STATE OF MICHIGAN

COURT OF APPEALS

ITT WATER & WASTEWATER USA, INC., formerly known as ITT-FLYGT CORPORATION, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED March 17, 2016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

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

PER CURIAM.

Defendant/counter-plaintiff, L. D'Agostini & Sons, Inc./Lakeshore Engineering Services, Inc. Joint Venture (defendant), appeals as of right from the stipulated order dismissing, without prejudice, all of the remaining claims between the parties not previously dismissed by the trial court. On appeal, defendant challenges the trial court's prior orders granting partial summary disposition in favor of plaintiff/counter-defendant, ITT Water & Wastewater USA, Inc. (plaintiff), on defendant's counterclaims for damages. We affirm.

This action arises from a contract dispute between plaintiff and defendant regarding defendant's purchase of eight water pumps from plaintiff with the intent to use the pumps during the construction of a sanitary and storm water treatment and pumping station.[1] Defendant first contends that the trial court erred when it ruled that defendant could not rely upon the *Eichleay*[2] formula for the calculation of home office overhead damages.[3] We disagree.

A grant or denial of summary disposition is reviewed de novo on appeal. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). " 'When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party.' " *Pace v Edel-Harrelson*, 309 Mich App 256, 264 n 3; 870 NW2d 745 (2015) (citation omitted). " 'Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.' " *Id*. (citation omitted). " 'A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ.' " *Id*. (citation omitted).

The initial issue presented involves the parties' dispute whether this Court should adopt the *Eichleay* formula as an acceptable method to calculate damages. The formula has been discussed in a single, unpublished case[4] in Michigan, which is not binding on this Court. See MCR 7.215(C)(1). At the outset, before contemplating the method to be employed for the calculation of home office overhead damages, it must first be determined whether a defendant is entitled to recover home office overhead damages. We first turn to the parties' contract.[5]

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[1] For a detailed discussion of the relevant facts, see *ITT Water & Wastewater USA, Inc v L D'Agostini & Sons, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2015 (Docket No. 319148), pp 1-4.

[2] "*Eichleay* damages involve a formula used to calculate a contractor's daily unabsorbed overhead; the amount is then multiplied by the number of days of . . . performance delay to determine the contractor's damages." *Charles G Williams Constr, Inc v White*, 271 F3d 1055, 1058 (CA Fed, 2001).

[3] "The term 'home office overhead' refers to the general administration costs of running a business, such as accounting and payroll services, general insurance, salaries of upper-level management, heat, electricity, taxes, and depreciation." *JMR Constr Corp v United States*, 117 Fed Cl 436, 442 (2014).

[4] *TR Pieprzak Co, Inc v City of Troy*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2014 (Docket No. 314451).

[5] We note that, contrary to the assertion of the partial concurrence/dissent, we do not hold that the absence of a provision in the parties' contract providing for home office overhead damages bars recovery of home office overhead damages. Instead, the parties' contract is a useful starting point to determine whether home office overhead damages were " 'the direct, natural, and proximate result of the breach.' " *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601-602;

Defendant has failed to identify any contractual provision within that document that would entitle it to recover home office overhead damages. Defendant's primary argument is that the parties' contract prohibited plaintiff from seeking home office overhead damages from defendant, but not the reverse. Thus, defendant reasons that the omission of language prohibiting defendant from recovering home office overhead damages implies that the parties intended for defendant to be able to recover such damages from plaintiff. "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.*" *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). An omission is not an ambiguity. *Mich Chandelier Co v Morse*, 297 Mich 41, 48; 297 NW 64 (1941). Accordingly, this Court may not read words into the plain language of the contract, *Northline Excavating, Inc v Livingston Co*, 302 Mich App 621, 628; 839 NW2d 693 (2013), or rewrite the terms of a contract " 'under the guise of interpretation,' " *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007) (citation omitted). Therefore, the absence of language prohibiting defendant from recovering home office overhead damages does not permit this Court to create contractual language allowing defendant to recover such damages from plaintiff.

Defendant also contends that the Prime Contract, between defendant and the Detroit Water and Sewerage Department (DWSD), allowed defendant to recover home office overhead expenses from plaintiff because the relevant provision in the Prime Contract was incorporated into the purchase order between defendant and plaintiff. It is true that the purchase order between defendant and plaintiff incorporated the Prime Contract by reference. Defendant contends that the Prime Contract's relevant language is found in Paragraph 11.12.2. However, while excerpts of the Prime Contract were attached to the motions and responses in the trial court, the page of the Prime Contract containing this paragraph was not submitted to the trial court at the time it decided the relevant motion and was instead attached to defendant's motion for reconsideration. This Court's review of a motion for summary disposition "is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). Evidence that was submitted for the first time with a motion for reconsideration is not properly before the trial court or this Court, and may not be considered on appeal. See *id.* at 474 n 6. Thus, we may not rely on this language to find that defendant was entitled to recover home office overhead expenses. See *id*.

In addition, a plain reading of the language cited by defendant demonstrates that it does not provide for the recovery of home office overhead damages resulting from a breach of contract between these parties. Rather, the language provides that if an extension of time is negotiated between defendant and the DWSD, then defendant is entitled to reimbursement of unabsorbed home office overhead expenses. Hence, the contractual language relied on by

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865 NW2d 915 (2014) (citation omitted). Furthermore, we address the issue because defendant argues that the parties' contract indicates that it was permitted to recover home office overhead expenses as damages.

defendant allows only for the recovery of such expenses against the DWSD and not against subcontractors such as plaintiff.

Defendant's argument regarding entitlement to the recovery of home office overhead damages also fails when subjected to further scrutiny.[6] We first note that defendant has not provided this Court with any authority from Michigan that allows a contractor to pursue home office overhead expenses. The closest defendant comes to such authority is its citation to *Walter Toebe & Co v Dep't of State Highways*, 144 Mich App 21; 373 NW2d 233 (1985). While this case affirmed an award of damages for lost overhead, it did not state whether this overhead was for home office overhead or for field overhead.[7] *Id*. at 37-38. Defendant contends that home office overhead expenses are compensable in a breach of contract action under Michigan's general rules pertaining to contract damages. In Michigan, " 'The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach.' " *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601-602; 865 NW2d 915 (2014), quoting *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Home office overhead damages, by their very nature, are "indirect costs, . . . not attributable to any one project." *Complete Gen Constr Co v Ohio Dep't of Transp*, 94 Ohio St 3d 54, 57; 760 NE2d 364 (2002). Thus, it is unclear whether home office overhead expenses may be recovered in a breach of contract action. See *Doe*, 308 Mich App at 601-602.

However, we need not reach the issue whether the recovery of home office overhead damages is permissible since, even assuming that home office overhead damages are generally recoverable and that the *Eichleay* formula is an appropriate method for calculating home office overhead damages, defendant failed to demonstrate its entitlement to recover those expenses. In response to plaintiff's first motion for summary disposition, defendant failed to present any evidence demonstrating that the pump delivery delay caused it to incur additional home office overhead expenses. "In a breach of contract case, the plaintiff must establish a causal link between the asserted breach of contract and the claimed damages." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 118-119; 839 NW2d 223 (2013). Plaintiff's expert witness concluded that the delay in the delivery of the pumps did not unduly affect the overall completion of the project. Ultimately, this expert concluded that providing the pumps on time "would not have changed . . . [defendant's] overall duration on the project by a single day." In

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[6] Due to the absence of Michigan authority on this subject, we rely on opinions from federal courts and other states. Decisions of the lower federal courts are not binding, but may be considered persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Similarly, this Court is not bound by decisions of other states, but may look to such cases as persuasive authority. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005).

[7] "Field overhead is described as 'administrative costs to run a project, such things as [a] superintendent, quality control, vehicles associated with those people, clerical staff, [and] office supplies.' " *Ace Constructors, Inc v United States*, 70 Fed Cl 253, 279 (2006) (citation omitted; alterations in original), aff'd 499 F3d 1357 (CA Fed, 2007).

contrast, defendant's expert concluded that the delay in delivering the pumps postponed the overall project's completion by 103 days. Accordingly, a question of fact exists with regard to whether the delay in delivering the pumps negatively affected the overall completion of the project.

Consequently, an issue exists regarding whether this alleged delay caused defendant to incur additional and uncompensated home office overhead expenses. Defendant acknowledges that it is still "required to prove causation regardless of what formula is used to calculate damages." As the United States Court of Appeals for the Fifth Circuit has explained, when asserting a claim of home office overhead expenses, a contractor must provide "proof of 'added' overhead costs proximately resulting from the construction delays." *Guy James Constr Co v Trinity Indus, Inc*, 644 F2d 525, 533 (CA 5, 1981), mod in part on other grounds 650 F2d 93 (CA 5, 1981). Such added costs "must be in excess of normally incurred fixed expense items, and such costs must be attributable to a delay that inhibits performance of other available construction projects." *Id*. (citation omitted). In both the trial court and this Court, defendant has asserted, without citation to any evidence, that it will demonstrate at trial that the pump delivery delay "resulted in 103 days of additional home office overhead expenses . . . that were not recovered under the contract." "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Nor will this Court "search the record for factual support for [defendant]'s claims." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Because defendant proffered no evidence of increased home office overhead expenses resulting from the pump delivery delay at the time of plaintiff's first motion for summary disposition, error has not been demonstrated. See *Maiden*, 461 Mich at 121; *Derderian*, 263 Mich App at 388.

Cases reviewed from other jurisdictions discussing the *Eichleay* formula's application lend further support to this conclusion. In *Berley Indus v City of New York*, 45 NY2d 683, 687-688; 412 NYS2d 589; 385 NE2d 281 (1978), the New York Court of Appeals found that the plaintiff had not shown any actual increase in home office overhead expenses due to a delay, but rather, relied only on the fact of a delay and the *Eichleay* formula as proof that such damages occurred. Finding no actual evidence of damages, the court rejected the plaintiff's reliance on the *Eichleay* formula to prove damages resulting from a delay. *Id*. at 689. Similarly, in this matter, defendant attempted to use the *Eichleay* formula as a means of presuming that it experienced increased home office expenses because completion of the project was delayed without proof that such expenses actually occurred. It is well-recognized, however, that "damages are not presumed in relation to contracts." *Doe*, 308 Mich App at 603.

Also of use is the Ohio Supreme Court's decision in *Complete Gen Constr Co*. In *Complete Gen Constr Co*, the defendant challenged an award of home office overhead damages calculated using the *Eichleay* formula, arguing that the formula allowed recovery without proof of causation. *Complete Gen Constr Co*, 94 Ohio St 3d at 60. The court noted that before the formula can be used a contractor must first establish that it was on "standby" during the delay, meaning that "the contractor is not working on the project, yet remains bound to the project. The contractor must be ready to immediately resume performance at any time." *Id*. at 58. The contractor must also establish that "it was unable to take on other work while on standby." *Id*. The court then explained that the required proof of these two elements established causation

because the formula could not be invoked absent a delay that "prevent[s] the contractor from finding replacement projects to cover the overhead." *Id*. at 60.[8]

Following this reasoning, defendant's claim for *Eichleay* damages fails. In response to plaintiff's first motion for summary disposition, defendant offered no proof that it was on "standby" or that it could not have assumed additional work. To the contrary, the evidence in the record shows that defendant was able to continue working on the project. For example, the project manager testified that defendant was able to reorder the sequence of work to continue progress on the project, and that it "never demobilized or left the site . . . ." Thus, defendant failed to establish that the delay caused additional home office overhead expenses or that the criteria for use of the *Eichleay* formula had been established. See *Complete Gen Constr Co*, 94 Ohio St 3d at 58-60. Absent proof of causation, defendant's claim necessarily fails. See *Doe*, 308 Mich App at 601-602.[9]

Defendant's argument on appeal primarily focuses on the propriety of using the *Eichleay* formula to estimate damages. Defendant contends that estimation of damages is proper where the nature of the case only permits an estimate and that it is proper to place the risk of uncertainty on the wrongdoer. It is true that estimates of the amount of damages are appropriate where a case only permits estimation. See *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). This rule, however, pertains to estimating the *amount* of damages. *Id*. Without first establishing the *fact* of damages, it is irrelevant whether it is proper to estimate the amount of those damages. See *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-512; 421 NW2d 213 (1988); *Wolverine Upholstery Co v Ammerman*, 1 Mich App 235, 244; 135 NW2d 572 (1965). Because the fact of

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[8] The federal courts have required similar proof before allowing recovery of *Eichleay* damages. In *Interstate Gen Gov't Contractors, Inc v West*, 12 F3d 1053, 1057 (CA Fed, 1993), the court held that a contractor must prove "that overhead be unabsorbed 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." See also *Vicari v United States*, 53 Fed Cl 357, 368 (2002) (noting that to recover home office overhead under the *Eichleay* formula, a contractor must demonstrate a delay which required the contractor to remain on standby and that it was "impractical for the contractor to obtain replacement work while on standby."); *Charles G Williams Constr, Inc*, 271 F3d at 1058 (explaining that application of the *Eichleay* formula requires proof that the contractor was on standby and unable to take on other work).

[9] Our holding does not constitute a wholesale rejection of the *Eichleay* formula. Instead, we conclude that we need not reach the issue whether recovery of home office overhead damages is permissible under Michigan law or the issue whether the *Eichleay* formula is an appropriate method for calculating home office overhead damages since, even assuming that defendant could recover home office overhead damages and that the *Eichleay* formula is an appropriate method for calculating the damages, defendant is not entitled to home office overhead damages under the *Eichleay* formula.

home office overhead damages remained uncertain at the time of the trial court's first order, defendant could not demonstrate entitlement to recovery of those expenses, no matter which formula or method was used to calculate the amount of the alleged damages. See *Wolverine Upholstery Co*, 1 Mich App at 244.

Defendant also argues that plaintiff may not raise the issue of causation on appeal because an appellee may not obtain relief more favorable than that provided by the trial court unless it files a cross-appeal, which plaintiff has not done. Defendant is correct, in that "a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal." *In re Estate of Herbach*, 230 Mich App 276, 284; 583 NW2d 541 (1998). While the trial court did indicate that it found a question of fact existed regarding whether defendant experienced a financial loss due to the delay, the trial court still dismissed defendant's claim of home office overhead damages as calculated under the *Eichleay* formula, finding that it must present actual proof of these damages. "[A] cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court." *Id*. Even if this Court were to construe the trial court's decision as finding that a question of fact existed on the issue whether the delay caused defendant to incur additional home office overhead expenses, plaintiff was not required to file a cross-appeal to raise the issue of causation on appeal. See *id*.

Next, defendant argues that the trial court improperly granted summary disposition in favor of plaintiff with regard to defendant's claim for general conditions damages premised on a pro rata distribution. We disagree.

In its April 27, 2012 claim summary, defendant alleged total extended general conditions damages of $595,143.99. These damages pertained to on-site overhead, typically referred to as field overhead expenses. See *Delhur Indus, Inc v United States*, 95 Fed Cl 446, 466 n 16 (2010). In its first motion for summary disposition, plaintiff argued that defendant had not presented actual proof of these damages, and instead relied on a method of calculation that simply assumed that such damages existed because a delay occurred. The trial court ruled that, while defendant would be permitted to pursue a claim for general conditions damages, it would have to present proof of actual damages rather than simply rely on its pro rata calculation. Defendant contends that the trial court's conclusion was erroneous because it is appropriate to estimate the amount of damages.

Again, we recognize that although the estimation of the *amount* of damages is permissible, the inability to demonstrate the *fact* of damages with certainty is fatal to a claim. *Wolverine Upholstery Co*, 1 Mich App at 244. Until defendant presented proof of actual general conditions damages, the manner for their calculation was irrelevant. Without proof of actual damages, defendant's claim for general conditions damages fails. See *id*. Similar to defendant's assertion of home office overhead damages, defendant simply presumed that any delay caused increased general conditions damages and then used a pro-rata calculation to estimate the amount of these damages. Damages may not be presumed in breach of contract cases. *Doe*, 308 Mich App at 603. See also *Blinderman Constr Co, Inc v United States*, 39 Fed Cl 529, 587 n 56 (1997), aff'd 178 F3d 1307 (CA Fed, 1998). Thus, the trial court correctly ruled that defendant could not simply presume damages resulting from the delay and required defendant to present

evidence of actual damages to proceed with its general conditions damages claim. See *Doe*, 308 Mich App at 603.

On appeal, defendant asserts that the fact of damages was established. However, defendant fails to provide support for its assertion that the fact of damages was established with regard to its use of the pro rata method for pursuing general conditions damages. That the trial court found that defendant presented actual evidence of general conditions damages in deciding plaintiff's second motion for summary disposition does not establish that defendant presented such evidence in response to plaintiff's first motion for summary disposition, particularly because defendant presented different theories and methods for calculating general conditions damages. Because defendant fails to present any argument demonstrating how it provided proof of actual damages in response to plaintiff's first motion for summary disposition, where its contention of error originates, it has not demonstrated error requiring reversal. See *Doe*, 308 Mich App at 603.

Finally, defendant contends that the trial court erred in granting summary disposition in favor of plaintiff with regard to the profit-based and salary-based distraction claims for home office overhead damages on the premise that the claims were based on gross profits rather than net profits. We disagree.

Following the trial court's rejection of defendant's initial attempt to demonstrate home office overhead and general conditions damages, defendant presented two alternative methods of calculating the alleged damages. Both methods relied on defendant's use of "distracted hours," referring to the hours expended by three individuals of the company in handling problems arising from the pump delivery delay. Defendant indicated that it "estimat[ed] the number of hours each of the relevant home office employees spent dealing with the pump delay and resulting construction complications." These estimates were substantial. The total "distracted hours" were 508, 306, and 949 for each of the identified individuals, respectively. In response to plaintiff's interrogatories, defendant explained:

> The "Hours Computations" . . . represents a fair computation of the hours spent by each individual performing several tasks that relate to [plaintiff]'s storm pump delay and its resulting impact. The . . . delay and its resulting impact can be generally divided into 7 main issues . . . . For each issue, each individual reviewed project correspondence and related documentation and reviewed the history of events to compute each individual's hours of distraction. The total hours spent per individual for each issue is summarized on page 2 of the Supplementary Discovery. The above-referenced individuals have not, and are not obligated to, keep calendars tracking each hour they spend on every work day. Each individual made the following computations in order to arrive at the totals in the referenced summary[.]

The documentation submitted to the trial court goes no further in explaining the method of calculation. Thus, there is no explanation for how each individual arrived at the total "distracted hours."

Regardless of whether defendant's calculations for home office overhead damages were based on gross or net profits, the claims failed because defendant provided no proof establishing the number of hours each individual allegedly spent "distracted" by the pump delay. While it may be appropriate to estimate the amount of damages, "uncertainty as to the *fact* of legal damages . . . is fatal to recovery." *Wolverine Upholstery Co*, 1 Mich App at 244. Defendant acknowledged that it had no record of the hours spent and that its calculations were only estimates. With regard to home office overhead, both the profit-based and salary-based damage claims relied on the number of "distracted hours" allegedly spent by the three identified individuals attending to the pump delay. Without proof that any of the individuals were actually "distracted" by the delivery delay, defendant's claims based on these hours necessarily failed because defendant could not demonstrate the fact of these damages with any degree of certainty. See *id*.

It is also unassailable that defendant relied on gross profits when calculating its home office overhead damages under the profit-based formula. At its core, this claim was to obtain a recovery for lost profits that might have been realized had the three individuals not been distracted by the pump delivery delay. "Damages for lost profits must be based on the loss of net, rather than gross, profits." *Getman v Mathews*, 125 Mich App 245, 250; 335 NW2d 671 (1983). As the trial court noted, defendant repeatedly stated that its profit-based calculation was based on gross profits. As one of many examples, in its supplemental discovery response explaining its calculation, defendant stated, "For the profit-based hourly rate calculation, [defendant] used an average of the gross profits of the company for the three years preceding the pump delay, 2007-2009." While defendant now contends that its gross and net profits were identical, its own spreadsheets belie this assertion. Defendant attached various spreadsheets to its supplemental discovery response. One such spreadsheet includes separate categories for gross profits and net profits and identifies that defendant's gross profits for the period of 2007 to 2009 averaged $8,697,479.67, with net profits averaging $1,302,700.67. Defendant used the gross profit figure, rather than the net profit figure, when apportioning profits among the three individuals. Because damages for lost profits must be based on net profits rather than gross profits, the trial court correctly rejected the profit-based calculation of home office overhead expenses. See *id*.

Although we do not concur with the trial court's conclusion that defendant's salary-based determination of home office overhead damages was impermissibly based on gross profits, we do agree that the claim is without merit. Defendant's salary-based formula was based on the salaries of the three individuals, not on lost profits. Because this was not a lost-profits claim, the prohibition against using gross profits when determining lost profits is irrelevant. See *Getman*, 125 Mich App at 250. Nevertheless, the claim still fails because defendant provided no proof of the number of alleged "distracted hours" which formed the basis for the claim. Thus, the trial court reached the correct result when it dismissed this claim. This Court will not reverse a lower court's ruling where it reached the correct result, albeit for an incorrect reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

On appeal, defendant further asserts that the trial court should have granted it an opportunity to amend its pleadings to proceed with a damages claim based on net profits. This issue was not raised in the statement of the questions presented. "Independent issues not raised in the statement of questions presented are not properly presented for appellate review."

Bouverette v Westinghouse Electric Corp, 245 Mich App 391, 404; 628 NW2d 86 (2001). Defendant also fails to identify when it requested such an opportunity in the trial court or when the request was denied by the trial court. Regardless, had defendant requested an opportunity to amend, the trial court would have properly rejected the request as futile. Although leave to amend pleadings should, in general, be freely granted, leave to amend should be denied if an amendment would be futile. *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007). Even if defendant revised its profit-based damages calculation to be based on net profits, the damages calculation would still be based on allegations of "distracted hours" for which defendant lacked proof and has admitted the absence of any documentary or evidentiary support. Without proof supporting its claim of "distracted hours," the claim still fails, and any proposed amendment on this basis would be futile. See *Wolverine Upholstery Co*, 1 Mich App at 244.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh