7-31-2009

Brian and Christie, Inc. v. Leishman Elec. Appellant's Brief Dckt. 35929

IN THE SUPREME COURT OF THE STATE OF IDAHO

★★★★★

BRIAN AND CHRISTIE, INC., an Idaho corporation, and d/b/a 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 No. 2006-826

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Seventh Judicial District For the County Madison

Honorable Brent J. Moss, District Judge, Presiding

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COMES NOW Plaintiff-Appellant Brian and Christie, Inc., d/b/a Taco Time ("Taco Time"), by and through counsel of record, and hereby submits its Opening Appellant's Brief as follows:

STATEMENT OF THE CASE

i. Nature of the Case:

Taco Time appeals from summary judgment dismissing its negligence claim based on the economic loss rule. The claim arises from an electrical fire at Taco Time's restaurant located in Rexburg, Idaho. The electrical fire was caused by a defective neon sign and obsolete transformer which failed to comply with the National Electrical Code ("NEC"). The fire caused extensive damage to Taco Time's restaurant building, fixtures, equipment, appliances, inventory, other contents and personal property located in the building at time of the fire, lost profits, and expenses for clean up, repair, replacement, and reconstruction. Total damages approach $300,000.00.

The neon sign and transformer were installed on the building by Sign Pro of Southeastern Idaho, Inc. ("Sign Pro") under a verbal agreement with Taco Time. Importantly, Sign Pro did *not* connect the primary building power to the neon sign and transformer because its employee was not a licensed electrician and lacked authority to do so.

Instead, Defendant-Respondent Leishman Electric, Inc. ("Leishman"), a licensed electrical subcontractor, negligently connected final, permanent primary building power to the sign and transformer without inspecting or verifying NEC compliance or ensuring it was safe to do so. Such connection was the final step necessary to energize that electrical circuit. Leishman made the connection while working at the Taco Time restaurant as the electrical subcontractor,

hired by the general contractor, under a separate written agreement for extensive remodeling of the interior and exterior of the building.

Taco Time contends the economic loss rule does not apply and the district court erred in granting summary judgment exclusively based on it. Taco Time seeks reversal of the summary judgment and remand for trial.

The economic loss rule does not apply where there is property damage to the defective chattel itself caused by an accident, casualty event, disaster, or calamitous event.

The economic loss rule does not apply where other property damage was caused by the defective neon sign and transformer. Other property damage includes the building, fixtures, equipment, appliances, inventory, and other contents and personal property located in the building at the time of the fire.

The economic loss rule does not apply where economic loss is parasitic to other property damage.

The economic loss rule does not apply where there is a "special relationship" which should be recognized here for a licensed electrical contractor, which rendered specialized services, and held itself out to the public as a competent quasi-professional.

In addition, the district court misconstrued and misapplied the economic loss rule to completely bar Taco Time's negligence claims finding that the "defective property which was the subject of the transaction" was the entire building remodel project merely because the neon sign and transformer were a physical part of the building. However, the undisputed facts here establish two separate and distinct "transactions": one was the neon sign and transformer installation; the other was the extensive building remodel. The district court "intermixed" the

two as synonymous or interchangeable. In so doing, the defective neon sign and transformer "transaction" was expanded to include the entire building remodel "transaction." The entire building thus became the "defective subject which was the subject of the transaction" to completely bar any recovery, rather than just the neon sign and transformer which the facts clearly evidence.

In addition, on remand Taco Time seeks reversal of the district court's ruling denying its motion to amend its complaint. Amendment is necessary so Taco Time may seek recovery of 100% of its total damages of nearly $300,000.00. The original complaint mistakenly sought recovery of only 50% of the total damages. The mistake was the incorrect assumption that Taco Time must give Leishman an offset for settlement monies recovered from Sign Pro. This Court's decision in the *Sani-Top* case and I.C. § 6-805(2) direct otherwise.

Taco Time seeks an award of attorney fees on appeal under I.C. § 12-121. Given this Court's preexisting case law, the economic loss rule clearly does not apply. Leishman's defense based thereon was raised without reasonable foundation in fact or law and is frivolous.

ii. Course of Proceedings Below:

The course of proceedings below material to this appeal are the following:

On June 5, 2007 Leishman's Motion for Summary Judgment was filed based on the economic loss rule and other grounds not material to this appeal. R., Vol. I, pp. 21-22.

On October 15, 2007, after briefing and oral argument, the Court's Memorandum Decision issued. R., Vol. I, pp. 98-103. The key holding grants *partial* summary judgment based on the economic loss rule stating:

> "In this Court's view, the *subject of the transaction with which Leishman Electric was involved was the remodel project including, of necessity, the electrical work to supply power to operate the signs acquired as part of the project.* Application of the economic loss rule prevents Taco Time's negligence claims seeking loss of income as well property damage that was subject of the transaction, i.e., the remodel project of 1998-1999 [footnote 6]. [string citation to Idaho case law referring to economic loss rule omitted]. The entire record lead this Court to conclude that the economic loss rule bars any negligence claims asserted against Leishman, *except for property damage not involved with the remodel project.*" (italics added)

R., Vol. I, pp. 101-02.

Taco Time contends the first italicized portion of the above quote is flawed and contrary to the undisputed facts establishing two separate and distinct contracts or "transactions," i.e., one with Sign Pro to install the defective neon sign and obsolete transformer, and another one with the general contractor for the extensive remodel project (who in turn hired Leishman as the electrical subcontractor). The district court's flawed reasoning "lumps together" the two separate contracts or "transactions."

Taco Time further contends the second italicized portion of the above quote evidences the district court's finding, supported by the undisputed evidence, that *other property damage, not involved in the remodel project, existed.* Taco Time agrees. The district court's first ruling acknowledging at least some "other property damage" renders the economic loss rule *completely inapplicable as a matter of law.*

On August 12, 2008, Taco Time moved for reconsideration of partial summary judgment based on the economic loss rule. R., Vol. II, pp. 285-87. Taco Time also moved to amend its Complaint to allege 100% of its damages were recoverable against Leishman, without offset for settlement monies recovered from Sign Pro. The decision did not only deny Taco Time's motion for reconsideration. It *sua sponte* enlarged its earlier partial summary judgment ruling, granting

full summary judgment, despite no motion seeking such relief having been made by Leishman. Evidently, the Court was determined to get the case off its docket for whatever reason. *See* Complaint, ¶¶ 30-31 (R., Vol. I, p. 14) with proposed First Amended Complaint, ¶¶ 27-31 (R., Vol. II, p. 296).

On September 16, 2008 the hearing on Taco Time's motion for reconsideration and motion to amend complaint was held. During the argument, the district court candidly confessed having "struggled with this, gentlemen, for a least five or six years on this miserable [economic loss] rule and when I think I've got it figured out there's a new wrinkle in it and I'm not sure it's as easy as you're presenting. It may be. I hope it is. That's what I'm struggling with." The court also indicated uncertainty and confusion as to whether the economic loss applied where there was other property damage, as it had found in its earlier partial summary judgment decision. In response to this argument, the district court responded: " . . . I wish the Supreme Court would say that." Tr., pp. 20-22. Taco Time's briefing and oral argument presented the case law so holding, but to no avail.

On October 1, 2008 the decision granting full summary judgment based on the economic loss rule, and denying Taco Time's motion to amend complaint, was issued. R., Vol. II, pp. 302-04. A Judgment of Dismissal was entered the same date. R., Vol. II, p. 306.

Subsequently, the district court awarded $12,500 in costs to Leishman in a final judgment entered on November 24, 2008. R., Vol. II, p. 349.

Taco Time timely filed this appeal. R., Vol. II, pp. 342-46, pp. 352-56.

iii. Statement of Material Facts:

The following facts are either undisputed and/or supported by the evidence viewed most favorably to Taco Time as the non-moving party opposing summary judgment:

Brian Larsen ("Brian") and his wife, Christie Larsen, are the owners/principals of Plaintiff, Brian and Christie, Inc., doing business as Taco Time in Rexburg, Idaho. The first Affidavit of Brian Larsen ("Larsen Affidavit") explains their involvement and ownership of the Taco Time restaurant:

> "1. My name is Brian Larsen. I reside in Rexburg, Idaho. My wife's name is Christie Larsen. We are the owners/principals of Plaintiff Brian & Christie, Inc., an Idaho corporation, and doing business under the assumed business name of "Taco Time" in Rexburg, Idaho (hereinafter "Taco Time Restaurant").
>
> * * *
>
> 3. The Taco Time Restaurant has been in existence since 1973 in the present location at 274 South 2nd West, Rexburg, Idaho, as a franchise restaurant business.
>
> 4. I was employed as the general manager of the Taco Time Restaurant by the former owner from approximately1984 to 1990.
>
> 5. In 1990 my wife and I purchased the Taco Time Restaurant and franchise from the former owner.
>
> 6. Since 1991, my wife and I have continuously owned, managed, and operated the Taco Time Restaurant to date. I am personally involved with general operations and management on a day to day basis."

Larsen Affidavit, ¶¶ 1, 3-6 (Tr., Vol. I, pp. 76-77). Brian worked his way up the ladder as a former employee to eventually become the owner. His is an American "success story." He works alongside his employees on a day-to-day basis. He is not an absentee owner/investor.

1. The Building Remodel Contract and Neon Sign and Related Transformer Installation Contract Are Separate and Distinct "Transactions"

The undisputed facts establish that the building remodel contract and neon sign and

related transformer installation contract are separate and distinct transactions. Taco Time made the building remodel contract with a general contractor, who in turn hired Leishman as the electrical subcontractor. There was no privity of contract directly between Taco Time and Leishman.[1]

After 25 years of operation, Brian determined that the restaurant building and business needed updating and remodeling, which occurred in 1998-1999 under a remodel contract entered with a general contractor. His Affidavit explains:

> "7. In the second half of 1998 and first half of 1999 we extensively remodeled the exterior and interior of the Taco Time building. An out-of-state general contractor was used which we obtained through contacts with the parent franchisor Taco Time company."

Larsen Affidavit, ¶ 7 (Tr., Vol. I, pp. 77).

At the same time as the remodel project was occurring, Brian purchased two neon signs and related transformers from a defunct restaurant, and hired Sign Pro, a local neon sign company from Idaho Falls, to install them. Again, his Affidavit explains:

> "8. As part of the remodel, two exterior neon signs were purchased from a closed Taco Time restaurant located somewhere in Nebraska to put on our Taco Time Restaurant in Rexburg. The two neon signs were shipped from out of state to Idaho. I arranged for the neon signs to be installed by Defendant Sign Pro of Southeast Idaho, Inc. ("Sign Pro"), or by whatever name it had previously gone by which included "Sign Pro" in the name."

Affidavit of Brian Larsen, ¶ 8 (Tr., Vol. I, pp. 77).

The building remodel contract, and neon sign and transformer contract, were separate

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[1]Given such lack of privity between Taco Time and Leishman, the district court's statement that "notes Plaintiff's remedies via contract, warranty, etc., are unaffected" by its final summary judgment ruling (R., Vol. II, p. 304) is misleading. The district court was well aware that there was no contract or warranty existing between the parties, and no such remedy other than one based on negligence.

"transactions." Again, his Affidavit explains:

> "8. . . . My contract with Sign Pro was separate from the remodel project contract with the general contractor, and I paid them a separate price than I paid to the general contractor for the remodel project."

Affidavit of Brian Larsen, ¶ 8 (Tr., Vol. I, p. 77).

Taco Time's Complaint's allegations mirror the facts stated in Larsen's Affidavit with regard to the two:

> "6. Sometime in late 1998 and early 1999 the Plaintiff remodeled its Taco Time restaurant building located in Rexburg, Idaho ("remodel project").
>
> 7. Plaintiff hired and contracted with a general contractor not named in this action to perform the remodel project, which work was done.
>
> 8. As part of the remodel project, the general contractor hired Leishman Electric as the electrical subcontractor to perform the electrical work of the remodel project, which work was done.
>
> 9. As part of the remodel project, Plaintiff purchased used exterior neon signs from another Taco Time restaurant.
>
> 10. As part of the remodel project, Plaintiff contracted with Sign Pro to inspect, repair, and install two neon sign systems and related electrical wiring, transformers, and related components onto the building, which work was performed."

Complaint, ¶¶ 6-10 (Tr., Vol. I, p. 10). The references "(a)s part of the remodel project" in paragraphs 8-10 of the Complaint quoted above are ambiguous and possibly mislead the district court into the erroneous factual understanding that the "remodel project" was <u>one</u> "transaction," rather than <u>two</u> "transactions" with separate parties as Larsen's Affidavit quoted above clarifies beyond all doubt.

Thus, the undisputed facts set forth above establish two separate and distinct contracts or "transactions" relating to the remodel project versus the neon sign and transformer installation.

2. Leishman Connected the Building Power to the Neon Sign And Transfer As The Final Step Energizing The Electrical Circuit Without Inspecting or Determining It Was Safe To Do So

The facts are undisputed that Sign Pro installed the neon signs and transformers on the building, but did *not* connect the building power supply to energize the circuit, which was done solely by Leishman, as the licensed electrical contractor present. The facts are further undisputed that Leishman *did* make the final power connection *without* making any effort to inspect the neon sign or transformer to determine their condition; whether they complied with the NEC; whether they created a fire hazard; or whether they were safe to connect.

Sign Pro's employee only installed the two neon signs on the sides of the building, and related two transformers on the roof. Larsen Affidavit, ¶ 9 (R., Vol. I, p. 78); Affidavit of Michael Packer, ¶¶ 9-11 (R., Vol. II, pp. 262-63)("Packer Affidavit").

Brian did not know who made the final building power connection to the neon signs and transformers. Brian Larsen Affidavit, ¶ 10 (R., Vol. I, p. 78). The answer was supplied in discovery by Sign Pro's employee, Michael Packer. His Affidavit states:

> "11. I attached the neon glass to the wall and used high voltage wire routed through plastic conduit to connect the neon glass to the transformer, *but I did not make the final connection between the transformer and the primary power source.* . . ." (italics added)

Affidavit of Michael Packer, ¶ 11 (R., Vol. II, p. 263). Packer explained why he did not make the primary power connection to energize the circuit:

> "14. I was not a licensed electrician, nor was an electrician present who supervised or otherwise observed the installation of the neon signs."

Id.

Further discovery determined that Scott Leishman, a principal in Leishman Electric, and a

long time journeyman electrician, actually made the connection between the building power and the transformer which led to the neon sign. He testified in his deposition:

Q: Did you make the connection between the transformer and the building power – or connect the transformer to the building power?
A: Yes.
Q: Did you observe where that – where the line leading downstream from the transformer led to?
A: No.
Q: So you don't know whether it went to the Taco Time sign?
A: I don't even know that it was hooked up for sure; I can't – to be honest with you, I can't – I don't know if that part was completed when I put power into that box.
Q: Was it a part of your original job, a part of the original project to make a connection of the neon sign?
A: No.
Q: How did – I guess why did you make that connection then?
Mr. Cooper: Object to form.
A: I didn't hook anything to a sign.
Q: (By Mr. Whiting): Why did you make a connection of that transformer that you found on the roof to the building power?
A: I don't know if the general contractor asked us to or if the owner asked us to, I don't know. That's been a long time ago. I don't' know which one asked us to, but we were requested to hook up power to the junction box there.
Q: And did you know at the time that the junction box was going to provide power to the neon sign?
A: Yes." (bold emphasis added)

Deposition of Scott Leishman, p. 14, l. 8 to p. 15, l. 7 (R., Vol. I, p. 88).

Leishman's written discovery response also admits Scott Leishman connected the primary building power to the neon sign and transformer in question:

> " . . . Scott Leishman ran power to two junction boxes supplied by Sign Pro and connected the junction box transformers to the primary side or line side power. . ."

Leishman Answer To Interrogatory No. 10 (R., Vol. I, p. 95).

Scott Leishman further testified that he did not "see" the neon sign in question before making the power connection because he "didn't look at that part of it." Deposition of Scott

Leishman, p. 15, ll. 8-11 (R., Vol. I, p. 88).

Scott Leishman further testified that he also did not "look" at the transformer to see if it was equipped with the secondary ground fault protection safety feature:

"Q: Did you look at the transformer before you connected it to the building power?
A: I saw it sitting there.
Q: Do you know whether or not it had secondary ground fault protection?
A: No.
Q: Why don't you know?
A: Because I wasn't looking for it.
Q: Was it contained inside of a junction box?
A: Yes.
Q: Was it possible to open the junction box and look at the transformer if you wanted to?
A: Yes."

Deposition of Scott Leishman, p. 16, ll. 10-22 (R., Vol. I, p. 88).

Bron Leishman is Scott Leishman's brother and also a principal and journeyman electrician for over 30 years who worked on the Taco Time remodel project. He also testified:

"Q: To the best of your knowledge, did anyone from Leishman Electric inspect the wiring of the neon sign?
A: Now we're talking about the neon sign that Sign Pro installed?
Q: Yes.
A: No, I don't know that."

Deposition of Bron Leishman, p. 16, ll. 18-23 (R., Vol. I, p. 93).

3. The Large Fire Was A Major Accident, Casualty, Disaster, Event, or Calamitous Event Resulting In Extensive Damage To The Building, Fixtures, Equipment, Appliances, Inventory, and Other Personal Property and Contents

The fire was a major accident, casualty event, disaster, or calamitous event, which resulted in extensive damages resulting to the building and contents. Larsen's Affidavit states:

> "13. On June 9, 2004, in the late evening hours, there was a major fire at the Taco Time Restaurant which caused substantial damage to the building and contents and business losses due to inability to operate while repairs were made. We could have continued to operate the business without the neon sign, just as we did prior to its installation and since the fire, if the building, equipment, furniture and supplies had not also been damaged."

Affidavit of Brian Larsen, ¶ 13 (R., Vol. I, pp. 78).

The Second Affidavit of Brian Larsen Exhibits B and B (corrected), contain an itemized list breaking down 17 different categories and amounts of damages sustained in the fire and total approaching the $300,000.00. R., Vol. I, pp. 117-18.[2] Real and personal property and damages sustained include:

- Building of $113,208.92 (line item #1 referring to U.S. Bank, which held the mortgage);
- Restaurant and store equipment for $11,069.47 (line item #2);
- Lost inventory of $13,796.78 (line item #11);
- Other equipment and expenses of $20,542.32 (line item #15);
- Fire clean up and restoration of $11,800.51 plus $10,134.67 (line items #3 and #16);
- Contractor's repairs of $7,228.42 plus $1,451.73 (line items #8 and #10);
- Major systems replacement or replacement for Culligan of $1,267.23, refrigeration of $2,717.50, plumbing and heating for $2,401.00 (line items #6, #7, #12).

Other listed items include large expenses incurred for cleanup , repairs, replacement, and reconstruction.

Another item lists "lost profit to shareholders" of $75,342.04. *Id.*, line item #5.

The Second Larsen Affidavit also differentiates between those portions of the original building which remained and changes made, as well as new additions made, as part of the

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[2]The total amounts are indicated in each document vary slightly due to additional review and re-calculation of damages. The changes are reflected in the notes on Exhibit B (corrected). *Id.*, p. 118.

remodel project, with square footage measurements or description provided.[3] Second Affidavit of Brian Larsen, ¶¶4-6 (R., Vol. I, pp. 110-11). He indicates that the "majority of the fire damage was sustained in the original portions of the building." *Id*., ¶ 7 (R., Vol. I, p. 111).

4. The Origin and Cause of the Fire, and Leishman's Negligence, Are Established By Taco Time's Expert Witnesses

Taco Time's three (3) expert witnesses' opinion testimony establish the origin and cause of the fire, and Leishman's negligence as the licensed electrician which connected the primary building power to the defective neon sign and obsolete transformer in violation of the NEC without inspecting them and without determining it was safe to do so.

Robert "Jake" Jacobsen, C.F.I., Burn Pattern Analysis, Salt Lake City, UT, was the fire investigator who determined the origin and cause of the fire. His Affidavit includes his fire investigation report and related relevant materials. R., Vol. II, pp. 234-260. Jacobsen's Affidavit, ¶ 6, summarizes the results of his fire investigation as follows:

> "5. ***Conclusion:*** All evidence, including my photographs, support the origin of the fire within the sign circuits. Arcing and over-heating of the circuits as well as the burn patterns all indicate that a failure associated with the electrical components was the underlying cause of this fire. All other possible causes were carefully considered, explored and eliminated during the scene inspection. Also be aware that the investigation was performed with both electrical company representatives present. Any suggestion that other potential causes existed are refuted by the actual evidence of the investigation, and the reported findings and conclusions as set forth in my Preliminary Report, and final December 7, 2005 letter report forwarding Dr. Kimbrough's engineering report to Plaintiff's insurer."

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[3]The Second Affidavit of Brian Larsen was made in response to the Court's first partial summary judgment ruling as Taco Time's effort to break out damages which were part of the remodel and those which were not in an effort to determine damages which could still be sought at trial. The subsequent full summary judgment ruling made this effort moot.

R., Vol. II, p. 243.

Jacobsen's 8/21/06 letter and photographs, attached as Exhibit C to his Affidavit, further explain:

> "With that said, I will further reiterate that the origin of this fire occurred inside the parapet wall, slightly above the roof membrane, on the interior surfaces of the parapet wall. In proximity to this location were the electrical sign circuitry within the conduit that ultimately exited from the exterior surface, to the interior surface, and then ran to the transformer. The transformer was positioned on the top of the roof.
>
> * * *
>
> In this location of erosion, was the signage conduit for the broken letter 'a'. It is shown in the photographs and identified by the red arrow in photograph #13. That shows the destruction at that location, which is dissimilar to any other position on that wall, roof or interior space. The greatest amount of destruction occurred in that specific location which is in proximity to the failing point of the letter 'a' and the conduit that is shown in photographs #13, #76 and #77, revealing the greatest degree of oxidation (which is generally an indicator of significant heat) found during the entire inspection of the signage materials.
>
> The evidence is clear, the burn patterns are identified in the photographs and these facts are in harmony with the findings of MRA Forensic Sciences' Engineer, Dr. Scott Kimbrough. His enclosed report will add additional information to the conclusions offered in this clarification letter."

R., Vol. II, pp. 254-55. Four color photographs, # 13, #63, #76 and #77, include additional written explanation on their face. *Id.*, pp. 257-60.

Scott Kimbrough, Ph.D., P.E., of Motion Research Associates, Salt Lake City, UT, is an electrical engineer which was consulted by Jacobsen to further evaluate the cause of the fire. His Affidavit states his expert opinions, and attaches related materials, including his CV and initial letter report. R., Vol. II, pp. 212-33. Kimbrough's Affidavit, ¶ 4, states:

> "4. In summary, as indicated in my letter report, the subject neon sign was improperly and defectively installed in a manner which violated two (2) significant requirements of the National Electrical Code ("NEC"). Specifically, my "Findings" as stated in the report are as follows:

'1. The neon sign in question violated two important requirements of the National Electrical Code.

a. The sign used a transformer that did not have secondary circuit ground fault protection.

b. The sign was not properly grounded.

Because of these violations, the sign would have presented a significant fire hazard.' (Exhibit 3, Report, p. 3)."

R., Vol. II, pp. 213-14. Kimbrough's 12/2/04 letter report is attached to his Affidavit as Exhibit 3 (R., Vol. II, 227-33). His letter report, at pages 3 and 5, cites the specific NEC provisions at **600.23 A, B** (requiring secondary ground fault protection) and **250.4 A, B** (requiring proper grounding). *Id.*, pp. 229 and 232.[4]

Kimbrough's Affidavit, ¶¶ 4-6, quoting from his attached letter report, states further:

"My report states further in the "Closure" section:

'The neon sign found in the zone of the most severe damage at the fire scene was of faulty design and violated two important safety requirements of the National Electrical Code. As it was constructed, the subject sign would have presented a significant fire hazard.

* * *

The defective sign was located in and around the damage zone from the fire. That supports the notion that the neon sign caused the fire. However, because the current capacity of a neon sign transformer is so low, failures from neon signs often do not produce clear evidence such as heavy arcing damages, which could help pinpoint the exact failure location. Typically, evidence that arc tracking has occurred appears as fine etching patterns in insulation and wood. Finding the exact failure point of a neon sign becomes even harder when the sign h as been engulfed in the ensuing fire, such as in this case, because the etching patterns are easily burned away.

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[4] Copies of the provisions are produced in the Appendix for convenient reference obtained from an available later 2002 edition.

> To date, this investigator has not been able to find an exact failure point, which is not an unusual outcome when analyzing a fire damaged neon sign. Therefore, fully implicating the neon sign may require showing that all other potential causes have been eliminated; which may not be too difficult since the zone of damage was limited in extent. This investigator has not been to the fire scene, so it will be up to the scene investigator to complete the case. (Exhibit 3, Report, p. 6)'

5. In my review of the scene investigation Preliminary Report by Mr. Jacobsen, in the section "Comments, Conclusions & Recommendations," the following statement is noted:

> 'All potential cause from deliberate human involvement, intentional acts or arson were eliminated during the investigation.
>
> While there were numerous electrical circuits routed throughout the attic assembly that provided branch circuit supply to lighting fixtures, heating appliances and outlets, those components do not appear to be involved with the cause of the fire.
>
> * * *
>
> All negligent and intentional acts by the insured and/or his employees were eliminated during the investigation." (Robert "Jake" Jacobsen Affidavit, Exhibit 7, pp. 9-10)'

6. Assuming and relying on the accuracy of Mr. Jacobsen's elimination of other potential causes of the fire as the scene investigator, *it is my expert opinion that the cause of the fire was the defective wiring and installation of the subject neon sign as explained in my letter report attached and summarized above. There is simply no evidence of other electrical failure in the area of origin of the fire which has been identified as a potential cause; and other possible causes have been reasonably eliminated.*" (italics added)

R., Vol. II, pp. 214-15.

Michael C. Higgins, P.E., of Higgins and Associates, Inc., Morrison, CO, evaluated the duty of an electrical contractor or electrician which connects the primary building power connection to a defective appliance without ascertaining whether it complied with the NEC or was safe to do so. His Affidavit stating his expert opinions, and attaching his CV, written report,

and deposition testimony excerpts, is also supplied. R., Vol. II, pp. 143-211.

Higgins' Affidavit, ¶¶ 2-4, states:

"2. I performed a review of the 1996 National Electrical Code and State of Idaho Division of Building Safety Electrical Bureau Licensing Statutes regarding the electrical work conducted at the Taco Time Restaurant in Rexburg, Idaho for the 1998-1999 building remodel at the request of John Goodell, attorney for the Plaintiffs in this case. My findings and discussion are stated in my letter report dated October 30, 2006.

Attached as **Exhibit 3** is a true and correct copy of my letter report.

3. In summary, as indicated in my letter report, the electrician who energized the neon sign was in violation of the code by failing to inspect the fixture to ensure it was wired according to the National Electrical Code ("NEC").

4. It is my expert opinion that the electrician was in violation of the Idaho State Electrical Code by energizing the neon sign prior to inspecting the fixture for compliance with the NEC, and would be legally responsible for damages caused by his work."

R., Vol. II, p. 143.

Higgins relies in part on the following provision of the Idaho Administrative Code, Division of Building Safety, Rules of Electrical Licensing & Registration - General, imposing certain "duties" on an "electrical contractor," which provides in part:

"b. Those duties include assuring that all electrical work substantially complies with the National Electrical Code and other electrical installation laws and rules of the state, and that proper electrical safety procedures are followed; . . . ."

IDAPA 07.01.03.015.01(b).[5]

Higgins Affidavit, ¶ 5, further explains the basis for his expert opinions:

"My interpretation of the Idaho rules and law governing electricians, and the NEC which is also adopted governing by Idaho law, and *common sense*, all support the

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[5]A highlighted copy of the IDAPA provision relied on is included in the Appendix for convenient reference.

position that an electrician may hook up and/or energize an electrical circuit when he has done whatever is necessary to ensure that such can be done safely.

* * *

Thus, unlike a UL-approved and marked appliance situation, in this case a neon sign which was *not* UL-approved or marked was involved, which had been installed by someone else, namely, Sign Pro. In such *distinct and different* situations, and absent UL-approved listing or marking, which was lacking, before the neon sign was energized or hooked up to the building power supply, Leishman Electric's electrician needed to do whatever was necessary to determine that such could be done safely. Obviously, inspecting the neon sign was necessary and appropriate, or otherwise verifying that whoever had installed it was licensed, had a permit, or that an inspection had been done, none of which occurred.

Most simply, all Leishman Electric's electrician had to do was look over the parapet wall on the roof and examine the wiring, and remove the cover on the junction box to verify that the necessary ground fault protection device was present, which would have taken about five minutes. Such inspection would have readily determined the defective condition of the wiring and/or the lack of NEC-required ground fault protection device.

If Leishman Electric's electrician had taken any of these steps to determine that the neon sign was safe and in a condition such that the circuit line providing the building power could be energized and hooked up safely, he would have been able to readily determine that the neon sign was unsafe, presented a fire hazard, and that the building power branch circuit line should *not* be energized.

Furthermore, since Sign Pro had already installed the neon sign and completed its work *before* Leishman Electric's electrician hooked up and energized the circuit line, he was the last person who did the last step in the process by which the dangerous condition was finalized, i.e., hooking up and energizing the circuit line with the defective neon sign attached at the end. He was the last person who could have prevented the fire hazard being created by declining to energize the circuit line. He was also the only *licensed electrician* involved in energizing the circuit line thereby providing power to the defective sign. Sign Pro's employee, Mr. Packer, has testified that he specifically did *not* provide power to the neon sign *because* he was *not* a licensed electrician and knew that it was *not proper or legal* for him to do so. Again, that leaves Leishman Electric's electrician as the sole licensed person who subsequently came along and acted to do so." (italics original)

R., Vol. II, pp. 144-46.

Taco Time relies on the above expert witnesses and their respective opinions in establishing the origin and cause of the fire; the violations of the NEC; the unsafe conditions creating a fire hazard; and the duty and breach of duty by Leishman, as the electrical contractor, who admittedly connected the primary building power supply to the defective neon sign and obsolete transformer without bothering to inspect or determine whether it was safe to do so. Obviously, the subsequent large fire establishes beyond all reasonable doubt that its was not safe to do so. Taco Time's substantial damages sustained in the fire to the building and other property, loss of profits, and expenses for clean up, repairs, replacement, and reconstruction resulted which its seeks to recover against Leishman in this action.

ISSUES PRESENTED ON APPEAL

1. Did the district court err in granting summary judgment holding Taco Time's negligence claim is barred by the economic loss rule?
2. Is Taco Time entitled to amend its complaint and seek recovery of all damages against Leishman, without offset for the settlement monies recovered from Sign Pro?

ATTORNEY FEES ON APPEAL

Taco Time seeks an award of attorney fees on appeal based on I.C. § 12-121.

ARGUMENT

Taco Time contends the economic loss rule does not apply to bar its negligence claim against Leishman as a matter of law for several reasons and the summary judgment based thereon should be reversed as legal error. The rule does not apply where there is property damage to the defective chattel itself as a result of an accident, casualty event, disaster, or calamity. The rule

also does not apply where the negligence or a defective product causes damage to other property. The rule does not apply to bar recovery of economic loss which is parasitic to other property damage. The rule does not apply where a "special relationship" exists which should be recognized here.

The lower court also erred in concluding that the entire building remodel job was the "defective property which was the subject of the transaction" for purposes of the economic loss rule. Such misconstrues and misapplies the rule. Such is contrary to the undisputed facts establishing that the "defective property which was the subject of the transaction" was the neon sign and transformer, not the entire building.

The trial court also erred in denying Taco Time's motion to amend its complaint. If the summary judgment is reversed and the case remanded for trial, this Court should also direct the district court to allow filing of Taco Time's amended complaint. Taco Time is entitled to seek recovery of 100% of if its damages sustained in the fire, without offset for settlement monies recovered from Sign Pro.

I. STANDARD OF REVIEW

The standard of review on appeal of a ruling on a summary judgment motion is property stated as follows:

> "In reviewing a ruling on a summary judgment motion, this Court employs the same standard used by the district court. *Sprinkler Irrigation Co. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 695, 85 P.3d 667, 671 (2004). Summary judgment is appropriate 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' I.R.C.P. 56(c). This Court liberally construes all disputed facts in favor of the non-moving party and will draw all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Lockheed Martin Corp. v. Idaho State Tax Comm'n*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006)."

Heinze v. Bauer, 145 Idaho 232, 234-35, 178 P.3d 597 (2008).

The Supreme Court exercises free review in determining over questions of law. *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 188 P.3d 846 (2008), rehearing dismissed.

Whether the economic loss rule applies to bar any recovery by Taco Time, particularly where the facts are undisputed as here, is a question of law. *See, Clark v. International* Harvester, 99 Idaho 326,581 P.2d 784 (1978); *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978); *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987); *Duffin v. Idaho Crop Improvement Ass'n.*, 126 Idaho 1002, 895 P.2d 1198 (1995); *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999); *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2004); *Eliopulos v. Knox*, 123 Idaho 400, 848 P.2d 984 (Ct. App. 1992), *pet. for rev. denied* (1993); *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 99 P.3d 1092 (Ct. App. 2004).

II. THE ECONOMIC LOSS RULE DOES NOT APPLY

The economic loss rule does not apply in this case for several reasons.

A. The Economic Loss Rule Does Not Apply When An Accident, Casualty Event, Disaster, Or Calamitous Event Results In Property Damage To The Defective Chattel Itself Or Other Property

The economic loss rule does not apply where an accident, casualty event, disaster, or other calamitous event, caused by negligence or a defective product, results in property damage to the defective chattel itself, or damage to other property. In such circumstances, general tort rules apply which support an action for negligence or strict products liability.

The leading case in Idaho adopting the rule that purely economic losses are not recoverable in negligence is *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784

(1978). Damages for economic loss were described as "costs of repair and replacement of defective property which is the subject to the transaction, as well as commercial loss for inadequate value and consequential loss of profits." 99 Idaho at 332, note 4, citing *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975).

The Court emphasized several times the narrow economic loss issue presented:

> "In this action the plaintiffs seek to recover only [for] lost profits due to alleged 'down time' and the costs of repairing and replacing allegedly defective parts [footnote omitted]."

99 Idaho at 332.

Again, the distinction between purely economic loss versus actual property damage or personal injury was emphasized: "The plaintiffs do not seek recovery for property damages or personal injury." 99 Idaho at 332, note 4.

Again, just to make sure the reader does not fail to get the point, the Court distinguished cases involving actual property damage or personal injury from the pure economic loss issue presented in *Clark*, stating:

> "We first consider the assignment of error No. 4, which concerns the recovery of damages for economic loss in a negligence action, because, in our view, that is dispositive of the negligence issue. The specific question presented by this assignment of error is best demonstrated by distinguishing this case from those of our earlier and somewhat related cases. This case is not like *Shields v. Morton Chemical Co.*, 95 Idaho 674, 518 P.2d 857 (1974), in which the plaintiff sought damages for economic loss as a result of seeds which were damaged by the defendant's chemicals. *In the instant case, the plaintiffs have not alleged that their economic losses were the result of any property damage caused by the defendants*. This case is not like *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421 (1974), in which the plaintiff sought damages for profits lost as a result of personal injury." (italics added)

99 Idaho at 332.

In *Clark*, the Court quoted the following passage from Dean Prosser's treatise with

approval in support of the majority rule which disallows recovery of purely economic loss in a products liability action sounding in tort:

> "There can be no doubt that the seller's liability for negligence covers any kind of physical harm, including not only personal injuries, *but also property damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes, as well as damage to any other property in the vicinity.* But *where there is no accident, and no physical damage, and the only loss is a pecuniary one*, through loss of the value or use of the thing sold, or the cost of repairing it, the courts have adhered to the rule, to be encountered later, that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery." W. Prosser, Handbook on the Law of Torts, § 101 at 665 (4th ed. 1971)." (italics added)

99 Idaho at 333.

Similarly, in explaining the basis for its holding, the Court in *Clark* again drew a distinction between property damage or personal injury versus economic loss stating:

> "The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property. If the defendant fails to exercise such due care *it is of course liable for the resulting injury to person or property as well as other losses which naturally follow from that injury.* However, the law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. That is not to say that such a duty could not arise by a warranty – express or implied – by agreement of the parties or by representations of the defendant [footnote omitted], but the law of negligence imposes no such duty. Accordingly, the trial court erred in granting a judgment to the plaintiffs on their negligence count." (italics added)

99 Idaho at 336.

In *Clark,* the Court held that plaintiffs could not recover in negligence for economic loss relating to costs of repairing their tractor which frequently broke down or lost profits resulting from "down time." 99 Idaho at 332, 336. There was no accident, casualty event, or calamity. There was no personal injury. There was no damage to the chattel itself, i.e., the defective tractor at issue. There was no other property damage. Rather, plaintiff alleged only *pure* "economic

losses."

In *Clark*, the Court noted the legislature's action enacting the Uniform Commercial Code to protect the "economic expectations" of the parties to a purchase and sale transaction, declining to extend negligence law into such area. 99 Idaho at 336.

The same "UCC versus tort law" distinction and underlying policies and interests sought to be protected, and related distinction between pure economic loss versus actual property damage noted in *Clark,* were also discussed in the case of *Citizens Insurance Co. of America v. Proctor & Schwartz, Inc.*, 802 F.Supp 133 (West. Dist. Mich. 1992). *Citizens Insurance* is also a fire case. The fire was caused by defective machinery in a factory. The similarities are instructive here.

The court articulated a distinction expressed in terms of "disappointment" versus "disaster." A "disappointment" is economic loss for which recovery in tort is not permitted. On the other hand, a "disaster" is not an economic loss and recovery in tort is permitted. *Citizens Insurance*, citing *Neibarger v. Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 12 (1992), explains:

> "The *Neibarger* court thus recognized as critical the distinction between 'disappointment' and 'disaster.' *Id.*, p. 10, quoting from *S. M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1376 (9th Cir. 1978). Where economic loss and even other property damage is a natural, foreseeable result of the product's defect, the 'disappointed' commercial buyer is limited to his contract remedies [citations omitted] . . . However, where a product's defect results in a sudden calamitous event causing damage to other property, then a 'disaster,' remedial in tort has occurred. See, e.g., *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982)(clock wiring malfunction caused a fire resulting in other property damage)."

802 F.Supp. at 140. In *Clark*, this Court expressed similar policy considerations in its discussion of the UCC and tort law which provide different remedies. 99 Idaho at 334-36.

The *Citizens Insurance* court continued:

> "Applying this distinction to the instant case, it is clear that Citizens complains of damage that was not only sustained not only by property other than the defective product, but that was caused by a sudden calamitous event [footnote 2]. Such damages are the result not of disappointment with machinery that performed unsatisfactorily, but of a disaster, the fire, allegedly caused by the defective product. Viewing the facts in the light most favorable to the nonmoving party, and considering, pursuant to *Neibarger*, 'the underlying policies of tort and contract law as well as the nature of the damages,' it appears the losses caused by fire damage to property other than the defective product, are of the sort traditionally remediable in tort. Even though they are 'economic losses,' in the sense that they are assigned monetary values, thy are not the sort usual commercial losses that should naturally have been within the parties' contractual contemplation and that would therefore be remediable exclusively in contract [citation omitted]. They are not the sort of economic losses which 'necessarily result from the delivery of a product of poor quality' [quoting *Neibarger*, at p. 18 of slip opinion]. Recovery of such losses in tort is not barred by the economic loss doctrine."

802 F.Supp. at 140-41.

The above *Citizens Insurance* rationale and "disappointment" versus "disaster"distinction are fully consistent with the Idaho Supreme Court's case law in *Clark* and its progeny concerning the scope and application of the economic loss rule in Idaho.

In the instant case, the fire is unquestionably an accident or casualty event as contemplated by *Clark*'s quote of Dean Prosser stated above. Such a large fire is also clearly a "disaster" or "calamitous event" in the terminology of the *Citizens Insurance* and *Neibarger* courts. Therefore, damages to the defective chattel itself (i.e., the defective sign and transformer), and to other property (i.e., the building, equipment, appliances, inventory, other personal property and contents, expenses of clean up, repair, etc.), are remediable in negligence. Idaho's case law has long so recognized. There is nothing new or novel about it.

Overwhelming authority from other jurisdictions is to the same effect. For example, in an

asbestos case, the South Carolina Supreme Court rejected application of the economic loss rule and allowed potential recovery for the costs or inspection, testing and removal of the asbestos because the plaintiff had alleged and offered proof of other property damage. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 396 S.E.2d 369 (S.C. 1990). The South Carolina court explained:

> The sole issue which needs to be addressed here is whether the economic loss rule applies when a plaintiff claims and proves "other property damage". We held in *Kennedy* that the rule does not apply where other property damage is proven. 299 S.C. at 341, 384 S.E.2d at 734. In addition, we agree with and adopt the reasoning of the recent District Court decision in *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559 (D.S.C. 1986), aff'd 827 F.2d 975 (4th Cir. 1987). In *W.R. Grace*, an asbestos case, the District Court held that the economic loss rule does not preclude an action in tort for damages sustained where a defendant's product caused damage to other property of the plaintiff. We therefore need only follow *Kennedy* and *W.R. Grace* in order to dispose of Gypsum's argument here, since Kershaw has alleged and offered proof of other property damage. *See also Town of Hooksett School District v. W.R. Grace & Co.*, 617 F. Supp. 126 (D.N.H. 1984); *Cinnaminson Twp. Board of Education v. U.S. Gypsum Co.*, 552 F. Supp. 855 (D.N.J. 1982). Accordingly, we affirm the trial judge's refusal of Gypsum's motion for a direct verdict on the negligence cause of action.

Id. at 371 & fn.1. *See also, Koch v. Hicks (In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.)*, 457 F. Supp. 2d 298, 317-318 (S.D.N.Y. 2006) ("The economic loss rule, however, does not always bar the recovery of economic losses in a negligence case. . . . The economic loss rule does not bar plaintiffs' negligence or strict liability claims because plaintiffs have also alleged personal injury and property damage.")(Maryland law); *Aldrich v. ADD Inc.*, 437 Mass. 213, 222, 770 N.E.2d 1283 (Mass. 2002) ("It has been a long-standing rule in this Commonwealth, in accordance with the majority of jurisdictions that have considered this issue, that purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage."); *Carstens v. City of Phoenix*, 75 P.3d 1081, 1084 (Ariz. Ct. App.

2003) ("In Arizona, it is well-established that a homeowner may not recover in tort against a contractor for economic losses attributable to defective construction when the negligence has not caused personal injury or damage to property other than the defective structure itself."); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103 (Tex. App. Houston 14th Dist. 2000) ("Under the economic loss rule, economic damages are not recoverable unless they are accompanied by actual physical harm to persons or their property."); *N. Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 777 & fn.8 (Cal. App. 2d Dist. 1997)("The economic loss rule has been applied to bar a plaintiff's tort recovery of economic damages unless such damages are accompanied by some form of physical harm."); *American Towers Owners Ass'n v. CCI Mech.*, 930 P.2d 1182, 1189 (Utah 1996) ("Economic loss is defined as: Damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits – without any claim of personal injury or damage to other property . . . In other words, economic damages are not recoverable in negligence absent physical property damage or bodily injury."); *Holloman v. D.R. Horton*, 524 S.E.2d 790, 796 (Ga. Ct. App. 1999)("The economic loss rule provides that absent personal injury or damage to property other than to the allegedly defective product itself an action in negligence does not lie and any such cause of action may be brought only as a contract warranty action.").

The *Citizens Insurance*, *supra*, p. 140, footnote 2, discussed above, describes the damages sustained in the fire there: stock loss over $33,000; extra expenses over $186,000; building damages over $102,000; personal property loss over $399,000; and recent extra expense payment over $32,000.

The various items of damages sustained by Taco Time in the large building fire are

comparable to those damages sustained in the large building fire in the *Citizens Insurance* case. The fire resulted in damage to the defective chattel itself, i.e., the defective neon sign and transformer. The fire resulted in substantial damage to other property as well, including the building, fixtures, equipment, appliances, inventory, other personal property and contents located therein. Such physical property damages exceed $200,000. Such extensive damage to the building and other property is inherent in a large building fire such as occurred.

Even the district court found there was other property damage to parts of the building not involved with the remodel project, initially ruling such damages were recoverable and not barred by the economic loss rule. R., Vol. I, p. 102. Such finding acknowledging other property damage exists necessarily suggests the conclusion that the economic loss rule does not apply *at all*. The district court's "half a loaf" ruling of a "partial bar" evidences a lack of understanding of the rule's proper application, or some effort to compromise. On reconsideration, the error was pushed even further, ruling the economic loss rule a complete bar. Such legal errors are not surprising given the district court's indication of serious confusion and uncertainty with the economic loss rule for many years. Tr., p. 20, ll. 17-22.

B. The Economic Loss Rule Does Not Apply Where There Is Economic Loss "Parasitic" To Personal Injury Or Property Damage

The district court also failed to acknowledge the parasitic exception to the economic loss rule, or why it did not apply, to avoid summary judgment. The district court's failure to address it further evidences its lack of understanding of the scope or proper applications of the economic loss rule.

It is well settled in Idaho that "economic loss is recoverable in tort as a loss parasitic to an

injury to person or property." *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1007, 895 P.2d 1195 (1995); *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978); *C&S Hamilton Hay, LLC, v. CNH Amer., LLC*, 2008 U.S. Dist. Lexis 13151 (D. Idaho, filed Feb. 21, 2008)(Idaho law applied in diversity case). The effect of the "parasitic" loss exception is to allow recovery of all damages, including economic loss.

For example, in *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997 (1978), the Court explained:

> "This case in which the plaintiff seeks recovery for purely economic losses without alleging any attending personal injury or property damage must be distinguished from cases involving the recovery of economic losses which are parasitic to an injury to person or property. It is well established that in the latter case economic losses are recoverable in a negligence action. Restatement (Second) of Torts, § 766C, comment b, and illustration 5 (Tent. Draft No. 23, 1977). *See, e.g.*, Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974)(loss of profits resulting from personal injury); *Shields v. Morton Chemical Co.*, 95 Idaho 674, 518 P.2d 857 (1974)(loss of profits resulting from damaged seed beans)."

99 Idaho at 468, note 1.

Thus, where the negligence or a defective product causes injury to person or property, the economic loss rule no longer applies, and all damages, including the economic losses, are fully recoverable. *C&S Hamilton,* at 5-9; *see also, Clark v. International Harvester Co.*, 99 Idaho 326, 333 (1978).

In *Clark*, there was no personal injury or other property damage. There was no damage to the tractor, which was the alleged defective product itself. Rather, the plaintiff merely complained that his tractor didn't operate as efficiently as it should, resulting in lost profits and other economic losses. The plaintiff was merely "disappointed" that the tractor did not perform up to his higher expectations. The Court held that the economic loss rule barred recovery in tort.

The opposite result is illustrated by the Idaho federal court case in *C&S Hamilton Hay, LLC v. CNH America, LLC, 2008 U.S. Dist. LEXIS 13151* (February 21, 2008). The Court held that the economic loss rule did not prevent Plaintiff from recovering the full value of a three year old quad track tractor even though the tractor was destroyed by fire caused by its own allegedly defective design. Applying the parasitic loss rule articulated in *Duffin* and Prosser's explanation approved in *Clark*, the federal court concluded that because the tractor fire also destroyed other detachable implements, there was other property damage; therefore all damages were recoverable, including the cost of replacement of the defective tractor itself.

Here, as discussed above, Taco Time sustained other property damage to the building and contents from the large building fire accident. Therefore, its "economic losses" of $75,000+ in lost profits and cost of replacement of the defective neon sign and transformer is recoverable under the parasitic exception to the economic loss rule.

C. The "Special Relationship" Exception Applies

Taco Time submits that the "special relationship" exception to the economic loss rule applies where Leishman was a licensed electrical contractor; held itself out to the public to have special expertise in electrical matters; and was bound by law to follow the NEC in performing its electrical work. This appears to be an issue of first impression raised to a licensed quasi-professional in this context.

In *Blahd*, the Court stated:

> "[A]n exception to the economic loss rule is applicable in cases involving a 'special relationship' between the parties." *Duffin v. Idaho Crop Improvement Assoc.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995)(quoting *Just's, Inc. v. Arrington Constr. Co., Inc.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978)).

> The term "special relationship," ... refers to those 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, 126 Idaho at 1008, 895 P.2d at 1201. There are only two situations in which this Court has found the special relationship exception applies. One situation is where a professional or quasi-professional performs personal services. *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976). In *McAlvain*, an insured expressly requested his insurance agent provide complete insurance coverage on the insured's business inventory. The insurance agent knew or should have known the amount of insurance that was needed to completely cover the value of the inventory. A fire destroyed the inventory and the insurance coverage was insufficient to cover the loss. This Court held:

> When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.

Id. at 780, 554 P.2d at 958.

The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201."

141 Idaho at 301.

Here, Leishman was a licensed electrical contractor. Scott Leishman was a long time licensed journeyman electrician. Leishman held itself out to the public as having special expertise by reason of its licensing to safely perform electrical work. Leishman was bound to perform electrical work in conformity with the NEC, adopted as the law in Idaho (I.C. §§ 54-1001 and 54-1003A), and related licensing rules and regulations (IDAPA 07.01.03.015.01(b)).

Under these circumstances, recognizing a "special relationship" in furtherance of public safety that electrical work is performed safely, and in accordance with such laws and regulations,

is well supported by the legal framework and public policy.

D. The "Defective Property" Which Started The Fire Was The Defective Neon Sign and Obsolete Transformer, and the "Transaction" They Were the "Subject Of" Was the Contract With Sign Pro, Not The Entire Building Remodel Contract With The General Contractor

The undisputed facts establish that the "defective property which was the subject of the transaction" is the defective neon sign which lacked proper ground wiring and the obsolete transformer which lacked the secondary ground protection safety feature. The undisputed facts establish that the neon sign and transformer were the "subject of the transaction" between Taco Time and Sign Pro.

The undisputed facts establish that the neon sign and transformer were <u>not</u> part of the remodel contract between Taco Time and the general contractor.

Clearly, two separate and distinct contracts or "transactions" are evidenced, which is undisputed.

Instead of recognizing the two separate and distinct contracts or "transactions," the district court in effect "lumps" them together by observing that "the signs were installed as 'part of the remodel project.' " R., Vol. I, pp. 100, 101; R. Vol., II, p. 304.

From this characterization, the district court's first decision concludes that "the economic loss rule bars any negligence claims asserted against Leishman Electric, except for property damage not involved with the remodel project." R., Vol. I, p. 102. The first ruling partially barred Taco Time's claims.

The district court's expanded ruling in its second decision concludes it was the *entire* "restaurant/building . . . 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 than that which is the subject of the transaction. . . .' [citations omitted]" (R., Vol. II, p. 304). The latest ruling completely bars Taco Time's claims.

The court appears to have decided that because the neon sign was installed at the same time as the building remodel that they were all one "transaction" for purposes of the "economic loss rule." Clearly, they were not.

The mere fact that the remodel contract and separate neon sign and transformer installation contract were ongoing *at the same time* does not make them one and the same "transaction" for purposes of the economic loss rule. The separate nature of their transactions remains unaffected by such temporal consideration. It is also not logical or apparent why two separate transactions having different subjects cannot be ongoing at the same time. Clearly, such was the case here.

The building remodel contract and separate and distinct neon sign and transformer installation contract were not an "integrated whole" "transaction." The court erred in so concluding. Specifically, the court's first decision emphasizes that the "signs were installed as 'part of the remodel project,' " while also noting "albeit Sign Pro was hired independently to actually install the signs." R., Vol. I, p. 101. The court's final decision refers to the "various components of the remodeling, including the 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" (italics added)(R., Vol. II, p. 304).

These observations merely state the obvious results of construction when completed. Such would be true of any construction project, i.e., there is a complete building. Physically incorporating material as part of a building does not identify the "transaction" source. The Court confuses the physical construction results with the "transaction" which caused the work to be done. Clearly these are different matters.

Thus, the first relevant question is: "What is the defective property?" The answer is: "The only defective property involved in this case is the neon sign and transformer."

The next relevant questions is: "What transaction was the defective property the subject of?" The answer is: "The agreement between Taco Time and Sign Pro to install the neon sign and transformer." It is undisputed that the neon sign and transformer installation was not part of the remodel agreement. Scott Leishman Deposition, p. 14, l. 14 to p. 15, l. 4 (R., Vol. I, p. 88); Bron Leishman Deposition, p. 12, l. 14 to p. 13, l. 3 (*Id.*, p. 13). If it had been, there would never have been an agreement made between Taco Time and Sign Pro for its installation.

The next relevant question is: "Were the neon sign and transformer and the building remodel part of a single transaction?" The answer is: "No, they are two separate transactions, made at different times, between different parties, having different and distinct subject matters."

The court's reliance on *Tusch Enters.* and *Blahd* to support its flawed "integrated whole" reasoning is misplaced.

In *Tusch Enterprises*, a seller hired a contractor to level a hill to prepare the area for construction. The seller participated in the site preparation, hired a builder to construct a duplex on the site and sold the duplex to a buyer. The buyer purchased the building and lot as an 'integrated whole' then discovered the duplex was damaged because the foundation was

defective. The buyer sued the seller and the builder alleging negligence in preparing the foundation. The Court held the economic loss rule barred the negligence claims because the damage to the duplex caused by the defective foundation was purely economic. *Tusch Enters.*, 113 Idaho at 41; *see also*, *Blahd*, 141 Idaho at 300.

In *Blahd*, the buyers of a house which was settling, causing damage to the house, brought suit against several entities, including the developer of the subdivision and two engineering firms. Blahds alleged that the subject of the transaction was the improperly filled and compacted lot, not the house later constructed on the lot. The defendants argued the house and lot must be considered an integrated whole and any damage to the house is purely economic because both the house and the lot were the subject of the transaction. The Court agreed stating: "The Blads purchased the house and lot as an integrated whole" 141 Idaho at 301. Further, the court concluded this was identical to the situation in *Tush Enters.*, stating: "Like the leveled lot and duplex in *Tusch Enters.*, the subject of the transaction in this case is both the lot and the house." *Id.* Thus, damages to the house were purely economic and Blahds' negligence claim was barred by the economic loss rule.

The "integrated whole" concept as articulated in *Tusch Enters.* and *Blahd* dealt with an entirely newly built duplex or house, which were then purchased by a buyer as a completed project, which suffered damage from settling of the foundation. As such, both the lot and building in each case, as an "integrated whole," i.e. a final and complete project, were the "subject of the single transaction" for purchase and sale of the property between the parties.

In addition, the *timing* of the construction of the duplex and house, on their respective lots, were done as part of the overall construction of the new and complete residences by the

same actors, and *before* they were sold to the buyers in each case. Thus, from the buyers' viewpoint, at the time of purchase, the lot and residences built thereon were at that point an "integrated whole." The construction was complete.

Here, unlike *Tusch Enters.* and *Blahd*, the damage to Taco Time's building and property were *not* part of a "transaction" which was an "integrated whole." Here, Plaintiff already owned the building. One contract was made with the general contractor for remodeling. A separate contract was made with Sign Pro for the neon sign and transformer installation. The instant case involves a remodel of an older existing building. The "subject of the transaction" of each contract were different. There was no transaction which was an "integrated whole" which incorporated both of them.

Finally, the fact that Leishman performed *services* on the remodel contract and connected the primary building power to energize the neon sign and transformer is immaterial. Idaho case law rejects determining the "subject of the transaction" based on services provided.

In *Blahd,* the Court explained its prior decision in *Tusch Enters.*, stating that the duplex was the subject of the transaction, not its construction, although it was the alleged negligent leveling of the site which caused the settling and damage to the duplex. 141 Idaho at 300, citing its explanation later made in *Ramerth v. Hart*, 133 Idaho at 197.

Similarly, in *Ramerth v. Hart*, 133 Idaho 194, 983 P.2d 848 (1999), the Court determined that the subject of the transaction was the airplane, not the mechanic's services of inspecting and repairing the airplane even though his alleged negligent services were the cause of the damage.

Where the property determines the subject of the transaction, not the involvement of any particular persons or services rendered, the relevant inquiry is thus whether two separate items of

property were acquired as an "integrated whole" in one single transaction. *Blahd*, 141 Idaho at 300-01. The building remodel contract and neon sign and transformer installation contract were clearly distinct and separate transactions, occurring at different times, between different persons, not one single transaction. They were not purchased or entered by Taco Time as one single transaction. They were not previously completed and existing before Taco Time acquired the building. The "integrated whole" concept does not apply. The district court's reliance on such concept is misplaced. The case law recognizing the concept does not apply to this case. Rather, the correct economic loss analysis identifies the only neon sign and transformer as the defective property. Such property was the "subject of" the "transaction" between Sign Pro and Taco Time. Such property was not the "subject of" any "transaction" between Taco Time and the general contractor. The economic loss rule does not apply.

III. TACO TIME IS ENTITLED TO AMEND ITS COMPLAINT TO SEEK RECOVERY OF ITS FULL DAMAGES AGAINST LEISHMAN WITHOUT OFFSET FOR SETTLEMENT MONIES RECOVERED FROM SIGN PRO

On remand, Taco Time's motion to file the proposed amended complaint should be ordered allowed and the district court's prior order denying the amendment reversed. Taco Time is entitled to pursue 100% of its damages sustained in the fire against Leishman, without offset for settlement monies recovered from Sign Pro.

Leave to amend a pleading "shall be freely given when justice so requires." IRCP 15(a). Idaho courts have long held that "in the interest of justice, district courts should favor liberal grants of leave to amend a complaint." *Hines v. Hines*, 129 Idaho 847, 853 (1997); *Wickstrom v. North Idaho College*, 111 Idaho 450 (1986).

Regarding joint and several liability, I.C. § 6-803(3) states, in pertinent part:

" . . . joint and several liability is hereby limited to causes of action listed in subsection (5) of this section. . ."

Idaho Code § 6-803(5) states:

"A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act."

Taco Time's original Complaint, ¶ 26, alleged "Sign Pro and Leishman Electric are jointly and severally liable" to Taco Time. R., Vol. I, p. 13. This allegation is factually incorrect.

Discovery since conducted clearly establishes that Leishman and Sign Pro were clearly *not* "acting in concert" or as "agent or servant" for one another. Scott Leishman and Bron Leishman each admit in their deposition testimony that they did not "interact with" or "talk to" anyone from Sign Pro to communicate or coordinate anything relating to installation of the neon signs or connecting them to the primary building power. Scott Leishman Deposition, p. 13, ll. 5-6; Bron Leishman Deposition, p. 13, ll. 21-22 (R., Vol. I, pp. 88, 93). No "joint and several liability exists. Accordingly, Taco Time should be allowed to file its First Amended Complaint to delete the "joint and several liability" allegation.

Where joint and several liability does not exist, then I.C. § 6-805(2) applies. It provides:

"A release by the injured person of one (1) or more tortfeasors who are not jointly and severally liable to the injured person, whether before or after judgment, does not discharge another tortfeasor or reduce the claim against another tortfeasor *unless the release so provides* and the negligence or comparative responsibility of the tortfeasor receiving the release is presented to and considered by the finder of fact, whether or not the finder of fact apportions responsibility to the tortfeasor receiving the release." (italics added)

In *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 235, 141 P.3d, 1099, 1104 (2006), construing

I.C. § 6-805(2), the Court held that plaintiffs' settlement with one tortfeasor, Home Depot, in no way discharged or reduced the claim against any other tortfeasors. It affirmed the district court's judgment against Sani-Top without an offset for settlement monies recovered from Home Depot. *Id.*

Taco Time's original Complaint, ¶¶ 30-31, alleges only one-half the total principal damages are recoverable against Leishman, with an offset for settlement monies recovered from Sign Pro. R., Vol. I, p. 14. Under I.C. § 6-805(2) and *Sani-Top*, no offset is owed. Taco Time's proposed amended complaint, ¶ 27, alleges that the full amount of damages, without offset for settlement monies recovered from Sign Pro. R., Vol. II, p. 296.

IV. APPELLANT SEEKS AWARD OF ATTORNEY FEES ON APPEAL

Appellant Taco Time requests this Court's award of attorney fees on appeal based on I.C. § 12-121. For reasons discussed above, the economic loss rule clearly does not apply. This Court's prior well-settled case law discussed above does not support the economic loss defense. Leishman's defense and motion for summary judgment based on it is without reasonable foundation in law or fact and frivolous. Although the district court was so persuaded, its confusion and uncertainty over the economic loss rule is well evidenced.

CONCLUSION

Based on the foregoing and entire record herein, Taco Time respectfully requests this Court's decision reversing the summary judgment entered below based on the economic loss rule, which does not apply, and remanding for trial; reversing the order denying Taco Time leave to file its amended complaint and directing that such shall be allowed on remand; and awarding Taco Time costs and fees on appeal.

Respectfully submitted this 30th day of July 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By: John R. Goodell
JOHN R. GOODELL
Attorneys for Plaintiff-Appellant Brian and Christie, Inc., d/b/a Taco Time

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of July, 2009, I served two (2) true and correct copies of the above and foregoing document to the following person(s) by regular U.S. Mail:

Gary L. Cooper
COOPER & LARSEN, CHARTERED
151 N. 3rd Ave., Ste. 210
P. O. Box 4229
Pocatello, ID 83205-4229

John R. Goodell
JOHN R. GOODELL

APPENDIX

IDAPA 07.01.03.015

IDAHO ADMINISTRATIVE CODE

*** THIS DOCUMENT IS CURRENT THROUGH JULY 1, 2007 ***

IDAPA 07: DIVISION OF BUILDING SAFETY
TITLE 01
CHAPTER 03: RULES OF ELECTRICAL LICENSING AND REGISTRATION - GENERAL
DIVISION OF BUILDING SAFETY

IDAPA 07.01.03.015 (2007)

015. ELECTRICAL CONTRACTOR.

01. Qualifications for Electrical Contractor. Effective Date: (4-7-91)

a. Except as hereinafter provided, any person, partnership, company, firm, association, or corporation

shall be eligible to apply for an electrical contractor license upon the condition that such applicant shall have at least one (1) full-time employee who holds a valid master electrician license or journeyman electrician license issued by the Electrical Bureau, and has held a valid journeyman electrician's license for a period of not less than two (2) years, during which time he was actively employed as a journeyman electrician for a minimum of four thousand (4,000) hours, and who will be responsible for supervision of electrical installations made by said company, firm, association, or corporation as provided by Section 54-1010, Idaho Code. An individual electrical contractor may act as his own supervising journeyman electrician upon the condition that he holds a valid master electrician license or journeyman electrician license issued by the Electrical Bureau, and has held a valid journeyman electrician's license for a period of not less than two (2) years, during which time he was actively employed as a journeyman electrician for a minimum of four thousand (4,000) hours. The supervising journeyman electrician shall be available during working hours to carry out the duties of supervising journeymen, as set forth herein. Effective Date: (4-5-00)

b. Those duties include assuring that all electrical work substantially complies with the National Electrical Code and other electrical installation laws and rules of the state, and that proper electrical safety procedures are followed; assuring that all electrical labels, permits, and licenses required to perform electrical work are used; assuring compliance with correction notices issued by the Bureau; and any person designated under Subsection 015.01.a., and the contractor he represents, shall each notify the Bureau in writing if the supervising journeyman's working relationship with the contractor has been terminated. Each notice must be filed with the Bureau within ten (10) days of the date of termination. If the supervising journeyman's relationship with the contractor is terminated, the contractor's license is void within ninety (90) days unless another supervising journeyman is qualified by the Bureau. Effective Date: (7-27-94)

02. Required Signatures on Application. An application for an electrical contractor license shall be signed by the applicant or by the official representative of the partnership, company, firm, association, or corporation making the application. The application shall be countersigned by the supervising journeyman electrician. Effective Date: (4-1-91)

03. Electrical Contracting Work Defined. An electrical contractor license issued by the Division of Building Safety must be obtained prior to acting or attempting to act as an electrical contractor in Idaho. Effective Date: (4-5-00)

a. Electrical contracting work includes electrical maintenance or repair work, in addition to new electrical installations, unless such work is expressly exempted by Section 54-1016, Idaho Code. Effective Date: (4-5-00)

b. Any person or entity providing or offering to provide electrical contracting services, including, but not limited to, submitting a bid shall be considered as acting or attempting to act as an electrical contractor and shall be required to be licensed. Effective Date: (4-5-00)

c. Any person or entity, not otherwise exempt, who performs or offers to perform electrical contracting work, is acting as an electrical contractor, whether or not any compensation is received. Effective Date: (4-5-00)

04. Previous Revocation. Any applicant for an electrical contractor license who has previously had his electrical contractor license revoked for cause, as provided by Section 54-1009, Idaho Code, shall be considered as unfit and

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Table 250.3 *Continued*

Conductor/Equipment	Article	Section
Switchboards and panelboards		408.3(D)
Switches		404.12
Theaters, audience areas of motion picture and television studios, and similar locations		520.81
Transformers and transformer vaults		450.10
Use and identification of grounded conductors	200	
X-ray equipment	660	517.78

250.4 General Requirements for Grounding and Bonding. The following general requirements identify what grounding and bonding of electrical systems are required to accomplish. The prescriptive methods contained in Article 250 shall be followed to comply with the performance requirements of this section.

(A) Grounded Systems.

(1) **Electrical System Grounding.** Electrical systems that are grounded shall be connected to earth in a manner that will limit the voltage imposed by lightning, line surges, or unintentional contact with higher-voltage lines and that will stabilize the voltage to earth during normal operation.

(2) **Grounding of Electrical Equipment.** Non–current-carrying conductive materials enclosing electrical conductors or equipment, or forming part of such equipment, shall be connected to earth so as to limit the voltage to ground on these materials.

(3) **Bonding of Electrical Equipment.** Non–current-carrying conductive materials enclosing electrical conductors or equipment, or forming part of such equipment, shall be connected together and to the electrical supply source in a manner that establishes an effective ground-fault current path.

(4) **Bonding of Electrically Conductive Materials and Other Equipment.** Electrically conductive materials that are likely to become energized shall be connected togerher and to the electrical supply source in a manner that establishes an effective ground-fault current path.

(5) **Effective Ground-Fault Current Path.** Electrical equipment and wiring and other electrically conductive material likely to become energized shall be installed in a manner that creates a permanent, low-impedance circuit capable of safely carrying the maximum ground-fault current likely to be imposed on it from any point on the wiring system where a ground fault may occur to the electrical supply source. The earth shall not be used as the sole equipment grounding conductor or effective ground-fault current path.

(B) Ungrounded Systems.

(1) **Grounding Electrical Equipment.** Non–current-carrying conductive materials enclosing electrical conductors or equipment, or forming part of such equipment, shall be connected to earth in a manner that will limit the voltage imposed by lightning or unintentional contact with higher-voltage lines and limit the voltage to ground on these materials.

(2) **Bonding of Electrical Equipment.** Non–current-carrying conductive materials enclosing electrical conductors or equipment, or forming part of such equipment, shall be connected together and to the supply system grounded equipment in a manner that creates a permanent, low-impedance path for ground-fault current that is capable of carrying the maximum fault current likely to be imposed on it.

(3) **Bonding of Electrically Conductive Materials and Other Equipment.** Electrically conductive materials that are likely to become energized shall be connected together and to the supply system grounded equipment in a manner that creates a permanent, low-impedance path for ground-fault current that is capable of carrying the maximum fault current likely to be imposed on it.

(4) **Path for Fault Current.** Electrical equipment, wiring, and other electrically conductive material likely to become energized shall be installed in a manner that creates a permanent, low-impedance circuit from any point on the wiring system to the electrical supply source to facilitate the operation of overcurrent devices should a second fault occur on the wiring system. The earth shall not be used as the sole equipment grounding conductor or effective fault-current path.

FPN No. 1: A second fault that occurs through the equipment enclosures and bonding is considered a ground fault.

FPN No. 2: See Figure 250.4 for information on the organization of Article 250.

250.6 Objectionable Current over Grounding Conductors.

(A) Arrangement to Prevent Objectionable Current. The grounding of electrical systems, circuit conductors, surge arresters, and conductive non–current-carrying materials and equipment shall be installed and arranged in a manner that will prevent objectionable current over the grounding conductors or grounding paths.

(C) Adjacent to Combustible Materials. Signs and outline lighting systems shall be installed so that adjacent combustible materials are not subjected to temperatures in excess of 90°C (194°F).

The spacing between wood or other combustible materials and an incandescent or HID lamp or lampholder shall not be less than 50 mm (2 in.).

(D) Wet Location. Signs and outline lighting system equipment for wet location use, other than listed watertight type, shall be weatherproof and have drain holes, as necessary, in accordance with the following:

(1) Drain holes shall not be larger than 13 mm (½ in.) or smaller than 6 mm (¼ in.).
(2) Every low point or isolated section of the equipment shall have at least one drain hole.
(3) Drain holes shall be positioned such that there will be no external obstructions.

600.10 Portable or Mobile Signs.

(A) Support. Portable or mobile signs shall be adequately supported and readily movable without the use of tools.

(B) Attachment Plug. An attachment plug shall be provided for each portable or mobile sign.

(C) Wet or Damp Location. Portable or mobile signs in wet or damp locations shall comply with 600.10(C)(1) and (C)(2).

(1) Cords. All cords shall be junior hard service or hard service types as designated in Table 400.4 and have an equipment grounding conductor.

(2) Ground-Fault Circuit Interrupter. Portable or mobile signs shall be provided with factory-installed ground-fault circuit-interrupter protection for personnel. The ground-fault circuit interrupter shall be an integral part of the attachment plug or shall be located in the power-supply cord within 300 mm (12 in.) of the attachment plug.

(D) Dry Location. Portable or mobile signs in dry locations shall meet the following:

(1) Cords shall be SP-2, SPE-2, SPT-2, or heavier, as designated in Table 400.4.
(2) The cord shall not exceed 4.5 m (15 ft) in length.

600.21 Ballasts, Transformers, and Electronic Power Supplies.

(A) Accessibility. Ballasts, transformers, and electronic power supplies shall be located where accessible and shall be securely fastened in place.

(B) Location. Ballasts, transformers, and electronic power supplies shall be installed as near to the lamps or neon tubing as practicable to keep the secondary conductors as short as possible.

(C) Wet Location. Ballasts, transformers, and electronic power supplies used in wet locations shall be of the weatherproof type or be of the outdoor type and protected from the weather by placement in a sign body or separate enclosure.

(D) Working Space. A working space at least 900 mm (3 ft) high, 900 mm (3 ft) wide, by 900 mm (3 ft) deep shall be provided at each ballast, transformer, and electronic power supply or its enclosure where not installed in a sign.

(E) Attic and Soffit Locations. Ballasts, transformers, and electronic power supplies shall be permitted to be located in attics and soffits, provided there is an access door at least 900 mm by 600 mm (3 ft by 2 ft) and a passageway of at least 900 mm (3 ft) high by 600 mm (2 ft) wide with a suitable permanent walkway at least 300 mm (12 in.) wide extending from the point of entry to each component.

(F) Suspended Ceilings. Ballasts, transformers, and electronic power supplies shall be permitted to be located above suspended ceilings, provided their enclosures are securely fastened in place and not dependent on the suspended ceiling grid for support. Ballasts, transformers, and electronic power supplies installed in suspended ceilings shall not be connected to the branch circuit by flexible cord.

600.22 Ballasts.

(A) Type. Ballasts shall be identified for the use and shall be listed.

(B) Thermal Protection. Ballasts shall be thermally protected.

600.23 Transformers and Electronic Power Supplies.

(A) Type. Transformers and electronic power supplies shall be identified for the use and shall be listed.

(B) Secondary-Circuit Ground-Fault Protection. Transformers and electronic power supplies other than the following shall have secondary-circuit ground-fault protection:

(1) Transformers with isolated ungrounded secondaries and with a maximum open circuit voltage of 7500 volts or less
(2) Transformers with integral porcelain or glass secondary housing for the neon tubing and requiring no field wiring of the secondary circuit

(C) Voltage. Secondary-circuit voltage shall not exceed 15,000 volts, nominal, under any load condition. The voltage to ground of any output terminals of the secondary circuit shall not exceed 7500 volts, under any load condition.

(D) Rating. Transformers and electronic power supplies shall have a secondary-circuit current rating of not more than 300 mA.

(E) Secondary Connections. Secondary circuit outputs shall not be connected in parallel or in series.

(F) Marking. A transformer or power supply shall be marked to indicate that it has secondary-circuit ground-fault protection.

II. Field-Installed Skeleton Tubing

600.30 Applicability. Part II of this article shall apply only to field-installed skeleton tubing. These requirements are in addition to the requirements of Part I.

600.31 Neon Secondary-Circuit Conductors, 1000 Volts or Less, Nominal.

(A) Wiring Method. Conductors shall be installed using any wiring method included in Chapter 3 suitable for the conditions.

(B) Insulation and Size. Conductors shall be insulated, listed for the purpose, and not smaller than 18 AWG.

(C) Number of Conductors in Raceway. The number of conductors in a raceway shall be in accordance with Table 1 of Chapter 9.

(D) Installation. Conductors shall be installed so they are not subject to physical damage.

(E) Protection of Leads. Bushings shall be used to protect wires passing through an opening in metal.

600.32 Neon Secondary Circuit Conductors, Over 1000 Volts, Nominal.

(A) Wiring Methods.

(1) Installation. Conductors shall be installed on insulators, in rigid metal conduit, intermediate metal conduit, rigid nonmetallic conduit, liquidtight flexible nonmetallic conduit, flexible metal conduit, liquidtight flexible metal conduit, electrical metallic tubing, metal enclosures, or other equipment listed for the purpose and shall be installed in accordance with the requirements of Chapter 3.

(2) Number of Conductors. Conduit or tubing shall contain only one conductor.

(3) Size. Conduit or tubing shall be a minimum of metric designator 16 (trade size ½).

(4) Spacing from Ground. Other than at the location of connection to a metal enclosure or sign body, nonmetallic conduit or flexible nonmetallic conduit shall be spaced no less than 38 mm (1½ in.) from grounded or bonded parts when the conduit contains a conductor operating at 100 Hz or less and shall be spaced no less than 45 mm (1¾ in.) from grounded or bonded parts when the conduit contains a conductor operating at more than 100 Hz.

(5) Metal Building Parts. Metal parts of a building shall not be permitted as a secondary return conductor or an equipment grounding conductor.

(B) Insulation and Size. Conductors shall be insulated, listed as Gas Tube Sign and Ignition Cable Type GTO, rated for 5, 10, or 15 kV, not smaller than 18 AWG, and have a minimum temperature rating of 105°C (221°F).

(C) Installation. Conductors shall be installed so they are not subject to physical damage.

(D) Bends in Conductors. Sharp bends in insulated conductors shall be avoided.

(E) Spacing. Secondary conductors shall be separated from each other and from all objects other than insulators or neon tubing by a spacing of not less than 38 mm (1½ in.). GTO cable installed in metal conduit or tubing requires no spacing between the cable insulation and the conduit or tubing.

(F) Insulators and Bushings. Insulators and bushings for conductors shall be listed for the purpose.

(G) Conductors in Raceways.

(1) Damp or Wet Locations. In damp or wet locations, the insulation on all conductors shall extend not less than 100 mm (4 in.) beyond the metal conduit or tubing.

(2) Dry Locations. In dry locations, the insulation on all conductors shall extend not less than 65 mm (2½ in.) beyond the metal conduit or tubing.

(H) Between Neon Tubing and Midpoint Return. Conductors shall be permitted to run between the ends of neon tubing or to the secondary circuit midpoint return of transformers or electronic power supplies listed for the purpose and provided with terminals or leads at the midpoint.

(I) Dwelling Occupancies. Equipment having an open circuit voltage exceeding 1000 volts shall not be installed in or on dwelling occupancies.

(J) Length of Secondary Circuit Conductors.