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American West Enterprises, Inc. v. CNH, LLC Appellant's Reply Brief Dckt. 40230

IN THE SUPREME COURT OF THE STATE OF IDAHO

AMERICAN WEST ENTERPRISES, INC., an Idaho Corporation, Plaintiff-Appellant, v. CASE NEW HOLLAND, INC., Defendant- Respondent.	)	Supreme Court No. 40230-2012 District Court No. CV-2011-238

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fifth Judicial District
of the State of Idaho, in and for Minidoka County

Honorable Jonathan P. Brody, District Judge

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I.

The District Court Erred in Granting Summary Judgment on the Basis of Privity of Contract

i. The Law is Unsettled

CNH states that there is "nearly forty years of Idaho jurisprudence requiring privity of contract in a breach of warranty action seeking purely economic loss." (*Respondent's Brief*, pg. 6.) However, CNH neglects the holdings of this Court in *State v. Mitchell Const. Co.* and *Tusch Enterprises v. Coffin*.

In *Mitchell Const.* three of the five Justices voted to overturn the privity requirement in cases of implied warranty for economic loss. *State v. Mitchell Const. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984). Chief Justice Donaldson, Justice Huntley, and Justice Bistline combined to overturn the probity requirement. *Id.* at 341, 1355.

This holding and elimination of the privity requirement was further reinforced by this Court in *Tusch Enterprises*. In that case, which was three years after the holding in *Mitchell Const.*, Justice Bistline wrote specially and in concurrence "only to inform the trial bench and bar that the *Salmon Rivers v. Cessna Aircraft Co.* case... **was specifically overruled in the *State v. Mitchell* case**." *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987).

Therefore, it appears from the jurisprudence that the privity requirement in cases of economic loss has been overturned since 1984 in the *Mitchell Const.* case, which was again reinforced by this court in 1987 in the *Tusch* case. *Mitchell Const.* at 341, 1355 and

Tusch at 37, 1022. At a minimum, the case law is unsettled regarding the continued validity of the privity rule.

The District Court failed to properly address the findings of *Mitchell Const.* and *Tusch* and the apparent elimination of the privity requirement. As such, this Court should remand the case for trial on the merits.

ii. The *Nelson v. Anderson Lumber Co.* Decision is Distinguishable

CNH contends that "American West's reliance on the 'goods' versus 'services' distinction is misplaced" as the privity requirement has been upheld in a goods case. (*Respondent's Brief*, p. 8-9) CNH relies upon *Nelson v. Anderson Lumber Co.*, in making this argument. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (2004).

The *Nelson* case was not a goods case as contended by CNH. Rather, the *Nelson* case is a construction case. In that case, the county building inspector determined that the "structure of the cabin" did not meet snow load requirements. *Id.* There is not any indication in the decision what the reason was for the "structure of the cabin" to fail to meet the snow load requirements. The only goods that might have been a factor in the case were building materials purchased by the Nelson's, including wall panels. However, "the Nelsons do not allege that the failure of the cabin's structure to meet the snow load requirements was caused by defective designs regarding the wall panel system." *Id.* at 711, 1101.

It is unclear from the decision exactly what the Nelson's alleged was defective that resulted in the "structure of the cabin" to fail to meet snow load requirements. What is clear from the decision is that Brent Nelson and his son constructed the cabin's

structure. *Id.* at 705, 1095. It is also clear that the Nelson's did not contend that it was faulty wall panels that resulted in the failed building inspection. *Id* at 711, 1101. There is no allegation of faulty goods in the *Nelson* case. Rather, it may be possible that the reason the "cabins structure" failed the building inspection was faulty construction by the Nelson's. It's possible that these were the reasons the Court was "not convinced" that the Nelson case was a case in which the plaintiff may be unfairly prejudiced by the operation of the economic loss rule in combination with the privity requirement. *Id.*

iii. Unfairness of Privity Requirement

In this digital era a large number of products are sold through third party distributors. The result is that manufacturers, such as CNH, have little to no contact with the consuming public and therefore, have minimal exposure for manufacturing faulty products if a privity of contract requirement is in place.

The unfairness of the privity requirement is compounded in the digital age we now live in. For example: Plaintiff A purchases an expensive widget manufactured by Widget Manufacturing, Inc. Plaintiff A purchases the widget online from Widget Distributing, Inc., which merely orders the widget from Widget Manufacturing, Inc. and has it shipped directly to Plaintiff A. The widget subsequently fails. Under the privity requirement, even though Widget Distributing, Inc. did not manufacture or even possess the widget, Plaintiff A would be required to sue them in order to obtain relief. It wouldn't matter if Plaintiff A and Widget Manufacturing, Inc. were both located in Idaho and Widget Distributing, Inc. was a Delaware corporation. Plaintiff A would still be required to sue Widget Distributing, Inc. no matter how minimal their involvement.

As the Alaska Supreme Court found in *Morrow v. New Moon Homes, Inc.*, and Idaho Chief Justice Donaldson relied upon in his decision in *Mitchell Const.*, "It is not the merchant who has defectively manufactured the product... Only the consumer will use these products; and only the consumer will be injured by them should they prove defective." *State v. Mitchell Const. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984) citing *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

II.

The District Court Erred in Finding That There is No Evidence of Intent to Benefit American West

The District Court improperly found that as Pioneer Equipment was only intending to benefit itself, American West could not therefore be an intended beneficiary of any agreement between Pioneer Equipment and CNH. R., p. 75. The District Court failed to into account *Adkinson Corp. v. American Bldg. Co.* In that case, the court found that before recovery can be had on contract by third-party beneficiary, it must be shown that contract was made for his direct benefit, **or as sometimes stated, primarily for his benefit**... *Adkinson Corp. v. American Bldg. Co.* 107 Idaho 406, 690 P.2d 341. (emphasis added).

The contract between each of the parties was primarily for the benefit of American West. Both the *Affidavit of Hal Anderson* and the *Affidavit of Chuck Simmons* support this. R., p. 50-58. Chuck Simmons, CNH's authorized repair center manager testified that "the engine and core were ordered specifically for the benefit of American West... R., p. 55.

Furthermore, it does not matter that both CNH and Pioneer equipment stood to gain from the transaction, rather, its relevant that the contract was primarily for the

benefit of American West and the engine was custom ordered for that purpose. *Adkinson*, at 406, 341; R., p. 55.

Additionally, it does not matter that there was no express contract between the parties. Rather, the circumstances surrounding the formation of the contract may be considered. *Idaho Power Co. v. Hulet*, 140 Idaho 110, 90 P.3d 335 (2004). Therefore, the District Court should have allowed a trial on the merits in order to consider the circumstances surrounding the formation of the contract between the parties.

III.

The District Court Erred in Finding That Pioneer Equipment Was Not CNH's Agent

The District Court improperly found that Pioneer Equipment was not CNH's agent. The District Court failed to take into account the factors the court relied upon in *Adkinson*, when this Court found that reasonable minds could differ as to whether or not there was a principal-agent relationship between ABC and RSI. *Adkinson* at 409, 344. In the case at hand, it is clear that Pioneer Equipment receives product, training, and warranty service from CNH. A trial on the merits should be had to further determine the relationship between Pioneer Equipment and CNH.

IV.

The District Court Ruled Properly in Denying CNH's Motion For Attorney Fees

The District Court found that there was no commercial transaction between American West and CNH upon which American West based its complaint. R., p. 127. Rather, the court found that American West merely alleged that it was a third party

beneficiary to a contract between CNH and Pioneer Equipment and therefore I.C. § 12-120(3) did not apply. R., p. 126.

This Court has reaffirmed the principle that commercial transactions at issue must be between the parties to the lawsuit. *Printercraft Press, Inc., v. Sunnyside Park Utilities, Inc.*, Nos. 36556, 36567, 2012 WL 2529230 at 19 (July 2, 2012). Whereas there is not a commercial transaction between CNH and American West, there is no basis to support an award of fees under I.C. § 12-120(3).

Furthermore, American West has appealed the District Court's decision. If the District Court's decision is not upheld, CNH should not be considered the prevailing party.

V.

Conclusion

Therefore, American West respectively requests that this Court remand the case back to the District Court finding that the granting of summary judgment was improper for the above-mentioned reasons and that the matter be permitted to proceed to trial as material issues of fact remain.

DATED this 4th day of March, 2013.

ROBINSON, ANTHON & TRIBE

By: _____
Brent T. Robinson

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of March, 2013, I served a copy of the within and foregoing **Appellant's Reply Brief** upon:

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by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said attorney at the foregoing address.

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