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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

REPLY BRIEF

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INTRODUCTION

A party aggrieved by a breach of contract is entitled to be placed in the same position that party would have been in had there been no breach—no worse and certainly no better. Brief of Appellant, p. 15. The undisputed facts in this case show that Dr. Harold Lee (Dr. Lee) would have realized at most \$84,994.00 in net profits if DWP General Contracting, Inc. (DWP) had completed the construction project within the time claimed. This was conceded by Laura Markee, the only damages witness on this point. Nonetheless, the jury awarded \$323,195.00 for lost profits when it was instructed to award the net profits that would have put Dr. Lee in the same position as if there had been no breach. Obviously, this verdict puts Dr. Lee in a better position than he would have been in had there been no breach and amounts to an impermissible windfall. Therefore, there is no support for the verdict and it is contrary to law.

The brief submitted on behalf of Dr. Lee barely mentions the cardinal rule that an aggrieved party is to be placed in the same position had there been no breach. It also does not refute the proposition that the jury's damage award put Dr. Lee in a better position than he would have occupied had there been no breach. Therefore, there can be little doubt that the trial court erred by denying DWP's motion for a new trial and for remittitur.

This Reply Brief will focus on the content of the brief submitted on behalf of Dr. Lee. It will avoid repeating or reiterating arguments made in the Brief of Appellant but will refer to the place in the Brief of Appellant where those points are discussed.

FACTUAL REJOINDER

There is a suggestion in the Brief of Respondent that the additional construction loan interest that Dr. Lee paid somehow bears on the question presented in this appeal. It does not. Dr. Lee sought and received an award of such interest in the amount of \$36,472.00. (CP 82) Ms. Markee estimated this element at \$36,000.00. (CP 124-26, pps. 40-46)¹

ARGUMENT

I. The Grant of a New Trial Will Not Offend Article 1, Section 21 of the Washington Constitution.

The Civil Rules allow a new trial to be granted if there is an error in the assessment of the amount of recovery in contract actions, or if there is no evidence to justify the verdict or if it is contrary to law. CR 59(a)(6), (7) Dr. Lee suggests that the grant of a new trial for either of those

¹ This citation to the record follows the same convention used in the Brief of Appellant. Ms. Markee's testimony was submitted in the four page "mini" format. The first citation is to the page in the Clerk's papers, and the second is to the page or pages within the transcript.

reasons will violate Article 1, Section 21 of the Washington Constitution because it will interfere with the jury's damages award. There is no support for that argument.

The constitutional provision, Article 1, Section 21, reads as follows:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

This provision does not eliminate the ability of a Court to grant a new trial if the jury's verdict is contrary to the evidence. *Coppo v. Vanwieringen*, 36 Wn.2d 120, 121-22, 130-32, 217 P.2d 294 (1950) The Court made this clear in *Green v. McAllister*, 103 Wn.App. 452, 462, 14 P.3d 795 (2000), when it stated:

The right of trial by jury on a legal claim is inviolate. CONST. art. I, § 21. The jury verdict must be upheld unless the court finds from the record that the damages are outside the range of substantial evidence in the record . . .

See also, *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) Furthermore, and as pointed out in the Brief of Appellant, p. 12, it is an abuse of discretion to deny a motion for a new trial if the verdict is contrary to the evidence.

The language of Article 1, Section 21, also does not preclude reduction of a jury verdict that is contrary to the evidence. *Bunch v. Department of Youth Services*, 155 Wn.2d 165, 172, 116 P.3d 381 (2005)

Based on these formulations, Courts have not hesitated to reduce a jury verdict not supported by the evidence or grant a new trial. For example, in *Hill v. GTE Directories Sales Corp.*, 71 Wn.App. 132, 138-39, 856 P.2d 746 (1993), an expert witness in a gender discrimination case put the plaintiff's lost income at \$16,347.00. There was also evidence suggesting that she may have received an additional bonus of \$1,000.00 to \$1,400.00. There was a claim for lost benefits but no evidence about their value. The jury awarded \$40,000.00 for economic damages. The trial court reduced that award to \$19,000.00. The plaintiff appealed arguing that the trial court had substituted its view of the evidence for that of the jury. The Court affirmed on the basis that the evidence did not support the jury's verdict. And in *Mutual of Enumclaw Company v. Gregg Roofing, Inc.*, 178 Wn.App. 702, 315 P.3d 1143 (2013), the Court reversed the denial of a motion for a new trial when the jury rendered a verdict of \$1.5 million in favor of Gregg Roofing, Inc., for a combination of lost profits, consequential damages, and damage to the business' reputation. There was no evidence quantifying the loss to the reputation of the business. The Court ruled that such evidence was necessary to support the claim. It

ordered a new trial on the amount of damages based on CR 59(a)(7), that there was no evidence or reasonable inference from the evidence to justify the verdict or that it was contrary to law. 178 Wn.App. at 727

In our case, the substantial evidence in the record did not support the jury's award of \$323,195.00, and the verdict was contrary to law and not supported by the evidence as discussed in the Brief of Appellant, pps. 14-26. Therefore, Article 1, Section 21 does not preclude the grant of a new trial. The evidence as to what gross rentals Dr. Lee could have expected and what the various expenses would have been was undisputed. It was also undisputed that the amount necessary to put Dr. Lee in the same position he would have been in had DWP performed as he claimed was no more than \$84,994.00. This is so because the only witness on this point, Ms. Markee, conceded as much. Remittitur is also not precluded for the same reasons.

II. The Verdict Cannot Be Justified on the Basis That the Jury Selected One Aspect of Ms. Markee's Testimony Over Another.

Dr. Lee's argument is very simple—because Ms. Markee gave a damages calculation of \$323,195.00, the jury's verdict was within the range of the evidence. That argument must be rejected because the issue presented is one of law and not one of fact.

The underlying facts concerning damages were not seriously disputed. For example, there was no issue concerning what gross rentals Dr. Lee could have realized, what his management expenses would have been, what he would have had to pay for real estate taxes after the buildings were built, and what the cost of flood insurance would have been. Even the amount necessary to put Dr. Lee in the same position he would have occupied in the absence of the breach was undisputed.

The jury's verdict is contrary to law and not supported by substantial evidence because it clearly did not deduct all the expenses necessary for Dr. Lee to realize gross rentals from the property—the mortgage payment, the taxes, and the flood insurance. It therefore put Dr. Lee in a better position had there been no breach. In other words, the verdict applied the wrong legal standard.

The issue here is one of law, not of fact. The Courts that have discussed what should be deducted to reach net profits have framed the issue as one of law. See cases cited at Brief of Appellant, pps. 17-19, 21-24; and *infra*, pps. 10-13. And Dr. Lee cannot rely on whatever Ms. Markee may have said since legal opinions under the guise of expert testimony are not subject to consideration. *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 122 Wn.2d

399, 344, 858 P.2d 1054 (1993); see also *Stenger v. State*, 104 Wn.App. 393, 407, 16 P.3d 655 (2001)

Our case is therefore different from *Green v. McAllister, supra*, cited by Dr. Lee. That case involved a partnership dispute concerning a real estate development. The jury awarded breach of contract damages based upon the fee the plaintiff could have realized. The trial court reduced the amount of the award. The Court reversed because the jury's award was within the range of the evidence submitted at trial. 102 Wn.App. at 463-64 There was no legal issue concerning computation of damages as there is here. Our case is also different from *Elias v. Seattle*, 2 Wn.App.2d 1039, 2018 Wash.App. Lexis 392 (2018), an unpublished opinion. In that employment discrimination case, the employees presented expert testimony concerning lost pay and benefits. The jury awarded an amount lower than the expert's opinion. On appeal, the City claimed that the opinion was incorrect but, critically, did not challenge the sufficiency of the testimony to support the jury's award. The Court affirmed the denial of remittitur and a new trial because the testimony was within the evidence. This case is not helpful because, as should be clear at this point, DWP does challenge the sufficiency of the evidence to support the jury's verdict.

Dr. Lee also rests on the fact that DWP did not call an expert witness. This argument misses the point. Experts deal with facts. The issue here is one of law—what expenses must be deducted to get to the same net profits Dr. Lee would have recovered had the contract been performed as he claimed it should have been. Furthermore, the facts about what gross rentals could have been expected to be and what expenses would have had to have been paid were not disputed. This is especially true of the mortgage payment. There was no reason to hire an expert to come up with different facts. Finally, Ms. Markee agreed that the deduction of the mortgage payment, the taxes, and the flood insurance were all necessary to place Dr. Lee in the same position he would have been in had DWP performed as he claimed. With this concession from Dr. Lee’s expert, DWP needed nothing further. The issues were well framed.

III. The Mortgage Payment, Real Property Taxes, and Flood Insurance Must Be Deducted.

Dr. Lee has argued that the mortgage payment, real property taxes, and flood insurance need not be deducted to reach net profits based on several cases that he has cited. The decisions do not support his position because none are based on a situation analogous to what we have here—a business with only one source of revenue.

In *Vitex Manufacturing Co., v. Caribtex Corp.*, 377 F.2d 795 (3rd Cir. 1967), a leading case on this issue, Vitex Manufacturing had closed its wool processing plant in the Virgin Islands. It then entered into an agreement with Caribtex to process wool that Caribtex would supply. Vitex proceeded to re-open its Virgin Islands plant, ordered the necessary chemicals, recalled its work force and made all the necessary preparations to perform its end of the bargain. Caribtex did not supply the wool in breach of the contract. Vitex sued for its lost profits which the trial court awarded. This was based on projected revenues less costs which would have been incurred. On appeal, Caribtex argued that the trial court erred by failing to deduct a portion of Vitex' overhead, including executive and clerical salaries and general administrative expenses, to reach net profits.²

The Court affirmed. It noted that overhead expenses are generally not affected by any individual contract and therefore should not be considered an expense necessary to the performance of such a contract. 377 F.2d at 798 It went on to indicate that this rule amounts to a tacit recovery of such overhead expenses. It stated:

. . . Suppose a company has fixed overhead of \$10,000 and engages in five similar transactions; then the receipts of

² The issue was framed as “. . . whether it was error for the district court, sitting without a jury, not to consider overhead as part of Vitex's costs in determining the amount of profits lost.” 377 F.2d at 796. This demonstrates that the issue of what must be deducted is a question of law, not of fact.

each transaction would bear \$2000 of overhead expense. If the company is now forced to spread this \$10,000 over only four transactions, then the overhead expense per transaction will rise to \$2500, significantly reducing the profitability of the four remaining transactions. Thus, where the contract is between businessmen familiar with commercial practices, as here, the breaching party should reasonably foresee that his breach will not only cause a loss of "clear" profit, but also a loss in that the profitability of other transactions will be reduced. (Citations omitted) Therefore, this loss is within the contemplation of "losses caused and gains prevented," and overhead should be considered to be a compensable item of damage.

397 F.2d at 799 This discussion makes clear that general overhead expenses should not be deducted to reach net profit where the aggrieved business lost profits from one of several contracts or sources of revenue. It has no applicability where, as here, Dr. Lee's business has only one contract, only one source of revenue—gross rentals from the apartments and townhouses, and the entire business is disrupted or injured. Applying the rule in a situation like ours results in an undeserved windfall for the business seeking damages for lost profits. Brief of Appellant, pps. 24-25

The quoted statement also jibes well with the notion that a party aggrieved by a breach of contract should be placed in the same position as the party would have occupied had there been no breach. As stated, a company that loses one of its contracts through breach, loses revenue that could be applied to general overhead. This loss of revenue makes its other contracts less profitable. In such a situation, the aggrieved party should

not have its recovery reduced by subtracting a portion of general overhead—such as clerical salaries—from an award of lost profits. Such a reduction would have the effect of putting such a party in a worse position than if there had been no breach.

It is also noteworthy that the Court in *Vitex Manufacturing Co., v. Caribtex Corp., supra*, relied in part on a California decision, *Oakland California Towel Co., v. Sivils*, 52 Cal.App.2d 517, 126 P.2d 651 (1942), in coming to its decision. 377 F.2d at 798. As discussed in detail in the Brief of Appellant, pps 20-25, California courts require deduction from profits of expenses necessary to acquire equipment or other items necessary to generate profit and require all expenses to be deducted when the whole business is interrupted.

In any event, DWP did not seek the deduction of general overhead types of expenses. There was no evidence of any general overhead of Dr. Lee's business as in *Vitex Manufacturing Co., v. Caribtex Corp. supra*. The expenses which should be deducted are those which would have been necessary to the realization of the profit to include property taxes with the buildings in place, flood insurance, and the mortgage payment—the expense necessary to secure the building of the units that generate the revenue.

The Washington cases that Dr. Lee cites are inapplicable for the same reasons. In each case, the Court ruled that general overhead expenses did not have to be deducted.

The first of these cases, *Coast Trading, Inc. v. Parmac Corporation*, 21 Wn.App. 896, 587 P.2d 1071 (1978), involved the breach by cancellation of a contract by which Parmac Corporation was to construct and ship large metal storage tanks. Parmac claimed lost profits as damages. The trial court computed these profits by deducting general overhead—referred to as plant “burden”—for such things as engineering, selling, and general administration expense. The Court noted that the order made by Coast Trading comprised 25-30% of Parmac’s sales for 1973. It also indicated that Parmac’s plant had not been shut down due to the loss of the Coast Trading contract but that its workers had been deployed to other projects. Since the Coast Trading job was only a part but not all of Parmac’s business, it concluded that only the direct costs of producing the tanks should be deducted to obtain lost profits and that general overhead should not be deducted.³ 21 Wn.App. at 908-12

In *Barnard v. Compugraphic Corp.*, 35 Wn.App. 414, 667 P.2d 117

³ The discussion could be considered dictum because the Court ruled that damages would be based on a cancellation clause in the parties’ contract. 21 Wn.App. at 909

(1983), the plaintiff purchased a typeset machine for his printing business from the defendant. The machine simply did not work. The Court awarded damages to plaintiff that included lost profits. On appeal, the defendant argued that employee wages should have been deducted in reaching the amount of lost profits. The Court rejected that argument. It noted that no additional labor would have been required to do the jobs which were lost because of the machine's malfunction. Therefore, employee costs were a fixed expense that would have been the same had there been no breach. 35 Wn.App. at 418

The rule set out in *Vitex Manufacturing Co., v. Caribtex Corp.*, *supra*, precludes deduction of general overhead expenses when the aggrieved business has other contracts and other sources of revenue. It is not applicable to our case because Dr. Lee had only one source of revenue—gross rentals—and no general overhead. Furthermore, the mortgage payment, the real property taxes, and the flood insurance are expenses of the project. In order to realize a profit, Dr. Lee had to pay them. The most obvious of these is the mortgage payment. This repaid the loan for the construction of the buildings. And without any buildings, Dr. Lee could not realize gross rentals. Furthermore if Dr. Lee did not pay the mortgage, he risked loss of the entire project—and the rentals that it

would generate—through foreclosure. He also risked foreclosure by failing to pay property taxes and not appropriately insuring the property.

In short, the line of cases beginning with *Vitex Manufacturing Co., v. Caribtex Corp., supra*, simply are not applicable here.

IV. Considerations of the Opportunity Cost of Equity Capital Have No Place Here.

Dr. Lee refers the Court to a limited statement from *The Comprehensive Guide to Economic Damages* by Nancy J. Fannon and Jonathan M. Dunitz to the effect that the opportunity cost of equity capital must be considered in the determination of lost profits. This reference is not helpful. First of all, no evidence was presented of any opportunity cost. Secondly, Dr. Lee made his choice to apply whatever capital interest he had to the construction of apartments and townhomes presumably before he contracted with DWP. Without such a choice, there would have been no construction of these units and therefore no contract with DWP. Finally, the only possible lost opportunity or opportunities stems from the delay. This delay conceivably caused two problems—loss of profits and payment of additional interest. The jury awarded Dr. Lee \$36,472.00 for the latter, and DWP has not taken any issue with that. And the loss of profits is the subject of this appeal.

In short, this reference is simply not helpful.

CONCLUSION

Dr. Lee has simply not refuted the arguments made in the Brief of Appellant. Assuming that Dr. Lee is entitled to anything for loss profits—since profits were merely delayed, not lost—he is entitled to at most \$84,994.00. Even this sum should be reduced by \$20,043.00 based on the reduction that Ms. Markee made to recognize the delay in securing permits for the townhomes. The Court should reverse the judgment and order a new trial on the damage element of lost profits. Alternatively, and since the evidence is clear, it should reduce the damages award.

DATED this 11th day of September, 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:

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DATED this 11th day of September, 2019.



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