8-5-2008

Aardema v. U.S. Dairy System, Inc. Appellant's Brief Dckt. 35218

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DON AARDEMA, an individual, RON AARDEMA, an individual, and DONALD J. AARDEMA, an individual, doing business as AARDEMA DAIRY, DON AARDEMA, an individual, and RON AARDEMA, an individual, doing business as DOUBLE A DAIRY, Plaintiffs/Respondents/ Cross-Appellants, v. U.S. DAIRY SYSTEMS, INC., an Idaho corporation, doing business as Automated Dairy Systems, WESTFALIASURGE, INC., a foreign corporation, EARL PATTERSON, an individual, Defendants/Appellants/ Cross-Respondents, and FREEDOM ELECTRIC, INC., an Idaho corporation, JOHN DOE and JANE DOE, husband and wife, I through X, and BUSINESS ENTITIES I through X, Defendants.	Supreme Court Docket No. 35218 FILED - COPY AUG 5 2008 Supreme Court Court of Appeals Entered on ATS by:

APPELLANTS' BRIEF

Appeal from the District Court of the Fifth Judicial District for Twin Falls County

Honorable G. Richard Bevan, District Judge, presiding:

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I. STATEMENT OF THE CASE

A. Introduction.

The present matter involves claims of negligence relating to the installation and maintenance of an automated milking system in four milking "parlors" at a dairy in south central Idaho. The Respondents, the dairy owners and their corporations, claim that the Appellants, U.S. Dairy Systems, Inc. (the installer) and WestafaliaSurge, Inc. (the manufacturer), negligently designed, installed and maintained the milking system, which resulted in decreased milk production and quality for their herd. Appellants contend that the milking system was adequate for the size of this particular dairy and performed within its specifications. As a result, Appellants contend that any claims of lost production or decreased milk quality, if any, are directly attributable to factors unrelated to the milking system and its wiring. This includes, but is not limited to, poor herd management and health, the sporadic use of bovine steroids and other causes in no way related to the milking system.

Appellants submit that any losses claimed by Respondents with respect to the Dairy are purely economic and thus barred by the economic loss rule. Respondents have not offered any evidence to establish any exception to the rule, including any support for the argument that their cows in question were physically and/or permanently harmed or damaged in any way. Appellants assert that the governing case law mandates that Respondents' claim for damages be dismissed accordingly.

B. Course of Proceeding Below.

On July 25, 2006, the Respondents (hereinafter referred to as "Respondents" or the "Aardemas") brought suit against the Appellants, U.S. Dairy Systems, Inc., WestfaliaSurge, Inc., Earl Patterson and Freedom Electric, Inc.(hereinafter referred to as "Appellants" or "U.S. Dairy" or "Westfalia" or "Freedom") in the Fifth Judicial District for the County of Twin Falls alleging

causes of actions for negligence/injury to chattel, breach of contract, breach of express/implied warranty and equitable estoppel related to the installation of an automated milking system at their dairy. ***See*** R., Vol. I, pp. 26-34. The Appellants denied any wrongdoing with respect to the installation and wiring of the system and asserted that Respondents' damages, if any, were speculative, unfounded, barred by statute and composed primarily of non-recoverable economic loss. ***See*** R., Vol. I, pp. 35-41, 42-48 and 49-54, respectively. Respondents subsequently amended their Complaint on September 24, 2007, alleging new causes of action for negligent design/construction, negligence/injury to chattel, breach of contract, breach of express/implied warranty and equitable estoppel. ***See*** R., Vol. I, pp. 55-65. Trial was initially set for April 1, 2008 for a four week period.

Freedom moved for summary judgment with respect to all claims on November 21, 2007. ***See*** R., Vol. I, pp. 82-95. Westfalia joined in Freedom's motion on December 17, 2007. ***See*** R., Vol. I, pp. 96-98. Westfalia subsequently filed an additional motion for judgment on the pleadings and/or for summary judgment on December 21, 2007. ***See*** R., Vol. I, pp. 99-104. Also on that date, U.S. Dairy filed a motion for summary judgment regarding the contractual claims. ***See*** R., Vol. I, pp. 105-113. The hearing on the above motions was scheduled before District Judge G. Richard Bevan for January 25, 2008.

Respondents subsequently moved to dismiss their contract claims on January 4, 2008, noting that they wished to proceed solely on the negligence issues. ***See*** R., Vol. I, pp. 129-132. In addition to the motion to dismiss, Respondents also filed a motion to amend their Complaint to include a claim for punitive damages against Westfalia. ***See*** R., Vol. I, pp. 132-134. U.S. Dairy filed an objection to Freedom's statement of undisputed facts on that same date. ***See*** R., Vol. I, pp. 114-129. On January 14, 2008, Freedom filed a joinder in Respondents' motion to dismiss their contractual claims. ***See*** R., Vol. I, pp. 135-138.

District Judge Bevan heard all pending motions on January 25, 2008. ***See*** Tr., Vol. I, pp. 1-102. At the hearing, the District Court granted Respondents' motion to dismiss their contractual claims. ***See*** Tr., Vol. I, pp. 5-1. Thereafter, U.S. Dairy requested permission from the Court to join in the other appellants' motions relating to negligence issues based upon the economic loss rule and the inapplicability of the exceptions to the rule, which was granted. ***See*** Tr., Vol. I, pp. 23, 77-78. Respondents did not request an extension of time in which to respond to U.S. Dairy's joinder in the economic loss motions. ***See id.***

The District Court, upon hearing the arguments on summary judgment, found in favor of Freedom Electric. ***See*** Tr., Vol. I, pp. 53-54. In regards to the remaining appellants' motions on the negligence issues as they related to the economic loss rule, the Court found for Respondents, determining that there were sufficient questions of fact to not allow entry of summary judgment. ***See*** Tr., Vol. I, pp. 54-60. However, in a follow-up court session later that day, the District Court invited the remaining defendants to submit a motion for permissive appeal based upon the unsettled case law and authority relating to the economic loss issues. ***See*** Tr., Vol. I, pp. 61-82. An order approving the appeal by permission was executed and entered into the record on February 8, 2008. ***See*** R., Vol. I, pp. 159-163.

As this Court is aware, Westfalia and U.S. Dairy filed a motion for permission to appeal with this Court on February 22, 2008. ***See*** R., Vol. I, pp. 164-165. Respondents filed a memorandum in opposition to the motion on March 10, 2008. ***See id.*** This Court issued an order granting the Appellants' motion on March 28, 2008. ***See id.*** An initial notice of appeal was filed by Appellants on April 14, 2008. ***See*** R., Vol. I, pp. 166-171. Appellants filed an amended notice of appeal on May 1, 2008. ***See*** R., Vol. I, pp. 178-184. Respondents submitted a notice of cross-appeal on May 2, 2008. ***See*** R., Vol. I, pp. 185-189.

The matter is now before this Court for determination on interlocutory appeal.

C. Statement of Facts.

The relevant facts regarding this case involve matters dating back to early 2000. In that year, Respondents entered into contracts with U.S. Dairy Systems in Jerome, Idaho, to install Westfalia milking equipment in their milking parlors located on the Double A Dairy facility north of Jerome, Idaho, known as Parlors #1 and #2. ***See*** R., Vol I., p. 57, Amended Complaint, ¶ 10; ***see also*** R., Vol I., p. 193, Exhibits, Higley Affidavit, 12/21/07, ¶ 2. The initial contract specifically included the installation of the Westfalia equipment, as well as a five year warranty for particular parts and two years associated labor and is representative of those that followed. ***See*** R., Vol. I., Exhibits, Highley Affidavit, 12/21/07, (Exhibit A to Affidavit – 2/15/00 Contract).

Each parlor was set up to milk 100 cows at a time, arranged in two parallel rows of 50 milking stations. This type of arrangement is known as a "Double 50" in the nomenclature of the industry. Each milking station is connected to a device called a "pulsator," which is an electrically controlled pneumatic pump. The pulsator connects to air hoses that are connected to a cow's teats. The pulsators are programmable and can be set to cycle at a number of predetermined rates.

The wiring to the individual pulsators is connected to one of four control boxes, which contain the computer circuits that manage the system. Each of the four control boxes were responsible for 25 pulsators. The Respondents had requested that the pulsators be set to milk at a 60/40 rate, which means that each individual pulsator extracted milk from a particular animal for 60% of the cycle period and was at rest for 40% of time.

In December 2000, construction was completed and Respondents began milking cows in Parlor #1. ***See*** R., Vol I., p. 57, Amended Complaint, ¶ 11; ***see also*** R., Vol I., p. 193, Exhibits, Higley Affidavit, 12/21/07, ¶ 4. In July, 2001, Parlor #2 became operational. ***See*** R., Vol I., p.

193, Exhibits, Higley Affidavit, 12/21/07, ¶ 4. Respondents contracted with U.S. Dairy to install Westfalia milking equipment in a new parlor located at the Double A Dairy facility known as Parlor #3 in 2002. ***See*** R., Vol I., p. 57-58, Amended Complaint, ¶¶ 12-13. In January, 2003, Respondents began milking cows in Parlor #3. ***See id.*** In 2004, Respondents entered into another contract with U.S. Dairy to install milking equipment in a fourth milking parlor at the same farm (Parlor #4). ***See*** R., Vol I., p. 58, Amended Complaint, ¶ 14; ***see also*** R., Vol I., p. 193, Exhibits, Higley Affidavit, 12/21/07, ¶ 5.

During the first week of December, 2004, Respondents allege they discovered a wiring defect in Parlor #3, necessitating some changes to the parlor's wiring. ***See*** R., Vol I., p. 59, Amended Complaint, ¶ 23; ***see also*** R., Vol I., p. 193, Exhibits, Higley Affidavit, 12/21/07, ¶ 5. No attempt was made to look at or diagnose any potential issues with the other three parlors at the time, as there were no observable problems. ***See id.*** The only issue observed in Parlor #3 was a flicker in a light on one of the control boxes for the pulsators. Additional wiring was run in December, 2004, which alleviated the flickering light. ***See*** R., Vol. I, p. 59, Amended Complaint, ¶ 23.

On July 25, 2006, Respondents' filed their initial Complaint and Demand for Jury Trial alleging damage related to the wiring in Parlor #3 only, asserting causes of action for negligence/injury to chattel, breach of contract, breach of express and/or implied warranty and equitable estoppel. ***See*** R., Vol I., pp. 26-34. In January 2007, Respondents hired an electrician to test all four parlors, who contends he discovered problems in the wiring in each milking parlor. ***See*** R., Vol I., p. 59, Amended Complaint, ¶ 24; ***see also*** R., Vol I., Exhibits, Neubauer Affidavit, 1/04/08. In response to Mr. Neubauer's findings and recommendation, Respondents had the wiring replaced in all four of the milking parlors during the summer of 2007.

Respondents filed an Amended Complaint on September 21, 2007, alleging similar causes of action related to all four parlors. ***See*** R., Vol I., pp. 55-65.

In the record before the Court, it is clear that Respondents' damages consist entirely of claims for decreased milk production and losses associated with lower milk quality bonuses due to fluctuating somatic cell counts. There has been no claim presented for any specific or particular injury to an individual animal as a result of the alleged defects. In late 2007, Respondents disclosed the report of their economist expert, asserting damages in excess of $50,000,000. The economist's report was subsequently revised just prior to his deposition, in which he lowered the damage estimate to $41,937,419. ***See*** R., Vol. I, p. 193, Exhibits, Behr Affidavit, 1/04/08, Report p. 3. The economist detailed "losses" dating back from 2002 through 2007, which were composed of milk loss, price premium loss, capital loss and loss from operations. ***See id.*** In summary, Respondents' expert identified that, "Plaintiff sustained ***economic damage*** to its dairy from malfunctioning equipment which had begun by January, 2002." ***Id.*** (emphasis added).

Presented only with alleged economic damages and losses, Appellants' summary judgment arguments focused on the fact that, if we were to assume that these damages even existed at all, they were not recoverable under Respondents' negligence claims. Initially, Westfalia had joined with Freedom with respect to the issues raised in regards to the economic loss rule and the non-applicability of the special relationship exception in Freedom's motion for summary judgment. ***See*** R., Vol I., pp. 96-98. U.S. Dairy moved to join the other parties in their summary judgment requests at the hearing. Judge Bevan allowed the joinder on the based upon the facts in the record. Judge Bevan overruled Respondents' objection and Respondents did not request additional time to present further briefing on the matter.

At the hearing, Respondents failed to present affidavits or testimony from any of their veterinary experts regarding actual physical harm to the dairy herd, as a result of the alleged wiring problems. Respondents' relied solely upon the opinion of their electrician that the wiring involved could have resulted in physical harm, although this individual admittedly was only an alleged expert in the wiring of the system and not the physiology of the animals it was serving. As mentioned above, Judge Bevan ruled that there was a question of fact as to the applicability of the economic loss rule and declined to grant summary judgment on that basis. He did find sufficient facts to conclude that there was not a special relationship between any of the parties. He subsequently invited the parties to pursue an interlocutory appeal.

II. STANDARD OF REVIEW

The standard for this Court's review of a trial court's ruling on a motion for summary judgment is the same standard as used by the trial court in ruling on the original motion. ***Shawver v. Huckleberry Estates, L.L.C.,*** 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). A party is entitled to summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **I.R.C.P. 56(c)**. In general, the court must construe facts in favor of the non-moving party in determining whether there is a genuine issue as to any material fact. ***Pratt v. State Tax Commission***, 920 P.2d 400, 128 Idaho 883 (1996). However, when "the defendant moves for summary judgment on the basis that no genuine issue of material fact exists with regard to an element of the plaintiff's case, the plaintiff must establish the existence of an issue of fact regarding that element." ***Zimmerman v. Volkswagen of America, Inc.***, 920 P.2d 67, 70, 128 Idaho 851 (1996) ***reh'g denied***.

> Further, a non-moving party's failure to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial,

> requires the entry of summary judgment. ***Celotex Corp. v. Catrett*** [477 U.S. 317, 106 S.Ct. 2548, 91 L.E.D. 2d 295 (1986)] ***see also***, I.R.C.P. 56(c). "In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning any central element of the non-moving party's case necessarily renders all other facts immaterial." ***Celotex Corp. v. Catrett, supra***, at 322-323.

Jarman v. Hale, 122 Idaho 952, 842 P.2d 288 (Ct.App. 1992).

Thus, to withstand a Motion for Summary Judgment, Respondents' case must be anchored in something more solid than mere speculation. "The plaintiff must do more than present a scintilla of evidence, and merely raising the 'slightest doubt' as to the facts is not sufficient to create a genuine issue." ***Id***; ***Edwards v. Conchemco, Inc.***, 111 Idaho 851, 853 (Ct.App. 1986). Furthermore, "the party opposing the motion may not merely rest on the allegations contained in the pleadings; rather, evidence by way of affidavit or deposition must be produced to contradict the assertions of the moving party." ***Ambrose v. Buhl Joint School District No. 412***, 126 Idaho 581, 584 (Ct.App. 1995) ***quoting Podolan v. Idaho Legal Aid Services, Inc.***, 123 Idaho 937 (Ct.App. 1993).

III. ISSUES PRESENTED ON APPEAL

A. Whether the district court erred in holding that the economic loss rule did not bar Respondents' tort claims.

B. Whether the economic loss rule bars recovery in tort for losses arising from commercial transactions when there is damage to other property, the possibility of which should have been foreseen and made a subject of the transaction if the purchaser wanted to be protected from the risk of such damage and its consequences.

C. Whether the economic loss rule bars recovery in tort when all of the alleged damages are economic losses and there no losses claimed for damage to

other property.

D. Whether there is any evidence of special circumstances or a special relationship exempting Respondents from application of the economic loss rule.

IV. SUMMARY OF ARGUMENT

In 1978 this Court adopted the economic loss rule barring tort actions arising out of commercial transactions in which economic losses are sought to be recovered.

In 1988 the Idaho Court of Appeals recognized an exception to the economic loss rule existed when the claimant of economic losses suffered injury to property other than the allegedly defective product. The Court of Appeals held that, while such an exception did exist, injuries to "other property" which did not result from a "calamitous event or dangerous failure of the product" did not qualify as the type of "property damage" which gives rise to an exception to the economic loss rule.

In 1995 this Court noted that "property loss" encompasses "damage to property other than that which is the subject of the transaction" but did not address the Court of Appeals requirement that the property damage be of a particular type and quality before it qualifies as an exception to the economic loss rule and did not discuss the definition of "other property" because it concluded that the losses at issue were purely economic. The Court went on to note that there are two additional exceptions to the economic loss rule, those being "unique circumstances" requiring a reallocation of the risk and a "special relationship" between the parties. Since that time an Idaho federal court has determined that damage to dairy cows, by a milking system with defective pulsation, was not the type of damage to other property which gives rise to an exception to the economic loss rule.

The Supreme Courts of Minnesota, Michigan and Wisconsin have addressed the issue of what constitutes the type of property damage which gives rise to an exception to the economic

loss rule. Appellants request that this Court accept the approach followed by those Courts, deferring to the Uniform Commercial Code ("UCC") in a commercial transaction.

Here the transaction is clearly a commercial transaction. It involves the construction of four milking parlors, each containing a sophisticated milking system designed to extract milk from, eventually, over 14,000 cows. The cows alone, in an enterprise of this size, have a market value of approximately $30 million dollars. This clearly qualifies the Respondents as an experienced business entity whose transactions are of the type that the UCC was designed to govern. The enterprise had full time veterinarians on staff, one of whom was its general manager, who were well versed in the relationship between malfunctioning milking equipment and disappointing milk production and the health of the herd. A venture of Respondents' magnitude and sophistication would certainly be cognizant of the possible risks that are inherent with a herd of this size and the equipment involved. These are the types of risk for which the UCC is designed to cover and thus not be governed by the tort system.

Respondents foresaw this risk and contracted with U. S. Dairy Systems for a warranty and a maintenance contract. It is the terms of the warranty contract and the maintenance contract with U. S. Dairy which must govern, not tort law concepts.

V. ARGUMENT

A. Adoption of the economic loss rule in Idaho.

In ***Clark v. International Harvester Co.***, 99 Idaho 326, 581 P. 2d 784 (1978) this Court adopted the economic loss rule noting that the Idaho legislature as well as the legislatures of nearly every state in the union have adopted the UCC which carefully and painstakingly sets forth the rights between parties to a sales transaction with regard to attendant economic losses. This Court noted that, in cases involving the intersection of tort claims and business losses, this Court is required to recognize the legislature's action in this area of commercial law and thus

accommodate the evolution of tort law with the principles laid down in the UCC. This Court noted that the economic expectations of parties have not traditionally been protected by the law concerning unintentional torts. This Court noted that it did not believe that any good purpose would be achieved by undermining the operation of the UCC provisions by extending tort law to embrace purely economic losses in product liability cases. ***Id.*** at 335. This Court noted that there was no compelling reason to extend negligence law into an area in which the legislature had enacted comprehensive legislation which would serve only to undermine the legislation. This Court clearly stated that the UCC provisions adequately defined the rights of the parties in commercial cases and that the judicial expansion of negligence law to cover purely economic losses would only add more confusion in an area already plagued with overlapping and conflicting theories of recovery. ***Id.*** at 336.

B. Application of the economic loss rule in Idaho.

Under the present state of Idaho law there are three exceptions to the bar of tort actions involving economic losses. They are articulated in ***Duffin v. Idaho Crop Improvement Ass'n.,*** *126 Idaho 1002, 895 P. 2d 1195 (1995)* In ***Duffin*** this Court noted that "property loss" encompasses "damage to property other than that which is the subject of the transaction." It did not define the type of "property loss" which qualifies for the exception. This Court also noted exceptions for "unique circumstances" which require reallocation of the risk and for a "special relationship".

As will be discussed later, there are no facts or even a colorable argument to support claims of "unique circumstances" or a "special relationship", neither of which was pled by the Respondents.

The question presented here is whether the alleged damage to other property is of the type which gives rise to an exception to the economic loss rule. In a case similar to that

presented here, the Idaho Court of Appeals in ***Myers v. A.O. Smith Harvestore Products***, 114 Idaho 432, 757 P. 2d 695 (App. 1988), ***relying on Seely v. White Motor Co.***, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 23, 403 P. 2d 145, 151 (1965), stated:

> ... Here, the Myers did not plead any specific damage to the losses in feed or cattle value. The losses suffered as a result of feed deterioration and cattle illness were manifested by income changes brought on by reduced milk production.
>
> Arguably, the Myers did allege property damage resulting from a defective product. However, these injuries did not result from a calamitous event or dangerous failure of the product. Rather, they arose from the failure of the product to match the buyers' commercial expectations. In sum, the Myers' claim is for lost profits and consequential business losses resulting from alleged failures of the silo. "When a loss results from mere product ineffectiveness, it is the law of contracts and commercial transactions, rather than strict products liability which fixes responsibility for the loss." [Citation omitted]. Here these economic losses were properly addressed as predicated upon the contract claims, not in tort. Clark v. International Harvester Co., supra. Therefore, we hold that the district judge properly dismissed the Myers' negligence and tortuous strict liability claims.

Myers was followed by the United States District Court for the District of Idaho in ***DeVries v. De Laval, Inc.***, 2006 U.S.Dist. LEXIS 41 599 .The ***DeVries*** case, much like the instant matter, presented a claim that a pulsation system caused injury to cows. Noting the decision in ***Myers v. A.O. Smith Harvestore Products, Inc., supra,*** the court stated:

> Despite the DeVries' best efforts to distinguish ***Myers*** from the circumstances of this case, the Court finds the facts of ***Myers*** strikingly analogous [to] the facts of this case. As in ***Myers***, the damages to the cattle in this case arose from the failure of the product to match the buyers' commercial expectations and were manifested by lost profits and consequential business losses resulting from alleged failures of the milking equipment and decreased milk production. And as in ***Myers***, although the DeVries did allege property damage of a sort, the essence of their claim is the loss of a contractual benefit of a properly functioning milking system in addition to consequential damages. ...

Duffin merely clarifies that, if there is injury to other property, then economic losses "parasitic" to that injury are recoverable in tort. However, to be parasitic, the damage to other property must rise to the level of legally recognized property damage, as opposed to merely

literal property damage, a distinction we believe is supported by the Court in ***Myers***.

Three state Supreme Courts have written extensively on the subject of whether and what type of property damage gives rise to an exception to the bar of the economic loss rule.

In ***Hapka v. Paquin Farms***, 458 N.W. 2d 683 (Minn. 1990), the Supreme Court of Minnesota concluded that the UCC exclusively controls claims alleging property damage in a commercial transaction. In that case the court effectively eliminated the "other property" exception to the economic loss rule. The Minnesota Legislature statutorily reversed ***Hapka*** providing that a tort claim could be grounded upon harm caused to a buyer's tangible personal property by a defective product. ***See,*** Minnesota Statute § 604.10.

Since the enactment of that legislation, the Minnesota Supreme Court has not addressed the issue of what constitutes the type of injury to personal property which qualifies for the exception.

In ***Neibarger v. Universal Cooperatives***, 486 N.W. 2d 612 (Mich. 1992) the Michigan Supreme Court held:

> Where damage to other property was caused by the failure of a product purchased for commercial purposes to perform as expected, and this damage was within the contemplation of the parties to the agreement, the occurrence of such damage could have been the subject of negotiations between the parties.

In a conclusion remarkably similar to that reached by the Court of Appeals in the ***Myers*** case, the Michigan Supreme Court stated:

> The physical damage to property alleged by the Plaintiffs includes instances of mastitis and other illnesses that allegedly caused the death of some cattle or necessitated culling them from the herd and selling them for beef. However, in his deposition, Plaintiff Darwin Neibarger testified that mastitis is a common problem for dairy farmers. Plaintiff Charles Houghton testified that mastitis could occur even where the cows were milked by hand, and his testimony reveals that he was aware that mastitis could be caused by the milking system. Deposition testimony also reveals that culling the cows was a normal part of the dairy business, and that the Houghtons would replace as many as twenty-five percent of their cows every year. Houghton, in fact, testified that he anticipated

problems with the new system because some cows would not adapt to the new system and would have to be replaced.

... The plaintiffs made business decisions to purchase new milking systems, hoping, as Charles Houghton and Darwin Neibarger testified, to expand the size of their herds and, we presume, thereby increase their incomes. Their commercial expectations were not met, however, and they experienced decreases in milk production and medical problems. Their complaints were properly viewed by the Courts below as attempts to recover for lost profits and consequential damages, losses which are compensable under the UCC. Thus, these actions fall squarely within the economic loss doctrine and are governed by the provisions of the UCC, including its 4-year statute of limitations.

As discussed below in greater detail, Dr. Behr's report demonstrates that the gravemen of this case rests on similar hopes and expectations.

In ***Grams v. Milk Products, Inc.***, 283 Wis. 2d 511, 699 N. W. 2d 167 (2005) the Supreme Court of Wisconsin undertook to define the type of injury to other property which qualifies for an exception to the bar of the economic loss rule. In ***Grams*** at page 534 the Court stated:

The Grams urge this Court to resolve the "other property" conundrum by adopting a new "bright line rule," that physical damage to anything other than the product itself would be considered damage to "other property" and therefore subject to suit in tort, and this argument attracts the dissent. See Chief Justice Abrahamson's dissent, 74, 80. The Grams concede that this proposal would obliterate the distinction between the literal "other property" and legal "other property" discussed in the case law. Suits in tort would be allowed whenever damage extends beyond the physical dimensions of the purchased product. If such a rule were applied to this case, the Grams' tort claims would proceed because the calves were property different from the replacer.

The ***Grams*** court followed an approach remarkably similar to that of ***Myers***, albeit much more verbose.

At pages 533-534, ***Grams*** notes its definition of legal other property as:

In exploring the parameters of the "other property" exception to the economic loss doctrine, we will incorporate this concept of "disappointed expectations" into our analysis, as well as the integrated system concept. This does not mean that contract principles will envelop all damages forseeable "in a remote and general sense." ***Rich Prods.***, 66 F. Supp.2d at 975. Rather, the

economic loss doctrine will apply when "prevention of the subject risk was one of the contractual expectations motivating the purchase of the defective product." ***Id.***

At page 535 ***Grams*** states:

> If a product is expected and intended to interact with other products and property, it naturally follows that the product could adversely affect and even damage that property. A rule that allows tort recovery based on what is damaged, rather than whether the risk of that damage was within the scope of the bargain, would leave little room for contract.

The least complicated rule would be to adopt that espoused by the Minnesota Supreme Court in ***Hapka***. It simply barred tort claims in commercial settings and relegated their resolutions to the UCC.

The Supreme Courts of Michigan and Wisconsin adopted an approach which evaluates the damage to other property to determine if it is of a type which was within the contemplation of the bargain.

The Idaho Court of Appeals in ***Myers*** defined the type of damage to other property which qualifies as an exception to the economic loss rule as that which results from a calamitous event or a dangerous failure caused by the allegedly defective product. ***Myers*** made it clear that damage to other property which results from the failure of the product to match the commercial expectations of the buyer does not qualify and is governed by the UCC.

Similar to ***Myers***' calamitous event or dangerous failure approach to the characterization of "legal property damage", ***Grams*** contrasted windows which caused the structure in which they were installed to rot with windows which spontaneously shattered causing shards of glass to damage an adjacent Picasso. The court pointed out that the damage caused by rotting was economic damage, while the damage to the Picasso was "legal property damage." ***Id.*** at 531.

At the same time that ***Grams*** was being decided this Court was in the process of approving the "integrated whole" approach to the definition of damage to other property in

Blahd v. Smith, 141 Idaho 296, 301, 108 P.3d 956. In that decision it was held that damage to a house caused by the negligently prepared lot on which it was built was economic damage which could not be recovered in a tort action.

C. The damages claimed here are not the result of the type of damage to other property which gives rise to an exception to the economic loss rule.

This is clearly a commercial transaction entered into between a very large and knowledgeable dairy enterprise which employed on-staff veterinarians, on-staff milking equipment service personnel and collectively should have had a high level of awareness regarding the relationship between proper operation of milking equipment and the udder health of its cows.

A review of Respondents' damage report authored on their behalf by Dr. Michael Behr, an economist, conclusively demonstrates that all of the damages sought by the Respondents are nothing more than economic losses. There is no expression of a claim for property damage. In order to express a claim for property damage the Respondents would have to show the difference in value of each cow which Respondents claim was injured before and after the injury. ***See,*** IDJI2d 9.07. There is no such claim for damage here. There is no quantification of the number of cows allegedly injured or their before and after values. The only claim is grounded upon the extent to which the quality and quantity of milk produced fell below the expectations of Respondents.

The only articulated loss of value of cows is driven by the Respondents' disappointed expectations. Dr. Behr states on page 63 of his report:

Line 8. Capital Loss

The value of the herd is below normal because of its reduced milk production. The amount is $450 per cow x 14,450 cows = $6,502,500.

See R., Vol. I., Exhibits, Behr Affidavit, 1/4/08, Exhibit "A," p. 63.

This computation of lost value of cows is purely economic. It does not account for cows which were not damaged and does not quantify the amount of loss with respect to each damaged cow. Assessment of damage to personal property must be done with respect to each piece of property which is damaged. Loss of the economic benefit of the reduced productive capacity of the property is purely an economic loss.

As noted in the last paragraph on page 8 of Dr. Behr's report, all damages are premised upon the difference between the level at which the cows milked by the equipment actually produced and the level at which the Respondents expected them to produce if the equipment operated as Respondents expected. The loss of capital value is grounded upon the production shortfall. The UCC allows the recovery of these types of damages if there is a breach of warranty. ***See***, Idaho Code §§ 28-2-714 and 28-2-715. The prerequisite to recovery, however, is the existence of a warranty, express or implied.

Thirty years ago in ***Clark***, ***supra***, this Court said:

> The economic expectations of parties have not traditionally been protected by the law concerning unintentional torts. [Citations omitted]
>
> We do not believe that any good purpose would be achieved by undermining the operation of the UCC provisions by extending tort law to embrace purely economic losses in product liability cases....

If there is no claim for property damage but only a claim for economic losses, can Respondents still claim an exception from to the economic loss rule if they claim there was damage to other property for which they are not making a property damage claim? This would seem to be resolved by the language of ***Seely*** at 403 P. 2d 151 where the California Supreme Court stated:

> ... A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damage for physical injuries and there is no recovery for economic loss alone.

Here the Respondents allege economic loss alone. The root basis for the damages claimed is that the Respondents did not achieve their expectation of milk production of 85 pounds per cow per day. This claim of disappointed expectations is clearly evident from the damage report of Dr. Behr. He states that the damage sustained by the Respondents is the result of their failure to progress from 20,000 pounds per cow per year to 26,000 pounds per cow per year during the period of the malfunction of the equipment.

D. There is no evidence of exceptional circumstances or a special relationship which supports an exception to the economic loss rule.

It is the Respondents' burden of proof to come forward with facts which support a claim that the exceptional circumstances or special relationship exceptions to the economic loss rule are applicable in this case.

After reviewing the record in this case the District Court stated:

> I am ruling as a matter of law that there are not sufficient facts to send this to a jury relative to the exceptions of either special relationship and/or special circumstance, so and apart from granting the motion for summary judgment, now you can see if I am right or wrong on that.

See Tr., Vol. I., p. 77.

The Respondents contracted with U.S. Dairy Systems to provide milking systems for four milking parlors. U.S. Dairy Systems utilized components purchased from WestfaliaSurge, Inc. and other manufacturers in providing pulsation systems for the four parlors. Respondents entered into a contract with U. S. Dairy Systems which provided Respondents with the

"Manufacturer warranty on all components" and a five year maintenance contract, clearly indicating that this transaction was governed by the law of contract, not tort. That is the relationship that Respondents bargained for and received.

The relationship among the parties here is without question the type which the UCC was designed govern. There are no unique circumstances that make the UCC inadequate to govern the relationship.

With respect to the unique circumstances and special relationship exceptions, ***Duffin*** speaks volumes where, at 1008, it states "there is an extremely limited group of cases where the law of negligence extends its protection to a party's economic interest." None of those circumstances are present here. There is simply a relationship between a large commercial dairy enterprise on the one hand and a milking system installer and milking system component manufacturer on the other.

The burden of pleading and proving unique circumstances or a special relationship is on the Respondents. Respondents have neither plead the requisite facts nor have they come forth with proof that rises to the level necessary to give rise to a fact issue with respect to the existence of either exception.

As noted in ***Blahd*** at 302, the unique circumstances exception has never been applied by this Court.

In discussing the types of relationships to which the special relationship exception is applicable ***Duffin***, at 1008, points to professional or quasi-professional relationships in which the party holds itself out to the public as having expertise regarding a specialized function and by so doing, the party induces reliance on his superior skill and knowledge.

There is no evidence that Respondents sought or received specialized advice and counsel from WestfaliaSurge, Inc. U.S. Dairy Systems was just one of several dairy equipment

companies which could have provided milking systems for Respondents. As such there was no evidence or plausible argument that a "special relationship" was created under the commercial transaction at issue in this case. Respondents bargained for and received a warranty and service contract. Those contracts govern the transactions at issue, not tort law.

VI. CONCLUSION

Here, the relationship between Appellants and Respondents is a commercial one governed by the UCC, the manufacturer's warranty and the service contract. To hold that tort law has any place in this case would emasculate the UCC. The Respondents are asking this Court to expand the exceptions to the economic loss rule beyond that called for by Idaho and other jurisdictions which have examined this issue. Here Respondents failed to submit any support for their contention that they have suffered more than pure economic loss. Without such support, the District Court erred in denying summary judgments to the Appellants.

It is respectfully submitted that the tort claims asserted by the Respondents must be dismissed with prejudice.

RESPECTFULLY SUBMITTED this ___ day of August, 2008.

ANDERSON JULIAN & HULL, LLP

By _____
Robert A. Anderson,
Attorneys for Appellant, U.S. Dairy Systems, Inc.

DATED this 5th day of August, 2008.

BENOIT, ALEXANDER, HARWOOD, HIGH & VALDEZ, L.L.P.

By _____
Thomas B. High, Attorneys for Appellants,
WestfaliaSurge, Inc. and Earl Patterson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2008, I served a true and correct copy of the foregoing APPELLANTS;' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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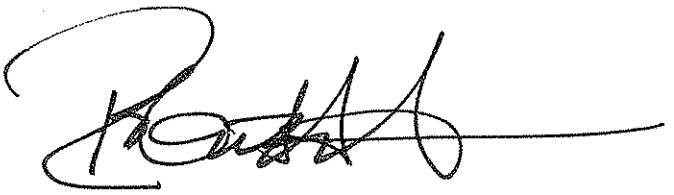

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