1-4-2010

Brian and Christie, Inc. v. Leishman Elec. Augmentation Record Dckt. 35929

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN AND CHRISTIE, INC., an Idaho corporation, and dba TACO TIME, an assumed business name,

Plaintiff-Appellant,

vs.

LEISHMAN ELECTRIC, INC., an Idaho corporation,

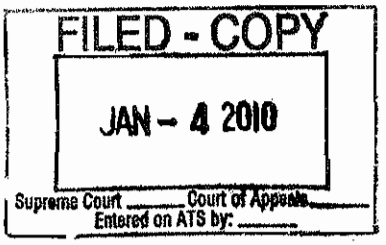
Defendant-Respondent,

and

JOHN DOES 1-10,

Defendants.

Supreme Court Docket No. 35929-2008
Madison County Case No. 2006-826



RESPONDENT'S AUGMENTED BRIEF ON APPEAL

Appeal from the District Court of the Seventh Judicial District in and for the County of Madison

Honorable Brent J. Moss, District Judge, Presiding

For Plaintiff-Appellant:

John R. Goodell
Brent L. Whiting
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P. O. Box 1391
Pocatello, Idaho 83204-1391

For Defendant-Respondent:

Gary L. Cooper
COOPER & LARSEN, CHARTERED
151 N Third Avenue, Second Floor
P. O. Box 4229
Pocatello, Idaho 83205-4229

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PURPOSE OF THE AUGMENTED BRIEF BY RESPONDENT

Contemporaneously[1] with the filing of Respondent's Brief on Appeal, the Idaho Supreme Court issued its decision in *Aardema v. U.S. Dairy Sys.*, 215 P.3d 505 (Idaho 2009) which represents its latest expression on the "economic loss rule" in Idaho.

Appellant's Reply Brief addressed the effect of the decision in *Aardema* on this case. The purpose of this Brief is to provide Respondent's analysis of the effect of the decision on this case.

ARGUMENT

A. THE DECISION IN *AARDEMA* IS NOT INCONSISTENT WITH THE TRIAL COURT'S DECISION IN THIS CASE DISMISSING TACO TIME'S NEGLIGENCE CLAIMS

In *Aardema*, U.S. Dairy Systems/Westfaliasurge contracted with Aardema Dairy to install and maintain a milking system. After the milking system was installed, Aardema Dairy suffered decreased milk production and quality of milk produced which resulted in lost profits. Initially Aardema Dairy sued U.S. Dairy Systems/Westfaliasurge for breach of contract and negligence, but ultimately dismissed its contract claims and proceeded solely on the negligence claim. Its damages would have been purely economic and barred by the economic loss rule except that there was a material issue of fact whether the improperly operating milking equipment damaged Aardema Dairy's cattle. Although there was no specific holding on the nature of the damages Aardema Dairy could recover if damage to its cattle are proven, it appears that the lost profits resulting from decreased milk production and quality of milk produced *will* be recoverable *if* such damages were caused by damage to Aardema Dairy's cattle.

---

[1]The decision in *Aardema* was filed on August 24, 2009, Respondent's Brief on Appeal was mailed on August 25, 2009 and it was filed in the Clerk's office on August 26, 2009.

In this case the lost profits and costs of repair claimed by Taco Time are not the result of damages to property which was not the subject of the transaction. The primary damages claimed by Taco Time are the result of damage to the building itself which had to be repaired following the fire. The *Aardema* logic does not easily transfer to the analysis of this case. Taco Time did not have a contract with Leishman Electric so it is more difficult to determine the "subject of the transaction." Taco Time was the electrical subcontractor for a general contractor which substantially remodeled the Taco Time five years before the fire which gave rise to the lawsuit. As a part of that remodel project, Taco Time also contracted with a sign contractor to install neon signs. One of the neon transformers supplied and installed by the sign contractor is alleged to have been the cause of the fire because it did not have secondary ground fault protection. In *Aardema* it was concluded that the purchase, installation and operation of the milking system was the subject of the transaction, not the cows which were allegedly damaged by the milking equipment, because "Aardema Dairy did not contract with any of the defendants for the cattle, but for the purchase, installation and operation of the milking system." The trial court in this case reasoned that:

> All of the Plaintiff's damage claims arise from restaurant property damaged by the fire, and such damages constitute economic loss. Plaintiff acknowledges that the installation of the signs by Sign Pro was part of the extensive remodel project undertaken in 1998/1999. Plaintiff had no relation with Defendant during this project as Defendant was hired by the general contractor to re-wire the building in connection with the remodel. The various components of the remodeling, including electrical rewiring, installation of the signs, and other building improvements were wholly integrated into the building, not separate or apart from it. These improvements were of necessity integrated with the existing building to better facilitate the purpose for which the building was used, a restaurant.
>
> It is the restaurant/building, not the services provided via remodeling, that was the subject of the transaction; and it was the building, its contents, and the profits derived from the building's use that were damaged by the fire. Plaintiff's damage claims do not relate to any property "other that which is the subject of the transaction."

R. Vol. II, p. 304

The trial court's reasoning is not inconsistent with the decision in *Aardema*. The subject matter of the contract in this case was the remodeling contract and for purposes of the economic loss rule that is the "subject of the transaction." If U.S. Dairy Systems/Westfaliasurge had been the milking system subcontractor to a general contractor which remodeled Aardema Dairy's barn and the barn, but not the cattle, had burned five years later due to a defect in an electrical component installed by another subcontractor, the fact scenario would be more akin to the one presented in this case. *Aardema* did not eliminate the "integrated whole" analysis, it was just not necessary to invoke that analysis in the specific factual scenario presented in *Aardema*. The "subject of the transaction" for purposes of the economic loss rule in this case is the remodeling project contract which integrated all of the remodeling improvements into the restaurant property damaged by the fire. Taco Time's damage claims do not relate to any property "other that which is the subject of the transaction" and are barred by the economic loss rule.

Taco Time argues in its Reply Brief that it suffered damage to property which was not the subject of the transaction[2] just as Aardema Dairy had and therefore the economic loss rule does not apply to Taco Time. Because the remodeling project was so extensive, any damage to property which was not the subject of the transaction was, at best, incidental property damage which should not take the case outside the economic loss rule. See *Miller v. United States Steel Corp.*, 902 F.2d 573, 576 (7th Cir. Wis. 1990) cited in Respondent's Brief on Appeal. The damage to cash registers, inventory food items, janitorial and bathroom supplies, etc. is not like the alleged damage to Aardema Dairy's cattle. If an employee or customer had been injured in the fire that would be more

---

[2]At page 2 of Taco Time's Reply Brief, Taco Time gives examples of property which was not the subject of the transaction – "cash registers, inventory food items, janitorial and bathroom supplies, etc."

akin to the situation presented in *Aardema*. That is not the case here and the incidental property damage suffered by Taco Time does not eliminate the application of the economic loss rule.

B. *AARDEMA* SUPPORTS THE TRIAL COURT'S CONCLUSION THAT A SPECIAL RELATIONSHIP EXCEPTION DOES NOT SAVE TACO TIME'S NEGLIGENCE CLAIM AGAINST LEISHMAN ELECTRIC

"The special relationship exception to the economic loss rule is an extremely narrow exception which applies in only limited circumstances." *Aardema*, 215 P.3d at 512 There are no facts in this case which would establish a "special relationship" between Taco Time and Leishman Electric. See Respondent's Brief on Appeal, pp. 29 - 32.

CONCLUSION

For the reasons discussed above, *Aardema* does not require reversal of the decision by the trial court that the economic loss rule bars Taco Time's claims against Leishman Electric.

DATED this 30th day of December, 2009.

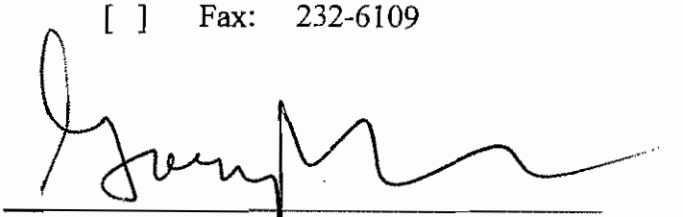
COOPER & LARSEN

GARY L. COOPER

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2009, I served a true and correct copy of the foregoing to:

John Goodell & Brent Whiting	[✓]	U.S. mail
Racine Olson Nye Budge & Bailey, Chtd	[ ]	Express mail
P. O. Box 1391	[ ]	Hand delivery
Pocatello, ID 83204-1391	[ ]	Fax: 232-6109



GARY L. COOPER