8-26-2009

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN AND CHRISTIE, INC., an Idaho corporation, and dba TACO TIME, an assumed business name, Plaintiff-Appellant, vs. LEISHMAN ELECTRIC, INC., an Idaho corporation, Defendant-Respondent, and JOHN DOES 1-10, Defendants.	Supreme Court Docket No. 35929-2008 Madison County Case No. 2006-826

RESPONDENT'S BRIEF ON APPEAL

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

Honorable Brent J. Moss, District Judge, Presiding

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STATEMENT OF THE CASE

Nature of the Case

Plaintiff-Appellant Brian and Christie, Inc. dba Taco Time (hereinafter "Taco Time") filed this lawsuit against Defendant-Respondent Leishman Electric, Inc. (hereinafter "Leishman Electric") to recover damages arising from a fire at its Rexburg location on June 9, 2004. This lawsuit was filed after Taco Time settled for 50% of its damages with Sign Pro, Inc. (hereinafter "Sign Pro") in another lawsuit. This lawsuit against Leishman Electric was dismissed when the trial court granted summary judgment holding that Taco Time's negligence claims were barred by the economic loss rule. It is from this order dismissing the case against Leishman Electric that Taco Time appeals.

The Course of the Proceedings Below

In early 2006 Taco Time sued Sign Pro, Leishman Electric and others in a different lawsuit. R. Vol. I, p. 63 Almost immediately after filing this lawsuit Taco Time and its attorneys "decided at that point to focus our attention on Sign Pro of Southeast Idaho, Inc., and discontinue our pursuit of the other defendants at that time." R. Vol. I, p. 60 An Amended Complaint was filed by Taco Time naming only Sign Pro as the party defendant. R. Vol. I, p. 65 The strategy resulted in recovery of "50% of the total damages and prejudgment interest." R. Vol. I, p. 60

On October 2, 2006, Taco Time filed this lawsuit naming Leishman Electric as the party defendant and sought to recover the remaining 50% of its alleged damages. R. Vol. I, pp. 9 and 14 at ¶¶ 30 and 31 After some initial discovery Leishman Electric moved for summary judgment on June 5, 2007, contending that the statute of limitations, res judicata and/or collateral

estoppel and the economic loss rule barred Taco Time's Complaint against Leishman Electric. The trial court denied the motion in part and granted it in part. The trial court held that the economic loss rule applied but did not completely bar Taco Time's claims. R. Vol. I, p. 98

After additional discovery, Taco Time moved for summary judgment on April 10, 2008, contending that there were no genuine issues of material fact about the negligence of Leishman Electric or the damages to which Taco Time was entitled. On that basis Taco Time sought judgment as a matter of law for damages in the amount of $146,868.04 and pre-judgment interest of $70,496.66 for a total of $217,364.70. R. Vol. I, pp.104 and 141 The trial court denied Taco Time's motion:

> Plaintiffs move the Court to grant summary judgment on their negligence action against Leishman Electric. Their motion is premature. Two elements of their case, causation and damages, have issues of material fact fit for jury determination. As to causation, several individuals worked on the sign and there is an issue of fact as to the extent each individual's actions had in the fire's causation. As to damages, the court has ruled that the Plaintiffs are limited to non-economic damages; there is an issue of fact as to the amount of those damages. Plaintiffs' summary judgment motion is denied.

R. Vol. II, p. 283

Taco Time moved for reconsideration "on the grounds and for the reason that Plaintiffs respectfully submit that the Court's "economic loss" ruling and application is erroneous as a matter of law given the undisputed facts established by the record in this case." R. Vol. II, p. 285 With its Motion for Reconsideration, Taco Time also filed a Motion to Amend its Complaint. The primary amendment it sought was to correct what its lawyers called a "mistake." The "mistake" was that after two years of litigation against Leishman Electric, Taco Time's lawyers had decided that Taco Time was not limited to recovering 50% of the damages it claimed to have suffered, but could instead recover Leishman Electric's proportionate share of the total damages

proved by Taco Time at trial. R. Vol. II, pp. 289 and 296 at ¶¶ 30 and 31

On October 1, 2008, the trial court reconsidered its prior decisions, concluded that its prior ruling on economic loss "was erroneous because Plaintiff's damage claims do not survive application of the economic loss rule" and dismissed Plaintiff's complaint against Leishman Electric. R. Vol. II, pp. 302 - 304 The Motion to Amend was also denied "as it is also based strictly on allegations of Defendant's negligence." R. Vol. II, p. 304

Statement of Facts

At the outset, a point of clarification is in order. Taco Time asserts that the facts it quotes in its "Statement of Material Facts" at page 6 of its Opening Brief are all "either undisputed and/or supported by the evidence viewed most favorably to Taco Time as the non-moving party opposing summary judgment." Throughout its Opening Brief, but particularly at pp. 1 - 2, 9 - 11 and 13 - 19, Taco Time quotes evidence allegedly supporting its claim of negligence against Leishman Electric which is, and was, only germane to Taco Time's Motion for Summary Judgment against Leishman. The Court's denial of Taco Time's Motion for Summary Judgment (Vol. II, p. 283) is not at issue here. No appeal was taken from that decision. R. Vol. II, pp. 343 at ¶ 1 and 353 at ¶ 1

The Negligence Case Against Leishman Electric is Disputed

Regarding evidence which allegedly supports Taco Time's claim of negligence against Leishman Electric, Taco Time is not entitled to have the evidence construed most favorably to it because Taco Time was the moving party on the Motion for Summary Judgment in which it tried to obtain summary judgment against Leishman Electric on negligence and causation. Although Leishman Electric does not believe these factual issues are important to determining the

"economic loss" question, because Taco Time devoted the time and effort to establish negligence on the part of Leishman Electric, a brief rebuttal is in order.

At the heart of the allegations of negligence against Leishman Electric are the transformers which were part of the used neon signage which Brian Larsen purchased from a closed Taco Time restaurant in Nebraska. R. Vol. I, p. 77 at ¶ 8 A photograph of one of the transformers is appended to this Brief. (Exhibit "G" to Cooper Second Affidavit attached to Motion to Augment.) A transformer takes electricity of one voltage and changes it into another voltage. In the case of the neon transformers which Brian Larsen supplied and Sign Pro installed, it required two connections on each transformer to operate the neon sign, one on the primary side and one on the secondary side. Leishman Electric attached the building power to the primary side of the transformers. R. Vol. I, p. 88 at deposition transcript p. 14, LL 1 - 4 However, to operate the neon signs the transformers also had to be connected to the neon signs. Michael Packer, the untrained employee of the unlicensed sign contractor which Brian Larsen hired[1], made that connection. R. Vol. II, p. 263 at ¶ 11 Taco Time repeatedly states that Sign Pro did not make the "final" connection, or that Sign Pro did not "energize" the circuit and that Leishman Electric "connected" the power to the neon sign. (Appellant's Opening Brief, pp. 1, 9, 10, 13, 16 and 19) Because it took two connections to energize each neon sign, it can just as easily be said that Sign Pro made the "final" connection, "energized" the circuit and "connected" the power to the neon sign. The trial court determined that genuine issues of material fact existed

[1]Brian Larsen made absolutely no effort to determine Sign Pro's qualifications to do the repairs to the damaged signs and the installation at the Taco Time facility in Rexburg. R. Vol. I, p. 56, Answer to Interrogatory No. 19

which required a jury to apportion negligence and causation between the several actors. R. Vol. II, p. 283

It is undisputed that the transformers did not have secondary ground fault protection, a fact which was known to Michael Packer, the untrained employee of the unlicensed sign contractor which Brian Larsen hired. R. Vol. II, p. 263 at ¶ 10 Plaintiff's experts opine that the fire was caused by a short circuit at a location where one of the neon tubes had broken. R. Vol. II, p. 255 Beginning in 1996, the National Electric Code required that transformers used with neon signs have secondary ground fault protection which would interrupt the power in the event of a short circuit. R. Vol. II, p. 229 The remodel which included the installation of the transformer and signage took place in 1998/1999. Taco Time's claim against Leishman Electric is that if Leishman Electric had discovered the transformers supplied by Brian Larsen and installed by Sign Pro were non-compliant with the National Electric Code it could have prevented the fire which occurred five years later by not making its connection to the transformer which supplied power to the neon sign which short circuited. The same can be said of Sign Pro.

In opposition to Taco Time's Motion for Summary Judgment, Paul Moore, an electrical engineer, submitted the following testimony by affidavit. (Affidavit of Paul Moore attached to Leishman Electric's Motion to Augment) Although the 1996 NEC required that neon sign transformers have secondary ground fault protection, by reason of a delay in approving and adopting labeling regulations, it was not until **after** this installation in early 1999 that neon transformers were required to have a label affixed to the transformer showing that it was equipped with secondary ground fault protection. Therefore, in early 1999 Leishman Electric would have had to dismantle the transformer to determine whether it was equipped with

secondary ground fault protection. The transformers which were supplied by Brian Larsen and installed by Sign Pro contained labels identifying them for "Luminous Tube" use. The transformers also contained a UL sticker which identified them as a "gas tube transformer." "Luminous Tube" and "gas tube" are common terms used to identify "neon lights." The 1996 NEC required that "Transformers and electronic power supplies shall be identified for the use and shall be listed." (1996 NEC 600-23) This transformer was in compliance with those requirements when Leishman Electric connected power to the primary side of the transformer. Paul Moore opined that under the circumstances of this case Leishman Electric was not required to inspect either the transformer or the neon signs for compliance with the National Electric Code. (*See* Affidavit of Paul Moore attached to Leishman Electric's Motion to Augment Record) The trial court held that "several individuals worked on the sign and there is an issue of fact as to the extent each individual's actions had in the fire's causation." R. Vol. II, p. 283

The Critical Evidence Necessary to Decide the Application of the Economic Loss Rule is Undisputed

1. When Brian Larsen, one of the owners of Taco Time, decided in 1998 to remodel his Taco Time in Rexburg, he contracted with an out of state general contractor to do the remodel. R.Vol. I, p. 77, at ¶ 7
2. The general contractor subcontracted with Leishman Electric to do the electrical work. R. Vol. I, p. 50, at Answer to Interrogatory No. 10 All of the electrical work performed by Leishman Electric at the Taco Time in Rexburg was performed under its subcontract with the general contractor and not under any contractual relationship with Taco Time. R. Vol. I, p. 50, at Answer to Interrogatory No. 10

3. The neon signs which were purchased by Taco Time and repaired and installed by Sign Pro were part of the remodel project. R. Vol. I, p. 77, at ¶ 8; R. Vol. I, p. 10, at ¶¶ 7, 8, 9 and 10; R. Vol. II, pp. 277 - 78 at ¶¶ 7, 8, 9 and 10; R. Vol. II, p. 292, at ¶¶ 7, 8, 9 and 10

4. The only causes of action alleged by Taco Time against Leishman Electric in this case are based in negligence. R. Vol. I, p. 9; R. Vol. I, p. 50, at Answer to Interrogatory No. 10; R. Vol. II, p. 276; R. Vol. II, p. 291

5. The damages which Taco Time seeks were, except for a minimal deductible, paid by Taco Time's fire insurance company. All of the property which was damaged in the fire was part of the Taco Time restaurant. It included the building, fixtures, contents and equipment. Taco Time also sought lost profits while the restaurant was closed for repairs. R. Vol. I, pp. 78 - 79, at ¶¶ 14 - 18; R. Vol. I, pp. 109- 141 Taco Time sought recovery of the following items of damages:

    1. Cost of repairs or replacement of the building
    2. Cost of replacement of restaurant equipment
    3. Cost of cleaning contents
    4. Replacement of credit card equipment
    5. Lost business profits
    6. Replace water softener
    7. Replace HVAC unit
    8. Replace business communications equipment
    9. Replacement of floor tile
    10. Inventory/personal property replacement
    11. Furnace replacement
    12. Replace microwave and freezer
    13. Clean cash registers

These undisputed facts support the trial court's decision to dismiss Taco Time's claims because they are barred by the economic loss rule.

ADDITIONAL ISSUES ON APPEAL

1. If the trial court is reversed and this matter remanded for further proceedings, should Taco Time be permitted to include a claim for pre-judgment interest in its Amended Complaint?

2. If the trial court is reversed and this matter remanded for further proceedings, should the economic loss doctrine prevent Taco Time's tort recovery for damage to the subject of the transaction, even if damage to "other property" is identified?

ARGUMENT

A. THE ECONOMIC LOSS RULE BARS TACO TIME'S NEGLIGENCE CLAIM

The United States Supreme Court, exercising its admiralty jurisdiction, and most, if not every state, in the United States have adopted some form of the economic loss rule either by judicial decision or by statute. See the cases collected in the appendix to William K. Jones, *Product Defects Causing Commercial Loss: The Ascendency of Contract over Tort*, 44 U. Miami L. Rev. 731, 799 (1990). There are as many versions of the rule as there are jurisdictions which have applied the rule to a particular set of facts[2].

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[2] For example, *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 154 (Ind. 2005) observed that because the "economic loss" doctrine permits tort recovery only for personal injury or damage to "other property," if property is damaged it is necessary to identify the product at issue which defines "other" property. The subject of "other property" has been approached in a number of different ways. Much of the law addressing the issue of what constitutes "other property" deals with whether the other property is a distinct item or merely a component of the overall defective product. Other courts have focused on whether "goods" are involved. Yet others have concluded that the economic loss doctrine precludes recovery for injury to "other property" if the injury was, or should have been, reasonably contemplated by the parties to the contract. Some have concluded that the "product" is the product purchased by the plaintiff, not the product sold by the defendant.

This Court recognized in *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306 (Idaho 1975) that the "economic loss" rule in Idaho has its genesis in the debate about how far courts were willing to extend tort liability, specifically products liability, in cases arising out of contractual relationships. In *Dean v. Barrett Homes, Inc.*, 968 A.2d 192, 406 N.J. Super. 453, 472 (App.Div. 2009) the New Jersey Superior Court, Appellate Division, discussed the interplay between tort law and contract law:

> The economic loss rule "defines the boundary between the overlapping theories of tort law and contract law by barring the recovery of purely economic loss in tort, particularly in strict liability and negligence cases." R. Joseph Barton, Note, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 Wm. & Mary L. Rev. 1789, 1789 (2000). The purpose of the rule is to "strike an equitable balance between countervailing public policies," that exist in tort and contracts law. Gennady A. Gorel, Note, *The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-eating Monster*, 37 Rutgers L. J. 517, 524 (2006).

This theoretical basis for the economic loss rule, however, provides little guidance about how to apply the rule to a particular set of circumstances. In Idaho the economic loss rule is described as:

> Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another. *Duffin v. Idaho Crop Improvement Ass'n.*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995); *Tusch Enters. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *Clark v. International Harvester Co.*, 99 Idaho 326, 336, 581 P.2d 784, 794 (1978). The rule "applies to negligence cases in general; its application is not restricted to products liability cases." *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848, 851 (1999) (citations omitted). "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc., v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). On the

other hand, "property damage encompasses damage to property other than that which is the subject of the transaction." *Id.*

Blahd v. Richard B. Smith, Inc., 141 Idaho 296, 300, 108 P.3d 996 (Idaho 2005)

Distinguishing between the "subject of the transaction" and "other property" is a perplexing task. The economic loss rule does not seem to be conducive to bright line rules which makes its application to a particular set of circumstances difficult. That is no less the case here. Taco Time was in privity of contract with the person or entity from whom it purchased the damaged neon sign and the transformers which did not comply with the National Electrical Code. Taco Time did not exercise its contractual remedies against the seller for the defects which it now alleges caused the fire that caused the damages it seeks to recover. Taco Time was in privity of contract with the general contractor which subcontracted with Leishman Electric for the electrical work on the remodel project in 1998/1999. Taco Time did not exercise its contractual remedies against the general contractor. Taco Time was in privity of contract with Sign Pro which installed the neon signs and connected it to the transformers. Taco Time did exercise its contractual remedies against Sign Pro and elected to settle for 50% of its loss.

Because of Taco Time's decisions to either not exercise or only partially exercise its contractual rights against those with which it had privity of contract and, instead, seek recovery against an entity with which it did not have privity, the trial court was and now this Court is faced with deciding whether Taco Time should be able to recover the rest of its damages from Leishman Electric based only on negligence theories. In Texas, this lack of privity would preclude Taco Time's claims under its interpretation and application of the economic loss rule.

Sterling Chems., Inc. v. Texaco Inc., 259 S.W.3d 793, 797 (Tex. App. Houston 1st Dist. 2007)

(Texas courts have applied the economic loss rule to preclude tort claims between parties who are not in contractual privity)

Citing the "modern trend[3]" the Eighth Circuit Court of Appeals, in *Dakota Gasification Co. v. Pascoe Bldg. Sys.*, 91 F.3d 1094, 1099 (8th Cir. N.D. 1996), held that the economic loss rule precluded the owners of an oxygen plant from recovering against the subcontractor who supplied the pre-engineered metal building that enclosed the oxygen plant[4]. Similar to this case, the building did not fail until more than eight years after the subcontractor had finished its work. That is when a part of the oxygen plant's roof collapsed under the weight of ice and snow, causing damage to various items within the plant. Although the collapse caused significant damage to property, it did not cause any personal injuries. The collapse was caused by a faulty weld which was not, but allegedly should have been, discovered during the construction. The trial court and the appellate court were faced with trying to determine whether the damage was only to the product itself [the "product itself" and "the subject of the transaction" are similar, if not the same concept] or to "other property." Both decided there was no damage to "other property" and barred recovery based on the economic loss rule:

> The trial court recognized that the modern trend in many jurisdictions holds that tort remedies are unavailable for property damage experienced by the

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[3] The "modern trend" has been described as the "forseeability test" which involves the extension of the economic loss doctrine to preclude liability in tort for physical damage to other nearby property of commercial purchasers who could foresee such risks at the time of purchase. *Dakota Gasification Co. v. Pascoe Bldg. Sys.*, 91 F.3d 1094, 1101 (8th Cir. N.D. 1996)

[4] It should be noted that although the modern trend is still binding in Eight Circuit federal litigation, North Dakota has not yet adopted this "modern trend." See *Albers v. Deere & Co.*, 599 F. Supp. 2d 1142, 1147 (D.N.D. 2008)

> owner where the damage was a foreseeable result of a defect at the time the parties contractually determined their respective exposure to risk, regardless whether the damage was to the "goods" themselves or to "other property."

Dakota Gasification Co. v. Pascoe Bldg. Sys., 91 F.3d 1094, 1099 (8th Cir. N.D. 1996)

> . . . it is difficult to imagine a scenario in which the natural consequence of an installed structural component's failure would be damage only to the structural component itself without any damage to the surrounding property. If such economic damage is a foreseeable consequence to the parties in a commercial relationship governed by the UCC, then it is a proper subject for negotiation and contract law, not for tort remedies. The modern trend's reasoning is therefore nothing more than a fairly subtle and very logical extension of the economic loss doctrine discussed in *East River* and adopted in *Cooperative Power*. Indeed, as the Sixth Circuit noted, many cases discussing the "other property" exception end up holding that the damage was only to the property itself.

Dakota Gasification Co. v. Pascoe Bldg. Sys., 91 F.3d 1094, 1100 (8th Cir. N.D. 1996)

> Allowing tort remedies in a case such as this would perversely encourage contractors to "bargain" for no warranty or insurance protection in exchange for a reduced purchase price, because they could rely on tort remedies as their "warranty." Such an outcome is plainly inconsistent with the values of commercial efficiency and predictability that drive the economic loss doctrine . . .

Dakota Gasification Co. v. Pascoe Bldg. Sys., 91 F.3d 1094, 1100 (8th Cir. N.D. 1996)

The facts of this case are not unlike the facts in *Dakota Gasification*. There the roof collapsed causing damages to various items in the plant. Here the fire caused damages to various items in the Taco Time restaurant. Taco Time has or had contract remedies against those with which it had contractual relationships. Clearly it could have bargained for warranties and other contractual protection from those with which it had contractual relationships. Taco Time insured itself from the risk of these damages as evidenced by the fact that this is an insurance subrogation action. R., Vol. I, p. 54, Answer to Interrogatory No. 16 If the "modern trend" were applied to this case, the "economic loss doctrine" would bar any tort claims for the damages which Taco

Time now seeks to recover from Leishman Electric.

In 1998, the American Law Institute adopted Restatement (Third) of Torts: Products Liability, § 21 which addressed the issue but failed to provide any bright line rule to make application of the economic loss rule easier. The following comment provides what little guidance is offered:

> **Harm to the plaintiff's property other than the defective product itself.** A defective product that causes harm to property other than the defective product itself is governed by the rules of this Restatement. What constitutes harm to other property rather than harm to the product itself may be difficult to determine. A product that nondangerously fails to function due to a product defect has clearly caused harm only to itself. A product that fails to function and causes harm to surrounding property has clearly caused harm to other property. However, when a component part of a machine or a system destroys the rest of the machine or system, the characterization process becomes more difficult. When the product or system is deemed to be an integrated whole, courts treat such damages as harm to the product itself. When so characterized, the damage is excluded from the coverage of this Restatement. A contrary holding would require a finding of property damage in virtually every case in which a product harms itself and would prevent contractual rules from serving their legitimate function in governing commercial transactions.

The "integrated whole" referred to in Section 21, Restatement (Third) Torts is also referred to as an "integrated system analysis." Many courts use this analysis to help determine if the case involves damage to the product itself (i.e. the subject of the transaction) or damage to other property. Based on the language in *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996 (Idaho 2005) Idaho appears to favor this analysis to help identify whether the damage alleged is to "other property":

> The fact that the buyer in *Tusch Enterprises* only sued the builder and the seller is immaterial. It is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued. The Blahds purchased the house and lot as an ***integrated whole***. Like the leveled lot and duplex in *Tusch Enterprises*, the subject of the transaction in this case is both

> the lot and the house. That being the case, the damages to the Blahds' house are purely economic and the Blahds' negligence claims against the Smith Entities and Jones are barred by the economic loss rule. (***Emphasis*** supplied)

The trial court followed this guidance and concluded in this case that: "the various components of the remodeling, including electrical rewiring . . . were of necessity integrated with the existing building to better facilitate the purpose for which the building was used, a restaurant." Therefore, the trial court concluded that the subject of the transaction was the restaurant/building and because "Plaintiff's damage claims do not relate to any property 'other than that which is the subject of the transaction'" the claims are barred by the economic loss rule. R. Vol. II, p. 304

Other courts, most notably Wisconsin, have more fully developed the "integrated whole" analysis which has been identified as the "majority view"[5]:

> . . . the homeowners purchased a finished product, their condominium units, the quality of which fell below expectations. While the Association argues that the defective windows caused damage to interior and exterior walls and casements, these are but other component parts in a finished product. Because of the integral relationship between the windows, the casements and the surrounding walls, the windows are simply a part of a single system or structure, having no function apart from the buildings for which they were manufactured.

Bay Breeze Condo. Ass'n v. Norco Windows, 2002 WI App 205, 651 N.W.2d 738 (Wis. Ct. App. 2002)

> Regardless whether property is other property in a literal sense, it may be "other property" in a legal sense for purposes of the economic loss doctrine. See

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[5] *Dean v. Barrett Homes, Inc.*, 406 N.J. Super. 453, 470, 968 A.2d 192 (App.Div. 2009) concluded that in the case of construction defects, the integrated system analysis is the majority view: "We conclude that the sounder view is expressed by us most recently in *Marrone* and the majority of jurisdictions that have addressed the critical issue. Here, plaintiffs purchased a house, not exterior siding, and the exterior siding was an integrated component of the finished product of that house.

> *Grams v. Milk Prods., Inc.*, 2005 WI 112, PP27, 31, 283 Wis. 2d 511, 699 N.W.2d 167. At least two tests are used to determine whether damaged property is "other property" in a legal sense: the "integrated system" test and the "disappointed expectations" test. *Id.*, PP27-28, 31. We discuss both below and then, in subsequent subsections, apply them.

Foremost Farms USA Coop. v. Performance Process, Inc., 2006 WI App 246, 297 Wis. 2d 724, 726 N.W.2d 289 (Wis. Ct. App. 2006)

What is immediately apparent from reading the *Foremost Farms* case is that in many situations the "integrated system" test and the "disappointed expectations" test can be difficult and complicated to apply. Thus, not even this approach results in an easy fix to the complicated analysis necessary to determine if the economic loss rule applies. However, the "integrated system" test which looks to see whether the allegedly defective product is a component in a larger system, appears to answer the questions presented by this case. The electrical subcontract work of Leishman Electric which involved re-wiring the electrical system in the Taco Time building so that it could function as a restaurant, including running power to components like the transformers for the neon signs, was completely integrated into a larger system, that being the remodeled restaurant building. Under these circumstances the restaurant/building was an integrated system. The electrical wiring had no function apart from the restaurant where it was installed. According to the *Foremost Farms* decision, "If damaged property is not "other property" under the "integrated system" test, the economic loss doctrine applies and tort claims are barred. The "other property" inquiry ends."

So it is in this case. The Memorandum Decision denying Taco Time's Motion for Reconsideration and granting summary judgment to Leishman Electric stated:

> It is the restaurant/building, not the services provided via remodeling, that was the subject of the transaction; and it was the building, its contents, and the profits derived from the building's use that were damaged by the fire. Plaintiff's damage

claims do not relate to any property "other that which is the subject of the transaction."

R. Vol. II, p. 304

The trial court was correct in dismissing Taco Time's claims because they are barred by the economic loss rule.

B. A CALAMITOUS EVENT IS NOT A RECOGNIZED EXCEPTION TO THE ECONOMIC LOSS RULE IN IDAHO AND IS NOT A GOOD TEST FOR DETERMINING WHEN THE ECONOMIC LOSS RULE APPLIES

Taco Time contends that the economic loss rule does not apply "where an accident, casualty event, disaster, or other calamitous event" occurs. Appellant's Opening Brief, p. 21 This argument is raised for the first time on appeal and should not be considered. *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848 (Idaho 1999) (exceptions to the economic loss rule which were not asserted nor decided by the district court will not be considered for the first time on appeal) R. Vol. II, pp. 285-287

In the event this Court does consider the application of this exception, Taco Time's argument should be rejected for several reasons. The United States Supreme Court rejected this exception as a basis for determining whether the economic loss rule applies in *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 870, 90 L.Ed. 2d 865, 106 S. Ct. 2295 (U.S. 1986):

> . . . Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. Compare *Morrow v. New Moon Homes, Inc.*, 548 P. 2d 279 (Alaska 1976), with *Cloud v. Kit Mfg. Co.*, 563 P. 2d 248, 251 (Alaska 1977). But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of

> its bargain -- traditionally the core concern of contract law. See E. Farnsworth, Contracts § 12.8, pp. 839-840 (1982)

The "destructive or calamitous exception" appears to be a minority view. See discussion in *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, at 869 - 870 (U.S. 1986) Kentucky refused to adopt this exception as a valid method for determining when to apply the economic loss rule:

> . . . we hold that the destructive or calamitous exception to the Economic Loss Rule does not apply in Kentucky. As the Supreme Court of the United States noted in *East River S.S. Corp.* and as the *Graves* Circuit Court noted herein, there is no logical reason to determine the amount of damages available based on whether a product failed by small increments or suddenly. The end result is the same, the product failed.

Indus. Risk Insurers v. Giddings & Lewis, Inc., 2009 Ky. App. LEXIS 106 (Ky. Ct. App. July 2, 2009)

One of the decisions relied upon by Taco Time to support its argument that the "destructive or calamitous" exception is good policy has been rejected by a later decision. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 243 (6th Cir. Mich. 1994) (Our decision today explicitly rejects the approach taken by the district court in *Citizens Ins. Co. v. Proctor & Schwartz*, 802 F. Supp. 133 (W.D. Mich. 1992), aff'd on other grounds, 15 F.3d 558 (6th Cir. 1994)) The Sixth Circuit Court of Appeals has also strongly suggested that the distinction between "disaster and mere commercial disappointment" is not the "bright line rule" which Taco Time suggests it is. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 242 (6th Cir. Mich. 1994):

> We recognize that the extent of the damage--both to property and persons--suggests a hazardous product and, therefore, implicates concerns addressed by tort law. [citations omitted] However, the approach adopted by *Neibarger* focuses our inquiry not so much on the magnitude or extent of the damage as on the parties involved and the nature of the product's use.

Other courts have predicted that if the issue were presented to the Idaho Supreme Court, it would not adopt the "destructive or calamitous" exception to the economic loss rule:

> . . . the United States Supreme Court has rejected an attempt to distinguish cases based on the manner in which the product is damaged. *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 872, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain -- traditionally the core concern of contract law. *Id.* at 870. A federal court in Idaho also has predicted that Idaho courts would refuse to recognize a "sudden and calamitous event" exception to the economic loss rule. See Memorandum And Order filed March 3, 1999 in *J.R. Simplot Co. v. Harnischfeger Corp.*, D. Idaho No. 97-0490-E-BLW, at 8, attached to Reply In Support Of Cessna Aircraft Company 's Motion For Summary Judgment Against Plaintiffs Spirit Air, Inc. And Mountain Bird, Inc. (Doc. # 602) filed October 15, 2008. This Court likewise predicts that the Idaho Supreme Court would decline to create an accident exception to the economic loss rule.

In re Cessna 208 Series Aircraft Prods. Liab. Litig., 591 F. Supp. 2d 1161, 1167 (D. Kan. 2008)

Judge Winmill's decision in *J.R. Simplot Co. v. Harnischfeger Corp.*, D. Idaho No. 97-0490-E-BLW is appended to this Brief. Concluding that the "sudden and calamitous event" exception is the minority rule, Judge Winmill predicted that the Idaho Supreme Court would refuse to adopt it.

It is unclear from Appellant's Opening Brief whether Taco Time believes the Idaho appellate courts have already adopted the "destructive or calamitous exception" or whether Taco Time is advocating its adoption. To date, the Idaho Supreme Court has **not** explicitly recognized

the "destructive or calamitous exception." Idaho currently recognizes two (or three) exceptions[6] to the economic loss rule:

> The general rule in Idaho is that there is no recovery for pure economic loss in a negligence action, as there is no "duty" to prevent economic loss to another. *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995). The two exceptions to this general rule are where a special relationship exists and the occurrence of a unique circumstance requires a different allocation of risk.

Nelson v. Anderson Lumber Co., 140 Idaho 702, 710, 99 P.3d 1092 (Idaho Ct. App. 2004)

Although the "special relationship" exception has been applied to the facts of one case, the "unique circumstances" exception has never been applied by the Idaho Supreme Court in any of the cases presented to it. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 299, 108 P.3d 996 (Idaho 2005) Taco Time does **not** argue that this case presents a situation where the "unique circumstances" exception should apply, but Taco Time does argue that the "special relationship" exception applies. That argument will be addressed later in this Brief.

Although fairly simple to explain, the economic loss rule is difficult to apply. A fact which Judge Moss candidly admitted when he stated "I've struggled with this, gentlemen, for at least five or six years on this miserable 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." Tr., p. 20, LL 17 - 21 Another exception will only make the economic loss rule more unclear and difficult to apply. Idaho

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[6]Judge Winmill in *J.R. Simplot Co. v. Harnischfeger Corp.*, D. Idaho No. 97-0490-E-BLW stated that Idaho recognizes three exceptions. The Idaho Court of Appeals in *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 710, 99 P.3d 1092 (Idaho Ct. App. 2004) states that Idaho recognizes two exceptions while in *Graefe v. Vaughn*, 132 Idaho 349, 350, 972 P.2d 317 (Idaho Ct. App. 1999) it identified three exceptions.

should not adopt the "destructive or calamitous exception" which several courts, including the United States Supreme Court, have found to be illogical. The "destructive or calamitous exception" does not further the policies behind the "economic loss" rule and will not make the rule easier to understand or easier to apply.

C. IN THIS CASE THERE IS NO PROPERTY OTHER THAN THAT WHICH IS THE SUBJECT OF THE TRANSACTION SO THE 'PARASITIC EXCEPTION' DOES NOT APPLY TO SAVE TACO TIME'S NEGLIGENCE CLAIMS

Taco Time faults the trial court for not giving it the benefit of the "parasitic exception" to the economic loss rule. This Taco Time claims "evidences its [the trial court's] lack of understanding of the scope or proper applications of the economic loss rule." Appellant's Opening Brief, p. 28 The trial court understood that its task was to identify the "subject of the transaction" so that it could determine if there was any "other property" to which Taco Time's economic loss could be parasitic. It is not surprising that the trial court found the "installation of the signs" was integrated into the building because, from the beginning, Taco Time claimed that the neon signs were purchased by it and repaired and installed by Sign Pro as part of the remodel project. R. Vol. I, p. 77, at ¶ 8; R. Vol. I, p. 10, at ¶¶ 7, 8, 9 and 10; R. Vol. II, pp. 277 - 78 at ¶¶ 7, 8, 9 and 10; R. Vol. II, p. 292, at ¶¶ 7, 8, 9 and 10 Those admissions support the trial court's conclusion that it was the remodeled restaurant/building which was the subject of the transaction, not the neon sign and transformer installation contract as argued by Taco Time. To save its negligence claims against Leishman Electric the economic losses must be parasitic to "other damage" and not to the subject of the transaction. *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195 (Idaho 1995) ("property loss" encompasses "damage to

property other than that which is the subject of the transaction.")

The use of the phrase "economic losses which are parasitic to an injury to person or property" began in *Just's v. Arrington Constr. Co.*, 99 Idaho 462, 469, 583 P.2d 997 (Idaho 1978) (cases where 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).

Duffin v. Idaho Crop Improvement Ass'n, 126 Idaho 1002, 1007, 895 P.2d 1195 (Idaho 1995) more fully developed the phrase " parasitic to an injury to person or property." The Idaho Supreme Court explained:

> Following *Just's*, this Court has adhered to a general rule prohibiting the recovery of purely economic losses in all negligence actions. See, e.g., *Tusch Enters. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (defending the rule that "purely economic losses are not recoverable in negligence"). Based solely on the application of this general rule, the district court's analysis regarding the recovery of economic loss in tort would be correct; ordinarily a party would owe no duty to exercise due care to prevent the type of loss suffered by the Duffins. However, there are exceptions to the general rule of non-recovery.
>
> First, economic loss is recoverable in tort as a loss parasitic to an injury to person or property. E.g., *Just' s* at 468, 583 P.2d at 1003. We have defined "economic loss" as including "costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975) (citations omitted), rev'd on other grounds. Conversely, "property loss" encompasses "damage to property other than that which is the subject of the transaction." *Id.* See also *Tusch Enterprises v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987); *State v. Mitchell Constr. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1985); *Clark International Harvester Co.*, 99 Idaho 326, 332, 581 P.2d 784, 790 (1978). Since the losses claimed here are purely economic, this exception is inapplicable.

See also *Graefe v. Vaughn*, 132 Idaho 349, 350, 972 P.2d 317 (Idaho Ct. App. 1999) (Although the general rule is that such losses are not recoverable, the *Duffin* Court went on to state that in certain instances, a party can recover for purely economic loss in tort when: (1) it is parasitic to an injury to person or property; (2) the occurrence of a unique circumstance requires a different allocation of the risk; or (3) where a "special relationship" exists between the parties)

Taco Time appears to recognize that, in cases of property damage, before the economic loss is considered "parasitic to an injury to property," the damage must be to "other property" meaning property other than that which is subject to the transaction. This is clearly the rule in Idaho. In *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996 (Idaho 2005) the Idaho Supreme Court made clear that it "is the subject of the transaction that determines whether a loss is property damage or economic loss, not the status of the party being sued." The trial court in this case held that the subject of the transaction was the extensive remodel project in 1998/1999 which made the entire restaurant and building an integrated whole for purposes of applying the economic loss rule. R., Vol. II, p. 304

The Idaho Supreme Court has decided cases which are conceptually similar to this case and those decisions help determine the subject of the transaction for purposes of applying the economic loss rule in this case. In *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848 (Idaho 1999) Ramerth attempted to avoid the application of the economic loss rule by arguing that it was Hart's service which was the subject of the transaction and not the engine or the airplane that was serviced. The Idaho Supreme Court rejected that argument and held that it was the airplane, not the mechanical services, which was the subject of the transaction. Similarly, in *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 895 P.2d 1195 (1995) the Idaho Supreme Court

held that it was the seed, not the inspection, which was the subject of the transaction. In *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987) the Idaho Supreme Court held that it was the duplex itself, not the construction, which was the subject of the transaction.

Following the reasoning of those cases, the trial court was correct in concluding that the subject of the transaction in this case was the remodeling of the restaurant/building, not the neon sign and transformer installation contract. The decision in *C & S Hamilton Hay, LLC v. CNH Am. LLC*, 2008 U.S. Dist. LEXIS 13151, 10-11 (D. Idaho Feb. 21, 2008) does not dictate a different result. Judge Lodge distinguished the decision in *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848 (Idaho 1999):

> . . . The factual circumstances in *Ramerth* presented a different issue to decide than the one faced by the Court in this case. The court in *Ramerth* was required to determine whether or not there was a difference between service performed on the engine and the engine itself that would create a distinction as to what constituted the "subject of the transaction." In this case no service has been performed and therefore the Court is not asked to make such a distinction. ***A relationship between service and the physical item receiving the service would support the "integrated whole" idea from Blahd.*** However, in this case the Court fails to see how an item/service relationship relates to two separate physical items and the Court is not convinced that *Ramerth* warrants a finding that the implements in this case constitute the "subject of the transaction." Therefore a finding that the implements constitute "economic loss" would be improper. (***Emphasis*** supplied)

C & S Hamilton Hay, LLC v. CNH Am. LLC, 2008 U.S. Dist. LEXIS 13151, 10-11 (D. Idaho Feb. 21, 2008)

That distinction described by Judge Lodge makes the *C&S Hamilton Hay* decision inapplicable to the facts of this case. Leishman Electric supplied material and services to perform the electrical subcontract on the Taco Time restaurant in 1998/1999, just like the mechanic did when he performed his overhaul and service of the airplane engine in *Ramerth*. It

is the electrical services which Taco Time claims caused the fire in this case, just as it was the claim of Ramerth that Hart's mechanic services caused the damage to the engine and airframe of the airplane when Hart left out the four spacers in the course of the overhaul. Judge Lodge was correct when he observed that if there was a "relationship between service and the physical item receiving the service" it would support the "integrated whole" idea from *Blahd.* There are no "peripherals" in this case because, like the trial court concluded, the business was an integrated whole and all of the damage was to the "subject of the transaction" and is considered economic loss. "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Air. Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975)

There must be damage to other property, i.e. property which was **not** the "subject of the transaction" to establish "property damage" which can eliminate the application of the economic loss rule based on the theory of "parasitic loss." There is no "other property damage" in this case and therefore the theory of (or exception for) "parasitic loss" is not applicable.

D. THE BUILDING REMODEL WAS THE TRANSACTION AND THE SUBJECT OF THE TRANSACTION WAS THE RESTAURANT/BUILDING

Taco Time urges this Court to separate the remodeling transaction from the transaction for the installation of the transformers and neon sign. It is undisputed that there was no contractual relationship between Taco Time and Leishman Electric. Leishman Electric performed all of its work as part of its subcontract with the general contractor who had the contract for the remodel of the restaurant/building. R. Vol. I, p. 50, at Answer to Interrogatory

No. 10 Taco Time's argument that the subject of the transaction for determining the liability of Leishman Electric is a transaction with which Leishman Electric admittedly had no involvement makes no sense. It makes even less sense when judged against Taco Time's repeated admissions that the purchase and installation of the neon signs were part of the remodel project.

In the original decision granting Leishman Electric's economic loss motion for summary judgment in part and denying it in part, the trial court concluded "the subject of the transaction with which Leishman Electric was involved was the remodel project" and decided "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 trial court did not identify what it thought was damage to "other property" except to note in a footnote that "some of the damage claims appear to be separate from the remodel project." R. Vol. I, p. 102 at fn 6

In Taco Time's Motion for Reconsideration, it did not identify the "other property." The Motion for Reconsideration claimed:

> The fire damage to the building and equipment clearly establishes "other property damage." The Court's prior Memorandum Decision acknowledges "other property damage." By definition, where there is "other property damage," the "economic loss rule does not apply under the governing Idaho case law."

R. Vol. II, p. 286

In further support of its argument that there was "other property damage" Taco Time submitted the Second Affidavit of Brian Larsen which laboriously attempted to separate "economic losses" from "non-economic losses." R. Vol. I, pp. 109 - 141 Although the restaurant was expanded during the 1998/1999 remodel, "95%" of all electrical wiring was new in the remodel." R. Vol. I, p. 111 at ¶ 6 The electrical wiring, of course, was part of Leishman

Electric's subcontract. The trial court concluded as follows after considering the submission by Taco Time:

> Brian Larsen's second affidavit of April, 2008, illustrates the difficulty of attempting to parse the building/restaurant into portions that were actually being remodeled and portions that were not. This affidavit reveals that the building and remodeling are an "integrated whole", and that it was the building/restaurant as an integrated whole that was the "subject of the transaction."

R. Vol. II, p. 302 at fn 1

On appeal Taco Time relies on the same affidavit the trial court considered. Appellant's Opening Brief, pp. 11 - 13 However, having failed to convince the trial court that it could identify the damage claims which were "separate from the remodel project" Taco Time has changed tactics on appeal. Taco Time now argues that the "only defective property involved in this case is the neon sign and transformers." Appellant's Opening Brief, p. 34 Taco Time further argues that the "transaction" was the "agreement between Taco Time and Sign Pro to install the neon sign and transformer." Appellant's Opening Brief, p. 34 Its theory to avoid application of the economic loss rule is illustrated by this statement:

> 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."

Appellant's Opening Brief, p. 37

Based on this analysis, Taco Time argues on appeal that the fire resulted in damage to the "defective neon sign and transformer" and everything else was "other property" including "the building, fixtures, equipment, appliances, inventory, other personal property and contents located therein." Appellant's Opening Brief, p. 28

This analysis ignores that the basis for Taco Time's claim against Leishman Electric is that Leishman Electric allegedly breached its duty as the electrical contractor by connecting "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." Appellant's Opening Brief, p. 19 There must be a nexus between the "transaction" and the "breach of duty." In every Idaho case involving the economic loss rule there was a nexus between the transaction and the breach of duty. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996(Idaho 2005) reviewed the prior "economic loss" decisions and clarified what "transaction" meant: "These cases indicate the word "transaction," for purposes of the economic loss rule, does not mean a business deal--it means the subject of the lawsuit." It would not be the "subject of the lawsuit" without a nexus.

The "transaction" for purposes of this case is not a business deal between Taco Time and Sign Pro to install transformers and a neon sign. The trial court correctly concluded that "the damage claims arise from restaurant property damaged by the fire." R. Vol. II, p. 304 Leishman Electric's only nexus was as a subcontractor to the general contractor who was hired to remodel the Taco Time building to make it a better restaurant, not to make a building which was later converted into a restaurant. Leishman Electric did not just wire the transformer to which Sign Pro connected the neon signs. Leishman Electric rewired 95% of the entire restaurant building. In *Blahd* the homeowner "purchased the house and lot as an integrated whole." Here Taco Time purchased a remodeled restaurant and the "various components of the remodeling, including electrical rewiring, installation of the signs, and other building improvements were wholly integrated into the building, not separate and apart from it." R. Vol. II, p. 304 It was the building and the restaurant which were the subject of the transaction.

The trial court's conclusion that the subject of the transaction was the restaurant/building is supported by the numerous cases involving defective component parts. A good example is *Pro Con, Inc. v. J&B Drywall, Inc.*, 20 Mass. L. Rep. 466 (Mass. Super. Ct. 2006)

> In claims involving defective component parts, most courts have held that the relevant "product" is the finished product into which the component is integrated. See, e.g., *East River*, 476 U.S. at 867-68 (stating in admiralty law that "since all but the very simplest of machines have component parts, [a contrary] holding would require a finding of 'property damage' in vitally every case where a product damages itself . . . and would eliminate the distinction between warranty and strict products liability.")

This is entirely consistent with the Idaho Supreme Court's use of the "integrated whole" concept in *Blahd* where it held that the house and lot must be considered an integrated whole and any damage to the house or the lot is considered purely economic loss. Some courts have described the task of determining the subject of the transaction as one of looking for the identity of the product purchased by the plaintiff, as opposed to the product sold by the defendant. It would make no sense for the court to look for a transaction which even Taco Time admits did not involve Leishman Electric to find the subject of the transaction. The only "product" which Taco Time purchased **and** which involved Leishman Electric was a remodeled restaurant. Because the finished product was the result of work by many contractors, it is completely logical to consider the remodeled restaurant/building an "integrated whole." It integrated all the work performed by the various contractors who completed the project. The Fifth Circuit Court of Appeals decision in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 927 (5th Cir. La. 1987) involved a lawsuit by a ship owner alleging tort theories against the vessel builder/seller and the designer of a component part of the vessels for damage to the vessels themselves. Relying heavily on the United States Supreme Court decision in *East River Steamship Corp. v.*

Transamerica Delaval, Inc., 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986), the Fifth Circuit reasoned that:

> Permitting a buyer to assert a tort claim against a subcontractor or component supplier may also implicate the seller; the supplier or subcontractor who is sued in tort can be expected to assert indemnity or contribution claims against the seller which assembled the product and incorporated the supplier's component or work in the finished product. The effect of such a claim, if successful, would visit ultimate tort liability for defects in the vessel on the manufacturer and seller and would nullify the objective of *East River* to limit the seller's liability in this type case to that assumed by contract.
>
> Several cases decided by the Eighth and Ninth Circuits under Minnesota and California law support the view that the product in this context means the finished product bargained for by the buyer rather than components furnished by a supplier. [citations omitted]

Shipco, 825 F.2d 925, 930

The same result should apply in this case. For purposes of determining whether the economic loss rule applies to bar Taco Time's claims against Leishman Electric, the finished product bargained for by Taco Time was the remodeled restaurant/building, not the installed neon sign and transformer. Taco Time has not identified any property which was not part of the "building, its contents, and the profits derived from the building's use that were damaged by the fire." R. Vol. II, p. 304 All of the damages claimed by Taco Time are economic loss resulting from the subject of the transaction and are barred by the economic loss rule.

E. THE SPECIAL RELATIONSHIP EXCEPTION DOES NOT APPLY

Taco Time contends that because Leishman Electric was a licensed electrical contractor, the "special relationship" exception should apply to take this case out of the operation of the economic loss rule. Appellant's Opening Brief, p. 30 This argument is raised for the first time on appeal and should not be considered. *Ramerth v. Hart*, 133 Idaho 194, 197, 983 P.2d 848

(Idaho 1999) (exceptions to the economic loss rule which were not asserted nor decided by the district court will not be considered for the first time on appeal) R. Vol. II, pp. 285 - 287

In the event this Court does consider the application of this exception, Taco Time's argument should be rejected because there was no "special relationship" between Taco Time and Leishman Electric. Taco Time had no direct contract with Leishman Electric. Leishman Electric was a subcontractor to the general contractor with which Taco Time contracted. Taco Time did not purchase the neon signs and transformers from Leishman Electric. Taco Time did not contract with Leishman Electric to repair or install the neon signs and transformers. The evidence that Taco Time had a special relationship with Leishman Electric or relied on Leishman Electric for any critical work or inspections related to the neon signs is not present in this case. In fact, Brian Larsen, one of the owners of Taco Time testified as follows in his deposition:

26

Q. I just want to make sure that this is in the record. You know for a fact that Leishman Electric had nothing to do with repairing the neon signs; correct?
A. Correct.

27

Q. You never talked to Leishman Electric about installing the neon signs?
A. Specifically installing the neon signs?
Q. Yes.
A. I did not have that conversation.
Q. Did you ever talk to anybody at Leishman Electric and request that they inspect or evaluate the neon signs or the work of Sign Pro?
A. I did not ask them to inspect the work of Sign Pro.
Q. Did you ever ask Leishman Electric to inspect the transformers that were in those boxes?
A. No.
Q. Did you ever ask Leishman Electric whether Sign Pro was qualified to do the work that you had hired

16 them to do?
17 A. No.
Brian Larsen deposition, pp. 26, L 22 - 27 L 17 (attached to Leishman Electric's Motion to Augment)

Because there was no personal relationship between Taco Time and Leishman Electric the "special relationship" described in *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976) is not applicable to the facts of this case. The "special relationship" described in *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1008, 895 P.2d 1195 (Idaho 1995) is also inapplicable. *Duffin* found a "special relationship" with the Idaho Crop Improvement Association (ICIA) but not with the Federal-State Inspection Service (FSIS). The "special relationship" with ICIA was based on the fact that it had engaged in a marketing campaign, for the benefit of its members, the very purpose of which was to induce reliance by purchasers on the fact that potato seed had been certified. In contrast, no "special relationship" was found to exist with the FSIS because there was no theory from which it could be concluded that FSIS had actively sought to induce reliance on the part of purchasers of certified seed. The seed was inspected by the FSIS and found to be within tolerances for the absence of disease and FSIS inspectors placed tags on the trucks delivering the seed which designated that seed as "certified." However, that was not enough to create a "special relationship" with the FSIS.

Applied to the facts of this case, Leishman Electric did not actively seek to induce reliance on the part of Taco Time. The fact the Leishman Electric was a licensed electrical contractor and performed electrical work as part of its subcontract is not sufficient to create a "special relationship" in this case.

Nelson v. Anderson Lumber Co., 140 Idaho 702, 711, 99 P.3d 1092 (Idaho Ct. App. 2004), where there was no direct relationship between the licensed engineer and the homeowner,

is also instructive:

> With respect to Wicher, at no time did the Nelsons or Steinbruegge have any contact with Wicher. Wicher, a licensed engineer, was hired by IBP to review the Nelson's cabin plans. There was no relationship at all between Wicher and the Nelsons. Thus, there is no special relationship between Wicher and the Nelsons similar to that found in *Duffin*. With consideration of the Idaho Supreme Court's holding in *Duffin* that a special relationship only applies to an extremely limited group of cases, we decline the invitation to expand that principle to the facts of this case.

In the words of the Idaho Supreme Court there are an "extremely limited group of cases" where the "special relationship" exception will apply. *Duffin,* 126 Idaho 1002 at 1008 There are no facts in this case which would establish a "special relationship" between Taco Time and Leishman Electric.

F. THE DISTRICT COURT'S FIRST DECISION IN WHICH IT "PARSED" DAMAGES BETWEEN WHAT WAS DIRECTLY SUBJECT TO THE REMODELING AND THE PARTS THAT WERE NOT IS SUPPORTED BY CASES FROM OTHER JURISDICTIONS

Taco Time severely criticizes the trial court's original decision which found that the economic loss rule precluded Taco Time's negligence claims against Leishman Electric for damage to property which was the subject of the transaction. However, in a footnote the trial court salvaged a portion of the claim by stating: "This ruling does not dismiss all property damage claims asserted by Taco Time because some of the damage claims appear to be separate from the remodel project." R. Vol. I, p. 102 Taco Time claims this holding "evidences a lack of understanding of the rule's proper application." Appellant's Opening Brief, p. 28

Actually many courts, using the economic loss analysis, have denied recovery for damages to the subject of the transaction and allowed recovery of damages to "other property."

This is well-summarized in *Albers v. Deere & Co.*, 599 F. Supp. 2d 1142, 1164 (D.N.D. 2008)

> If the court is wrong about the header and the gasoline not being "other property" and tort recovery is permitted, Albers argues he is entitled to recover all of his losses, including the loss of the combine. Essentially, his argument is that the economic loss doctrine does not apply whatsoever once there is injury to persons or "other property." While there is some support for this argument, *C & S Hamilton Hay,* 2008 U.S. Dist. LEXIS 13151, 2008 WL 504031 at *4 (applying Idaho law); *Dutsch v. Sea Ray Boats, Inc.*, 1992 OK 155, 845 P.2d 187, 189, 193 (Okla. 1992), it appears most courts would apply the economic loss doctrine to limit tort recovery for damage to the product, even when there is personal injury or damage to "other property." E.g., *Indemnity Ins. Co. of North America v. American Eurocopter, LLC*, 2005 U.S. Dist. LEXIS 34011, 2005 WL 1610653, *16 (M.D.N.C. 2005) (applying North Carolina law); *Corsica Cooperative Association*, 967 F. Supp. at 387 (applying South Dakota law); *Fleetwood Enterprises, Inc. v. Progressive Northern Ins. Co.*, 749 N.E.2d 492 (Ind. 2001).

Because there is no Idaho decision which precisely addresses this issue, it is not clear that Judge Lodge's decision in *C & S Hamilton Hay* accurately applied Idaho law and it is certainly not binding precedent on this Court. However, it is presumptuous for Taco Time to suggest that the trial court lacked "understanding of the rule's proper application" where other courts have done exactly the same thing as the trial court did when applying the economic loss rule.

It should be noted, however, that "incidental" property damage is not sufficient to avoid the bar of the economic loss rule. *Miller v. United States Steel Corp.*, 902 F.2d 573, 576 (7th Cir. Wis. 1990) explained:

> Incidental property damage, however, will not take a commercial dispute outside the economic loss doctrine, *Chicago Heights Venture v. Dynamit Nobel of America, Inc.*, 782 F.2d 723, 726-29 (7th Cir. 1986); the tail will not be allowed to wag the dog.

While Leishman Electric fully supports the trial court's decision completely dismissing Taco Time's negligence claims by reason of the application of the economic loss rule, the

original order was not clearly erroneous in view of the above referenced authorities. If the order dismissing Leishman Electric is reversed, this Court should not permit Taco Time to recover all of its damages. Those damages to property which was the subject of the transaction should still be barred.

G. IF THE JUDGMENT DISMISSING TACO TIME'S COMPLAINT IS REVERSED AND TACO TIME IS ALLOWED TO AMEND ITS COMPLAINT IT SHOULD NOT INCLUDE A CLAIM FOR PRE-JUDGMENT INTEREST

This issue need not be addressed unless the judgment dismissing Taco Time's claims against Leishman Electric is reversed. Leishman Electric agrees that "joint and several liability" with Sign Pro is not appropriate. However, that does not end the inquiry because two additional issues are implicated: (1) the proposed amended complaints seek recovery of 100% of Taco Time's damages which necessarily includes damages to the subject of the transaction and (2) the proposed amended complaints seek a recovery for pre-judgment interest.

Leishman Electric submits that if the judgment is reversed, Taco Time should not be allowed to recover damage to the subject of the transaction. Because this issue is briefed and argued above, the authorities and arguments in support of this position are not restated here. For the reasons stated above, the damages sought in any amended complaint should not include damages to the subject of the transaction.

The issue of pre-judgment interest was raised by Leishman Electric in opposition to Taco Time's Motion to Amend, but the trial court did not reach the issue because it granted Leishman Electric's Motion for Summary Judgment. Although amendments are to be liberally granted, there is also a long-standing rule in Idaho that when considering whether to grant a motion for leave to amend, a trial court may consider whether the amended pleading sets out a valid claim.

Spur Prods. Corp. v. Stoel Rives LLP, 142 Idaho 41, 44, 122 P.3d 300 (Idaho 2005); See also *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1013, 895 P.2d 1195 (Idaho 1995) (although leave to amend is to be freely given the decision to grant or refuse permission to amend is left to the sound discretion of the trial court); *Black Canyon Racquetball Club v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175, 804 P.2d 900 (Idaho 1991) (when determining whether an amended complaint should be allowed, the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim)

The proposed amended complaints which have been filed with the trial court seek pre-judgment interest. R. Vol. II, p. 279 at ¶ 24 and p. 296 at ¶ 29 This is not an appropriate case for pre-judgment interest. *Farm Dev. Corp. v. Hernandez*, 93 Idaho 918, 920, 478 P.2d 298 (Idaho 1970) (the amount upon which the interest is to be based must have been mathematically and definitely ascertainable to support a claim for pre-judgment interest); *Bott v. Idaho State Bldg. Auth.*, 128 Idaho 580, 591, 917 P.2d 737 (Idaho 1996) (the district court erred in awarding prejudgment interest since the damages were not finally ascertainable until the district court ruled on the ISBA's motion for judgment n.o.v.); *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 17, 43 P.3d 768 (Idaho 2002) (even where Plaintiff clearly suffered some amount of damages prior to the time they brought suit; the actual amount of damage was not ascertainable until the jury returned its verdict and Plaintiff was not entitled to an award of pre-judgment interest)

Taco Time argued at one point in the proceedings that it was entitled to "pre-judgment interest" by reason of the decision in *Nampa & Meridian Irrigation Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868 (Idaho 2003) which relied on *Young v. Extension Ditch Co.*, 13 Idaho 174, 182, 89 P. 296, 298 (1907). *Mussell* involved damages to a ditch while *Young* involved damage

to farm ground caused by the operators of a ditch. Both cases state that for damages to land the measure of damages is the actual cash value of the land or the cost of repair "with legal interest thereon." *Mussell*, 139 Idaho 28, 33; *Young*, 13 Idaho 174, 182 A close reading of both decisions reveals that whether or not "pre-judgment interest" could be recovered in such cases was not the issue and it does not even appear that pre-judgment interest was calculated or awarded in either case.

The present case does not involve damage to land and the decisions in *Mussell* and *Young* offer no rationale or logic why pre-judgment interest should be awarded in a case such as the one presented here. In *McGuire v. Post Falls Lumber & Mfg. Co.*, 23 Idaho 608, 614, 131 P. 654 (Idaho 1913), the Idaho Supreme Court established the measure of damages for property and fixtures nearly 100 years ago:

> Where the property is totally destroyed or so badly injured and impaired as to render it valueless for the use to which it was originally designed and appropriated, the measure of damages should be the value of the property at the time of its destruction. Where, however, the property is merely damaged and is capable of being repaired, the measure of damage should be the cost of repair together with the value of the use of the property during the time that it would take to repair it.

Cf. *Skaggs Drug Centers, Inc. v. City of Idaho Falls*, 90 Idaho 1, 10, 407 P.2d 695, 699 (1965) (in civil action, the measure of damages for property or merchandise which *is* totally destroyed is the value of the property at the time and place of its destruction); *Latham Motors, Inc., v. Phillips*, 123 Idaho 689, 696, 851 P.2d 985, 992 (Ct. App. 1992) (in civil action, measure of damages for the total loss of a car is the fair market value of the car at the time of its loss); also see IDJI 9.07:

> If the jury decides that the plaintiff is entitled to recover from the defendant, the

jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by the defendant's negligence.

The elements of damage to plaintiff's property are:

[either]

1. The reasonable cost of necessary repairs to the damaged property, plus the difference between its fair market value before it was damaged and its fair market value after repairs.

[or]

1. The difference between the fair market value of the property immediately before the occurrence, and its [salvage value] [fair market value without repairs] after the occurrence.

The Idaho Jury Instructions define "fair market value" for property as follows in IDJI 9.12:

> When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

Nowhere in the history of Idaho jurisprudence is it suggested that in a case like this involving fire damage to a building and its contents is a plaintiff entitled to pre-judgment interest. More importantly, there is no suggestion in the cases involving damage to buildings and its contents, that such awards are exempt from the well-established rule that a grant of pre-judgment interest requires a showing that the damages were liquidated, even in cases where pre-judgment interest is allowed by an agreement in a contract or by statute. *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 762, 992 P.2d 751 (Idaho 1999) The Idaho Supreme Court held in *Boel v. Stewart Title Guar. Co.*, 137 Idaho 9, 17, 43 P.3d 768 (Idaho 2002):

> The title insurance policy did not specify a liquidated amount or a mechanism for mathematically determining the amount of damages the Boels would suffer as the result of any particular title defect. Contrary to Stewart Title's argument, the Boels clearly suffered some amount of damages prior to the time they brought suit; however, the actual amount of damage was not ascertainable until the jury returned its verdict. Consequently, the district court's decision to deny the Boels' claim for pre-judgment interest is affirmed.

In this case the amount of the damages is disputed and the share attributable to Leishman Electric, if any, is disputed. The actual amount of damage is not ascertainable until a verdict is returned in this case. Therefore, pre-judgment interest is not appropriate and if Taco Time is permitted to file an amended complaint, it should not be permitted to include a claim seeking pre-judgment interest because such a claim does not state a valid claim for relief under the circumstances of this case.

H. TACO TIME IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

Leishman Electric did not seek attorney fees below and does not seek attorney fees on appeal. Application of the "economic loss" rule is difficult and it is no surprise that the parties to this appeal see the issues differently. "When there are fairly debatable questions, attorney fees are not awardable pursuant to I.C. § 12-121." *Sunnyside Indus. & Prof'l Park, LLC v. Eastern Idaho Pub. Health Dist.*, 2009 Ida. App. LEXIS 33 (Idaho Ct. App. Apr. 28, 2009) Regardless of the outcome of this appeal, Leishman Electric does not believe that it has defended this appeal frivolously, unreasonably or without foundation. The trial court twice ruled in favor of Leishman Electric's arguments on the "economic loss" rule and Leishman Electric has submitted substantial authorities and facts which support the trial court's decisions. Leishman Electric requests that Taco Time's request for attorney fees on appeal be denied.

CONCLUSION

Leishman Electric subcontracted to rewire the Taco Time restaurant as a part of remodeling project in 1998 and 1999. The transaction was the remodeling project and the subject of the transaction was the remodeled restaurant and building. That is what Taco Time purchased. It was an integrated whole and all of the damages which Taco Time sought to recover against Leishman Electric as a result of the 2004 fire were damages to the subject of the transaction. The court below was correct when it dismissed Taco Time's claims against Leishman Electric because the damage claims are barred by the economic loss rule. Leishman Electric requests this Court to affirm the court below.

If the judgment dismissing Leishman Electric is reversed and this matter remanded for further proceedings, Leishman Electric requests this Court to hold that if damages to "other property" are found all damages to the subject of the transaction are barred by the economic loss rule. Leishman Electric further requests this Court to hold that Taco Time is not entitled to recover pre-judgment interest in this case.

DATED this 25 day of August, 2009

COOPER & LARSEN

By: _____
GARY L. COOPER
Attorney for Leishman Electric

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of August, 2009, I served a true and correct copy of the foregoing to:

John Goodell & Brent Whiting
Racine Olson Nye Budge & Bailey, Chtd
P. O. Box 1391
Pocatello, ID 83204-1391

[✓] U.S. mail
[ ] Express mail
[ ] Hand delivery
[ ] Fax: 232-6109

GARY L. COOPER

EXHIBIT
6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

J.R. SIMPLOT CO., a Nevada corporation, Plaintiff, v. HARNISCHFEGER CORPORATION, a Delaware corporation, et al, Defendants.	)	Civil Case No. 97-0490-E-BLW MEMORANDUM DECISION AND ORDER

The Court has before it Defendant's motion for summary judgment on Plaintiff's tort claims. Oral argument was held on March 3, 1999, at the conclusion of which the Court granted the motion. This Memorandum Decision is intended to supplement and explain the Court's oral ruling.

BACKGROUND

Plaintiff J.R. Simplot Company ("Simplot") operates the Smokey Canyon Mine in Caribou County, Idaho. Defendant Harnischfeger Corporation ("Harnischfeger") manufactures surface-mining equipment. In 1987 Simplot purchased a Series 1200B hydraulic mining shovel ("the 1200B") from Harnischfeger for use at the Smokey Canyon Mine.

Some 10 years later, on April 3, 1997, the 1200B caught fire and was severely damaged or destroyed. Its operator, Tommy Cynova, was not injured, and there was no damage to any property except the 1200B itself. For purposes of this hearing, the Court

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assumes that the fire was intense and spread rapidly, such that it was simply a matter of luck that Cynova escaped uninjured.

In addition to breach-of-contract claims, Simplot brings negligence and strict liability claims against Harnischfeger seeking to recover for the damage to the 1200B. Harnischfeger has moved for summary judgment on all of Simplot's claims. The parties announced at oral argument, however, that they had reached a stipulation to dismiss the breach-of-contract claims. Finally, several other motions are pending, all of which involve Harnischfeger's recent discovery of significant evidence regarding the fire-preventive features of the 1200B.

SUMMARY-JUDGMENT STANDARD

The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The evidence must be viewed in the light most favorable to the non-moving party, *see id.* at 255, and the Court must not make credibility determinations. *See id.* The Court must determine whether the evidence presented is such that a jury applying the proper evidentiary standard could reasonably find for either the plaintiff or the defendant. *See id.*

Once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *See id.* at 256-57. In meeting this burden, the non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

TORT CLAIMS

In *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978), the Idaho Supreme Court established the "economic-loss rule," which prevents a purchaser of a product from recovering in tort against the product's manufacturer when the purchaser has sustained purely economic losses. "Economic losses" include the "costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *E.g., Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995) (citation and internal quotation omitted). The rationale for the economic-loss rule is that provisions of the Uniform Commercial Code "adequately define the rights of the parties" where purely economic losses are at issue, and expanding tort law to address such losses "would only add more confusion in an area already plagued with overlapping and conflicting theories of recovery." *Clark*, 99 Idaho at 336, 581 P.2d at 794.

Because Simplot does not allege that the fire caused any personal injury or damage to property other than the 1200B itself, application of the economic-loss rule would bar Simplot's tort claims for damage to the 1200B. The rule, however, has three established exceptions: (1) where economic loss is parasitic to personal injury or property damage; (2) where unique circumstances require a different allocation of the risk; and (3) where the parties have a "special relationship" such that the manufacturer should have a duty to avoid economic loss to

the purchaser. *Duffin*, 126 Idaho at 1007-08, 895 P.2d at 1200-01. Simplot urges the creation of a new exception for economic losses arising from a sudden or calamitous event.[1]

The parties agree that whether Simplot's economic losses are recoverable in tort is a question of Idaho law. The Court is mindful that, when interpreting Idaho law, it is bound by decisions of the Idaho Supreme Court. *See Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995). In the absence of a controlling decision, this Court must predict how the Idaho Supreme Court would decide the question, "using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* (citation and internal quotation omitted). Because the Idaho Supreme Court has never addressed whether a "sudden or calamitous event" exception to the economic-loss rule should be created, the Court must refer to such sources to predict how the Idaho Supreme Court would resolve this question.

The Court first examines the *Duffin* decision itself. The *Duffin* court listed the three exceptions to the economic-loss rule enumerated above using language suggesting that no undiscovered exceptions exist. The decision does not employ a broad phrase like "the exceptions to the rule include" before listing those three exceptions. Instead, it notes that the rule has exceptions, states the "first" exception, states another exception, and "finally" states the third exception. *Duffin*, 126 Idaho at 1007-08, 895 P.2d at 1200-01. This manner of

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[1]To the extent Simplot argues that sudden and calamitous events, by their nature, fall within one or more of these exceptions, the Court concludes that the Idaho Supreme Court would not so hold. The Court reaches this conclusion for essentially for the same reasons it will later conelude that the Idaho Supreme Court would not create a new exception for such events.

listing the exceptions to the economic-loss rule suggests that the list was intended to be exhaustive.

Simplot argues that a decision of the Idaho Court of Appeals implicitly recognizes the "sudden and calamitous event" exception. That decision, *Myers v. A.O. Smith Harvestore Prods., Inc.*, 114 Idaho 432, 436, 757 P.2d 695 (Ct. App. 1988), contains the following statement, made in the context of deciding to apply the economic-loss rule to bar a tort claim for damage to a product that malfunctioned in a less spectacular way than the 1200B is alleged to have done: "[T]hese injuries did not result from a calamitous event or dangerous failure of the product. Rather, they arose from the failure of the product to match the buyers' commercial expectations." While this statement suggests that the Idaho Court of Appeals might have been receptive to creating the exception Simplot advocates, it is difficult for the Court to assign it significant weight. The statement is, at best, pure dictum. More precisely, it is nothing more than an off-handed observation by the Court of Appeals about the facts presented in that case. As such, it provides no guidance as to how receptive the Idaho Supreme Court would be to the "sudden and calamitous event" exception urged by Simplot under the facts of this case.

Simplot does, however, point to several jurisdictions that have created an exception to the economic-loss rule for losses stemming from sudden or calamitous events. *See Cloud v. Kitt*, 563 P.2d 248 (Alaska 1977); *Gene Cantrell Drilling Co. v. Ingersoll-Rand Co.*, 571 F. Supp. 1216 (N.D. Ill. 1983) (applying Missouri law); *Touchet Valley Grain Growers, Inc. v. Op & Seibold Gen. Constr., Inc.*, 831 P.2d 724 (Wash. 1992); *Mac's Eggs, Inc. v. Rite-Way Agri Distribs.*, 656 F. Supp. 722, 730 (N.D. Ind. 1986) (applying Indiana law); *Salt River*

Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp., 694 P.2d 198 (Ariz. 1984); *National Crane Corp. v. Ohio Steel Tube Co.*, 332 N.W.2d 39 (Neb. 1983); *Russell v. Ford Motor Co.*, 575 P.2d 1383 (Or. 1978). These courts distinguish between "the disappointed users...and the endangered ones." *Russell*, 575 P.2d at 1387. In other words, they tend to view harm caused by a calamitous event as properly within the realm of tort law, regardless of the existence of a contractual relationship between the product's manufacturer and the person it harms.

These court represent the minority view. Interestingly enough, the United States Supreme Court had the opportunity to air its views on this very issue in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986) (applying admiralty law), in which the Court unanimously rejected the "sudden and calamitous event" exception. Citing "the need to keep products liability and contract law in separate spheres and to maintain a realistic limitation on damages," the Court pronounced the minority view "unsatisfactory" and "too indeterminate." *Id.* at 870-71. It held that "[e]ven when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of his bargain--traditionally the core concern of contract law." *Id.* at 870. Adopting the reasoning of *Seely v. White Motor Co.*, 403 P.2d 145 (1965), the progenitor of the majority approach, the Court elaborated:

> "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury.

> The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products." *Seely v. White Motor Co.*, 63 Cal. 2d, at 18, 403 P.2d, at 151. When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong.

Id. at 871.

It is difficult to regard a unanimous pronouncement by the United States Supreme Court on the precise issue at hand as anything less than extremely persuasive. *East River* was decided not by a fractured Court that was unemphatic in its holding, but by one that thoroughly reviewed the case law and policy rationales on both sides and then, with one voice, wholeheartedly rejected the "sudden and calamitous event" exception. Although *East River* has no binding effect on the Idaho Supreme Court, it strikes this Court as highly influential, both because of the justices' unanimity and because of the quality of their reasoning.

Finally, the Restatement (Third) of Torts recognizes the economic-loss rule and contains no "sudden and calamitous event" exception:

> A...difficult question is presented when the defect in the product renders it unreasonably dangerous, but the product does not cause harm to persons or property. In these situations the danger either (1) never eventuates in harm because the product defect is discovered before it causes harm, or (2) eventuates in harm to the product itself but not in harm to persons or other property. A plausible argument can be made that products that are dangerous, rather than merely ineffectual, should be governed by the rules governing products liability

> law. However, a majority of courts have concluded that the remedies provided under the Uniform Commercial Code--repair and replacement costs and, in appropriate circumstances, consequential economic loss--are sufficient. Thus, the rules of this Restatement do not apply in such situations.

Restatement (Third) of Torts § 21 cmt. d (1997).

Thus, the persuasiveness of *East River*, the fact that *East River* represents the majority rule of American jurisdictions, the position taken by the Restatement (Third) of Torts, and the Idaho Supreme Court's longstanding adherence to the economic-loss rule and its previous delimitation of the rule's narrow exceptions all combine to strongly suggest that the Idaho Supreme Court would refuse to adopt a "sudden and calamitous event" exception to the economic-loss rule. For this reason, Simplot has failed to create a genuine issue of material fact that its claims are not barred by the economic-loss rule. Harnischfeger's motion for summary judgment on those claims is granted.

CONTRACT CLAIMS

On January 29, 1999, Harnischfeger moved for summary judgment on the contract claims stated in Count IV of Simplot's complaint. A few weeks later, on February 22, 1999, Simplot filed a notice of its intent to seek voluntary dismissal of the contract claims. At oral argument, the parties announced that they had reached a stipulation to dismiss Simplot's contract claims, which they would soon be filing. The stipulation will provide for dismissal of those claims with prejudice, with each party reserving its right to seek attorney fees, costs, and sanctions as allowed by rule.

The Court now grants the soon-to-be-filed stipulation. Simplot's contract claims are dismissed with prejudice, and either party may seek attorney fees, costs, and sanctions upon further application to the Court.

Having decided to grant summary judgment, the Court finds moot the remaining motions, all of which involve Harnischfeger's newly changed position on a factual matter irrelevant to the summary-judgment decision. Finally, because no claims remain for trial, this case is closed.

ORDER

In accordance with the views expressed above,

IT IS ORDERED that Defendant's motion for summary judgment--contract claims (Docket No. 42) is MOOT in accordance with a soon-to-be-filed stipulation of the parties. Plaintiff's contract claims are DISMISSED with prejudice pursuant to that stipulation, without prejudice to the rights of either party to seek an award of attorney fees, costs, and sanctions, if applicable, and upon further application to the Court in this matter.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment--tort claims (Docket No. 33) is GRANTED. Plaintiff's tort claims are DISMISSED with prejudice.

IT IS FURTHER ORDERED that the remaining motions (Docket Nos. 31 and 38, parts 1, 2, 3, and 4) are MOOT.

IT IS FURTHER ORDERED that this case is CLOSED.