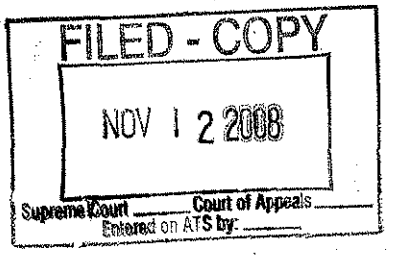
11-12-2008

Aardema v. U.S. Dairy System, Inc. Appellant's Reply 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 

APPELLANTS'/CROSS-RESPONDENTS' REPLY BRIEF

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

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A. INTRODUCTION

The facts presented in the record demonstrate a tripartite contractual relationship between the Aardemas, Westfalia and U.S. Dairy who engaged in a commercial transaction governed by the UCC, the manufacturer's warranty and the service contract. To hold that tort law has any place in this case would be to deprive Westfalia and U.S. Dairy of their rights under the Uniform Commercial Code ("UCC") and contract law. Westfalia and U.S. Dairy had every right to believe that the UCC and contract law, not tort law, was applicable to their transaction in light of the holding of ***Myers v. A.O. Smith Harvestore Products***, 114 Idaho 432, 757 P.2d 695 (Ct. App. 1988). This could not be more clearly demonstrated than through ***Myers'*** application to an allegation of damage to dairy cows by a pulsation system in ***DeVries v. DeLaval, Inc.*** 2006 U.S. Dist. LEXIS 41 (2006). The Aardemas, not the Appellants, are asking this Court to modify the law of Idaho regarding the economic loss rule.

Here, the Aardemas failed to submit any admissible evidence which supports their contention that their cows suffered any injury which qualifies for an exception to the economic loss rule. The Aardemas also failed to submit any evidence which supports their contention that a special relationship existed between them and Westfalia and/or U.S. Dairy, thereby giving rise to an exception to the economic loss rule. By their silence, the Aardemas have abandoned any claim that the special circumstances exception applies here.

B. RESPONDENTS MISSTATE THE STANDARD OF REVIEW

Recognizing that the record does not contain any admissible evidence of damage to their cows, the Aardemas argue that the review in this case is limited to abstract legal questions. They contend that this Court may not examine the record to determine if there is, in fact, an absence of evidence which qualifies for the "damage to other property" exception. This is a disingenuous argument in light of the fact that the question presented is, "What type of damage to other property qualifies for the exception."

In support of their argument, the Aardemas cite ***Winn v. Freshar,*** 116 Idaho 500, 777 P. 2d 772 (1989). In ***Winn,*** while this Court did not look behind findings of fact made by the District Court in order to determine if they were supported by the record, it did determine the applicability of a principle of law to the facts presented by the District Judge in the form of findings of fact. Here the District Court did not make findings of fact. The District Court has asked this Court to determine if the facts in the record constitute "damage to other property" of the type which gives rise to an exception to the economic loss rule.

In addition to ***Winn,*** the Aardemas cite several federal cases, i.e., ***Amundsen v. Jones***, 533 F. 3d 1192, 1199 n. 3 (10th Cir. 2008), ***Barella v. City of Philadelphia***, 501 F.3d 134, 136 n. 2 (3rd Cir. 2007) and ***Valdes v. Crosby***, 450 F.3d 1231, 1236 (11th Cir. 2006) for the proposition that review on interlocutory appeal is limited to controlling questions of law. These federal cases are inapplicable because they are dealing with interlocutory appeals of qualified

immunity questions pursuant to a special procedure adopted by the United States Supreme Court with respect to determination of a qualified immunity prior to proceeding with the litigation.

Since the district court here made no explicit factual findings with respect to the nature and extent of the damage, if any, to the cows, this Court must ferret out the facts on which to base its legal conclusions from the record.

Here the controlling question is whether the record on appeal demonstrates an injury to other property of the type which qualifies as an exception to the economic loss rule. Consequently this Court must look at the record to determine if there are admissible facts in the record to support an exception to the economic loss rule. It must be kept in mind that the determination of a motion for summary judgment must be based upon admissible evidence, not allegations and possibilities.

With respect to the critical issue of whether there was damage to Respondents' cows the District Court noted "... that the Plaintiffs have adequately **contended** in this record that the milk production was reduced and their cattle were injured." The Court relies upon the "Plaintiff's Complaint" for this contention. **Tr.**, Vol. I., p. 55)(emphasis added). The District Court also stated:

> "... So 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 .... "

Id. (emphasis added). The Court then added that " ... agents of the Defendants had noted the injuries that **may** occur to the cattle themselves as a result of a defective product." ***Id.*** at p. 57. (Emphasis Added)

Allegations and possibilities are not sufficient to overcome a motion for summary judgment. 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 the 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. Ed. 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, the Aardemas' case must be anchored in something more solid than mere speculation. "A 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).

C. RESPONDENTS' STATEMENT OF FACTS MISSTATES KEY FACTS AND DRAWS IMPROPER CONCLUSIONS THEREFROM.

In order for this Court to determine whether an exception to the economic loss rule applies, the Court must first be shown what type of property damage actually **occurred**. The Aardemas have not shown any property damage which gives rise to an exception to the economic loss rule. Nor have they shown that they purchased a Westfalia product because Westfalia represented itself to the Aardemas as having special expertise in a determination of the type of product the Aardemas needed to realize their commercial expectations. The UCC provides for an implied warranty of fitness for the buyer's particular purpose. The Aardemas are attempting to torture the implied or express warranty of fitness for a particular purpose into a special relationship.

Respondents' Statement of Facts, as set forth in Respondents'/Cross-Appellants' Brief, misstates several key facts of this case or draws improper conclusions therefrom. For example, Respondents presume, without a basis in the Record, that the ProFORM Milking System "was intended to accommodate dairies with smaller milking parlors." ***Respondents' Brief***, p. 4. After making this statement, Respondents go on to imply, as a result of this assumption, the milking system was "overextended" which "caused the pulsators to malfunction" in the present matter. ***Id.*** Respondents then attempt to use these efforts at speculation as a spring board for the unsupported assumption that the pulsators alleged "malfunction" caused their cows to suffer injury or damage.

All of these statements are based upon the Respondents' reliance upon the report of their "master electrician," Larry Neubauer. Significantly, the Record is devoid of any qualifications that Mr. Neubauer has to offer an admissible opinion on cow health or injuries. As such, this type of opinion is entirely outside the scope of this individual's expertise. If the Court looks closely at Respondents' Statement of Facts, it will see that any statements of actual physical injury to the cows in question are unsupported by the Record. Specific references are made to the Record with respect to Mr. Neubauer's conclusions regarding the operating system and the alleged malfunction, however, any time Respondents suggest a causal link between the malfunction and any resulting damage, their brief is silent.

For example, on Page 5 of their brief, Respondents suggest that "The result of the malfunction was damage to the cows and decreased milk production." ***Respondents' Brief***, p. 5. This statement lacks a citation to any evidence in the Record. Such an allegation should not be treated as a "fact" for purposes of deciding the appeal. Respondents clearly had the opportunity at the summary judgment stage to present evidence to support their contentions and chose to rely solely on the testimony of an expert not qualified to speak on the subject at hand.

Later in Respondents' Statement of Facts, they make the claim that, "[Respondents] also have engaged two veterinarians who have rendered opinions that the cows have suffered injuries from the malfunctioning pulsators." ***Respondents' Brief***, p. 7. Noticeably absent is any evidence in the record of the opinions directly from these veterinarians. Appellants question why, if this

information actually exists, it was not presented at the district court level for consideration at the summary judgment hearing. In reality, Respondents had every opportunity to present this type of evidence and failed to do so. To make such an unfounded contention at this stage in the appellate proceedings without support in the underlying record speaks volumes about the lack of support Respondents could muster for their argument that their cows were somehow harmed. As will be discussed further, a large majority of this case focuses on Respondents' ability to prove damage or injury to their dairy herd. They cannot create such harm out of a silent record at this late stage.

Respondents essentially admit in their brief that the record does not contain actual evidence supporting harm to their cows an by falling back on the District Judge's acknowledgment that physical injury was plead in their initial Complaint and their Amended Complaint. However, for purposes of prevailing at summary judgment and upon appeal, mere allegations in a pleading should not be seen as sufficient to warrant denying a motion. Respondents' case should have been 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." ***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).

Finally, in their Statement of Facts, Respondents fail to establish any special circumstances which make it equitable to impose a tort duty on Westfalia or U.S. Dairy. The UCC provides all of the protection needed by the buyer. Correspondingly, the UCC provides the seller with protection against unlimited liability arising out of a sales transaction.

In an attempt to counter arguments such as these, Respondents cite to a number of depositions taken of representatives of Westfalia, which they suggest show admissions on the part of the company that a malfunctioning milking system can injure a cow. Unfortunately, the deposition citations referenced were taken out of context and totally mischaracterize the testimony of the individuals involved. Specifically, Respondents assert that, "Westfalia representatives conceded that malfunctioning pulsators cause physical injury to dairy cows." ***Respondents' Brief***, p. 5. Again, this statement is not specifically linked to a particular portion of the record or Respondents' cows in any way. As mentioned above, it would be improper to draw any conclusions from these broad statements relative to the Aardemas' case. A more accurate statement based upon the testimony would be that a malfunction "could" potentially cause an injury. Respondents cannot point to any particular testimony where a Westfalia representative stated that an alleged malfunction in the present matter actually caused any injuries to the cows at issue in this appeal.

Jeff Snyder, one of the Westfalia representatives referred to by Respondents in their brief, specifically testified in response to questions about the potential for problems or injury that, ". . . a possibility exists but is not always the result." ***See R.***, Vol. I., p. 193, Exhibits, Whitehead Aff., 1/4/08 (Exhibit A to Aff., Snyder Dep. p. 24, Ll. 6-7). This is clearly not the smoking gun that Respondents attempt to make it out to be. Mr. Snyder further testified that a malfunction could potentially be one of the things that causes injury, however, that is ". . . one of the huge list of things that ***could*** affect the cow's somatic cell count." ***Id.*** at p. 26, Ll. 14-15 (emphasis added). Obviously, there are many things that could change the potential production output for a particular cow, many of which have no relationship to a milking system. Respondents cannot cite to any specific statement by Mr. Snyder that the system involved in this case caused any injury to the cows in question.

The testimony cited from Earl Patterson's deposition should also be examined in the same light. Again, Mr. Patterson made no explicit statement that the system in question caused any injuries to Respondents' cows. As with Mr. Snyder's testimony, Mr. Patterson's testimony at deposition in response to general questions as to whether a malfunction in the system would result in injury, was always qualified and in his responses he stated that it was only a "possibility" or "could" happen. ***See R.***, Vol. I., p. 193, Exhibits, Whitehead Aff., 1/4/08 (Exhibit C to Aff., Patterson Dep. p. 25, l. 18 – p. 26. l. 21). He specifically explained that

a malfunctioning system was just one of the many possible causes for increased somatic cell count and decreased production. ***Id.***

The record demonstrates nothing more than a claim of disappointed expectations. Dr. Behr's report underscores this conclusion. There, he states that, prior to use of the new system, the Aardema cows were producing at the rate of 66 pounds of milk per cow per day. Dr. Behr computes damages on the basis that the production did not increase, as expected, to 85 pounds per day. Dr. Behr starts his damage calculation with the cows producing 20,321 pounds per cow per year and projects that, but for the defective equipment, it would have risen to 26,000 pounds per cow per year. (On average a cow lactates for 305 days and is dry for 60 days. Hence, 20,321 divided by 305 equals 66.6 pounds per day and 26,000 divided by 305 equals 85 pounds per day) The record and his report are devoid of any scientifically supported basis for the conclusion that the increase did not occur because of the pulsation system rather than other causes or because the cows simply were not genetically capable of such production.

If the Aardemas wanted assurance that the systems they purchased would increase the production they were experiencing from 66 pounds of milk per cow per day to some higher level, they were required to negotiate for that performance. There is no evidence they sought or received or relied upon advice of Westfalia or U.S. Dairy to this effect, and the contracts for the installation of the system did not contain any specific performance provisions. ***See*** R., Vol. I., Exhibits, Highley Affidavit, 12/21/07, (Exhibit A to Affidavit – 2/15/00 Contract).

As mentioned above, there are a multitude of different ailments, conditions or events that could have accounted for the alleged losses sustained by Respondents. It was Respondents' burden at the hearing on the summary judgment motion to establish these facts, which they failed to do. As such, Respondents have not established or referred to any credible, admissible evidence in the record supporting their claim of harm to their cows.

Instead, they ask this Court to rely on an electrician's questionable report about an area outside his area of purported expertise. Even today, they cannot point to anything in the record, other than unqualified statements by their other "experts" to show that any injury or physical damage actually occurred.

D. RESPONDENTS' FAILURE TO PRESENT ADMISSIBLE EVIDENCE DEMONSTRATING DAMAGE TO OTHER PROPERTY PREVENTS THE APPLICATION OF AN EXCEPTION TO THE ECONOMIC LOSS RULE.

The facts material to a determination of whether the Aardemas are entitled to an exception from the principle that the economic loss rule bars tort claims are:

A. Whether there is admissible evidence of damage to other property which qualifies for an exception to the economic loss rule; and

B. Whether there is admissible evidence of a special relationship or special circumstances relating to a transaction between the Aardemas and Westfalia or the Aardemas and U.S. Dairy.

U.S. Dairy contracted to design and install a milking system in each of four dairy parlors built by Vance Dairy Construction. ***See*** R., Vol. I., Exhibits, Highley Affidavit, 12/21/07, (Exhibit A to Affidavit – 2/15/00 Contract). U.S. Dairy

purchased components from various sources. The components for the pulsation system installed in each parlor were purchased by U.S. Dairy from Westfalia.

As mentioned above, the record is devoid of any submitted affidavits, depositions or other admissible evidence which establishes (1) there was damage to Respondents' cows; (2) the nature of the damage, if any, to Respondents' cows; (3) a sudden or calamitous event which injured their cows; (4) the pulsation system was dangerous as opposed to disappointing with respect to performance; or (5) there was a reliance on Westfalia or U.S.Dairy giving rise to special circumstances or a special relationship.

Evidence of decreased milk production, reduced milk quality or increased somatic cell counts does not qualify as the type of damage which supports an exception to the economic loss rule. They are strictly disappointed expectations, not actual physical harm.

If the pulsation system, which is controlled by electricity, electrocuted a cow or caused electrical burns to her teats which prevented milking until they healed, it could possibly qualify as damage to cows of a sufficient nature to allow a claim for attendant economic losses. However, such a claim could only include the extent of production lost while the injury healed. There is no evidence to support such a contention.

As noted above, Westfalia employees Vern Foster (Foster dep.. pp 24-25), Earl Patterson,(Patterson dep.. pp. 24-30) Jeffery Snyder (Snyder dep.. pp. 24-26) and Norman Schuring (Schuring dep. pp. 49) testified that a defective or

malfunctioning pulsation system could be a **possible** cause of injuries to cows, that it **could, not would**, cause injuries to cows, that **it theoretically can cause injury to cows** but pointed out **that there are other reasons and bigger factors than milking systems which cause injuries** and that **sticking pulsators could be caused by lack of cleaning rather than defect.** None of the Westfalia employees' testimony established that (1) there was injury to the Aardema cows or (2) that injury to the Aardema cows was caused by a defective Westfalia or U.S. Dairy product.

Neither Lawrence Neubauer nor Michael Behr are qualified to testify with respect to whether and to what extent, if any, the equipment caused injury to the cows. In order for their testimony to be admissible on this point, it would be incumbent upon the Aardemas to demonstrate that they are qualified on the subject of damage to cows. Neither report demonstrates qualifications to support a conclusion that the Aardemas' cows were, based upon veterinary medical probability, physically injured by the pulsation system. ***See Weeks v. Eastern Idaho Health Services,*** 143 Idaho 834, 1535 P. 3d 1180, 1183 (2007) which states, "The proponent of the testimony must lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony..." ***Id.*** The Aardemas' reliance on the deposition testimony of Westfalia employees demonstrates the insufficiency of the Aardemas' evidence. That a malfunctioning pulsation system might cause damage is irrelevant to the issues raised in this case. The question here is whether, to a probability, it did.

Neubauer argues that uncontrolled electricity affects the operation of the plungers "such that the vacuum is not controlled as predicatively [sic] as it should be in order to ensure the best milking conditions and the good health of the cows." Assurance of "the best milking conditions and the good health of the cows" is best handled by the law of contracts and warranty, not tort.

The evidence in the record does not demonstrate a product which destroyed or physically injured cows. There is no evidence of lacerated or bruised teats or other indicia of damaging, physical impact. There is no evidence of electrocution or electrical burning. The evidence, at best, demonstrates that the Aardemas' cows produced 66 pounds of milk per day rather than the hoped for 85 pounds of milk per day during the period of time they were milked by the system as installed by U.S. Dairy. This is not evidence of an unsafe product. It is merely evidence of disappointed expectations which are most properly addressed under the Uniform Commercial Code and the law of contract.

E. THE BAR OF THE ECONOMIC LOSS RULE IN IDAHO AND ITS EXCEPTIONS

Both the Aardemas and the Idaho Dairymen's Association claim in their respective briefs that Westfalia and U.S. Dairy advocate change in Idaho's law with respect to the economic loss rule. To the contrary, Westfalia and U.S. Dairy are simply claiming that the District Court should have followed established Idaho law. In actuality, it is the Aardemas and the IDA who are advocating for a sweeping change to the economic loss rule. As will be discussed in more detail below, the IDA suggests a total overhaul of the rule and essentially argues ignoring the UCC

based solely upon the contention that because of the size of the parties involved in this matter, the actual contract negotiated is an adhesion contract which unfairly benefits the manufacture. However, this argument entirely disregards the fact that there were other manufacturers and dealers in the market that the Aardemas could have approached for a different contract. Instead, Appellants' contend that the evidence in the record conforms with that relied upon by Supreme Courts of other states applying the economic loss rule, which is also consistent with the established application of the rule within the State of Idaho.

The economic loss rule had its genesis in ***Seely v. White Motor Co.*** 45 Cal. Rptr. 17, 403 P. 2d 145 (1965). Idaho adopted the rule in ***Clark v. International Harvester Co.***, 99 Idaho 326, 581 P. 2d 784 (1978). Idaho applied the rule to dairy cows in ***Myers v. A.O. Smith Harvestore Products***, 114 Idaho 432, 757 P. 2d 695 (App. 1988). In ***Blahd v. Richard B. Smith, Inc.*** 141 Idaho 296, 108 P. 3d 996 (2004) Idaho adopted, as part of the economic loss rule, the integrated system bar to tort claims.

In an agricultural setting the Supreme Courts of Michigan, Minnesota and Wisconsin in ***Hapka v. Paquin Farms***, 458 N.W. 2d 683 (Minn. 1990), ***Neibarger v. Universal Cooperatives***, 486 N.W. 2d 612 (Mich. 1992) and ***Grams v. Milk Products, Inc.*** 283 Wis. 2d 511, 699, N.W. 2d 167 (2005) adopted an approach like that of ***Myers***. Minnesota legislatively overruled Hapka. It is respectfully suggested that if ***Myers*** is to be overruled after being the law of Idaho for twenty

years it should be done only by the legislature. It has been the guiding light upon which commerce has gauged its risks for 20 years.

The above-mentioned out-of-state cases were addressed at length in Appellants' brief and will not be revisited here. However, the case of ***Nelson v. Todd's Ltd.***, 426 N.W. 2d 120 (Iowa, 1988) is an illustration of how yet another agricultural state addressed the issue. There, at page 125, the Supreme Court of Iowa stated:

> "We agree that the line to be drawn is one between tort and contract rather than between physical harm and economic loss. As we draw that line, the harm to the Nelson's meat falls on the contract-warranty side. The damage was the foreseeable result from a failure of the product to work properly because of a defect or omission from the product. When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract. ***See Moorman Mfg. Co. v. National Tank Co.***, 91 Ill. 2d 69, 84, 61 Ill. Dec. 746, 763, 435 N.E. 2d 443, 450 (1982).
>
> Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect. For example, had Quick Qure caused chemical burns to the Nelson's hands or damaged their meat processing equipment, an action would lie in strict tort liability. That sort of harm could not have been reasonably anticipated by the contracting parties, and would be a hazard peripheral to sale."

As noted in ***Clark***, the comprehensive provisions of the UCC should be preferred over tort in commercial transactions. This being the case, application of the "damage to other property" exception to the economic loss rule should be carefully limited as was done in ***Myers*** and ***Blahd***. It must also be kept in mind

that, in the commercial sector, both buyers and sellers have relied on the teaching of ***Myers*** since its decision in 1988, twenty years ago.

The Idaho Dairymen's Association at pages 5 and 6 of its Amicus brief argues that neither ***Myers*** nor ***DeVries*** discussed exceptions to the economic loss rule. This is a puzzling, and quite frankly disingenuous, argument since both do clearly address the "damage to other property" exception to the economic loss rule. The ***DeVries*** case even deals with its application to a defective pulsation system. ***DeVries*** clearly indicates that Magistrate Williams considered ***Myers*** to dispel a contention virtually identical to that made by the Aardemas. U.S. District Judge Edward Lodge in affirming Magistrate Williams states:

> "The Devries object to the magistrate judge's recommendation that summary judgment be granted on the strict liability claim. However, as the magistrate judge's analysis demonstrates, (Report and Recommendation at 26-28), the Idaho case law indicates that the damages the DeVries seek are of the kind that are not recoverable under a strict liability cause of action. ***See Myers Clark v. International Harvester Co.***, 581 P.2d 784 (Idaho 1978) (explaining that economic loss not recoverable in tort action); ***Myers v. A.O. Smith Harvestore Products, Inc.***, 757 P.2d 695, 699 (Ct. App. 1988) (explaining that physical damage to dairy cattle due to faulty feed storage and delivery system is really claim of economic loss sounding in contract)."

The Aardemas argue in their brief at page 33 that ***Myers*** established a bright line rule that any damage to other property gives rise to the exception. This is clearly contrary to ***Myers*** which held that "cattle illness" and "property damage" did not qualify for the exception when the claimed damages arise from the "failure of the product to match buyer's commercial expectations." The court also notes it

important that the injuries did not result from a "calamitous event or a dangerous failure of the product." ***Myers***, 114 Idaho at 436.

In order to deflect the clear import of ***DeVries*** and ***Myers***, the Aardemas make the quantum leap claiming their alleged economic losses were parasitic to damage to their cows. However, as noted above, they failed to produce any admissible evidence that their cows suffered any damage at all and certainly failed to demonstrate that their cows suffered damage of the type which qualifies for an exception to economic loss rule. Again, if the machine had pulled the teats off the cows or electrocuted them, the Aardemas could perhaps make a more plausible case for application of the exception.

Instead, all Respondents can direct the Court to is an allegation that the plungers in the pulsators stuck which resulted in a lower rate of production than the Aardemas expected from their cows. The Ardemas' claim is that cows which were, on average, producing milk at the rate of 66 pounds per cow per day when the system was installed, did not reach their productive expectation of 85 pounds per cow per day. This a disappointed expectation which is best covered by warranty law.

It is significant that the claim is not that demonstrated productive capability was reduced, but that it did not increase at the rate expected. Any such expectation, to be recoverable if it is not achieved, can only be based upon contract, not tort.

In their original and amended complaints, the Aardemas asserted claims based upon contract, express warranty and implied warranty as well as tort. When faced with motions for summary judgment on the basis that the economic loss rule barred their tort claims, the Aardemas, without explanation, dismissed their contract and warranty claims. One must ask why? Since no reason was given in the motion to dismiss the contract and warranty claims, it is fair to assume that the Aardemas wanted to deprive Westfalia and U.S. Dairy of all of their rights and defenses under the UCC and contract jurisprudence.

The UCC is a comprehensive system which provides a fair balance between buyer and seller. It provides the buyer with the right to recover damages, including consequential damages, if the product purchased is not merchantable or not fit for the purpose intended. ***See*** Idaho Code § 28-2-714 and 28-2-715.

Under the Uniform Commercial Code the seller may disclaim express and implied warranties, may modify or limit remedies and is entitled to the defense of lack of notice. ***See*** Idaho Code § 28-2-316, 28-2-719, 28-2-607 (3).

The Idaho Dairymen's Association in its Amicus brief argues that small dairymen have no bargaining power with multinational corporations. They suggest that a single dairyman has no realistic ability to dictate the terms of any agreement he or she enters into with a corporate vendor, and, as a result, any contract developed is purely one of adhesion. The IDA totally ignores the protections within the UCC and suggests that because of the relative size of the parties, the small dairymen will have no chance to pursue any of the remedies outlined in the law.

Interestingly, the IDA does not provide any evidence or case law suggesting that this is really the case. The Uniform Commercial Code adequately protects a small buyer from a large seller. There are no provisions in the law that single out a party based upon their size. The UCC was drafted to fairly treat both parties to a commercial transaction. The IDA's argument also overlooks the fact that there are usually multiple sources in the marketplace to purchase milking equipment in the dairy industry, which gives the "small dairymen" the opportunity to compare different proposals from the various suppliers and make an educated decision on which product best suits their needs. The IDA's position, if adopted, would represent a major change in Idaho law.

Looking at the IDA's argument as it relates to the present matter, the Aardemas are hardly a small buyer. The 15,000 cows they milk through their four parlors which contain some Westfalia equipment have a value of $30 to $40 million. When you consider the land, the buildings and the equipment taken together, this is an enterprise having assets worth well over $100 million. A buyer such as the Aardemas certainly has bargaining power when it buys $4 million worth of equipment.

All buyers, large or small, have the protection of the Courts under the Uniform Commercial Code. Idaho Code § 28-2-719 and 28-2-302 provide that a buyer may be relieved of a disclaimer of express or implied warranties or a modification or a limitation of remedies contained in the contract of sale if the buyer demonstrates that the warranties failed of their essential purpose or were

unconscionable. Upon such a determination the buyer is entitled to recover the full spectrum of damages provided by Idaho Code § 28-2-714 and 28-2-715.

It is important to note that in Idaho Code § 28-2-318, it is provided that seller may not exclude or limit injuries to persons in a consumer's household but makes no mention, and thereby permits exclusion of injury to property.

One of the important limitations that a seller has under the UCC is the ability to limit its warranty to injuries caused by defects in the product and allows for a provision that the warranty will be void if the product is misused, abused or modified. This is a very important right under the Uniform Commercial Code. The Uniform Commercial Code provides certainty and protection to both buyers and sellers in a comprehensive fashion.

F. RESPONDENTS PRESENTED NO EVIDENCE OF A SPECIAL RELATIONSHIP OR EXCEPTIONAL CIRCUMSTANCES WITH RESPECT TO WESTFALIA WHICH QUALIFIES FOR AN EXCEPTION TO THE ECONOMIC LOSS RULE

At pages 35-38 of the Aardemas' brief they argue that there is substantial evidence of a special relationship with Westfalia but do not supply a single citation to the record. ***See Respondents' Brief***, pp. 35-38. Other than in the title of the section commencing on page 35 of their brief, the Aardemas make no mention, much less cite any portion of the record to support exceptional circumstances, thus abandoning any such argument. ***Id.*** With respect to Westfalia, the Aardemas argue that there are genuine issues of fact regarding exceptional circumstances and/or a special relationship as an exception to the economic loss rule. The

Aardemas have presented no evidence that would support a special relationship or special circumstances justifying an exception to the economic loss rule.

The Aardemas rely on ***Duffin v. Idaho Crop Improvement Ass'n.***, 126 Idaho 1002, 895 P. 2d 1195 (1995) to support their argument that a special relationship existed between the Aardemas and Westfalia. The Aardemas argue that Westfalia had expertise regarding the equipment which it manufactured and sold. The Aardemas argue that under ***Duffin,*** Westfalia had a special relationship to the Aardemas because it had greater knowledge of its products than the Aardemas.. To the contrary, ***Duffin*** clearly expresses the proposition that a special relationship arises if, and only if, the seller holds himself out as having expertise regarding a specialized function and by doing do, induces reliance upon his superior knowledge and skill.

In ***Duffin*** ICIA was the only certifier of seed. Here there are a number of companies who sell pulsation systems.

There is no evidence that the Aardemas sought or received advice from Westfalia regarding any particular subject. Westfalia had a product which it sold to U.S. Dairy which U.S. Dairy in turn installed as part of an overall system which U.S. Dairy sold to the Aardemas. The relationship between Westfalia and the Aardemas is no different than the relationship between any manufacturer and an end-user in a commercial transaction.

There is no evidence that the Aardemas sought advice from Westfalia regarding whether the pulsation system, which was being installed by U.S. Dairy,

would increase the Aardemas' production to 85 pounds of milk per cow, per day from the 66 pounds per cow, per day which they were experiencing at the time of installation.

The UCC, particularly its provisions with respect to express and implied warranties, governs the nature of the relationship between buyer and seller.

The special relationship discussed in ***Duffin*** is based upon the sale of a service, not a product.

G. THE DISTRICT COURT PROPERLY ALLOWED U.S. DAIRY TO JOIN IN THE OTHER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PARTICIPATE IN THE ARGUMENTS AT HEARING.

Respondents argue that the district court impermissibly took up the issue of the economic loss rule and special relationship exception as it related to U.S. Dairy. Procedurally, U.S. Dairy joined with the other defendants' summary judgment arguments as they related to Respondents' negligence claims, once Respondents dismissed their contract based claims. Judge Bevan astutely determined that the issues raised by Freedom and Westfalia were nearly identical to those that were raised by U.S. Dairy, and as a result, there would be no prejudice on that part of the Respondents to allow U.S. Dairy to join in these arguments at the hearing. The District Court also sought to address the issue of whether the "special relationship" exception to the economic loss rule applied, and properly ruled that it did not.

As the Court is well aware, Idaho Rule of Civil Procedure 56 allows a judge to, ". . . to alter or shorten the time periods and requirements of this rule for good cause shown." I.R.C.P. 56(c). Clearly, if U.S. Dairy's arguments with respect to

the economic loss issues mirrored those of the other defendants, there was no need to provide Respondents additional time to respond to U.S. Dairy's request for summary judgment. Interestingly, this Court had previously addressed a similar argument involving a summary judgment motion in the recent appeal of ***Gem State Ins. Co. v. Hutchison***, 175 P.3d 172, 174 (Idaho 2007), which also arose before Judge Bevan.

There, the district court dealt with a summary judgment motion involving a negligence claim related to a fire allegedly caused by a subcontractor on a construction project. On appeal, one of the issues heard by this Court was whether Hutchison was entitled to present oral argument before the district court at the summary judgment hearing. ***See Gem State Ins. Co.***, 175 P.3d at 176. Gem State argued that a party's failure to file a brief in opposition to a motion for summary judgment precludes that party from presenting argument on the motion. Gem State's argument was based upon the interplay between I.R.C.P. 56(c) and I.R.C.P. 56(e). ***Id.*** As this Court pointed out:

> "I.R.C.P 56(c) provides that "[t]he adverse party ***shall*** also serve an answering brief at least 14 days prior to the date of the hearing." (emphasis added). I.R.C.P. 56(e) states, in pertinent part, as follows:
>
> > "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. ***If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."***

See id. at 176 (emphasis added by the Court). In light of the facts of the case, Gem State argued that since Hutchinson had not filed a response per I.R.C.P. 56(c), he should be precluded from presenting oral argument on the issue at hearing.

Notwithstanding the above, this Court delved more fully into the wording of the rule and determined that:

> "I.R.C.P. 56(c) provides the sanctions that a trial court may, in the exercise of its discretion, impose upon a party for failure to comply with the requirements of that rule. In the event of a party's failure to comply with the requirements of the rule, "[t]he court ... ***may*** impose costs, attorney fees and sanctions against a party or the party's attorney, or both."

Id. at 176 (emphasis added). Interestingly though, this Court went on to find that certain wording in the rule was missing, and as a result:

> ***"The rule simply does not provide for exclusion of a party from participation in summary judgment as a sanction. "***

Id. (emphasis added). Based upon the above, this Court went on to order that, "The district court ***did not err*** when it overruled ***Gem State***'s objection to Hutchison's participation." ***Id.*** (emphasis added).

Obviously, Judge Bevan had this recent ruling in mind when he allowed U.S. Dairy to join in the other defendants' motions for summary judgment and present argument at the hearing. He correctly deemed under I.R.C.P. 56(c) that he had the discretion to determine which parties could participate in the summary judgment hearing and he felt that it was appropriate for U.S. Dairy to join because U.S. Dairy's position did not involve the introduction of any new facts. The district

court's decision is further supported by the fact that the Respondents failed to request additional time or briefing to respond to U.S. Dairy's joinder and did not attempt a motion to reconsider after the fact.

In further support of the district court's decision, the Idaho Court of Appeals previously found that summary judgment may be entered by a court sua sponte on grounds other than those raised by the moving party in ***Mason v. Tucker & Assocs.***, 125 Idaho 429 (Ct. App. 1994). In ***Mason***, the Court of Appeals explained that generally, Rule 7(b)(1) requires notice to the nonmoving party of the grounds for a motion. ***See Mason***, 125 Idaho at 432. Referring to a prior decision by this Court, the justices continued to note that good practice demands that the basis of a motion and the relief sought shall be clearly stated" so that the other party may not complain of surprise or prejudice." ***Id.*** (***citing to Patton v. Patton***, 88 Idaho 288, 292, (1965)). However, the Court of Appeals further clarified that:

> "We do not suggest that summary judgment may never be entered by a court sua sponte or on grounds other than those raised by the moving party. However, in such event, ***the party against whom the judgment will be entered must be given adequate advance notice and an opportunity to demonstrate why summary judgment should not be entered.***"

Mason, 125 Idaho at 423 (emphasis added).

H. THE DISTRICT COURT PROPERLY DETERMINED THAT NO SPECIAL RELATIONSHIP OR EXCEPTIONAL CIRCUMSTANCES EXISTED BETWEEN RESPONDENTS AND U.S. DAIRY

The record in this matter is clear in that Respondents had "adequate advance notice" with respect to the economic loss arguments and the issues surrounding the special relationship exception. Both Freedom Electric and Westfalia raised

arguments based upon the applicability of the economic loss rule. ***See*** R., Vol I., pp. 82-85, 96-98, 99-101 (Freedom & Westfalia's Motions for Summary Judgment and Westfalia's Joinder in Freedom's Motion). These motions, filed well outside the 28 day notice requirement of I.R.C.P. 56, placed Respondents on notice of the above-stated issue.

Freedom's Memorandum in Support specifically addressed the special relationship exception and set out the relevant case law. ***See*** R., Vol I., Exhibits, Memorandum in Support of Freedom Electric's Motion for Summary Judgment, 11/21/07, pp. 9-12. It is without support for Respondents to now argue that they did not have an opportunity to demonstrate why summary judgment should not have been entered with respect to this issue when it was laid out before them a month and a half before the hearing.

Additionally, Respondents had the opportunity to brief this issue in their responsive pleadings to Freedom and Westfalia's motions, which they did on January 4, 2008. ***See***, R. Vol. I., Exhibits, [Respondents'] Memorandum in Opposition to Defendants Westfaliasurge and Patterson's Motion for Summary Judgment, 1/4/08, pp. 5-10; ***see also*** R., Vol. I., Exhibits, Plaintiffs' Memorandum in Response to Freedom Electric's Motion for Summary Judgment, 1/4/08. As the Court can see, Respondents abandoned their claims against Freedom and raised objections to Westfalia's economic loss arguments which are nearly identical to those they are raising in this appeal. ***See id.*** Respondents asserted, without evidentiary foundation, that Westfalia's employees, by virtue of their knowledge of

the milking system, fell within the special relationship exception. ***Id.*** Respondents took the same position relative to U.S. Dairy and its employees when Respondents objected to U.S. Dairy seeking summary judgment on the same ground. The district court considered that argument and, as it held with respect to Wesfalia, it ruled there was no special relationship between the Aardemas and U.S. Dairy sufficient to allow economic losses to be sought.

The facts as they relate to U.S. Dairy's business relationship with Respondents are hardly different than those raised by the other defendants at the hearing. As mentioned above, U.S Dairy contracted to install milking components provided by Westfalia for a sophisticated business customer who was running a large dairy operation. U.S. Dairy was not the Aardemas only option for milking equipment in Idaho, as there are a number of other manufacturers' dealers who could have provided similar products. Following the delivery and set-up of the product, U.S. Dairy technicians conducted limited maintenance pursuant to the service contract. Respondents had their own technical and veterinary staff that was responsible for the day to day operations of the dairy. Based upon similar information in the record before the district court, Judge Bevan explained during his oral discussion of his decision on the motions that:

> "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 the special relationship and/or special circumstance . . ."

Tr., Vol. I, p. 77, Ll. 8-11. Clearly, he saw no evidence to establish that anything more than a regular contractually based consumer relationship existed between U.S. Dairy and Respondents.

As discussed above, ***Duffin***, describes a special relationship arising in, ". . . situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an ***extremely limited group*** of cases where the law of negligence extends its protections to a party's economic interest." ***Duffin v. Idaho Crop Improvement Ass'n***, 126 Idaho 1002, 1008 (Idaho 1995) (emphasis added). It was further clarified that a special relationship may exist only where one party conducts a highly specialized function, and that, by so doing, induces reliance on his superior knowledge and skill. ***See id.*** The case focused on professional or quasi-professional relationships and only slightly expanded that narrow focus to include the unique situation where the Idaho Crop Improvement Association only because the Idaho Crop Improvement Association was the sole entity in Idaho authorized to certify seed potatoes. ***See id.*** Furthermore, ***Duffin*** can clearly be read to deal with the provision of services, not the sale of products.

In the present matter, Respondents were operating one of the largest dairies in the country with a trained support staff. It was Respondents' own personnel who performed troubleshooting and repair of the barns, as is exemplified by the fact that their technician allegedly observed a wiring defect in the first place. It is not plausible to assert that contractual installation and maintenance relationship

between U.S. Dairy and Respondents created any "special relationship" or duty on the part of U.S. Dairy, when Respondents own technicians had the same skills to diagnose problems and multiple other companies offered competing products and similar services. U.S. Dairy simply provided limited maintenance and factory direct parts as per the manufacturer's recommendations. As noted earlier, U.S. Dairy was not the only supplier of milking equipment from whom the Aardemas could choose.

U.S. Dairy does not fall within the clearly defined categories of professionals who could qualify under the exception. Unlike engineers and architects, no special certificate or license is necessary from the State of Idaho to work on the subject milking systems. In fact, a large portion of the wiring involved in this matter is low voltage and not subject to any local or state electrical codes or inspection. Therefore, it is not practical to equate the service work provided by U.S. Dairy employees to that of an engineer or other highly skilled field as contemplated by the exception.

This Court in ***Duffin*** clearly intended to limit the application of the special relationship exception to a fairly specific set of facts, none of which are present in this matter. Expanding the special relationship exception beyond what was contemplated in ***Duffin*** would result an exception which would swallow the rule. The services and products provided by U.S. Dairy are similar to those involved in thousands of commercial transactions occurring every day in Idaho. As argued above, the UCC adequately governs these business transactions. Modifying the

exception to the extent that it would apply to the facts of this matter would affect numerous industries within the state and eviscerate the effectiveness of the UCC.

II. CONCLUSION

Here, the relationship between the Aardemas, Westfalia and U.S. Dairy is a multilateral commercial transaction governed by the UCC, the manufacturer's warranty and a service contract. To hold that tort law has any place in this case would deprive Westfalia and U.S. Dairy of their rights under the Uniform Commercial Code. Westfalia and U.S. Dairy had every right to believe that the UCC was applicable to their transaction in light of the holding of ***Myers***. This could not be more clearly demonstrated than the application of *Myers* to pulsators in ***DeVries v. De Laval, Inc.***, 2006 U.S. Dist. LEXIS 41 599. The Aardemas are asking this Court to modify the law of Idaho regarding the economic loss rule. Here the Aardemas failed to submit any admissible evidence for their contention that they suffered injury to other property which qualifies for an exception to the economic loss rule. Without such admissible evidence, the District Court erred in failing to apply long established Idaho precedents. The Aardemas have also failed to establish that any of the other exceptions to the economic loss rule apply. Specifically, there is no evidence to support Respondents' claims that a special relationship or unique circumstances existed between themselves or any of the other parties.

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

RESPECTFULLY SUBMITTED this 12th day of November, 2008.

ANDERSON JULIAN & HULL, LLP

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

DATED this 12th day of November, 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 12 day of November, 2008, I served a true and correct copy of the foregoing APPELLANTS'/CROSS-RESPONDENTS' REPLY 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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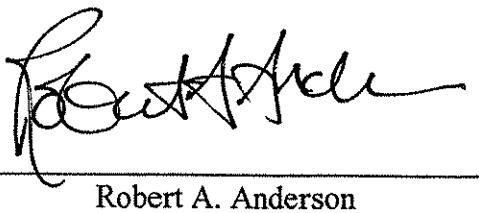

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