

IN THE SUPREME COURT OF THE STATE OF IDAHO

<p>BURNS CONCRETE, INC. and BURNS HOLDINGS, LLC, Plaintiffs-Counter-defendants- Respondents-Cross Appellants, v. TETON COUNTY, Defendant-Counterclaimant- Appellant-Cross Respondent.</p>	<p>Docket No. 46827-2019 Teton County District Court Case No. CV-2013-165</p>
<p style="text-align: center;">CROSS-RESPONDENT’S BRIEF and APPELLANT’S REPLY BRIEF</p>	
<p style="text-align: center;">Appeal from the District Court of the Seventh Judicial District for Teton County. The Honorable Dane Watkins, District Judge, presiding.</p>	

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I. STATEMENT OF THE CASE

Teton County incorporates by reference the Statement of the Case presented in Appellant's Brief. Teton County responds to the Burns Plaintiffs' Statement of the Case as follows:

The Burns Plaintiffs incorrectly assert that business valuation expert Richard S. Hoffman's testimony was effectively challenged and wholly disregarded. (Cross-App. Brief at 27.) In fact, the trial court referred specifically to Mr. Hoffman's testimony (R., P. 245.) and adopted findings consistent with Mr. Hoffman's testimony. (*Id.*) By contrast, rebuttal expert Bruce L. Ross made the incredible assertion that a business generating incremental profit should continue operations where, as here, profits were insufficient to cover debt obligations. (Resp. Brief at 8-10.) The trial court did not adopt any findings consistent with Mr. Ross's testimony. (*See* R., P. 205-225; R., P. 236-258.)

The Burns Plaintiffs repeatedly imply that Teton County did not contest the damages claim. Teton County asserted numerous factual and legal challenges to the amounts at trial and in post-trial briefing. (*See, e.g.*, R., P. 115-123.) Teton County challenged line items at deposition resulting in pre-trial adjustments to the claim. (*See* Tr., P. 162, L. 15.) Moreover, the trial court recognized that "Teton County objected to any award of reliance damages and disputed that any of Plaintiffs' claimed damages were caused by Teton County's breach of the Agreement. (R., P. 251.) Teton County has not ever consented to the Burns Plaintiffs' claimed damages or the claimed damages amount.

The Burns Plaintiffs incorrectly assert that they cannot construct the permanent facility without an amended to the ordinances of Teton County. (Cross-App. Brief at 9.) At trial, Kirk Burns acknowledged that a competitive plant in Teton County had been built “in a hole.” (Tr., P. 397, L. 18.) Similarly, Burns Concrete could construct its permanent facility with the ground level recessed to comply with the County’s height restriction.

The Burns Plaintiffs assert that the issues related to the temporary batch plant’s height violation, the legal failures of the Burns Plaintiffs’ attempted assignment of the chose in action, and the post-trial request for entry of declaratory judgment are each barred by the “law of the case” doctrine. However, the Burns Plaintiffs have not identified any error preceding *Burns I* that was not raised in *Burns I*, nor any holding stated in *Burns I* which would preclude consideration of those issues on this appeal.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

Teton County presents no additional issues in response to Cross-Appellant’s Brief.

III. ATTORNEY FEES ON APPEAL

Teton County claims attorney’s fees on appeal pursuant to paragraph 12(e) of the Developer’s Agreement.

IV. ARGUMENT

By focusing on the smallest details, we risk missing the big picture. In this case, the big picture is important.

Burns Concrete wanted to have a batch plant in Teton County to take advantage of a booming construction market. According to the Burns Plaintiffs, Teton County “induced” Burns Holdings to buy property and equipment in 2006. (Resp. Brief at 2; Cross-App. Brief at 2, 21-22.) Burns Holdings purchased property and applied for a zone change to allow manufacturing. In 2007, the County effected the requested zone change by the Agreement with Burns Holdings. The Agreement allowed Burns Holdings to erect a temporary facility while constructing a permanent facility.

Burns Concrete began operating its temporary facility in 2007. The construction market crashed in 2009. Burns Concrete lost money operating the temporary facility. (Cross App. Brief at 31-32.) Burns Concrete voluntarily ceased operating the temporary facility in 2010. The Burns Plaintiffs alleged and the trial court found: “Burns Concrete’s decision to cease operations in 2010 was based, at least in part, on the existence of an unfavorable environment in Teton County, created by actions of the Teton County Board of Commissioners.” (Resp. Brief at 4.)

Burns Concrete had not operated the temporary facility for over two years when, in 2012, Teton County asked Burns Concrete to cease operations and remove the temporary facility. The Agreement anticipated that the temporary facility would be in place for 18 months – the duration allowed for temporary structures under the County’s building code. In *Burns Concrete, Inc. v. Teton County*, 161 Idaho 117, 384 P.3d 354 (2016) (*Burns I*), this Court held that the

Agreement's *force majeure* provision tolled the 18-month limitation period. To date, Burns Concrete has not removed the temporary facility.

The Burns Plaintiffs' blame is sweeping. Burns Holdings blames Teton County for inducing it to buy the property. (Cross-App. Brief at 2.) Burns Concrete blames the Teton County Commissioners for creating an unfavorable business environment. (Resp. Brief at 4.) The Burns Plaintiffs blame Teton County for not giving them an opportunity to cure alleged breaches. (Cross-App. Brief at 10.) Burns Holdings blames Teton County for ordering it to remove the temporary facility. (Cross-App. Brief at 9.) The Burns Plaintiffs cite many causes for their operational failure.

However, this is not an action in tort. The Burns Plaintiffs have not claimed fraud in the inducement or intentional interference or defamation.¹ This is an action in contract. Contract damages are compensatory - not punitive. Contract damages do not give one party a windfall to the other party's detriment. Contract damages make the non-breaching party whole. Contract damages remedy breach.

Looking, then, to the big picture, what measure of damages will make the Burns Plaintiffs whole? The trial court found multiple causes for the cessation of operations. (*See, e.g.*, R., P. 213.) The trial court further found that the temporary facility lost money while it operated. (R., P. 257.) In the bust economy, without any breach or cause, the Burns Plaintiffs would have lost money through 2016. (*See* R., P. 213.) Consistent with Richard Hoffman's testimony, the

¹ Such claims would likely have been barred by the applicable statutes of limitation and/or the Idaho Tort Claims Act, Idaho Code Title 6, Chapter 9.

trial court found that Burns Concrete would have turned a net profit in 2017. (R., P. 213.) Hoffman opined that the net profit amount at the end of 2017 would have been \$115,602. (Ex., P. 152.) Under these facts, where the Burns Plaintiffs would have made just over One Hundred Thousand Dollars if the contract had been performed, the trial court's award of over One Million Dollars is punitive. The judgment gives the Burns Plaintiffs a windfall, awarding them more money than they would have earned if they had continued operations. The award overcompensates, accounting for causes beyond contractual breach. Teton County is pursuing appeal to correct this unjust award.

Now, to the details. Teton County first replies to the arguments in section IV. A. of Respondent's Brief regarding the award of reliance damages. Next, Teton County responds to arguments presented in the Cross-Appellants' Brief.² Issues which have been fully presented or for which no further response is needed are not discussed again in this brief.

A. The award of reliance damages should be disallowed or reduced to prevent an unjust windfall to plaintiffs.

In its opening brief, Teton County urged this Court to follow other jurisdictions in limiting reliance damage to claims where expectation damages are not available. The Burns Plaintiffs cited three opinions in support of allowing reliance damages. In *Brown v. Yacht Club of Coeur d'Alene, Ltd*, 111 Idaho 195, 199, 722 P.2d 1062, 1066 (Ct. App. 1986), cited by the Burns Plaintiffs, the Court of Appeals held that an expectancy interest is inconsistent with a

² Teton County's arguments in reply to Respondent's Brief and in response to the Cross-Appellant's Brief are combined pursuant to Idaho Appellate Rule 35(c).

claim for rescission and remanded with instruction to reexamine reliance damages. In *Beco Const. Co., Inc. v. Harper Contracting, Inc.*, 130 Idaho 4, 9, 936 P.2d 202, 207 (Ct. App. 1997), cited by the Burns Plaintiffs, the Court of Appeals upheld reliance damages in the context of rescission. In *Silverwing at Sandpoint, LLC v. Bonner County*, 164 Idaho 786, 796-98, 435 P.3d 1106, 1116-18 (2019), the plaintiff pursued expectancy and reliance damages. The trial court rejected the evidence of expectancy damages as too speculative, and this Court rejected reliance damages as a matter of law because the defendant fully performed, albeit late. *Id.* None of these cases address whether reliance damages should be considered where expectancy damages are available. The first two cases, *Yacht Club* and *Beco*, are distinguishable because they deal with contract rescission, rather than contractual breach. The third case, *Silverwing*, rejects reliance damages on other grounds. The trial court's analysis in this case shows how tort and contract damage theories can be conflated where reliance damages are liberally allowed, despite this Court's rejection of tort-type damages in contract disputes. *See, e.g., Hummer v. Evans*, 129 Idaho 274, 923 P.2d 981 (1996).

If the trial court's award of reliance damages is not wholly disallowed, it should be adjusted to accurately measure the damages amount. The Idaho Supreme Court discussed the proper calculation of reliance damages in *King v. Beatrice Foods Co.*, 89 Idaho 52, 402 P.2d 966 (1965). Arvel King borrowed money to purchase a milk route for \$9,000. *Id.* at 55. The purchase included a truck and trailer valued at \$3,800 and the balance for goodwill. *Id.* To obtain financing, King entered a five-year agreement with Beatrice Foods to deliver milk to it for 22¢ per hundred pounds. *Id.* For two years, King delivered milk to Beatrice Foods in cans. *Id.* at 56.

Then, Beatrice Foods dismantled its can facility and converted to bulk tanks. *Id.* Beatrice Foods refused to accept milk in cans. *Id.* King did not have the capacity to deliver milk in bulk, and King sued Beatrice Foods for breach of contract. *Id.* King claimed reliance damages of the \$9,000 paid for the milk route plus anticipated lost profits through the remaining contract term. *Id.* at 56-57. Citing *French v. Nabob Silver-Lead Company*, 82 Idaho 120, 350 P.2d 206 (1960), the Idaho Supreme Court stated that an “injured party may recover the reasonable expense which he has incurred in anticipation of performance.” *King*, 89 Idaho at 57. The Court articulated the measure of reliance damages for breach of the partially executed contract. *Id.* at 59. First, the Court took the claimed reliance damages (\$9,000), and deducted the depreciation and salvage value of the truck and trailer (estimated at \$3,800) for a balance of \$5,200. *Id.* Then, the Court gave instruction for remand: “if plaintiff could have earned a profit, over and above his operating expenses . . . that profit however small would have compensated him in part at least for this reliance expense.” *Id.* Accordingly, “if plaintiff can prove such a profit with reasonable certainty, he would be entitled to a judgment against defendant for the amount thereof.” *Id.* In other words, if King could prove lost profits of \$4,000, then he could recover up to \$4,000 of his claimed reliance damages. If he could prove lost profits of \$5,200, then he could recover the full amount of his reliance claim. If the *King* methodology were applied in this case, then the Burns Plaintiffs could recover no more than the lost profits they were able to prove. Richard Hoffman opined that the Burns Plaintiffs would have earned no profit through the end of 2016 and would have earned just \$115,602 by the end of 2017. (*See*, Ex., P. 152.)

The trial court's findings of financial loss are inconsistent. The trial court found that the temporary facility lost money while it operated and would have turned a net profit by 2017. (R., P. 213; R., P. 257.) Kirk Burns testified that it was not possible to calculate Burns Concrete's future profits. (Tr., P. 282, L. 10.) The finding of net profit is only supported by Richard Hoffman's opinion testimony. Hoffman testified that Burns Concrete would have earned a net profit of \$115,602 by the end of 2017. (Ex., P. 152.) Despite its findings of loss and profit, the trial court inexplicably concluded that Teton County failed to offset reliance damages. (R., P. 245.) Although the trial court adopted the Restatement rule capping damages (R., P. 93-95), it did not properly apply the rule to effect the cap (*see* R., P. 245). If properly applied, damages would be capped at no recovery for the period ending in 2016, and damages would be capped at \$115,602 for the period ending in 2017.

The measure of reliance damages should further be adjusted to exclude damages not caused by breach. The trial court's findings regarding causation misapply the law. *Hull v. Giesler*, 156 Idaho 765, 774, 331 P.3d 507, 516 (2014) (holding that a claimant must prove amount and causation with reasonable certainty). Rather than linking causation to breach, the trial court links causation to the formation of the Agreement. (R., P. 246-47.) As grounds for its damages award, the trial court found that "Burns Concrete would not have incurred the expenses if not for the Agreement's existence." (R., P. 247.) The trial court did not conclude that any amount of damages flowed from the failure to provide notice of default, failure to provide an opportunity to cure, or the 2012 request to cease operations – the findings of breach. (R., P. 84-86.) Moreover, the trial court found: "Burns Concrete's decision to cease operations in 2010 was

based, at least in part, on the existence of an unfavorable environment in Teton County, created by actions of the Teton County Board of Commissioners.” (Resp. Brief at 4.) The trial court identified a cause of injury unrelated to and preceding breach. (R., P. 246-47.) By incorrectly tying damages to contract formation, rather than breach, and by including injuries otherwise caused, the trial court misapplied the law.

Finally, Teton County reiterates that the measure of damages requires both a beginning and a conclusion. The Burns Plaintiffs’ cited authority stating that pre-contract expenses should only be allowed where “the defendant knew of such expenses.” (Resp. Brief at 18 (*citing Westfed Holdings, Inc. v. U.S.*, 52 Fed. Cl. 135, 161 (2002).)) The same authority requires a plaintiff to prove “that both the magnitude and type of damages were foreseeable.” (Resp. Brief at 19 (*citing Westfeld*, 52 Fed. Cl. at 6.)) There is no record evidence to support a finding that Teton County new or foresaw the type of claimed expenses or their amounts. For example, many of the pre-contract expenses involved modifications to the temporary batch plant to allow operation from a remote location, and there is no evidence that Teton County would have anticipated those modifications or their costs. (*See Ex.*, P. 2-202.) The earliest point to begin calculating reliance damages is the contract date. The end date for the damage calculation should be the date of breach, because, at that point ongoing reliance on a broken promise is unreasonable. In *King*, discussed above, the claimed reliance damages occurred prior to breach – when reliance on the promise was reasonable. In this case, the trial court did not establish any end date, and its damages calculation should be adjusted to properly account for duration.

B. Plaintiffs should not receive double-recovery for revenues.

Teton County urged the trial court to cap damages at net profits. Although the trial court did not account for profits as urged by Teton County, the trial court did account for revenues to prevent double recovery. While operating the temporary facility, Burns Concrete recovered \$625,196.45 in revenues. (Exhibit 7, Ex., P. 103.) Deducting the cost of sales (\$213,053.82), the trial court identified compensation to Burns Concrete of \$412,142.63 – which Burns Concrete could have used to cover its claimed costs. (*Id.*) Because Burns Concrete recovered this incremental profit by operating the temporary facility, the trial court appropriately reduced the amount from the judgment award to prevent double recovery.³

C. The trial court adequately identified excluded costs.

The trial court found that the Burns Parties did not meet their burden of proof regarding \$443,951.25 of their claimed expenses. The Burns Plaintiffs' claimed damages consist of over 7,300 separate line items. (*See Ex.*, P. 2-202.) On appeal, they request reversal with remand instructions to identify disallowed expenses by line item and amount. As part of their argument, the Burns Parties repeatedly imply that Teton County did not contest the claimed expenses. However, Teton County asserted numerous factual and legal challenges to the claimed amounts. (*See, e.g., R.*, P. 115-123.) The trial court recognized that "Teton County objected to any award of reliance damages and disputed that any of Plaintiffs' claimed damages were caused by Teton

³ Teton County maintains that net profits should serve as a cap on any damages award, rather than a reduction from the damages claim. However, to the extent this Court does not follow the mathematical formula adopted in *King*, discussed above, it should at least uphold the reduction of incremental profit to prevent double-recovery.

County's breach of the Agreement. (R., P. 251.) Like the trial court, Teton County analyzed the expenses by category, for example, arguing that the trial court should reject claimed attorneys' fees. (R., P. 115-123.) Due to the number of line items, addressing the claim by category rather than item is prudent. Requiring a line-by-line analysis would impose an undue burden on the trial court. The categories identified by the trial court correlate to items described in Exhibit 8 with sufficient specificity to understand the trial court's reasoning and judgment.

D. The trial court properly denied plaintiffs' claim for rescission because plaintiffs did not restore the *status quo ante*.

Rescission requires a claimant to tender back any benefit received under the contract and restore the other party to its pre-contract position. *Watson v. Weick*, 141 Idaho 500, 112 P.3d 788 (2005) (upholding denial of rescission where the claimant did not make an adequate tender to restore the status quo to the other party); *White v. Mock*, 140 Idaho 882, 888, 104 P.3d 356, 362 (2004) (upholding denial of rescission where restoration and remodeling prevented return to the status quo); *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 45 P.3d 829 (2001) (denying rescission as a remedy for misrepresentation where the rescinding party failed to tender back any benefit received under the contract within a reasonable time); *Weber v. Pend D'Oreille Mining & Reduction Co.*, 35 Idaho 1, 203 P. 891 (1921) (holding that rescission was not appropriate where the rescinding party did not offer to place the other party in status quo and it was apparent that he could not).

In *Rino v. Statewide Plumbing & Heating Co.*, 74 Idaho 374, 262 P.2d 1003 (1953), this Court recognized that rescission could not be granted on conditions where the status quo could

not be restored. The parties to that action entered an agreement to install a heating system. Following partial performance, the property owner sought rescission. Although the system components could have been returned, the prior use of the system and the benefit of the labor and materials could not truly be restored. 74 Idaho at 378, 262 P.2d at 1005. Therefore, rescission was not allowed.

In this case, Teton County rezoned Burns Holdings' property to a manufacturing zone in 2007. The property has never been rezoned. The Burns Plaintiffs have had the benefit of the zone change for over a decade, and like the benefit of heat in *Rino*, it cannot be restored. The Burns Plaintiffs now argue that the restoration requirement should be waived because it is not a monetary benefit. However, as demonstrated in *Rino*, the requirement of restoration is not limited to monetary benefits. Because the status quo was not tendered back to Teton County and cannot be fully restored to Teton County, rescission was properly denied.

E. The trial court properly disallowed prejudgment interest.

“Prejudgment interest should be awarded on a claim that is ascertainable by mere mathematical process.” *Beco Const. Co. Inc. v. Harper Contracting, Inc.*, 130 Idaho 4, 936 P.2d 202 (Ct. App. 1997). In this case, Allen Barger developed the damages claim with assistance from Kirk Burns and Burns Concrete's attorney. (Tr. at 178:5-14.) Barger testified the he did not generate the claim from accounting software or base it on standard financial reports. (Tr. at 177:16-178:7.) Barger testified that it took him a year to prepare the claim. (Tr. at 178:15-16.) Barger testified that the presented claim was incomplete, insofar as it omitted certain charges for which documentation could not be found. (Tr., P. 74, L. 11.) Moreover, the damages claimed by

the Burns Plaintiffs were reduced by the trial court. Because the claimed damages were not ascertainable by Teton County using a mere mathematical process, the trial court correctly denied prejudgment interest.

V. CONCLUSION

Teton County respectfully renews its request that this Court require expectation damages where available; clarify the calculation of reliance damages to require causation, limited duration, and caps; reject the trial court's finding of breach; and reject the trial court's conclusion that the claims were assigned and/or jointly held. In addition, Teton County requests that the Court deny the Burns Plaintiffs' arguments on appeal by affirming the trial court's reduction of damages, denial or rescission, and disallowance of prejudgment interest. Furthermore, insofar as it is successful in this appeal, Teton County requests an award of attorney's fees consistent with paragraph 12(e) of the Agreement.

Respectfully submitted on November 21, 2019.

OFFICE OF THE TETON COUNTY
PROSECUTING ATTORNEY

/s/ Billie J. Siddoway
By: Billie J. Siddoway
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CERTIFICATE OF SERVICE

The undersigned certifies that date set forth below, a true and correct copy of the foregoing was caused to be filed electronically with automated service to:

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Dated: November 21, 2019.

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