# STATE OF MICHIGAN

# COURT OF APPEALS

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| ITT WATER & WASTEWATER USA, INC., formerly known as ITT-FLYGT CORPORATION,<br><br>Plaintiff/Counter-Defendant-Appellee, | UNPUBLISHED<br>March 17, 2016 |
| v<br><br>L D'AGOSTINI & SONS, INC., LAKESHORE ENGINEERING SERVICES, INC., and TRAVELERS CASUALTY & SURETY CO. OF AMERICA,<br><br>Defendants,<br><br>and<br><br>L D'AGOSTINI & SONS, INC./LAKESHORE ENGINEERING SERVICES, INC. JOINT VENTURE,<br><br>Defendant/Counter-Plaintiff-Appellant. | No. 328128<br>Wayne Circuit Court<br>LC No. 11-006958-CK |

Before: JANSEN, P.J., and CAVANAGH and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

This case concerns the scope of damages available in a suit arising from a construction delay. ITT Water & Wastewater USA, Inc. (called Flygt in this litigation) agreed to sell eight hydraulic pumps to general contractor L. D'Agostini & Sons, Inc. (LDS), for use in a water treatment and pumping station project. Flygt failed to deliver the pumps on time. LDS claims that this breach of the parties' contract resulted in a variety of damages including a component called "unabsorbed home office overhead."

The majority rejects LDS's unabsorbed home office overhead claim as well the method used by courts nationwide for computing this form of damage, the *Eichleay* formula. Although I agree that the *Eichleay* formula should not be applied under the particular circumstances presented here, I respectfully disagree with the majority's reasoning in several key respects. I do

not share the majority's reluctance to permit the recovery of home office overhead damages or its unwillingness to acknowledge the virtually universal acceptance of the *Eichleay* formula. Unabsorbed office overhead is an established and uncontroversial element of damages in construction-delay cases. The *Eichleay* formula provides a valid and useful method for calculating these damages under certain evidentiary circumstances. Furthermore, I believe that LDS has set forth an alternate form of compensable damages due to the pump delivery delay and should be permitted to further prove its damages by utilizing either of the mathematical models it proposed.

## I. BACKGROUND FACTS AND PROCEEDINGS

LDS contracted with the Detroit Water and Sewerage Department (DWSD) to build a new sanitary and storm water treatment facility and pumping station for a total cost of $154,507,025. This was an enormous and complex project. The DWSD and LDS anticipated that the work would extend over three years. Integral to the operation of the pumping station were the pumps themselves. Gino D'Agostini, LDS's project manager, characterized the pumps as "the heart of the facility."

Flygt agreed to sell LDS eight specially designed and manufactured pumps for a price of $12,920,479. The parties' contract stated that delivery was "[e]xpected in May/June 2009," with an exact date to be "confirmed upon approved submittals." According to LDS, Flygt delivered all eight pumps late. The last pump motor arrived in January 2011, setting back the completion of the project (in LDS's estimation) by 103 days. Gino D'Agostini averred in an affidavit that due to the belated pump delivery, the most intensive portion of the work (building the pump station) was elongated, which extended LDS's presence on the project and level of commitment. LDS withheld $2,680,685.91 of the pump contract price as damages for the delay. Flygt sued for the unpaid balance, and LDS counterclaimed for damages it attributed to the tardy pumps.

Flygt concedes that its pumps were delivered late and that the project sustained delays. However, Flygt insists that events and circumstances unrelated to its pumps plagued the project and more directly accounted for any delays. Its lawsuit demands full payment of the overdue contract price, as well as storage costs, attorney fees, and costs. The parties have agreed to submit this dispute to binding arbitration. At issue here are the damages that LDS may offset and recover if it proves that Flygt inexcusably and consequentially delayed the project.

In the circuit court, LDS initially identified four categories of damages: unabsorbed home office overhead calculated under the *Eichleay* method ($1,813,899.39), extended general conditions ($595,143.99),[1] roof replacement costs ($8,825.01), and charges by subcontractors occasioned by the delay ($373,888.84). Flygt filed a motion for partial summary disposition challenging LDS's entitlement to all damages other than the roof replacement costs. The parties flooded the trial court with briefs and further motions. The arguments primarily focused on whether LDS could employ the *Eichleay* formula in computing its home office overhead

[1] General conditions damages are onsite overhead expenses, such as field supervision, trailer office, telephone, utilities, and the supervisor's transportation vehicle.

damages. That discussion spilled over into the realm of extended general conditions damages, as LDS also used the *Eichleay* formula to calculate its general conditions reparations. Flygt further contended that LDS lacked proof that the delay negatively impacted its field office operations.

The circuit court determined that genuine questions of material fact existed regarding whether the delay caused LDS any financial injuries, but precluded LDS from relying on the *Eichleay* formula to prove its damages. Instead, the court instructed LDS "to prove actual damages." Similarly, the court required that LDS predicate its extended general conditions claim on actual, proven damages rather than a formulaic estimate. The court denied partial summary disposition regarding the subcontractors' charges.

LDS went back to the damages' drawing board. It prepared and presented two alternate methods for calculating the unabsorbed home office overhead and general conditions damages resulting from the delay. The computation of the combined sum started with a number called "distracted hours."

According to its answers to interrogatories and attached "supplemental discovery response regarding damages," LDS "calculated its actual home office overhead by estimating the number of hours each of the relevant home office employees spent dealing with the pump delay and resulting construction complications." LDS averred: "[LDS] principally relies on three key individuals to generate profits for the business: James D'Agostini, Bob D'Agostini and Gino D'Agostini." In LDS's parlance, "distracted hours" represent the time the three men spent responding to the delay, including "resequencing" and rescheduling other project work to accommodate for the tardy pumps. LDS's interrogatory answers assert that the three D'Agostini's calculated their hours by reviewing "project correspondence and related documentation and reviewed the history of events" to add up "each individual's hours of distraction." LDS acknowledged that the distracted hours were not exact or the product of contemporaneous records, as the principals of the company "have not, and are not obligated to, keep calendars tracking each hour they spend on every work day."

Distracted hours in hand, LDS created a "profit based" calculation of overhead damages, and an alternative "salary based" computation. As to the former, the LDS discovery response elaborated:

> In order to determine the rate at which to charge for their time [LDS] estimate[d] the amount of profit generated by each as follows:
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> • For the profit-based hourly rate calculation, [LDS] used an average of the gross profits of the company for the three years preceding the pump delay, 2007-2009.
>
> • [LDS] then attributed 1/3 of the gross profits to each of the three individuals responsible for profit generation.
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> • [LDS] next divided each individual's share of the average gross profits by 2000 hours, to account for the number of hours typically worked in a year, resulting in an hourly rate based on profit generating capability.

Thus, the profit-based approach asserts that but for being distracted by the pump delivery delay, LDS's leadership would have bid on and been awarded other projects, which would have produced profits. The math resulted in a total profit-based claim of $2,241,345.75. The second method, a salary-based analysis, utilized the annual salaries of James, Bob, and Gino D'Agostini, divided them by 2,000 hours to obtain an hourly rate, and multiplied this rate by the number of distracted hours. This formula resulted in damages of $399,411.67.

Flygt again sought partial summary disposition, urging the circuit court to reject LDS's computations because they were based on gross rather than net profits. Flygt further asserted that LDS's damage claim remained flawed because it reflected estimates rather than actual damages. Flygt also contended that the delay damages LDS claimed to have experienced were unforeseeable. LDS responded that its calculations were predicated on net rather than gross profits, that its damages were foreseeable, and that it had assembled its damage claims based on sound methodologies.

In a written opinion, the circuit court ruled that "[b]ecause damages must be based on net profits, and not gross profits," partial summary disposition was warranted "as to the profit based calculation of Home Office Overhead."[2] The circuit court observed that although LDS argued that it had used net rather than gross profits in its calculations, its discovery responses clearly indicated that it used gross profits. Because the salary-based computation included a gross profit adjustment, the circuit court ruled that it, too, was precluded.

The court rejected Flygt's foreseeability argument, finding that Flygt, as "an experienced supplier that regularly conducts business with public works contractors" could have foreseen that any delays would impact LDS's ability to procure other construction projects. The court summarized that although the pump contract did not specifically permit LDS to recover delay damages, contractual language limiting *Flygt's* ability to claim delay damages evidences "that the parties foresaw that lost profits could result from breach of their commercial contract."

LDS challenges the circuit court rulings prohibiting it from claiming unabsorbed office overhead damages under the *Eichleay* formula or alternatively under one of the "distraction" formulae.

## II. THE *EICHLEAY* FORMULA

More than 50 years ago, the Armed Services Board of Contract Appeals adopted the *Eichleay* formula as a mechanism for calculating one form of damage—unabsorbed home office overhead—incurred by construction contractors during periods of work suspension. Home office overhead encompasses items such as home office salaries, supplies, utilities, insurance, depreciation, telephones, accounting expenses and rent, and represents a substantial indirect cost borne by construction contractors. When contractors bid for a project, they typically incorporate their indirect costs as well as direct costs such as workers' wages and equipment expenses. *Complete Gen Constr Co v Ohio Dep't of Transp*, 94 Ohio St 3d 54, 57-58; 760 NE2d 364

[2] The court later clarified that its ruling also applied to the general conditions claim.

(2002). The Ohio Supreme Court has explained, "[e]ach project a contractor undertakes derives benefits from the home office, and each contributes to paying for home office overhead. . . . Each project in some degree is responsible for the contractor's costs of simply doing business, and each project plays its proportionate part in paying those costs." *Id*. at 57.

When a contractor is idled by a job-site delay, the contractor continues to incur and pay overhead expenses, but receives no corresponding contractual payments to offset these costs. "Suspension or delay of contract performance results in interruption or reduction of the contractor's stream of income from payments for direct costs incurred. This in turn causes an interruption or reduction in payments for overhead, derived as a percentage of direct costs, which is set by the contract." *Wickham Contracting Co, Inc v Fischer*, 12 F3d 1574, 1577 (CA Fed, 1994). When payments dry up, the contractor's overhead is unabsorbed by the contract price for the work. *Id*.

In *Eichleay Corp*, ASBCA No. 5183, 60–2 B.C.A. (CCH) ¶ 2688, 1960 WL 538 (1960), the Armed Services Board of Contract Appeals introduced the rationale for including this form of damage in a contractor's recovery for a construction delay:

> [I]t must be borne in mind that overhead costs, including the main office [or home office] expenses involved in this case, cannot ordinarily be charged to a particular contract. They represent the cost of general facilities and administration necessary to the performance of all contracts. It is therefore necessary to allocate them to specific contracts on some fair basis of proration. [*Id.* at 13,574.]

The Board "adopted a specific formula for estimating proportionate home office overhead that may be unabsorbed due to a suspension[.]" *West v All State Boiler, Inc*, 146 F3d 1368, 1372 (CA Fed, 1998). The formula calculates a daily overhead dollar figure applicable to the contract in question, which is multiplied by the number of days of delay. *Altmayer v Johnson*, 79 F3d 1129, 1132-1133 (CA Fed, 1996). The formula proceeds in three steps:

> 1) to find allocable contract overhead, multiply the total overhead cost incurred during the contract period times the ratio of billings from the delayed contract to total billings of the firm during the contract period; 2) to get the daily contract overhead rate, divide allocable contract overhead by days of contract performance; and 3) to get the amount recoverable, multiply the daily contract overhead rate times days of government-caused delay. [*Wickham Contracting Co*, 12 F3d at 1577 n 3.]

The Court of Appeals for the Federal Circuit has held that in the federal circuit, "the *Eichleay* formula is the *only* means for calculating recovery for unabsorbed home office overhead." *ER Mitchell Constr Co v Danzig*, 175 F3d 1369, 1372 (CA Fed, 1999) (emphasis in original). Virtually every state court that has considered the issue has adopted the *Eichleay* formula. The Ohio Supreme Court has described *Eichleay* as "the most well-known formula for calculating unabsorbed overhead costs arising out of a government-caused delay," and allows its use in a modified form in Ohio courts. *Complete Gen Constr*, 94 Ohio St at 55 (quotation marks and citation omitted). The Supreme Court of Virginia has held that "where . . . there is evidence that a contractor has suffered actual damages as a result of an unreasonable owner-caused delay,

the *Eichleay* formula is an acceptable method, though not the only possible method, of calculating the portion of home office expenses attributable to delay." *Fairfax Co Redevelopment & Housing Auth v Worcester Bros Co, Inc*, 257 VA 382, 390; 514 SE2d 147 (1999). The Court of Special Appeals of Maryland embraced the formula in *Gladwynne Constr Co v Mayor & City Council of Baltimore*, 147 Md App 149, 176; 807 A2d 1141 (2007). The Florida Court of Appeals has approved the use of the *Eichleay* formula under certain circumstances, *Broward Co v Brooks Builders, Inc*, 908 So 2d 536, 540-541 (Fla Ct App, 2005), as has the California Court of Appeal. *JMR Constr Corp v Environmental Assessment & Remediation Mgt, Inc*, 243 Cal App 4th 571; 197 Cal Rptr 3d 84 (2015). In *PDM Plumbing & Heating, Inc v Findlen*, 13 Mass App Ct 950, 951; 431 NE2d 594 (1982), the Massachusetts Court of Appeals characterized the *Eichleay* formula as "logically calculated to establish a reasonable basis for recovery" of home office overhead, and endorsed its use.

The courts around the country that permit use of the *Eichleay* formula have determined that it is an equitable and realistic way to allocate indirect but nonetheless real damages that would otherwise elude calculation. See *Satellite Electric Co v Dalton*, 105 F3d 1418, 1420-1421 (CA Fed, 1997); *Wickham*, 12 F3d at 1580-1581. I have located but one case that has disallowed the formula, *Berley Indus, Inc v City of New York*, 45 NY2d 683; 412 NYS 2d 589; 385 NE2d 281 (NY Ct App, 1978). In a subsequent case, New York's Supreme Court, Appellate Division approved home office overhead damages, finding "that the delay precipitated engineering or design problems that called for central staff consideration." *Manshul Constr Corp v Dormitory Auth of New York*, 436 NYS 2d 724, 729; 79 AD2d 383 (NY S Ct, 1981).[3]

The majority rejects the *Eichleay* formula for three reasons, none of which have any legal merit.

The majority offers as its first justification for rejecting *Eichleay* that "[d]efendant has failed to identify any contractual provision within [the parties' contract] that would entitle it to recover home office overhead damages." The majority misapprehends basic principles of contract law.

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[3] The *Manshul* Court devised its own formula for calculating home office overhead/delay damages:

> (i) Estimate the actual cost of the work done after the scheduled completion date by deducting from the contract price the portion allocable to overhead and profit.
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> (ii) Allocate a percentage of this cost for overhead, and allow this as excess overhead due to delay.
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> (iii) Add to this a profit percentage based on this excess overhead.
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> (iv) Award 95% of the figure thus arrived at (the sum of (ii) and (iii)) to plaintiff as delay damages. [*Id*. at 391-392.]

While a contract may define or limit the remedies available in the event of a breach (this one does not), the absence of such provisions does not bar recovery of damages. Long ago, Michigan contract jurisprudence embraced the rule of *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854), which permits the recovery of those damages "that arise naturally from the breach or those that were in contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980), citing 5 Corbin, Contracts, § 1007. In *Miholevich v Mid-West Mut Auto Ins Co*, 261 Mich 495, 498; 246 NW 202 (1933), our Supreme Court emphasized that the damages "which a party ought to receive" for breach of contract are those that "may fairly and reasonably be considered either as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it." (Quotation marks and citation omitted.) Alternatively stated, the damages that may be awarded in a common-law breach of contract action are those "designed to make the plaintiff whole." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 586 n 4; 624 NW2d 180 (2001).

That unabsorbed home office overhead damages are not spelled out as recoverable in the parties' contract is legally meaningless. The correct "starting point" is a determination of whether unabsorbed home office overhead damages were in the contemplation of the parties when the contract was formed. See *Lawrence v Will Darrah & Assocs, Inc*, 445 Mich 1, 11; 516 NW2d 43 (1994). I fully agree with the circuit court's analysis in this regard. The circuit court observed that "Flygt is an experienced supplier that regularly conducts business with public works contractors like [LDS]. . . . Accordingly, considering Flygt's experience in contracting with public works contractors, it was foreseeable that [LDS] would lose profits on other projects due to the delay in delivering the materials under the contract." Taken but a small step further, Flygt certainly knew that home office overhead accrues during periods of construction delay, and that contractors around the country had claimed damages for unabsorbed overhead costs. The *Eichleay* formula came on the legal scene a long time ago, and has enjoyed steady, "growing acceptance by federal courts and administrative boards of contract appeals as an appropriate measure for computing unabsorbed home office general and administrative expense in connection with delays caused by the federal government on construction projects." McGeehin & Strouss, *Learning From* Eichleay: *Unabsorbed Overhead Claims in State and Local Jurisdictions*, 25 Pub Cont L J 351, 351 (1996). Unabsorbed home office overhead indisputably constitutes a foreseeable form of consequential damage in cases involving the breach of a public works construction contract.

The majority additionally spurns the *Eichleay* formula because LDS failed to provide "any authority from Michigan that allows a contractor to pursue home office overhead expenses." The more relevant observation is that no published case *prohibits* a contractor from recovering home office overhead expenses or the application of an *Eichleay* calculation. Given that home office overhead expenses are foreseeable, they are recoverable. That no earlier opinion has said so is completely irrelevant, as in any case of first impression.

Thirdly, the majority opines that "[h]ome office overhead damages, by their very nature, are 'indirect costs . . . not attributable to any one project.' Thus, it is unclear whether home office overhead damages may be recovered in a breach of contract action." (Citations omitted, omission in original.) I confess to being stumped by this statement. Precisely *because* home

office overhead expenses are indirect, they cannot be allocated as a distinct sum to a given project and instead are factored more generally into a contractor's bids. Their indirect nature gives rise to the difficulty claimants have experienced in *proving* unabsorbed office overhead damages occasioned by a delay. Enter the *Eichleay* formula, the single most widely-accepted method for locating a reasonable number. No court, including *Berley*, has rejected *Eichleay* based on the fact that home office overhead is an "indirect" cost. Rather the issue in the caselaw is how courts should approach the problem of quantification—by using *Eichleay*, a modified version of *Eichleay*, or some other mathematical technique. As the Supreme Court of Virginia aptly put it, "The *Eichleay* formula is not a legal standard that must be formally approved or adopted; rather, it is merely a mathematical method of prorating a contractor's total overhead expenses for a particular contract." *Fairfax Co RHA*, 257 Va at 389.[4]

The *Eichleay* formula is entirely consistent with Michigan's common law of damages in breach of contract actions, which embraces "a flexible approach when determining the foreseeability of contract damages." *Lawrence*, 445 Mich at 12. In *Lawrence*, the Supreme Court quoted from two treatises to highlight that the facts of a case dictate the damages that may be recovered:

> The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case. [5 Corbin, Contracts, § 1002, p 33.]
>
> Likewise, professors Calamari and Perillo observe:
>
> It should be noted that the rule is not applied blindly and mechanically. Courts must be aware of the transactional context in which the transactions occur. [Calamari & Perillo, Contracts (3d ed), § 14-7, p 599.] [*Id.* at 12 n 12.]

"Michigan has never required precise calculation of damages as a prerequisite to recovery."

*Cicelski v Sears, Roebuck & Co*, 422 Mich 916, 919 n 5; 369 NW2d 194 (1985)

> "An element of uncertainty in the amount of damages or the fact that they cannot be calculated with mathematical accuracy or with absolute certainty or exactness is not a bar to recovery. Nor is mere difficulty in the assessment of damages a

[4] The majority conflates "indirect costs" with foreseeable damages in a breach of contract action. The majority accurately notes that home office overhead represents "indirect costs . . . not attributable to any one project." But that fact is legally irrelevant, assuming that a contractor proves that construction delay resulted in unabsorbed home office overhead. As long as the unabsorbed home office overhead qualifies as a direct, natural, and proximate result of the delay, it matters not one whit that the costs involved are "indirect."

> sufficient reason for refusing them where the right to them has been established." [*Id*. at 918 n 5, quoting 22 Am Jur 2d, Damages, § 23, p 42.]

As have the vast majority of the courts considering the issue, I would hold that the *Eichleay* formula represents a potentially appropriate method for calculating unabsorbed home office overhead expenses in certain cases. I turn to an analysis of why this is not such a case.

## III. THE EVIDENTIARY FOUNDATION FOR AN *EICHLEAY* COMPUTATION

In the federal courts, a contractor's entitlement to *Eichleay* damages "turns on whether the contractor can establish: (1) a government-caused delay; (2) that it was on 'standby'; and (3) that it was unable to take on other work." *Altmayer*, 79 F3d at 1133. The "standby" element of this test "focuses on the delay . . . of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform." *Id*. (quotation marks and citation omitted, omission in original). The Federal Circuit emphasized in *Altmayer* that "the linchpin to entitlement under *Eichleay* is the uncertainty of contract duration occasioned by government delay or interruption." *Id*. As stated by a different federal circuit panel, "The *raison d'etre* of *Eichleay* requires at least some element of uncertainty arising from suspension, disruption or delay of contract performance. Such delays are sudden, sporadic and of uncertain duration. As a result, it is impractical for the contractor to take on other work during these delays." *CBC Enterprises, Inc v United States*, 978 F2d 669, 675 (CA Fed, 1992).

The Federal Circuit further clarified the contours of "standby" in *Interstate Gen Gov't Contractors, Inc v West*, 12 F3d 1053, 1057 (CA Fed, 1993), explaining that "[p]roperly understood, the 'standby' test focuses not on the idleness of the contractor's work force (either assigned to the contract or total work force), but on suspension of work on the contract." The court rejected that a contractor's work force needed to be at a complete stand-still to satisfy the "standby" element. However, the evidence must support that the contractor experienced unabsorbed overhead "because performance of the contract has been suspended or significantly interrupted and that additional contracts are unavailable during the delay when payment for the suspended contract activity would have supported such overhead." *Id*. When a contract's performance is suspended or delayed, the contractor loses the stream of income it counted on to offset its overhead, which continues to accrue. *Id*.

In *PJ Dick Inc v Principi*, 324 F3d 1364, 1373 (CA Fed, 2003), the Federal Circuit again addressed the "standby" prong, encouraging courts ask the following questions before permitting *Eichleay* damages:

> (1) was there a government-caused delay that was not concurrent with another delay caused by some other source; (2) did the contractor demonstrate that it incurred additional overhead (*i.e.,* was the original time frame for completion extended or did the contractor satisfy the *Interstate* [12 F3d 1053] three-part test); (3) did the government CO issue a suspension or other order expressly putting the contractor on standby; (4) if not, can the contractor prove there was a delay of indefinite duration during which it could not bill substantial amounts of work on the contract *and* at the end of which it was required to be able to return to work on the contract at full speed and *immediately;* (5) can the government satisfy its

> burden of production showing that it was not impractical for the contractor to take on replacement work (*i.e.,* a new contract) and thereby mitigate its damages; and (6) if the government meets its burden of production, can the contractor satisfy its burden of persuasion that it was impractical for it to obtain sufficient replacement work. Only where the above exacting requirements can be satisfied will a contractor be entitled to *Eichleay* damages. [*Id*. at 1373 (emphasis in original).]

Here, the evidence demonstrates that despite Flygt's delay in delivering the pumps, LDS never ceased working on the project. At his deposition, Gino D'Agostini admitted that LDS "kept working throughout" the project, and was at no time forced to "demobilize[]" or leave the site. Another LDS employee, Jason Emerine, testified that LDS was able to continue working throughout the delay period, and reformulated its work schedule to accommodate the late delivery. The record reflects that LDS personnel spent substantial amounts of time reorganizing and "resequencing" work on the project. But LDS presented no evidence suggesting that the stream of payments from the DWSD ever stopped flowing. In other words, LDS successfully mitigated some if not all of its home office overhead damages.

Accordingly, while I disagree with the majority regarding the propriety of the *Eichleay* formula in construction-delay cases, I agree that it would not apply under the circumstances presented here.

## IV. LDS'S ALTERNATIVE DAMAGE CLAIMS

When the circuit court disallowed use of an *Eichleay* computation, the court advised LDS that "you are going to prove actual damages." LDS followed the court's directive, creating "profit based" and "salary based" calculations of damages incurred due to the delayed pumps. The alternative damages theories were premised on the number of "distracted hours" consumed by the efforts of LDS's key personnel to rearrange work on the project so as to accommodate the pump delays. The majority upholds summary disposition of both calculations, holding that LDS failed to explain "how each individual arrived at the total 'distracted hours' " and "provided no proof establishing the number of hours each individual allegedly spent 'distracted' by the pump delay." These statements are demonstrably incorrect.

In answers to interrogatories and supplemental discovery responses, LDS provided detailed explanations of how the distracted hours were computed. These answers qualify as "proof" of the distracted hours. Interrogatories are answered under oath. MCR 2.309(B)(1). The answers constitute evidence that may be submitted in support of or response to a motion for summary disposition filed under MCR 2.116(C)(10). See MCR 2.116(G)(2). LDS's interrogatory answers detailed the number of hours each individual spent attending to each identified delay issue, and the method by which the individual calculated his hours. That the hours claimed were estimated rather than contemporaneously recorded impacts only the weight of this evidence, not its admissibility. And at the summary disposition stage, we must not decide issues of weight or credibility. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 480; 776 NW2d 398 (2009).

The majority similarly errs by asserting that "[w]ithout proof that any of the individuals were actually 'distracted' by the delivery delay, [LDS]'s claims based on these hours necessarily

failed because [LDS] could not demonstrate the fact of these damages with any degree of certainty." Once again, the majority fails to read or appreciate the record. Deposition testimony submitted to the trial court substantiates that LDS "resequenced" work on the project in several material aspects. The steel roof of the pump building had to be removed to provide extra space to insert the late pumps; the original plan called for the steel to be erected after the pumps arrived. A "boxout" had to be created on one side of the pump station so that construction could continue elsewhere, and masonry work had to be rearranged because of the pump delivery delay. According to one of LDS's experts, "[d]elivery of the last pump was the critical path of the project[,]" and "[t]he control building work slipped . . . by seven weeks due to the late storm pumps." Contrary to the majority, ample evidence supports that LDS personnel invested considerable time and effort to protect the project's work flow while awaiting the pumps.

By developing the profit-based and salary-based damage approaches, LDS followed the circuit court's direction to the letter: it premised its damage claim on actual damages. I would characterize the "distraction" damage theories as lost profit analyses, and would evaluate them through that legal lens.

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). The goal is "to make the nonbreaching party whole." *Id*. at 625-626. "[T]he general principle is that all losses, however described, are recoverable." Restatement Contracts, 2d, § 347 cmt c, p 114. Indisputably, Michigan permits the recovery of damages for lost profits—even for new business ventures—provided that they are established with "reasonable certainty." *Fera v Village Plaza, Inc*, 396 Mich 639, 644; 242 NW2d 372 (1976).

As in every breach of contract case, an aggrieved party must mitigate its damages. Restatement Contracts, 2d, § 350, cmt b, p 127, advises that "[o]nce a party has reason to know that performance by the other party will not be forthcoming, . . . he is expected to take such affirmative steps as are appropriate in the circumstances to avoid loss by making substitute arrangements or otherwise." Mitigation efforts are potentially compensable. Corbin observes that "[i]nasmuch as the law denies recovery for losses that can be avoided by reasonable effort and expense, justice requires that the risks incident to such effort should be carried by the party whose wrongful conduct makes them necessary." 11 Corbin, Contracts (rev ed), § 57.16, p 349. "Therefore," Corbin continues, "special losses that a party incurs in a reasonable effort to avoid losses resulting from a breach are recoverable as damages." *Id*.

LDS's salary-based claim for damages represents a reasonable approach to establishing losses attributable to the pump delay. Essentially, LDS asserts that it lost profits because of the time its principals spent mitigating. If satisfactorily substantiated, this claim seems eminently reasonable.

The majority accurately characterizes LDS's profit-based "distracted hours" claims as seeking "recovery for lost profits that might have been realized had the three individuals not been distracted by the pump delivery costs." The majority errs, however, by reflexively rejecting the claim on the ground that "damages for lost profits must be based on the loss of net, rather than gross, profits." As a general proposition, when determining damages "[t]he law will make

the best appraisal that it can, summoning to its service whatever aids it can command." *Sinclair Refining Co v Jenkins Petroleum Process Co*, 289 US 689, 697; 53 S Ct 736; 77 L Ed 1449 (1933). While generally the damages recoverable for lost profits must be based on gross rather than net profits, there are recognized exceptions to this rule. For example, "[w]hen operating expenses (overhead) are fixed . . . gross profits may be awarded as representing net profits." *US Welding, Inc v B & C Steel, Inc*, 261 P3d 513, 514 (Colo App, 2011). LDS asserts that its operating expenses are fixed, and that an increase in sales would have no impact on its overhead. In other words, LDS claims that its gross and net profit numbers are substantially identical.

I have no idea whether this allegation is true or false, and neither does the majority. In my view, LDS has presented adequate evidence to merit submission of this damage claim to the fact finder. If the net and gross profit numbers would be interchangeable under the circumstances presented here, it makes no sense to discard the claim.

The majority concedes that LDS's salary-based formula was not tainted by gross profits, but nonetheless rejects it because, in the majority's view, LDS "provided no proof of the number of alleged 'distracted hours' which formed the basis for the claim." As I previously noted, the majority has failed to appreciate that this evidence exists in the record. I would hold that the salary-based computation should be submitted to the arbitrator for consideration as an element of LDS's delay damages. Because the arbitrator will serve as the judge of the facts in this case, the arbitrator may determine that LDS's claimed mitigation hours or anticipated profits are overstated. But as a preliminary matter, LDS has made a factual showing that the majority overlooks, and that entitles LDS to consideration of this form of damage at the arbitration.

In summary, I would reverse the circuit court's limitation on LDS's delay damages other than its preclusion of the *Eichleay* formula, and would allow the arbitrator to sort out the strengths or weaknesses of the proofs.

/s/ Elizabeth Gleicher