9-18-2009

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

APPELLANT'S REPLY BRIEF

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

Honorable Brent J. Moss, District Judge, Presiding

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

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

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

REPLY ARGUMENT

I. SUMMARY OF REPLY ARGUMENT

The district court's decision granting summary judgment dismissing Taco Time's negligence claim is erroneous as a matter of law. It should be reversed and the case remanded for trial. The economic loss rule does not apply given the undisputed facts.

This Court's recent decision in *Aardema v. U. S. Dairy Systems, Inc.*, 2009 Opinion No. 107 (filed August 24, 2009),[1] addresses the economic loss rule. It clarifies that the "*underlying contract* that is the subject of the lawsuit *is the subject of the transaction*" (emphasis added)." *Aardema, supra* at p. 6, note 2. Such clarification of preexisting case law on the economic law issue appears dispositive of this appeal.

There are three (3) "underlying contracts" arguably involved in the instant case: (1) the Taco Time-Sign Pro contract to repair and install the neon signs and transformers;[2] (2) the Taco

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[1]The Court's opinion in *Aardema* was released on August 24, 2009. Leishman's respondent's brief was signed and mailed for filing and service the next day on August 25, 2009, but does not acknowledge or mention the opinion.

[2]Two neon signs were installed on two different exterior vertical walls of the building. Each sign had a transformer which was installed nearby on the roof. The neon sign on the front of the building, and related transformer was installed on the roof of the building, are the identified origin and cause of the fire in this case. The components, location, and physical configuration of the subject neon sign and transformer are undisputed and as described in the Affidavit, attached Report, and attached photos of Robert "Jake" Jacobsen. R., Vol. 2, p. 241-242; Ex. A thereto (Preliminary Report)(*Id.*, pp. 249-250, 251); Ex. C thereto (8/21/06 supplemental letter report)(*Id.*, p. 254-256), and attached photos #13, #63, #76, #77(*Id.*, pp. 257-260). A copy of the supplemental letter report and color photos are attached in the appendix hereto.

Time-General Contractor contract for remodel of the pre-existing building; and (3) the General Contractor-Leishman subcontract for electrical work. There are no other "underlying contracts" which are the "subject of the transaction."

It is undisputed there is "other property damage" to parts of the building not involved with any of the three "underlying contracts." For example, the Second Affidavit of Brian Larsen, ¶ 7, states:

> "The majority of the fire damage was sustained in the original portions of the building. . . ."

R., Vol. II, p. 111. Larsen's testimony quoted above is uncontroverted by any other evidence. Damage to other parts of the building, which were not involved with the three contracts identified above, is sufficient to make the economic loss rule non-applicable. Thus, general tort/negligence principles for property damage apply.

In addition, setting the building aside, it is undisputed there is "other property damage" to equipment, fixtures, inventory, and other contents and personal property which were located in the building at the time of the fire. Such items were also not involved with the any of the three "underlying contracts" identified above. Examples include: cash registers, inventory food items, janitorial and bathroom supplies, etc. Such damage to such equipment, inventory, personal property, etc., which are unrelated to the three "underlying contracts" identified above, is sufficient to make the economic loss rule non-applicable. Again, general tort/negligence principles for property damage thus apply.

The combination of damage to other parts of the building, and/or damage to equipment, fixtures, inventory, and other contents and personal property, which are undisputed as having occurred, all of which are unrelated to the three "underlying contracts" discussed above, establish

beyond all doubt that the economic loss rule is non-applicable. They were also not the "subject of the transaction" per *Aardema*. The economic loss rule does not apply. Taco Time is entitled to recover all property damage, together with purely economic losses (i.e., lost profits) against Leishman based on a negligence cause of action.

In addition, it is unnecessary to differentiate further between which one or more of the three "underlying contracts" identified above are determined to be the actual "subject of the transaction." It does not matter. Under any or all of them, there still remains "other property damage" beyond their scope which therefore does not change the conclusion that the economic loss rule does not apply. Thus, no material factual issue is raised to non-applicability of the economic loss rule as to which of the three "underlying contracts" identified above are deemed the "subject of the transaction" in this case. Again, it does not matter. Under any one of them, the rule does not apply because there exists "other property damage" beyond the scope of all of them.

In *Aardema, supra at p. 7,* the Court reversed and remanded holding an issue of fact as to whether there was actual injury to the plaintiff's cows or the cows' teats from the milking machines because the evidence suggested such "could" be the case, but it was not definitely established.

In contrast, here the undisputed evidence establishes such "other property damage" as discussed above. Thus, unlike *Aardema*, there is no necessity to remand to determine whether "other property damage" exists. Here, where such is the case, the outcome is properly determined on appeal that the economic loss rule does not apply as a matter of law. There is no threshold factual issue whether "other property damage" exists; it clearly does exist.

Under such an evidentiary record, Taco Time requests this Court's ruling that the economic loss rule does not apply as a matter of law. Such ruling will completely eliminate the rule from this case once and for all for further proceedings in the event of reversal and remand.

On the other hand, if the Court does not hold that the economic loss rule does not apply as a matter of law, then Leishman will continue to "make mischief" asserting it in further proceedings. Leishman will likely seek to persuade the district court again that the economic rule applies to some or all of the damages; that damages should be "parsed" as it argues in Part F of its respondent's brief at pages 32-34; or that this Court's failure to hold the rule non-applicable as a matter of law somehow implies the opposite. More confusion, distraction, and legal error are likely to occur in any further proceedings. The likelihood of a second appeal after any trial is increased. The economic loss rule should be declared not applicable as a matter of law thus ending any consideration of it.

Aardema, and foregoing discussion in light of it, refutes Leishman's contention that "the entire building" is the "subject of the transaction." Such is the foundation to Leishman's argument and position on this appeal. Such is the foundation of the district court's summary judgment decision. If such is legal error, as Taco Time contends, then reversal and remand is required. Taco Time submits that the "entire building" as the "subject of the transaction" is untenable in light of *Aardema* which directs otherwise.

If the "entire building" cannot be the "subject of the transaction," per *Aardema*, as Taco Time contends, then such appears dispositive, and reversal and remand is required. In such case, Leishman's additional arguments and authorities asserted in its respondent's are largely immaterial and irrelevant to proper disposition of this appeal.

In the event the case is reversed and remanded because the economic loss rule does not apply as a matter of law, then Taco Time should also be allowed to amend its complaint to pursue 100% of its damages sustained in the fire against Leishman, which is not entitled to an offset for settlement funds recovered from Sign Pro. I.C. § 6-805(2); *Horner v. Sani-Top, Inc.*, 143 Idaho 230, 141 P.3d 1099 (2006). Leishman concedes the point where it "agrees that 'joint and several liability' with Sign Pro is not appropriate." Respondent's Brief, (G), p. 34. Taco Time requests this Court's opinion also address and rule on the amendment issue.

II. THE "ENTIRE BUILDING" IS *NOT* THE "SUBJECT OF THE TRANSACTION" FOR PURPOSES OF THE ECONOMIC LOSS RULE

The district court's and Leishman's contention that the "property which is the subject of the transaction" is the "entire building" is the dispositive issue on the economic loss issue on this appeal; all else is secondary. Leishman's central reliance on this contention is stated repeatedly in its respondent's brief in one way or another.

For example, at page 14 of its respondent's brief, Leishman states:

> "The trial court followed this guidance [of *Blahd*] and concluded 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.' "

Similarly, at page 23 of its respondent's brief, Leishman states:

> "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."

At page 25 of its respondent's brief, Leishman states:

> ". . . 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.' "

As a side note, the internal contradiction and inconsistency between the district court's initial partial summary judgment decision, and subsequent full summary judgment decision, even Leishman acknowledges.[3] The significance of this inconsistency Leishman chooses to avoid for reasons which are obvious.

At page 27 of its respondent's brief, Leishman states:

> "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 [Taco Time added footnote].[4] Leishman Electric rewired

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[3]Leishman acknowledges the "other property damage" finding of the district court in its initial decision: "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.' " *Id.*, citing the lower court's partial summary judgment decision (R., Vol. I, p. 102, note 6). Such acknowledged existence of "other property damage" is the central basis upon which Taco Time relied arguing unsuccessfully in the district court that the economic loss rule *did not apply at all.*

[4]Leishman misrepresents the timing and order of work which the record clearly establishes. Sign Pro first installed both the wired sign and the transformer on the building. Thereafter, Leishman connected the primary building power to the transformer. Scott Leishman's own testimony cited in Taco Time's Opening Brief, establishes his work being done *after* Sign Pro installed the transformer. R., Vol. I, p. 88. Packer's Affidavit establishes that he installed the sign on the building at the same time as the transformer on the roof and connected

> 95% of the entire restaurant building. In *Blahd* the homeowner 'purchased the lot as an integrated whole.' Here Taco Time purchased a remodeled restaurant and the 'various components of the remodeling, including electrical rewiring, installation of signs, and other building improvements where 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."

At page 7 of its respondent's brief, referring to what it characterizes as "critical evidence necessary to decide the application of the economic loss rule," at item 3, Leishman states:

> "The neon signs which were purchased by Taco Time and repaired and installed by Sign Pro *were part of the remodel project*" (emphasis added).

The trial court clearly ruled, as Leishman's brief's passages quoted above acknowledge, that the economic loss rule allegedly "applied" because the neon sign and transformer were

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the two items, and his work was finished. R., Vol. II, pp. 262-63. The only reason Scott Leishman does not know that the neon sign was installed at the other end away from the transformer is that *he did not bother to look.* R., Vol. I, p. 88. Such ignorance was totally *self-induced*, but no excuse for failure to determine that whatever was there was safe to hook up. He could have easily done so, and should have, according to Taco Time's expert, Higgins, which would have taken him only about "five minutes." R., Vol. I, p. 145. This sleight of hand by Leishman obviously seeks to distance itself from failure to inspect and determine the lack of grounding in the improper wiring of the Taco Time sign letters. Leishman's alleged "factual" discussion relates to the transformer only, not the plainly visible mis-wiring of the neon sign letters, evidencing its vulnerability for negligent failure to inspect and identify the latter as a fire hazard before energizing the building power to the entire circuit. Apparently, it is easier for Leishman's expert, Moore, to argue Leishman was allegedly "not negligent" for not opening the cover of the transformer to determine if it had secondary ground fault protection, as required by the NEC then in effect, than to argue it should not have seen the plainly mis-wired sign letters, which Scott Leishman did not bother to even look at. It is indeed interesting that Leishman's brief is completely silent on this *second hazardous condition,* i.e., the mis-wired sign letters which lacked ground wiring, and it focuses its "factual" argument on the transformer only. Such silence speaks loudly regarding Leishman's negligence in energizing the circuit not only with the obsolete transformer, but also with the mis-wired letters of the sign lacking ground wiring, and without bothering to look, despite the NEC's contrary requirements and its supposed competency as the only "licensed electrician" making power connections on site.

merely a "part of the building" and "part of the remodel project" and, therefore, the "subject of the transaction" which caused Leishman to be working on the building. This reasoning is flawed and does not support application of the economic loss rule in this case.

As discussed above, *Aardema* clearly explains that this Court unanimously and currently considers that the "subject of the transaction" for purposes of the economic loss rule is the "subject matter of the underlying contract." *Id.*, at p. 6; see also, note 2 thereto.

The second issue on appeal was identified by the Court as follows: "(2) whether a genuine issue of fact exists as to whether Aardema Dairy suffered any property damage[.]" *Id.*, at p. 3.

In discussing this issue, the Court first exhaustively reviewed its prior decisions on the economic loss rule, stating:

> "It is a long-held legal maxim that animals are tangible property and that intentional acts leading to the destruction or loss of such chattels give rise to a cause of action[.]" *Oppenheimer Indus., Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 426, 732 P.2d 661, 664 (1986). Economic loss is distinguishable from property damage, which would be recoverable under a tort claim. "Property damage encompasses damage to property other than that which is the *subject of the transaction." Ramerth v. Hart*, 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (emphasis original) (quoting *Salmon Rivers Sportsman Camps, Inc.*, 97 Idaho at 351 544 P.2d at 309). This Court has not defined the "subject of the transaction," instead relying on factual comparisons from previous decisions. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005) (finding that the house and the lot are the subject of the transaction and, therefore, constitute economic loss where the allegation is damage to the house from the settling foundation); *Ramerth*, 133 Idaho at 197, 983 P.2d at 851 (finding that repair of the engine is the subject of the transaction if the allegedly negligent repair subsequently causes need for further repair to the engine); *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200 (finding that no property loss, other than property which is the subject of the transaction, existed when delivered and certified seed is found to

> contain bacterial ring rot); *Tusch Enters. v. Coffin*, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987) (holding that allegations of negligent design and construction of a duplex is barred by the economic loss rule); *Oppenheimer Indus., Inc.*, 112 Idaho at 426, 732 P.2d at 664 (holding that a tort action may be maintained when the plaintiff alleged that his cattle were sold without his permission because the cattle brand inspector failed to verify cattle ownership prior to the sale). *This line of cases delineates a clear pattern that this Court has implicitly defined the "subject of the transaction" by the subject matter of the contract.* [footnote 2].

Id., at p. 6.

Footnote 2, referred to in the above quote, states:

> In *Blahd* this Court stated that the case law "indicate[s] the word 'transaction,' for purposes of the economic loss rule, does not mean a business deal-it means the subject of the lawsuit." *Blahd*, 141 Idaho at 300, 108 P.3d at 1000. However, if the subject of the transaction is defined as the subject of the lawsuit essentially every claim would be barred by the economic loss rule. Instead we read this overbroad language from *Blahd* to mean that the *underlying contract* that is the subject of the lawsuit is the subject of the transaction." (emphasis original)

Id.

In light of the above case law and footnote clarification of what *Blahd* meant with regard to the "subject of the transaction," the Court's opinion continued:

> "U.S. Dairy argues that the cows are the subject of the transaction; however, this argument is strained. Based on the preceding case law, the milking machines are the subject of the transaction. Aardema Dairy did not contract with any of the defendants for the cattle, but for the purchase, installation and operation of the milking system. In this case, the subject matter of the contract is the milking system and not the cattle that are milked. Therefore, on remand the inquiry is whether there is sufficient evidence to raise a genuine issue of material fact that there is damage to the cows which amounts to more than the failure of the milking equipment to meet Aardema Dairy's expectations.
>
> Evidence existed that the wiring at Aardeman (*sic*) Dairy was

> faulty and that faulty wiring would lead to improperly operating milking equipment. An expert opined that 'if the pulsator isn't working properly . . . the blood circulation through the . . . teat end wouldn't be adequate and it *could* injure the cow.' (Emphasis added). Aardema Dairy also presented evidence that its loss extended to 'reduced milk production, loss of price premium from reduced milk quality, loss of dairy capital and loss of present value' all *allegedly* stemming from the physical damage to the cattle. On remand, if the only damage that is produced is in the form of lost milk production, quality and profits and not actual physical damage to the cows then this is purely economic loss; that is, the failure of the milking equipment to produce the products and profits anticipated by Aardema Dairy."

Id., pp. 6-7.

Thus, in *Aardema,* the Defendant U.S. Dairy argued that the "cows" were the "subject of the transaction," not the milking system used on them. This Court rejected this argument. It held the milking machines, not the cows, were the "subject of the transaction."

In the instant case, Leishman, like U.S. Dairy, argues that the "entire building," not the contract with Sign Pro to install the neon sign and transformer, nor the remodel contract with the general contractor, nor the electrical subcontract of Leishman, was the "subject of the transaction." Such is flawed and erroneous. Such violates the Court's "bottom line" characterization and summary of its prior case law dealing with economic loss distilled as meaning:

> "This line of cases delineates a clear pattern that this Court has implicitly defined the 'subject of the transaction' by the subject matter of the contract."

Id.

In *Aardema,* there was no clear evidence whether there was actual damage to the cows

which would support recovery for the purely economic damages claim for lost milk production, quality, and profits. Thus, the summary judgment granted by the lower court was reversed and the case remanded for resolution of that factual issue. *Id.*, p. 7.

As discussed above, in contrast, in the instant case, there is ample – indeed overwhelming – evidence of damage to the building *other than any of the three arguable underlying contracts involved* (i.e., Larson-Sign Pro contract for neon sign and transformer repair and installation; Larson-General Contractor building remodel contract; or General Contractor-Leishman Electric electrical subcontract as part of the building remodel). *Thus, here, it does not make any difference which one of the three arguable underlying contracts are the "subject of the transaction" for purposes of the economic loss rule being determined not applicable.*

The evidence is clear that there was enormous damage to the entire building – old and new, remodeled or not – and also damage to equipment; fixtures; inventory; supplies, etc. See Second Affidavit of Brian Larsen, pp. 109-111, and attached as Exs. B (corrected) and E (R., Vol. I, pp. 118, 128-141). Indeed, how could there not be extensive damage to the building and all contents from this major building fire conflagration, which common sense and all the physical evidence, including fire investigator Jacobsen's report, affidavit, and photos, clearly establish. See, Jacobsen Affidavit and attachments (R., Vol. I, pp. 234-260).

Owner Larsen's Affidavit also states:

> "The majority of the fire damage was sustained in the original portions of the building. Approximately forty (40) linear feet of exterior wall had to be removed and replaced after the fire. Eight and one half feet (8.5') of the replaced exterior wall was a part of the original building structure."

Second Larsen Affidavit, ¶ 7 (R., Vol. I, p. 111). Such testimony is undisputed. Such testimony alone establishes that there was "other property damage" which was not the subject of any of the three (3) arguable "transactions" involved in this case identified above.

Therefore, as discussed in the Summary above, any three of the arguable contracts identified are not the "entire building," but only lesser parts of it. The first contract between Taco Time-Sign Pro is only the two neon signs and two transformers. The second contract between Taco Time-General Contractor is the remodeling which occurred to parts of the existing building, but there is no doubt it was not the "entire building" as some portions of the original building pre-existed the remodeling project. The third contract is the General Contractor-Leishman electrical subcontract, which only involved the electrical system rewiring and updating. Thus, there is "no contract" which is the subject of the "entire building" for construction or remodel or anything else. The "entire building" "theory" of Leishman, and the lower court, being the "subject of the transaction" or "subject of the underlying contract," under any one of the three arguable contracts involved, do not incorporate or include the "entire building."

Taco Time submits that since the neon sign and transformer have been identified as the origin and cause of the fire, not other aspects of the remodel work by the general contractor or Leishman's work as the electrical subcontractors, then logically that is the "underlying contract" which is the "subject of the transaction" for purposes of the economic loss rule. Clearly, the entire rest of the building, and all the equipment, inventory, and other contents, were therefore "other property damage" resulting from the fire and, therefore, the economic loss rule does not apply. Such conclusion is consistent with *Aardema* and all the Court's prior line of case law on

the economic loss rule.

However, as discussed above, Taco Time believes it is unnecessary to identify one of the three "underlying contracts," since the result is the same with any of them. There is still "other property damage" which exists, rendering the economic loss rule non-applicable as a matter of law.

In *Aardema, supra* at p. 6, this Court found U.S. Dairy's argument that the cows were the subject of the transaction "strained." The same is true of Leishman's argument, and trial court's characterization, that the "entire building" was the "subject of the transaction" herein. *Aardema* requires a different conclusion limited to one or more of the three contracts identified above. Which one makes no difference, as they are all limited to less than the "entire building" where "other damage" occurred. Even setting the entirety of the building aside, the "other damage" to equipment, fixtures, inventory, contents and other personal property, etc., which were clearly not the "subject of any transaction" or "subject of any underlying contract," are sufficient to establish that the economic loss ruled simply does not apply. Rather, traditional tort rules apply allowing recovery of all property damages, including all economic losses, i.e., lost profits.

III. THE OCCURRENCE OF AN "ACCIDENT" OR "CALAMITOUS EVENT" *IS SIGNIFICANT* FOR CONSIDERING WHETHER THE ECONOMIC LOSS RULE APPLIES

Leishman contends that a "calamitous event" is not a recognized exception to the economic loss rule. Leishman mis-characterizes and misconstrues Taco Time's argument in this regard. Taco Time submits it is significant whether there is an "accident" or "calamitous event" occurrence in considering whether the economic loss rule applies under Idaho case law.

Moreover, Leishman mis-characterizes Taco Time's argument by suggesting Taco Time urges this Court recognize a "new exception" or adopt a "minority rule" in Idaho. Taco Time emphatically does no such thing.

Apparently, it is Leishman who refuses to acknowledge or comprehend this Court's prior case law which so suggests.

Aardema, supra at pp. 4-5, quotes with approval and reaffirms the leading seminal quote from Dean Prosser's Handbook on the Law of Torts, also quoted with approval in *Clark v. International Harvester Co.*, 99 Idaho 326, 333, 581 P.2d 784, 791 (1978), as follows:

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

Aardema, supra at p. 5, also cites the Court's prior decision in *Myers v. A. O. Smith Harvestore Prod., Inc.*, 114 Idaho 432, 436, 757 P.2d 695, 699 (1988), described as "holding that decreased milk production in cows caused by a defective feed storage system is not an injury from a 'calamitous event or dangerous failure of the product' and is merely the product's failure to meet the plaintiff's expectations[.]"

The above-quoted "accident" language of *Clark,* and "calamitous event" language of *Myers*, both point to a conclusion that damages which result from such circumstances are <u>not</u>

likely to be "purely economic losses," i.e., a mere failure to meet the buyer's or user's "expectations." It is therefore highly material and relevant in determining whether the economic loss rule applies – or does not – to consider such circumstances. Where property damage arises out of an "accident" or "calamitous event," resulting from an actor's negligence or a product defect, then, in all likelihood, *by definition, inevitable consequence, or accompanying circumstance,* there is likely "other property damage" to the thing itself (e.g., car wrecked due to bad brakes per Prosser's example quoted in *Clark*), or some "other property," or possible "personal injury." In such case, the economic loss rule does not apply.

Rather, in such a case, basic tort rules apply allowing recovery for such property damage or personal injury, together with any damages that are also characterized as "economic losses" under the "parasitic" rule. *Aardema, supra; Clark, supra; Duffin, supra. See also*, voluminous case law both from and other jurisdictions cited in Appellant's Opening Brief, (II)(A and B), pp. 21-30, which will not be revisited as unnecessary.

IV. LEISHMAN'S RELIANCE ON CASE LAW WHERE THERE IS NO "OTHER PROPERTY DAMAGE" ARE DISTINGUISHABLE

To the extent Leishman cites and relies on case law where no "other property damage" exists, particularly product liability cases where the only issue is damage to the product itself, or costs to repair it, such cases are clearly distinguishable.

For example, Leishman's relies on U.S. District Judge Winmill's Memorandum Decision and Order in *J. R. Simplot Co. v. Harnischfeger Corporation,* Civil Case No. 9700490-E-BLW ("Winmill Decision"). Such reliance is misplaced. This case involved Simplot's effort to

recover from the manufacturer the value of a hydraulic mining shovel, model 1200B. At the outset, the court stated:

> "Some 10 years later [after its purchase], 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 to the 1200B itself."

Id., at p. 1. Judge Winmill's purpose in stating the undisputed facts in the above quote is clear. He wanted to point out and emphasize that the case was *not* one involving personal injury, and was *not* one of damage to "other property." If such had been the case, then the economic loss rule would *not* have applied, which is implicit. Rather, he sought to clarify that this was solely a cased of damage to the 1200B mining equipment itself when it caught fire from its own operation. Such circumstances resulted in damages for repair or replacement of the 1200B itself only which, by definition, is "pure economic loss" as defined in the Idaho case law cited in *Aardema* and going back to *Salmon Rivers*.

Thus the *Simplot* case is completely distinguishable from the instant case and no authority to support applying the economic loss rule herein. Here, the electrical fire started in a defective neon sign, which was not grounded. Such fire was not prevented by a secondary ground fault protection safety feature, which should have been but was not a safety feature of the sign's transformer, making it an obsolete device which violated the NEC. Leishman admittedly connected the building power energizing the electrical circuit and these devices. Leishman did so after Sign Pro installed the transformer on the building and the neon sign on the exterior wall and ran the electrical connection between them only. An electrical fire eventually occurred. The fire was a large one. The fire spread throughout large portions of the building before it was

discovered. The fire caused extensive damages to the building (old and new, remodeled or not), and also to most of the equipment, fixtures, inventory, supplies, etc. Costs of repair and replacement of the damaged building and other property is nearly $300,000. These facts, which are established by the evidentiary record in this case, and essentially undisputed, differ hugely from the 1200B mining equipment which caught fire from its own operation involved in the *Simplot* case. The facts are not remotely comparable. The *Simplot* case does not involve other extensive damage to a building or other personal property. Plainly, it is no authority to invoke the economic loss rule in this case.

For the same reasons, Leishman's reliance on *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986)(applying admiralty law), is also misplaced. In *East River S.S. Corp.*, the manufacturer designed, built, and installed turbine engines in ships that were eventually chartered by the charterers. The turbine engines were defective and required repair. The charterers filed an action in tort against the manufacturer, seeking to recover the costs of the repairs. The district court entered summary judgment for the manufacturer. The appellate court upheld the district court's decision. The appellate court's order was affirmed on certiorari review. The court held that the economic loss doctrine applied in admiralty cases. The charterers sustained purely economic losses when the turbine engines failed; only the turbines themselves were damaged when they failed. As the failure of the turbine engines to properly function was the essence of a breach of warranty action, the charterers had to pursue a warranty action to recover.

Presumably, if the turbine engines were not the only damage, but had started a fire which spread throughout the rest of the ship, destroying or causing it significant other damage, or

causing it to sink, then the opposite result would have occurred. The latter situation is obviously the one analogous to the instant case, not the actual facts of the *East River S.S. Corp.* case.

The same may be said of most, if not all, of the case law cited in Leishman's brief, particularly the ones from outside Idaho. Where Taco Time considers that governing Idaho case law exists, particularly as recently further clarified or developed in the *Aardema*, it is frankly not useful, productive, necessary to engage in further discussion of other non-Idaho case law cited in Leishman's brief.

V. THE "INTEGRATED WHOLE" CONCEPT DOES NOT MAKE THE ECONOMIC LOSS RULE APPLICABLE

Leishman seeks to bolster its argument that the economic loss rule applies invoking the "integrated whole" concept as applied in *Blahd* and *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). Such concept does not apply here. Leishman misconstrues and misapplies it. If anything, the undisputed facts establish that the "integrated whole" concept clearly does not apply and therefore the economic loss rule also does not apply.

The "integrated whole" concept as previously considered in *Blahd* and *Tusch Enters.* involved a new building constructed on lot. The building/lot "unit" was then sold as an "integrated whole" to the respective buyers who purchased them as such.

They did not involved remodeling of an existing building. They did not involve an existing owner of a building who had it remodeled in part, and neon signs and related transformers added, under different contracts with different persons, which later started a fire.

Such cases did involve damages from gradual settling of the building structure built on the foundations due to site preparation inadequacies. They did not involve an electrical fire

which was a sudden "accident" or "calamitous event."

Such cases involved settling damages only to the building as described. They did not involve a fire incident which substantially destroyed or damaged the entirety of the building, equipment, fixtures, inventory, and other contents including personal property located within.

The similarity of *Blahd* and *Tusch Enters.* to this case starts and ends with the fact that they all involved property damage to buildings. The underlying rationale for applying the economic loss rule there does not apply to the instant case given the obvious dissimilarities. Such cases are distinguishable.

VI. LEISHMAN'S "ENTIRE BUILDING" THEORY PRODUCES ABSURD RESULTS AND IS AGAINST PUBLIC POLICY, PRIVITY ARGUMENT IS IRRELEVANT, AND EFFORTS TO BLAME OTHER THIRD PARTIES DOES NOTHING TO DIMINISH LIABILITY FOR ITS OWN NEGLIGENCE

Leishman's "entire building" theory is sought to be bolstered by various "kitchen sink" arguments sprinkled throughout its brief. Such arguments produce absurd results; violate public policy; raise privity of contract which is irrelevant in a negligence action; and seek to prejudice by casting blame on other actors. Such arguments merely serve to confuse and distract. Such arguments are irrelevant and do nothing to diminish Leishman's liability for its own negligence as may be determined by a jury as the licensed electrical contractor which energized an electrical circuit line as part of its remodel work in the Taco Time building, despite their non-compliance with the NEC, and without bothering to inspect them to determine whether they did comply or were otherwise safe. Leishman is responsible for its own negligence in contributing to the cause of the fire regardless of other actors' arguable concurring negligence, which is for the jury to

determine in this case. Such arguments have nothing to do with whether summary judgment was properly granted on the basis of the economic loss rule which is the dispositive issue on this appeal.

In addition, footnote 2 to the *Aardema* opinion is appropriately raised here. As the Court narrowed or limited the broad language in *Blahd* stating: "However, if the subject of the transaction is defined as the subject of the lawsuit essentially every claim would be barred by the economic loss rule. Instead we read this overbroad language from *Blahd* to mean that the *underlying contract* that is the subject of the lawsuit is the subject of the transaction" (emphasis original). *Aardema, supra* at p. 6, note 2.

Under Leishman's "theory" of economic loss, anyone who did anything to repair or install anything in any building, however negligently, which resulted in damage to the entire building and contents, would be insulated from liability because whatever item they repaired or worked on or installed was "part of the entire building." This is an absurd result.

For example, under Leishman's alleged "theory" of economic loss, a company could improperly install a boiler or furnace, causing an explosion, which substantially destroys the building, and yet be immune from liability for any damage to the whole building or contents. Many analogous situations involving damages caused by negligent repair or installation of all kinds of equipment and devices by electricians, plumbers, contractors, or anyone else are readily conceivable.

It is self-evident that such a "legal rule" would tremendously undermine public safety and allow wrongdoers to escape liability leaving the injured party without remedy or compensation.

Such a legal rule would completely undermine the licensing requirements for skilled trades persons such as electricians, plumbers, etc. Such licensed persons should be deemed "quasi-professionals" for purposes of the economic loss rule. By reason of licensure, such persons hold themselves out to the public as having expertise in a specialized function, which induces reliance on its performance. See, *Duffin, supra.* Indeed, there is no point to licensing if it implies no expertise, qualifications, or specialized competency.

Leishman argues that the lack of direct privity between itself and Taco Time is a reason that no "special exception" should be recognized for a licensed electrical subcontractor, or its employee/principal, Scott Leishman, who did the work as an 18 year experienced licensed electrician. Leishman argues the lack of direct privity establishes a lack of reliance. Sadly, such is not the case. Taco Time may not have had a direct contract or privity with Leishman, but it did with the general contractor, who hired Leishman via a conventional electrical subcontract in the ordinary course of the construction business. Naturally, Taco Time and Larson relied on the general contractor to hire a *competent and licensed electrician* to perform the electrical subcontract portion of the remodeling work.

It is not reasonable or necessary, and should not be legally required, that Taco Time cannot pursue action against Leishman as the hired *licensed electrical subcontractor* for its negligence in performing the work in such manner as to create a fire hazard; for failing to inspect and do whatever else was reasonable and necessary to ensure the safety of the transformer and neon sign before energizing the electrical circuit as the last step in that part of its activities, where such facts are established.

It is precisely because there is no contractual privity between Taco Time and Leishman

that it is *necessary and essential* that it be allowed a remedy in negligence law. Such is in accord with traditional negligence and tort principles. The economic loss rule should not be so broadly read or applied as to totally bar any and all right of action by Taco Time against Leishman for its licensed electrician's negligence. Indeed, the failure to comply with the NEC in two respects: failure to inspect and ensure a transformer with the required secondary ground fault protection was part of the neon sign components before connecting and energizing it; and failure to inspect and insure that the neon sign was wired with proper grounding, would appear sufficient to establish negligence.

Leishman makes many arguments and excuses for why it should not have had to do so, while never denying the plain NEC provisions so requiring. If Taco Time cannot rely on the licensed electrical contractor, or its employee/owner who is an 18 year experienced and licensed electrician, to ensure that the electrical work done as part of the remodeling, including connecting and energizing those components' electrical circuit line, then it is not apparent who has such responsibility.

Taco Time's experts are clear that such is and was Leishman's responsibility given its licensure. The NEC's provisions, and Idaho Administrative Code's provisions, which are included in the appendix to Taco Time's Opening Brief, appear to plainly impose such duties and responsibilities on Leishman as the electrical contractor who did such work. It is no surprise that Leishman ignores such provisions and its legal duties and responsibilities as set forth therein; Leishman clearly failed to meet them, which constitutes negligence on its part.

Leishman also makes many arguments about "privity" Taco Time had with other parties, i.e., the restaurant from which it purchased the older used neon signs and transformers; the

general contractor; Sign Pro, etc.; Taco Time's potential remedies against those persons or entities; and seeks to case blame or fault on them. Taco Time's alleged privity with other actors, any arguable remedies which may exist against them, or their arguable comparative negligence, does nothing to render Leishman unaccountable its own concurring negligence which caused the subject fire. Comparative negligence arguments are appropriate at trial before a jury, but immaterial to this appeal.

The point of this appeal, of course, is that at present Taco Time is *denied* a trial based on the *sua sponte* summary judgment decision of the trial court issued on Taco Time's motion for reconsideration of its prior partial summary judgment decision. Such occurred despite the lack of any motion even being made by Leishman, but was apparently an effective way to move the case of the district court's docket.

Leishman's "kitchen sink" arguments should be rejected as without merit.

VII. LEISHMAN FAILS TO ACKNOWLEDGE THIS APPEAL IS FROM SUMMARY JUDGMENT AGAINST TACO TIME AND THE APPROPRIATE STANDARD OF REVIEW

At the outset of its brief, Leishman makes various statements and comments which seem to indicate confusion about the posture of the case being Taco Time's appeal from the summary judgment against it entered below, and the familiar summary judgment standard in such a posture that all facts and inferences therefrom must be made in favor of Taco Time and against Leishman. Such is undoubtedly the law and the posture of this case. The district court granted summary judgment against Taco Time. The fact that such procedurally resulted from Taco Time's motion for reconsideration of the lower court's earlier partial summary judgment decision

does not change the decision appealed from.

Further, Taco Time is not appealing the lower court's of its own summary judgment motion, as Leishman wrongly suggests at page 3 of its respondent's brief.

Given its appeal from the summary judgment decision against it, Taco Time is entitled to the standard of review under IRCP 56 where all facts and inferences are construed on appeal in its favor. *Aardeman, supra* at p. 3. Any other suggestion by Leishman to the contrary is plainly wrong. *Id.*

It is doubtful Leishman is unclear about the procedural status. Leishman purports to raise its so-called "point of clarification" as a pretextual tactic or device to launch into its own self-serving "statement of facts," which does not respect the IRCP 56 standard given Taco Time's appeal from the summary judgment entered against it. Taco Time's Opening Brief's "statement of facts" comports with IRCP 56 and the summary judgment standard which applies; Leishman's clearly does not.[5] Leishman merely argues self-serving facts to try and explain away its own negligence with respect to its electrical work, failure to comply with the NEC, failure to inspect

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[5]Actually, Taco Time believes the material facts are largely undisputed a set forth in its Statement of Facts. Who did what work where and when is established by Packer's and Scott Leishman's testimony. The contracts and dealings between Taco Time and owner/principal Brian Larsen, as set forth in the Complaint and his first and second Affidavits, are undisputed. The damages to the building, equipment, inventory, contents, etc., are undisputed. Leishman's admitted conduct wiring and energizing the circuit without inspecting the transformer or the sign wiring and determining whether it was safe to do, which turns out not to be the case, given the NEC's violations due to the transformer's lack of secondary ground protection safety device, and improper wiring without any grounding of the neon sign, are undisputed. Really, the *only* arguable "factual" dispute is Leishman's expert Paul Moore's contradiction of Taco Time's experts "opinion" to the effect Leishman had no responsibility and didn't have to comply with the NEC or otherwise ensure the safety of the circuit and its components prior to connecting the building power and energizing them.

the transformer and neon sign's wiring, to minimize its own responsibility for the resulting fire hazard and seek to case blame on Larson, Sign Pro, or anyone else it can think of.

VIII. RECOVERABILITY OF PREJUDGMENT INTEREST IS NOT RIPE AND IS UNNECESSARY

In the event of reversal and remand, Leishman seeks this Court's ruling that prejudgment interest claimed by Taco Time is not recoverable as a matter of law. Taco Time submits such a ruling from this Court is not ripe and is unnecessary. Recoverability of prejudgment interest depends on various facts and factors which are better determined at trial, not on this appeal as a matter of law. The issue is not so "black and white" as Leishman suggests.

The legal rate of interest in tort cases where property is damaged or destroyed is 12% per annum, as provided in Idaho Code § 28-22-104(2). *See, Schenk v. Smith*, 117 Idaho 999, 1000-01 (1990). When real property is damaged but repairable, the measure of damages is the cost of repair plus prejudgment interest from the date of the loss to the entry of judgment. *Nampa & Meridian Irrigation Dist. v. Mussell*, 139 Idaho 28, 33 (2003).

Prejudgment interest on personal property is recoverable if the value of the personal property has a readily identifiable market value that can be determined by an objective, recognized standard. *Id.* at 1001.

The property damaged in this case is both real property and fixtures, and personal property including equipment, inventory, etc. While there is a large amount of damages given the severity of the large fire, it is not readily apparent that such are not liquidated or mathematically ascertainable according to appropriate measures and standards. Indeed, such was done as a matter of property loss adjustment by Taco Time's property insurer with it, which has

been fully produced and shared with Leishman early on in the case. The summary of categories and amounts are shown in Exhibit B (corrected) to the Second Larsen Affidavit (R., Vol. I, p. 118), and the voluminous underlying documentation which supports it, also all produced early on in discovery to Leishman.

It is also significant that the date of the fire loss was June 9, 2004, which is a very long time, and if this Court grants Taco Time relief sought on appeal and reverses and remands for trial, the likelihood of much further delay until trial, and possible second appeal, remain. The purposes of allowing prejudgment interest is to provide full and complete compensation; to provide a disincentive for delay; and to enhance settlement possibilities. Such purposes are frustrated and not served if a ruling on this appeal unnecessarily addresses the prejudgment interest issue.

IX. ATTORNEY FEES ARE PROPERLY AWARDED TO TACO TIME

Finally, Taco Time submits that this is an appropriate case for an award of attorney fees on appeal. This Court's prior case law on the economic loss rule plainly establishes that the economic loss rule does not apply. Leishman's efforts were successful in confusing and misleading the district court into granting partial summary judgment initially, and full summary judgment ultimately. The basis for doing so was merely that the "entire building" was the subject of the transaction for purposes of the economic loss rule. Such is patently contrary to the well settled interpretation and proper application of the economic loss rule and grossly overbroad.

CONCLUSION

Based on the foregoing Reply Brief, its Opening Brief, and the entire record herein, Appellant Taco Time respectfully seeks this Court's decision as follows:

1. Reversing the summary judgment based on the economic loss rule below and holding such rule does not apply to this case as a matter of law given the undisputed facts of "other property damage," or for one of the other reasons relied on;

2. Directing the lower court to grant its motion for leave to file its proposed amended complaint so that 100% of the damages sustained in the fire, without offset for settlement monies recovered from Sign Pro, may be pursued against Leishman at trial;

3. Awarding Taco Time attorney fees incurred on appeal;

4. Denying Leishman's request for a ruling that prejudgment interest is not recoverable as a matter of law which is premature and unnecessary.

Respectfully submitted this 16th day of September, 2009.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of September, 2009, I served two (2) true and correct copies of the above and foregoing document to the following person(s) by regular U.S. Mail:

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

John R Goodell

JOHN R. GOODELL

Burn Pattern Analysis, Inc.
"Our Expertise Could Be Your Best Protection"

EXHIBIT C

August 21, 2006

John Goodell, Attorney
Racine, Olsen, Nye, et al
201 East Center Street
Pocatello, Idaho 83204-1391

RE: Taco Time/Brian Larsen
Date of Loss: 6-9-04
Civil Case #: CV-05-884 (Madison County Idaho)
Our File #: 24-2392 SL

Dear Mr. Goodell:

Thank you for your telephone conversation this evening regarding the above captioned litigation matter. After our discussion, it appears that the adverse counsel, Mr. Brian D. Harper, is confused about the determinations of origin and cause by this office and also by the Engineer, Dr. Scott Kimbrough of MRA Forensic Sciences.

May I offer this letter as a clarification regarding those issues. In view of that I've also duplicated photographs that I took during my investigation, blown them up in a larger format for clarification purposes. Hopefully, with these additional documents and photographs, as I truly believe in the old adage that "a picture is worth a thousand words," will add clarification to the issue and resolve the matter.

With that said, I will further reiterate that the origin of this fire occurred inside of the parapet wall, slightly above the roof membrane, on the interior surfaces of the parapet wall. In proximity to that location were the electrical sign circuitry within conduit that ultimately exited from the exterior surface, to the interior surface, and then ran to the transformer. The transformer was positioned on top of the roof.

The roof construction consisted of a ½" thick rubber membrane that had a mineral coating that would offer additional surface protection, which would also inhibit or delay flame penetration for a fire within the parapet wall and below the sub-roof, as noted in photographs #13 and #63.

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This is an important factor in view of the fire travel in this incident. While the fire originated within the parapet wall, the most readily combustible components would have been the OSB plywood sub-roof and also the same materials that were used in the construction of the parapet wall. The rubber membrane would have been coved and ran up the interior surface of the parapet wall. That rubber membrane enhanced the fire to burn inside of the open spaces of the concealed attic below the sub-roof and above the sheetrock as the path of least resistance and the easier combustible fuel.

The fire destroyed these readily combustible components and propagated to adjacent combustible material during the duration of the fire. These circumstances and "fall-down burning" led up to the complete destruction of the baseplate for the parapet wall. These are shown in photograph #76, with arrows identifying those specific locations. The fire was contained in the channel of the parapet wall by virtue of the vertical studs that were used for support purposes, and in a normal fashion of constructing a wall of that type.

Once the fire propagated to the point that the baseplate of the parapet wall was breached, additional combustion air was offered in the dead space below the sub-roof and above the sheetrock wall. That combustion air allowed the fire to propagate and extend throughout that level, again, burning through the easily combustible plywood sub-roof and eventually through the rubber membrane which then presented itself as open burning on top of the roof, as witnessed by various parties that saw the fire during that stage of burning. It is also important to understand that the fire continued to burn for an extended period of time prior to the witnesses noticing the flames on top of the roof, as the fire was well advanced within the attic at this point.

In this location of erosion, was the signage conduit for the broken letter "a". It is shown in the photographs and identified by the red arrow in photograph #13. That shows the destruction at that location, which is dissimilar to any other position on that wall, roof or interior space. The greatest amount of destruction occurred in that specific location which is in proximity to the failing point of the letter "a" and the conduit that is shown in photographs #13, #76 and #77, revealing the greatest degree of oxidation (which is generally an indicator of significant heat) found during the entire inspection of the signage material.

The evidence is clear, the burn patterns are identified in the photographs and these facts are in harmony with the findings of MRA Forensic Sciences' Engineer, Dr. Scott Kimbrough. His enclosed report will add additional information to the conclusions offered in this clarification letter.

shown here. Note the heavy destruction directly behind the transfo
box for the sign equipment. This destruction to the parapet wall was fo
[illegible] left off

If I may be of further assistance in this matter, please contact me at your earliest convenience.

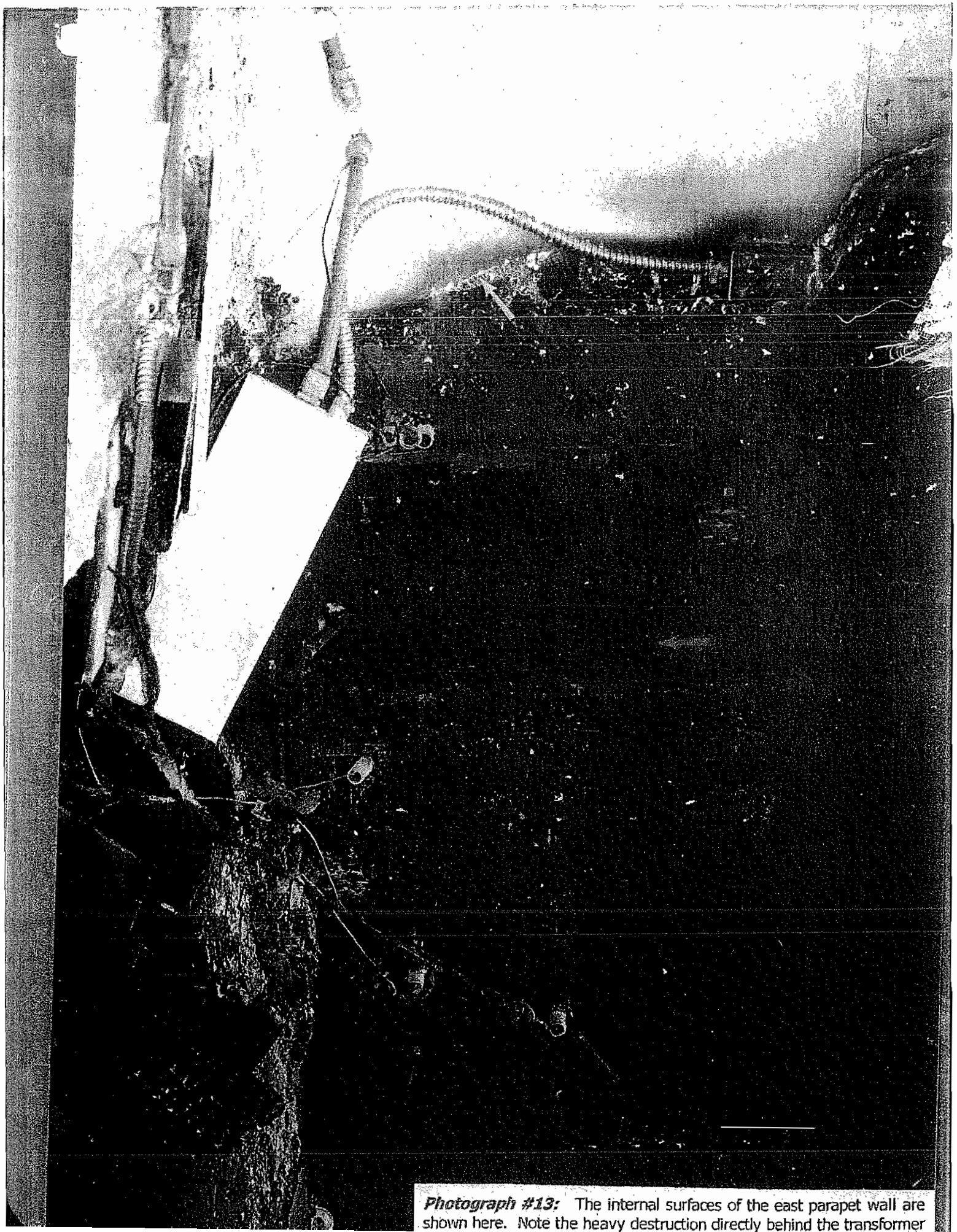
Sincerely,

Robert "Jake" Jacobsen, C.F.I.
BURN PATTERN ANALYSIS, INC.

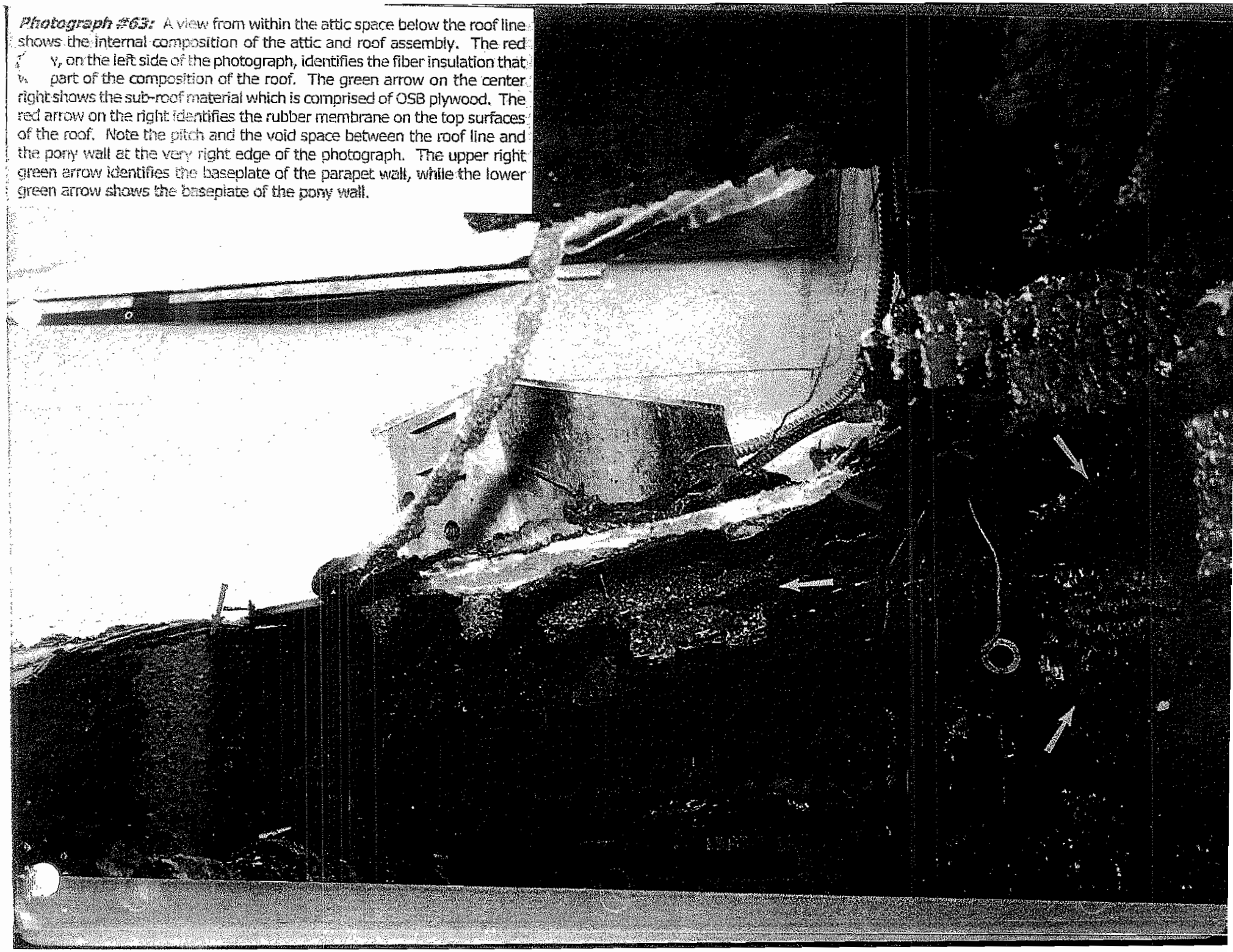
Enclosures: Enlarged views of photographs #13, #63, #76 and #77

RJJ:bpt

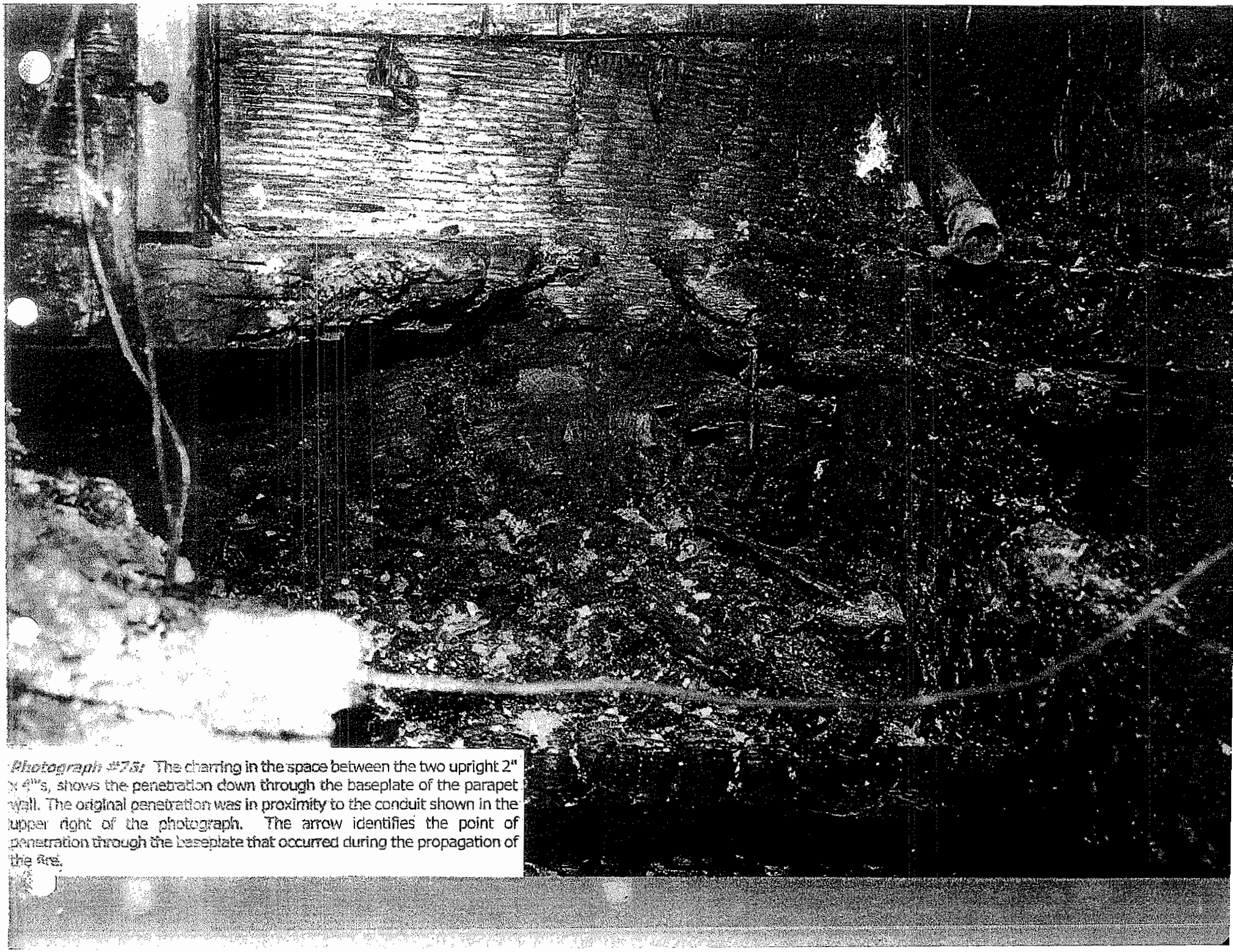
A:J68-2392.ltrJG



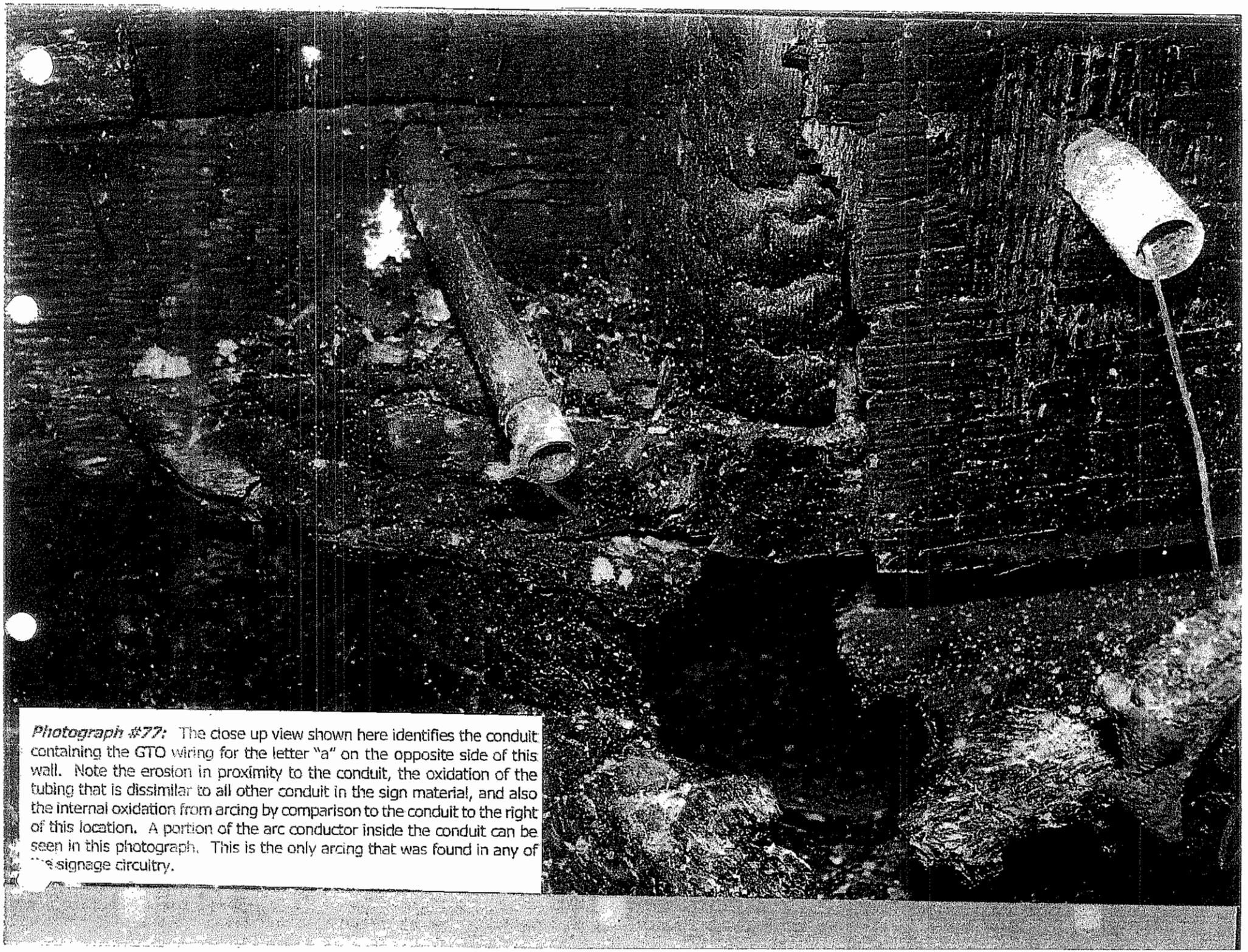
Photograph #13: The internal surfaces of the east parapet wall are shown here. Note the heavy destruction directly behind the transformer



Photograph #63: A view from within the attic space below the roof line shows the internal composition of the attic and roof assembly. The red arrow, on the left side of the photograph, identifies the fiber insulation that is part of the composition of the roof. The green arrow on the center right shows the sub-roof material which is comprised of OSB plywood. The red arrow on the right identifies the rubber membrane on the top surfaces of the roof. Note the pitch and the void space between the roof line and the pony wall at the very right edge of the photograph. The upper right green arrow identifies the baseplate of the parapet wall, while the lower green arrow shows the baseplate of the pony wall.



Photograph #75: The charring in the space between the two upright 2" x 4"s, shows the penetration down through the baseplate of the parapet wall. The original penetration was in proximity to the conduit shown in the upper right of the photograph. The arrow identifies the point of penetration through the baseplate that occurred during the propagation of the fire.



Photograph #77: The close up view shown here identifies the conduit containing the GTO wiring for the letter "a" on the opposite side of this wall. Note the erosion in proximity to the conduit, the oxidation of the tubing that is dissimilar to all other conduit in the sign material, and also the internal oxidation from arcing by comparison to the conduit to the right of this location. A portion of the arc conductor inside the conduit can be seen in this photograph. This is the only arcing that was found in any of the signage circuitry.