the deduction of these expenses would be necessary to place Dr. Lee in the same position he would have been in had the project been completed when he claimed it should have been. This was the only evidence in the record on this subject.

e. Dr. Lee Cannot Simply Rely on Exhibit 64 to Avoid the Grant of New Trial.

Dr. Lee may argue that a new trial should not be granted because Exhibit 64 setting out Ms. Markee’s damage calculation is in the record. That contention misses the point. That calculation does not

account for all expenses that would have been incurred and therefore does not put Dr. Lee in the same position he would have been in had there been no breach. Ms. Markee conceded as much. Therefore, the jury's verdict represents an error in the assessment of the amount of recovery requiring a new trial under RCW 59(a)(6). The jury's verdict is also not supported by the evidence and is contrary to law necessitating a new trial under RCW 59(a)(7).

f. Conclusion

Dr. Lee was entitled to be placed in the same position he would have been in had there been no breach of contract. One part of that recovery was net profits—expected revenues from rentals less expenses incurred. Ms. Markee, Dr. Lee's only witness on the subject of damages, conceded that deductions for flood insurance, property taxes, and monthly payments on the current loan were necessary to put Dr. Lee in the same position he would have been in had a certificate of occupancy been obtained fourteen months earlier than it was. This was the only evidence in the record utilizing the proper standard—what is necessary to put the plaintiff in the same position he would have been in had there been no breach as set out in Instruction No. 11.

The jury's verdict on lost profits was \$323,195.00, the amount set out on Exhibit 64, the exhibit that set out Ms. Markee's computations.

The verdict did not take into account the monthly loan payment that was required to be deducted, property taxes—other than a partial reduction—and flood insurance. Had those deductions been made, the amount of lost profits would have been \$6,071.00 per month which would have yielded an award of \$84,994.00 for fourteen months. Such an award is generous because Ms. Markee also conceded that gross revenues should be reduced by \$20,943.00 due to delay in permitting the town homes. That would take the loss to \$64,051.00. Therefore, the verdict impermissibly placed Dr. Lee in a better position than if the project had been finished within the claimed time frame by giving him profits that he would never have made.

For these reasons, there was an error in the assessment of the amount of recovery in a contract action. There was also no evidence or reasonable inference from the evidence to justify the verdict. Finally, and critically, the jury's verdict was contrary to law because it put Dr. Lee in a better position than he would have been in if there had been no breach. Therefore, a new trial was and is required under both CR 59(a)(6) and CR 59(a)(7). For that reason, the trial court erred by not granting DWP's motion for a new trial.

The trial court also erred by failing to grant remittitur. The substantial evidence in the record—Ms. Markee's concessions on cross examination—clearly shows that property taxes, flood insurance, and

payments on the permanent loan must be deducted to place Dr. Lee in the same position he would have been in had the project been completed fourteen months earlier. There is also no serious dispute about the amounts of these reductions. The amounts were based on subsequent experience and conceded by Ms. Markee.

Furthermore, the trial court should not have entered the General Judgment Awarding Money Damages because included the jury's verdict for lost profits.

Finally, and given the clarity of the record on this issue, the Court of Appeals should grant remittitur to reduce the principal of the judgment by at least \$238,201.00, the difference between the jury's lost profit award of \$323,195.00 and \$84,994.00, the most that could have been awarded. The Court should further reduce the lost profit award by an additional \$20,043.00 based on the reduction Ms. Markee made to account for higher rents in 2017 than in 2016. The principal of the judgment would then be reduced from \$500,202.00 to \$241,958.00.

CONCLUSION

The Court of Appeals should reverse the judgment against DWP and remand the matter to the trial court for a new trial on the subject of damages for lost profits. Alternatively, it should either reverse the judgment and remand the matter for entry of judgment based on what

could have been awarded for lost profits or exercise its authority to reduce the principal of the judgment.

DATED this 14^e day of June, 2019.



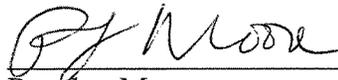
GIDEON CARON WSB#18707
Of Attorneys for DWP General
Contracting, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on the following named person on the date indicated below by e-mailing a true copy to said person at the e-mail address below based upon an agreement between the parties to accept service by e-mail:

Steven E. Turner
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DATED this 14th day of June, 2019.



Roselyn Moore,
Legal Assistant

CARON, COLVEN, ROBISON & SHAFTON PS

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