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# Aardema v. U.S. Dairy System, Inc. Respondent's Brief 1 Dckt. 35218

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IN THE SUPREME COURT FOR THE STATE OF IDAHO

DON AARDEMA, an individual, RON AARDEMA, an individual, and DONALD J. AARDEMA, an individual, and doing business as AARDEMA DAIRY; DON AARDEMA, an individual, and RON AARDEMA, an individual, doing business as DOUBLE A DAIRY,

Plaintiffs/Respondents/  
Cross-Appellants,

vs.

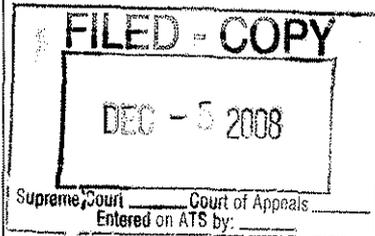
U. S. DAIRY SYSTEMS, INC., an Idaho corporation, doing business as Automated Dairy Systems, Inc., WESTFALIASURGE, INC., a foreign corporation, and EARL PATTERSON, an individual,

Defendants/Appellants/  
Cross-Respondents,

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



**RESPONDENTS'/CROSS-APPELLANTS' REPLY 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. Introduction

This brief is in reply to arguments made by Defendants related to Plaintiffs' cross-appeal of the grant of summary judgment in favor of both Westfalia and U.S. Dairy on the issue of the existence of a special relationship as an exception to application of the economic loss rule. Generally, Idaho law provides an exception to the economic loss rule and allows a party to recover economic losses in a tort action when a plaintiff establishes that there is a "special relationship" between the parties. *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195 (1995). The subject matter of this brief relates to only those issues relevant to the Plaintiffs' cross appeal. As stated in Respondents'/Cross Appellants' Brief, those two issues are as follows:

\* \* \*

3. Whether the district court erred in finding there is no evidence of a special relationship between Plaintiffs and Defendants?

4. Whether the district court erred in granting Defendant U.S. Dairy's motion for summary judgment on the issue of a special relationship without receiving any briefing and without U.S. Dairy providing a statement of relevant fact on the issue?

As demonstrated below, Plaintiffs have cited to specific evidence in the record which could support a jury's determination that a special relationship exists between Plaintiffs and Defendants. As such, the district court erred in finding that no special relationship exists and in granting summary judgment in favor of both Westfalia and U.S. Dairy. As further demonstrated below, the district court also erred in granting summary judgment in favor of U.S. Dairy on the issue of special relationship without a properly supported motion filed by U.S. Dairy on that issue. The *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 175 P.3d 172 (2007) case cited by Defendants in their brief is inapplicable in this case.

As such, Plaintiffs respectfully request that the Court reverse the entry of summary judgment in favor of Defendants Westfalia and U.S. Dairy on the issue of the existence of a special relationship.

**II. Plaintiffs Demonstrated Specific Evidence which Establishes Genuine Issues of Material Fact Precluding Summary Judgment as to the Existence of a Special Relationship**

Contrary to Defendants' arguments, Plaintiffs have demonstrated that as to both U.S. Dairy and Westfalia the record presents genuine issues of material fact regarding the existence of a special relationship between Plaintiffs and Defendants. These issues, which are inherently factual and must be determined by a jury, should have precluded entry of summary judgment against Plaintiffs on the issue of special relationship and should preclude the determination of the issues presented in this case on interlocutory appeal.

Generally, a special relationship, as an exception to the application of the economic loss rule, is established "where an entity holds itself out to the public as having expertise regarding a specialized function, and by doing so, knowingly induces reliance on its performance of that function." *Blaht v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996 (2004) (citing *Duffin*, 126 Idaho at 1008, 895 P.2d 1195). As Plaintiffs set forth in their initial cross-appeal briefing, the question of whether an entity holds itself out as to the public as having sufficient expertise and whether it knowingly induces reliance on such expertise inherently involves questions of fact which a jury must determine. *See Blickenstaff v. Clegg*, 140 Idaho 572, 578, 97 P.3d 439 (2004)(holding that genuine issues of fact regarding the existence of a special relationship precluded summary judgment); *General Fire & Cas. Co. v. Guy Carpenter & Co, Inc.*, 2006 WL 3239365 (D. Idaho 2006)("there exist genuine issues of material fact as to whether [the defendants] were in a special relationship such that the economic-loss rule would

not apply”).

Defendants misstate the factual record and erroneously argue that Plaintiffs have not set forth a sufficient factual basis for demonstrating a genuine issue of material fact as to the existence of a special relationship between Plaintiffs and Defendants. Plaintiffs set forth ample evidence directly from the record from which a jury could conclude that a special relationship exists. More specifically, Plaintiffs point out that witnesses from Westfalia admit that Westfalia has “superior knowledge” regarding the design and operation of its milking equipment than that of a dairy farmer such as Plaintiffs. (Respondents’/Cross-Appellants’ Br., p. 8). Moreover, Plaintiffs noted that dealers such as U.S. Dairy must be certified by Westfalia in order to sell the ProFORM System and must renew the certification every five years. (Respondents’/Cross-Appellants’ Br., p. 8). Contrary to Defendants’ arguments, Plaintiffs did in fact cite to specific testimony in the record in support of these facts. Defendants’ argument that Plaintiffs failed to make any citations to the record regarding the existence of a special relationship, therefore, is patently incorrect.

Defendants also misapply the holding in *Duffin*, 126 Idaho 1002, 1008, 895 P.2d 1195 (1995) in arguing that there is no special relationship between Plaintiffs and Defendants. Much like the current case, the court in *Duffin* held that in spite of the fact that a professional or quasi-professional relationship did not exist between the parties, a special relationship was established by examining the facts of the case and the relationship between the parties. Specifically, the *Duffin* court based its finding that a special relationship existed between the parties primarily on the fact that the defendant in that case could certify seed potatoes, the product in question, as suitable for use and free from disease or other defect. *Id.* The *Duffin* court found that this certification process demonstrated that the defendant held itself out as having expertise in the

area of seed potatoes, and specifically found that a special relationship existed. *Id.*

Contrary to Defendants' argument, therefore, the current case is indeed different from the relationship between any manufacturer or dealer and the end consumer. Like the defendant in *Duffin*, Westfalia engages in certification of its products through its dealers, and therefore holds itself out as having expertise in the design, manufacture and operation of milking equipment. Additionally, the certification of dealers such as U.S. Dairy by Westfalia enables the dealers to sell the milking equipment certified by the manufacturer. In both instances, U.S. Dairy and Westfalia hold themselves out as having superior knowledge and expertise, and induce reliance upon such superior knowledge and expertise, in the design, manufacture and operation of milking equipment. As this Court has previously stated in *Duffin*, such conduct establishes a special relationship between Plaintiffs and both Defendants, Westfalia and U.S. Dairy.

Plaintiffs set forth specific facts, and were in fact the only party to present any factual record regarding the existence of a special relationship between the parties. These facts cited by Plaintiffs in their brief are at the very least sufficient to withstand summary judgment on the issue of a special relationship. The trial court's entry of summary judgment should therefore be reversed and Plaintiffs should be permitted to present their case to a jury.

### **III. The District Court Erred in Granting U.S. Dairy's Motion for Summary Judgment, and the *Gem State* Case Cited in Defendants' Brief is Inapposite**

As stated in Respondents'/Cross Appellants' Brief, U.S. Dairy did not file a properly supported motion for summary judgment on the issue of a special relationship. Rather than setting forth a factual basis upon which U.S. Dairy arguably could be entitled to summary judgment, U.S. Dairy simply attempted to bootstrap its motion at oral argument onto Westfalia's previously filed motion, which concerned facts and argument related specifically to Westfalia

and not U.S. Dairy. (Respondents'/Cross-Appellants' Br., p. 39).

As Plaintiffs demonstrated in previous briefing, although a court may rule for either party and may even grant summary judgment in favor of the non-moving party when appropriate, a district court may only rule on the issues placed before it pursuant to a valid and properly supported motion for summary judgment. *Harwood v. Talbert*, 136 Idaho 672, 677, 39 P.3d 612 (2001). As this Court has previously stated, the burden falls upon the moving party to establish by means of a properly supported summary judgment motion that no genuine issue of material fact exists as to a particular element of a plaintiff's claim. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 531, 887 P.2d 1034 (1995). As was the case in *Thomson*, by granting summary judgment essentially *sua sponte* on an issue that had not been properly supported in briefing, the district court in this case "improperly seized" upon the special relationship issue between Plaintiffs and U.S. Dairy. *Id.* Because U.S. Dairy never filed a properly supported motion for summary judgment regarding the special relationship issue, "[t]he burden never shifted to [Plaintiffs] to provide evidence of [a special relationship] because [U.S. Dairy] never raised the issue in the first place." *Id.*

Because U.S. Dairy did not file a properly supported motion for summary judgment on the issue of the economic loss rule and the existence of a special relationship, Plaintiffs did not have the proper chance to respond to U.S. Dairy's purported motion. As a matter of due process, Plaintiffs must be given the proper notice and opportunity to respond to a properly supported and valid motion for summary judgment. *See Portsmouth Square, Inc. v. Shareholders Protective Committee*, 770 F.2d 866, 869 (9<sup>th</sup> Cir. 1985) (holding that due process requires that "the party against whom [summary] judgment was entered had a full and fair opportunity to develop and present facts and legal arguments in support of its position."). U.S. Dairy's failure to submit a

– properly supported motion for summary judgment on the issue of the economic loss rule and the existence of a special relationship precludes entry of summary judgment on that issue.

Defendants’ reliance on *Gem State Ins. Co. v. Hutchinson*, 145 Idaho 10, 175 P.3d 172 (2007) is misplaced. The holding in *Gem State* concerned whether a responding party who failed to file any response to a properly supported motion for summary judgment could be allowed to participate in oral argument. *Gem State*, 175 P.3d at 176. This Court held that the district court did not err in allowing the responding party to participate in oral argument because I.R.C.P. Rule 56 does not provide for exclusion from oral argument as a sanction for failing to respond to a summary judgment motion. *Id.*

The issue here, however, is not whether U.S. Dairy or any other party for that matter should be allowed to participate in oral argument. The issue is not even related to the sanctions for failing to respond to a summary judgment motion at all. Instead, the issue in this cross appeal is whether it was proper for the district court to grant summary judgment in favor of U.S. Dairy when U.S. Dairy has failed to file and serve a properly supported motion or any other documentation in support of summary judgment on a particular issue. Nothing in the *Gem State* opinion would support Defendants’ argument that it would be proper for a district court to grant summary judgment on an issue for which there has not been a properly supported motion filed and a proper opportunity for the opposing party to respond. In fact, the *Gem State* Court quotes the particular language in I.R.C.P. Rule 56(e) which states that the burden to respond to a motion for summary judgment does not shift to the party opposing the motion until “a motion for summary judgment is made and supported as provided in this rule . . . .” *Id.* (quoting I.R.C.P. Rule 56(e)).

Contrary to the Defendants arguments in their brief, the *Gem State* case is inapplicable to

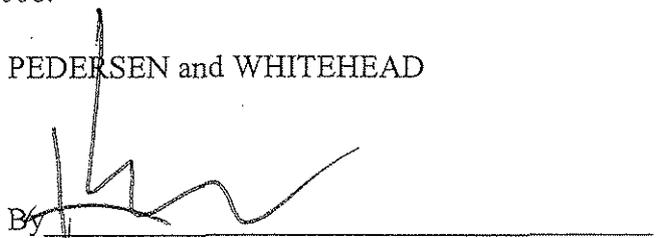
the particular issues presented in this cross appeal. As this Court has previously set forth in *Thomson*, a district court may not seize upon an issue which has not been properly briefed and supported and *sua sponte* grant summary judgment without providing the opposing party an opportunity to properly respond. *Thomson*, 126 Idaho at 531. Nothing in the Court's opinion in *Gem State* changes or contradicts this holding, and, in fact, *Gem State* addresses an entirely different situation than the one presented here. Because U.S. Dairy failed to file a properly supported motion for summary judgment on the issue of the existence of a special relationship, the district court erred in granting summary judgment in favor of U.S. Dairy on that issue. Plaintiffs respectfully request that the district court's entry of summary judgment in favor of U.S. Dairy on the issue of the existence of a special relationship be reversed.

**IV. Conclusion**

For the above and foregoing reasons, Plaintiffs respectfully request that the Court reverse the district court's entry of summary judgment in favor of Defendants Westfalia and U.S. Dairy on the issue of the "special relationship" exception to the economic loss rule.

DATED this 4th day of December, 2008.

PEDERSEN and WHITEHEAD



By \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

Jarom A. Whitehead, a resident attorney, hereby certifies that on the 4th day of December, 2008, he caused two true and correct copies of the within and foregoing RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF to be forwarded with all required charges prepaid, by the method(s) indicated below, to the following:

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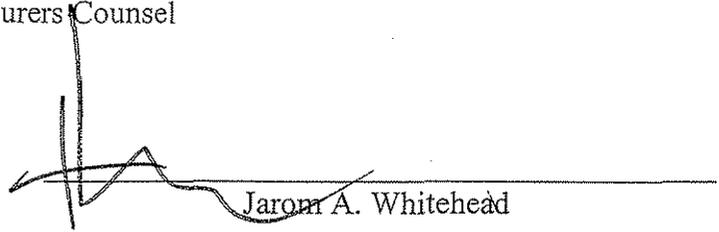
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