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Aardema v. U.S. Dairy Systems, Inc. Amicus Brief Dckt. 35218

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON AARDEMA, an individual, et al., Plaintiffs/Respondents/Cross-Appellants, v. U.S. DAIRY SYSTEMS, INC., an Idaho corporation, d/b/a AUTOMATED DAIRY SYSTEMS, et al., Defendants/Appellants/Cross-Respondents, And FREEDOM ELECTRIC, INC., an Idaho corporation, et al., Defendants.	Twin Falls County Case No. CV-06-3472 Supreme Court Docket No. 35218

AMICUS CURIAE BRIEF for the IDAHO DAIRYMEN'S ASSOCIATION

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. INTRODUCTION

A. The Role of the Idaho Dairymen's Association, Inc. in Idaho.

The Idaho Dairymen's Association, Inc. ("IDA") is a non-profit corporation established in 1944, with a goal of promoting Idaho dairy interests. It has continued that mandate for over sixty years by developing and sustaining an economically viable dairy industry in the domestic and global marketplace. The Amended Code of Bylaws of the Idaho Dairymen's Association, Inc. is found at www.idahodairycouncil.com/idahodairymenassoc.asp and describes the role of IDA.

IDA membership consists of *all* Idaho dairy producers regardless of the operation size. Currently, there are 634 dairies operating in Idaho. Interestingly, while Idaho ranks fourth in United States milk production,[1] forty-one percent of Idaho dairies have less than 200 animals and only 81 of the 634 dairies operate with 2,000 or more animals. In other words, Idaho producers have managed to preserve traditional family run operations and still rank among the nation's top dairy producing states.[2]

The IDA is run by nine elected board members, all of whom are dairy producers. All decisions, including the IDA's desire to participate in this litigation, are approved by the Board. The issues presented in this matter are of great importance to all IDA members. Members of the

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[1] Idaho is preceded by California, Wisconsin and New York in milk production, though Idaho will soon overtake New York. USDA, National Agricultural Statistics Service 2007.

[2] In 2007 Idaho produced 11.5 billion pounds of milk. From 2000 to 2007 milk production has grown 59.7%. Interestingly, a 6.5% annual growth rate requires a plant the size of Jerome Cheese to be built every three years to process the increased milk production. Obviously, the importance of dairy to the state's economy and agriculture is significant. In fact, based on a 2005 study, the Idaho dairy industry created 7,535 dairy jobs; 1,725 manufacturing jobs and 13,470 jobs in supply, goods and services industries. *Id.*

IDA are faced with a growing complexity in the operations and marketing of dairy products, primarily milk. Given the realities of the industry, Idaho dairymen are often forced to deal with multi-national companies such as the Appellant that have a dominant and sometimes controlling presence in the industry. The bargaining position between the dairy producers and the multi-national companies that provide goods to the industry is, essentially non-existent. Therefore, the legal concept of economic loss, which seems to be derived from contract principles, bears a significant potential of application in matters involving dairymen when sophisticated products are purchased by dairymen but somehow fail and cause injury. The injuries can be catastrophic and can lead to the demise of a dairy. It is important, then, that adequate remedies remain available in the event dairies sustain injuries and damages from products designed to assist dairies. The economic loss rule with its exceptions is one such remedy.

B. <u>The Economic Loss Standard in Idaho.</u>

The Economic Loss Doctrine is a court made rule that operates to limit damages in certain contexts. Often, the issue arises when a dispute is grounded in both contract and tort. Frequently these cases pit an analysis of a breach of warranty versus an analysis of strict liability or negligence. As articulated by the Court in *Just's Inc. v. Arrington Construction Co., Inc.*, 99 Idaho 462 (1978), "ordinarily, breach of contract is not a tort, although a contract may create circumstances for the commission of a tort." *Just's* at 468, citing *Taylor v. Herbold*, 94 Idaho 133 (1971). Generally, the courts have analyzed the issue of the recovery of economic loss as a function of a breach of warranty action, rather than a function of recovery in tort. *See*, for

example, *Clark v. International Harvester Co.*, 99 Idaho 326 (1978), relying on *Seely v. White Motor Company*, 403 P.2d 145 (Cal. 1965). Though the analysis does not stop there.

In Idaho, the Economic Loss Doctrine prohibits the recovery of purely economic losses in all negligence actions. *Ramerth v. Hart*, 133 Idaho 194 (1999); *Duffin v. Idaho Crop Improvement Assn.*, 126 Idaho 1002 (1995); *Just's Inc. v. Arrington Construction Co., Inc.*, *supra*. The genesis of the economic loss rule in Idaho is attributed to *Clark v. International Harvester Company, supra*. The *Clark* Court adopted the economic loss rule in the context of a tractor buyer suing the seller and manufacturer pursuant to negligence theories in an effort to recover purely economic losses. In the *Clark* decision, the Supreme Court adopted the basic economic loss rule and nothing more. However, on the same day, the Supreme Court also decided *Just's Inc. v. Arrington Construction Co., Inc.*, *supra*. In the *Just's Inc.* opinion the Supreme Court considered the case a companion case to *Clark v. International Harvester, supra*. *See Just's Inc.* at 468. The Idaho Supreme Court chose the *Just's Inc.* opinion to articulate the exceptions to the economic loss rule.

The Supreme Court observed that the economic loss rule "need not be applied mechanically." *Just's Inc.* at 470. The Court then articulated the exceptions to the economic loss rule, particularly a special relationship between the parties, such as an insurance agent, or unique circumstances requiring a different allocation of risk. *Id. See also, Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296 (2005) and *Duffin v. Idaho Crop Improvement Assn.*, *supra*. The *Duffin* Court, in particular, recognized the parasitic exception, attributing it to the *Just's Inc.*

decision. The *Duffin* court wrote that economic loss is recoverable in tort as a loss parasitic to an injury to person or property. *Duffin* at 1007.

The special relationship exception seems to apply when an individual or entity places itself in a superior position to the other party. The Idaho cases note the example of an insurance agent acting in a professional capacity as constituting a special relationship. The unique circumstances exception has not been discussed in Idaho cases other than by analogy referring to fishing grounds that were damaged by a negligent oil spill. *See Just's Inc.* at 470 referring to *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974).

The "parasitic" exception permits recovery of economic loss in tort when the loss is parasitic to an injury to person or property. *Duffin* at 1007. An injury to [person or] property "encompasses damage to property other than that which is the subject of the transaction." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351 (1975) and *Duffin, supra.* "Economic loss includes the cost of repair or replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers*, *supra* and *Duffin*, *supra.* To put it another way, then, if there is a loss or damage to property which is not the subject of the transaction, and that loss is parasitic to losses incurred as a result of the defective property which is the subject of the transaction, then economic losses may be recovered in tort. The word parasitic suggests that the matter is dependent on something else for existence or support.

C. Economic Loss Rule Applied in the Aardema Case.

The Aardema Dairy filed a tort action against the milking equipment manufacturer seeking, among other things, economic loss damages. As stated above, economic loss is not recoverable in tort unless an exception applies. In this case the parasitic exception does apply, as recognized by the District Court, and therefore, economic losses, if proven, are an applicable measure of damages. In the Aardema case the loss is parasitic to an injury to property. The property loss is comprised of injured cows or the herd. The cows constitute property which is not the subject of the transaction. The defective milking machine is property which is subject to the transaction. Since the cows were injured as a result of the failure of the product, the milking equipment, and since the milk production declined as a result of the damage to the cows, the lost profits from milk are losses parasitic to the injury to the cows.

II. ARGUMENT

A. The Appellants' Version of the Economic Loss Rule is Different from the Economic Loss Rule Established by the Idaho Supreme Court.

Appellants pose the question of whether the evidence of damage to "other property" supports an exception to the economic loss rule. The authority presented by Appellants does not support their argument and it attempts to expand Idaho law in an effort to restrict or eliminate the exceptions to the economic loss rule.

Initially, Appellants cite *Myers v. A.O. Smith Harvestore Products, Inc.*, 114 Idaho 432 (Ct. App. 1988). Notably, *Myers* did not deal with an exception to the economic loss rule. Rather, the Court of Appeals affirmed the District Court finding that only economic losses were

sought by the Myers. Because damage to "other property" was not plead or shown, economic losses could not be proven. In reviewing the Myers' strict liability claim, the Court of Appeals found that injuries did not result from a calamitous event or dangerous failure of the product. *Myers* at 436. Neither of these determinations exists in the instant case; therefore, the *Myers* analysis is of no value in analyzing the Aardemas' claims. Because the Plaintiffs in *Myers* did not correctly plead damages to justify a strict liability claim, the Court concluded that the claimed injuries "arose from the failure of the product to match the buyer's commercial expectations." *Id.* The opposite finding is true in the Aardema case.

The Appellants also cited *DeVries v. DeLaval, Inc.*, 2006 WL 1582179 (D. Idaho 2006) essentially for the same point that Appellants cited the *Myers* case – that the injuries were as a result of a failure of the product to match the buyer's commercial expectations. *Appellant's Brief*, p. 12. Like the *Myers* Court, the federal magistrate in *DeVries* was asked to assess a claim seeking "purely economic loss." *DeVries, supra*, p. 13 of Report and Recommendation. The federal magistrate tied the *DeVries* case analysis to the *Myers* case and found the essence of the claim was the loss of a contractual benefit due to the ineffectiveness of the milking machine. *DeVries*, *supra* at p. 14. Like the court in *Myers*, the magistrate in *DeVries* did not analyze or even acknowledge the existence of the exceptions to the economic loss rule. Thus, the decision does not aid this court in evaluating the Appellants' assault on the exceptions to the economic loss rule.

The Idaho Supreme Court decision in *Duffin v. Idaho Crop Improvement Assn.*, *supra*, is acknowledged by the Appellants in a two sentence paragraph recognizing that economic losses

parasitic to an injury to other property are recoverable in tort. *Appellant's Brief*, p. 12. The Appellants opined that in order to qualify as parasitic, the damage "must rise to the level of legally recognized property damage." Although Appellants believe that a distinction regarding the level of property damage is supported in the *Myers* case, no Idaho authority is presented. As discussed above, however, the *Myers* Court did not discuss the parasitic exception to the economic loss rule. Therefore, the Appellants' reliance on *Myers* for this point is misplaced.

The real effort by Appellants to characterize the parasitic exception to the economic loss rule is placed squarely on three out-of-state decisions that, not surprisingly, articulate a different approach to exceptions for the economic loss rule. This approach by the Appellants ignores the several Idaho Supreme Court decisions that have repeatedly and uniformly articulated the exceptions to the economic loss rule.

The first foreign decision advanced by the Appellants is *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). The Appellants write that the Minnesota court "effectively eliminates the 'other property' exception to the economic loss rule. The 'other property' exception is not detailed in the brief, though the main point of the argument seems to be that Minnesota UCC law exclusively controls claims of damage in commercial transactions. Interestingly, the legislature of Minnesota "statutorily reversed" *Hapka*. *See Appellant's Brief*, p. 13. More importantly, though, Minnesota UCC law (exclusively controlling damages in commercial transactions) is not the law in Idaho. The effect of this decision, though ultimately rejected in Minnesota, is to eliminate the exception to the economic loss rule. Of course, Idaho accepts the exceptions.

The second foreign decision cited by the Appellants is *Neibarger v. Universal Cooperatives, Inc.*, 486 N.W.2d 612 (Mich. 1992). *Neibarger* is cited for the position that the product failed to perform as expected and therefore, the analysis should be one of contract or warranty, not tort. The particular quotes selected by the Appellants from *Neibarger* illustrate the Michigan court weighing the evidence and concluding commercial expectations were not met. Consequently, the Michigan court decided the matter as a UCC problem which, under the facts, was barred by the statute of limitations. Significantly, the Michigan court did not address the issue of economic loss in tort, and particularly did not address the exception to the economic loss rule. In fact, one cannot glean Michigan's economic loss rule from the Appellants' argument.

The third foreign decision cited by Appellants is *Grams v. Milk Products, Inc.*, 699 N.W.2d 167 (Wis. 2005). In *Grams*, the trial court dismissed tort claims presented by a dairy on the basis that the claims were barred by the economic loss rule. The dairy appealed arguing the "other property" exception to the economic loss rule applied. In Wisconsin this exception allows tort claims when the product purchaser's claims of personal injury or damage to property other than the product itself are presented. *Grams* at 515. The Wisconsin Supreme Court rejected the dairy's appeal even though there was injury to other property. The court wrote, "it does not fit within the 'other property' exception and is therefore barred by the economic loss doctrine." *Grams* at 516.

The reason the exception did not "fit" for the Wisconsin court is that contract law should be adequate to cover the claims. The Court felt that the UCC provided a comprehensive system

for compensating economic loss and that parties of "roughly equal bargaining power" allocated the risks of loss through negotiation. *Grams* at 521, 522. Despite Wisconsin's recognition that the "other property" exception to economic loss exists in that state, the *Grams* Court wrote that its decision "repeatedly used techniques to limit the scope of the 'other property' exception." *Grams* at 526. One of the techniques used is the integrated system, but the Court quickly realized this technique "does not translate well to all situations." *Grams* at 528. Thus, in order to delimit the "other property" exception, the court enforced a "disappointed expectation" technique that applies to defeat the "other property" exceptions when commercial products cause property damage within the scope of the bargaining, or if the occurrence of such damage could have been the subject of negotiation between the parties.

The standard articulated by the Wisconsin court is obviously speculative ("could have been") and will lead to a subjective and abused standard that will, in effect, become meaningless. Any product that does not work correctly can be tagged as simply a disappointed performance expectation no matter how heinous or defective a product might be. Even the *Grams* court expressed a reservation about its newly articulated standard:

> We acknowledge that determining whether a case is one of disappointed performance expectations will not always be as simple as it is here. It will necessarily require interpretation of the purpose of a transaction and the expected uses of a product. While courts undertaking this inquiry should be mindful to prevent "contract from drowning in a sea of tort," they should also prevent tort from drowning in a sea of contract.

Grams at 537.

Despite the warning that Wisconsin's new approach necessarily requires "interpretation," the Supreme Court changed its rule for the "other property" exception to the economic loss rule. It did so procedurally on an appeal from the dairy which had lost summary judgment. In contrast, the District Court in this case ruled in favor of the dairy denying the Appellants application for summary judgment and finding that the economic loss rule does not bar the Plaintiff's claim. The District Court here found the property subject to the transaction was a dangerously defective product. Thus, the case at bar is clearly distinguishable from the cases advanced by the Appellant. Moreover, the case law in Idaho regarding the economic loss rule and the exceptions thereto has been solidly established and followed for 30 years. There is no reason to depart from Idaho's established law, particularly when the reasons asserted for departing are based on regional decisions from the Midwest that construed different statutory frameworks, different existing case law and different factual and procedural backgrounds.

B. <u>The Rule of *Stare Decisis* Applies in this Case and Therefore Appellants Attempts to Change the Economic Loss Rule Based on Foreign Jurisdiction Law Should Be Rejected.</u>

The Appellants' argument attempts to diminish or eliminate the exceptions to the economic loss rule. For their position they rely on Minnesota, Michigan and Wisconsin decisions. Indeed, the Minnesota decision "effectively eliminated the 'other property' exception to the economic loss rule." *Appellant's Brief*, p. 13, citing *Hapka v. Paquin Farms*, *supra*. If the Appellants cannot eliminate the exception in Idaho, their effort seems to be an attempt to water

down the application of the exceptions. Utilizing the analysis in the *Grams v. Milk Products, Inc.*, *supra*, case, the Appellants assert that the term "parasitic" must refer to "other property" damage that is "legally recognized property damage" as opposed to "literal property damage." *Appellants' Brief*, p. 12. Appellants also argue that the "other property" exception should incorporate "disappointed expectations" citing *Grams v. Milk Products, Inc.*, *supra*, which essentially means if a damage outcome is foreseeable, then damage or claim resolution will be through contract or UCC remedies. Moreover, the Appellant, interpreting the *Myers*, *supra*, decision, concludes that a product buyer should necessarily hold an expectation that a product is defective and could fail. Thus, following Appellants' logic, all products that fail or cause damage, can be resolved through contract or warranty remedies, not tort remedies.

The Appellants' arguments, then, are an attempt to dramatically change the economic loss rule in Idaho. The State of Idaho has a long-standing line of cases articulating the economic loss rule and the exceptions thereto. As a consequence, the rule of *stare decisis* must be followed in this case. The rule of *stare decisis* requires the court to follow controlling precedent "unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77 (1990); *Reyes v. Kit Manufacturing Co.*, 131 Idaho 239, 240 (1998); *State v. Watts*, 142 Idaho 230, 232 (2005). Additionally, courts should not consider overruling a sound and controlling precedent if other grounds for disposing an appeal exist. *Houghland Farms v. Johnson*, *supra*.

In Idaho, as in most jurisdictions, the economic loss rule is a relatively new court made doctrine. It acts to limit damages when an action presents concomitant theories of contract and tort. As stated earlier in this brief, Idaho adopted the economic loss rule and the exception to the rule on the same day in 1978 in two different cases. *See Clark v. International Harvester Co.*, *supra*, and *Just's Inc. v. Arrington*, *supra*. Since that time Idaho courts have regularly and uniformly acknowledged the economic loss rule and its exceptions. Indeed, the district judge in this case carefully reviewed a number of Idaho decisions dealing with the economic loss rule in order to analyze the issues and the record before him. The district judge properly followed the recognized exception to the economic loss rule in determining "that the damages here are noneconomic, sufficient, and parasitic to the injury to the cattle to allow this case to proceed to trial." Tr. p. 58, ll. 7-9. In drawing this conclusion, the district judge stated, "I don't think there's any question in this record as to the fact that the Plaintiffs have alleged that their cattle were injured by the property which was the subject of the transaction." Tr. p. 55, ll. 19-23. Moreover, the district court found milk production was reduced along with the injury to cattle (Tr. p. 55, ll. 11-14), and it wasn't caused by milk product ineffectiveness; rather it was caused by a dangerous product failure. Tr. p. 56, ll. 16-23. The district court clearly understood and followed Idaho's controlling precedent in deciding the case.

None of the exceptions to the *stare decisis* rule apply here. The exceptions to the economic loss rule are not "manifestly wrong." In fact, the origin of the exceptions in Idaho, the *Just's Inc.* case, goes back to an analysis of Professor Prosser. In this instance, the opposite is true – it would be "manifestly wrong" not to permit the exceptions because it would ignore the

enormous losses suffered by Aardema Dairy, while permitting a multi-national manufacturer to escape liability for its dangerous, failed product. Further, there is no evidence of any kind that the exceptions have proven over time to be unjust or unwise. For the same reasons expressed above, the economic loss exceptions are clearly just and wise. The economic loss exceptions are designed to apply when a tort analysis is the only fair way to examine the consequences that flow from events that began as a commercial transaction. Thus, the "manifest injustice" exception to *stare decisis* and the "unjust" or "unwise" exception to *stare decisis* do not apply.

Finally, overruling the economic loss rule exceptions is not necessary to "vindicate plain, obvious principles of law, and remedy continued injustice." The principles of law for economic loss and its exceptions are sound, have been followed in Idaho for 30 years, and have been followed in many other jurisdictions. There is not a legal deficiency with the exceptions to the economic loss rule. Therefore, there is no need to vindicate plain, obvious principles of law and there is obviously not an injustice to remedy. Hence, the rule of *stare decisis* requires this Idaho Court to continue adherence with the economic loss rule and its exceptions.

C. Appellants' Argument that the Contract Concept of Disappointed Expectations Should Govern the Determination of Exceptions to the Economic Loss Rule is Inappropriate as a Matter of Policy.

The underlying policy for the economic loss rule is based upon a tension that exists between contract law and tort law, particularly in strict liability tort. The earlier decisions embracing the economic loss rule, such as *Seely*, *supra*, recognized that both contract and tort maintain a place in the analysis. Justice Traynor wrote:

> The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. 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.

Seeley at 151 (emphasis added).

While the *Seely* quote recognizes the dichotomy between tort and warranty, the Appellant's arguments do not. The Appellants' trio of cases zeroed-in on the portion of the quote that pertains to a consumer acceptance of a risk that the product will not match his economic expectations. The remainder of the analysis is ignored by the Appellants, despite the commercial reality, that in many instances, consumers have no bargaining power with manufacturers.

Another case cited by the Appellants, *Myers v. A.O. Smith Harvestore Products, Inc.*, *supra*, also quoted the *Seely* Court and determined that the property damage arose from the failure of the product to match the buyer's commercial expectations. Like the *DeVries* case, the evidence in *Myers* was not presented that a defective product created an unreasonable risk of harm. The *Myers* case did offer, however, that "each case must be examined on its particular facts and in light of the foundations of the rule." *Myers* at 436.

The *Grams* case, cited by the Appellants, carried the concept even further. The Wisconsin Supreme Court expanded the *Seely* concepts by observing "[t]oday in a commercial setting, a sophisticated buyer must anticipate the risk that a purchased product will disappoint in its performance or fail entirely, and protect himself accordingly against economic loss." *Grams* at 178. This is tantamount to a consumer being required to expect that a product will be defective and that the manufacturer will have no accountability.

Moreover, the *Grams* Court also noted that 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.* The Wisconsin Court, in employing its rule, would first seek to determine whether the issue was "disappointed expectations." In doing so it would make inquiry into the substance and the purpose of the transaction which necessarily requires an interpretation of the events. The Appellants, then, clearly place all of their emphasis and inquiry on the contractual nature of the problem rather than the tort nature of the problem.

Today's commercial world is ever-changing. It is a complex array of mega-corporations that truly operate on an international scope. GEA Westfaliasurge, in this case, is a large, multi-national company based in Germany, with offices in 25 different countries. Its website indicates it "has been the leader in providing technology and service to milk producers throughout the world."[3] In contrast, the Plaintiff Aardema is a large dairy, but is not in an equal bargaining position with Westfaliasurge. In even a starker contrast, most of the dairies in Idaho, the vast majority of the members of the IDA, are small operations that are not equipped with the same

[3] See Westfaliasurge, Inc. history at www.westfalia.com.

bargaining power held by a multi-national company such as GEA Westfaliasurge. Since the premise of the "disappointed expectations" approach is based upon parties having relatively equal bargaining positions, the contractual premise upon which Appellants' arguments are based is not valid. Parties involved in commercial transactions, such as the one here (i.e., between an Idaho dairy and a large, multi-national conglomerate) do not share equal bargaining power. And, because the bargaining power is unequal, the premise for "disappointed expectations" must fail. Contracts like the one at issue are more akin to adhesion contracts, which have little or no bargained for exchange. Moreover, the warranties that exist (or do not, as the case may be) in contracts where the bargaining power is unequal are either disclaimed or watered down to the point of having no real effect.

When contracts become one-sided through superior bargaining position, a meaningful contractual relationship no longer exists. Moreover, the transaction lends itself to a lack of accountability by the larger and superior party. The "disappointed expectations" approach, which as a practical matter eviscerates the exceptions to the economic loss rule, will only serve to embolden the larger multi-national companies in their efforts to restrict accountability for their products. The balance between contract and tort, as articulated by Justice Traynor in the *Seely* decision, needs to be preserved through the long-standing exceptions of the economic loss rule. There are many instances when contract remedies do not adequately address the facts and circumstances of the use of a product, such as the facts and circumstances in the case at bar. Tort law has sufficient safeguards to prevent the sometimes articulated fear of contracts "drowning in a sea of tort." Tort law concepts such as foreseeability, proximate cause, and even the economic

loss doctrine operate to limit tort liability. Thus, there are valid and significant reasons to maintain a balance between contract and tort with respect to the economic loss rule. There is no reason now to impose radical changes in the long-established Idaho law. The invitation to change Idaho law advanced by the Appellants should be denied.

III. CONCLUSION

For the reasons discussed in this brief, the IDA respectfully requests that this Court affirm the District Court and allow the matter to proceed to trial based on the exception to the economic loss rule.

DATED this 14th day of October, 2008.

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CERTIFICATE OF SERVICE

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