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d.b.a. JACK'S AUTO REPAIR

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

WES CONSTRUCTION COMPANY, INC., a Nevada corporation,

Plaintiff,

Case No. CV-N-02-0679-DWH-RAM

vs.

UNITED STATES OF AMERICA; CLANTON NORDYKE and CAROLINE NORDYKE, d.b.a. JACK'S AUTO REPAIR; DOES 1-20, inclusive,

Defendants. /

REPLY IN SUPPORT OF MOTION TO DISMISS

COME NOW Defendants, CLANTON NORDYKE and CAROLINE NORDYKE, d.b.a. JACK'S AUTO REPAIR, by and through their attorneys, THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, and pursuant to FRCP 12(b)(6) hereby submit this Reply in Support of Motion to Dismiss moving this honorable court for its order dismissing the Complaint on the grounds that the Complaint fails to state a claim upon which relief can be granted.

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This Motion is made and based upon the Points and Authorities attached hereto and all pleadings and papers on file herein.

DATED this 18th day of June, 2003

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER

By: _____
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POINTS AND AUTHORITIES

I.

INTRODUCTION

Defendants, Clanton Nordyke and Caroline Nordyke, d.b.a. Jack's Auto Repair (hereinafter referred to as "Jack's"), filed their Motion to Dismiss on or about May 28, 2003, asserting that Plaintiff's claims are barred pursuant to the economic loss doctrine and that the claims against Jack's must be dismissed. Plaintiff, on or about June 6, 2003, opposed Jack's Motion to Dismiss, arguing that Javier Alvarado, the injured employee, is the property of Plaintiff and that the economic loss doctrine is limited to products liability and construction defect cases, and thus not applicable to Plaintiff's causes of action. As will be shown by the within Reply, Plaintiff's arguments are unsupported by the relevant case law and this action must be dismissed for failure to state a claim upon which relief may be granted.

II.

FACTS ALLEGED IN PLAINTIFF'S COMPLAINT

The facts alleged in Plaintiff's Complaint were adequately set forth in the Motion to Dismiss. However, to aid the Court in its determination of this matter, certain relevant facts are hereinafter repeated. Plaintiff's Complaint contains a single claim for relief that is prominently captioned "Negligence." There are no contract, warranty or non-negligence claims contained in the Complaint.

In addition to Jack's, Plaintiff has sued the United States of America. The basis of the claims against both Jack's and the United States is an accident that occurred on or around May 26, 2000, in the Montreaux development in Washoe County, Nevada. *See,* Plaintiff's Complaint, Page 3, Paragraph 2. Basically, the Compliant alleges that on that date, an employee of the United States Postal Service by the name of Wendell Sparks negligently drove his Jeep into a John Deere loader owned by Plaintiff and injured four of Plaintiff's employees who were sitting in the bucket of the loader eating lunch. One of the employees, an individual by the name of Javier Alvarado, was seriously injured and suffered a traumatic amputation of his right leg as a result of the accident.

The direct allegations against Jack's are contained in Paragraphs 7, 8, & 9 of the Claim for Relief of Plaintiff's Complaint. In particular, Paragraph 7 alleges that on May 11, 2000, Jack's

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inspected, serviced and evaluated the braking system of the Jeep driven by Mr. Sparks at the time of the accident. Paragraph 8 alleges that Jack's had an obligation to exercise due care in the inspection, servicing and evaluation of the braking system of the Jeep. Paragraph 9 alleges that Jack's breached this duty by failing to exercise due care in the inspection, servicing and evaluation of the brakes on the Jeep and that the failure of the Jeep's braking system contributed in whole or in part to the accident of May 26, 2000.

The foregoing constitutes all of the allegations against Jack's. As the Court can plainly see, the allegations are purely negligence based and contain no additional legal theories. Importantly, it is not alleged that there was any contractual or legal relationship between Jack's and Plaintiff.

The damages that Plaintiff claims to be entitled in this case are set forth in Paragraph 11 of the Claim for Relief of the Complaint which is found on Pages 6 and 7 of said Complaint. Those claimed damages are set forth verbatim below:

a) Loss of production at the scene of the accident. Two of Plaintiff's crews and their sub-contractors were unable to resume work after the accident due to loss of job site access, loss of employees who were injured in the accident or who were being questioned in the investigation of the accident, and loss of equipment under investigation;

b) Loss of production in the weeks following the accident as a result of the lead-time needed to replace the injured employees and to train new employees;

c) Overtime man-hours incurred by Plaintiff to meet the construction schedule;

d) Costs incurred in connection with inspection of the John Deere loader struck by Mr. Spark's Jeep including losses incurred because the loader was unusable for three (3) days while its inspection took place;

e) Overhead costs associated with the handling of insurance and workman's compensation claims;

f) The cost to train Javier Alvarado to perform new job duties consistent with his permanent disability (the loss of his leg);

g) Costs associated with increased insurance premiums as a result of the accident;

h) Any losses incurred by Plaintiff should Plaintiff lose its business license as a result of the accident.

Notably absent from the description of damages found in Plaintiff's Complaint is any mention that Plaintiff suffered any actual tangible damage to any of its property or equipment.

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Indeed, there is no allegation that the subject loader was damaged as a result of this incident, only that it was "inspected" and "down and unusable for three (3) days." It is clear from the allegations of the Complaint that Plaintiff's claimed damages are all purely economic in nature, *i.e.*, the alleged work delays, increased overhead and overtime and the like. As will be discussed below, well-settled principles of Nevada law prohibit the recovery of Plaintiff's claimed damages under alleged facts of the Complaint.

III.

LEGAL ARGUMENT: THE ECONOMIC LOSS DOCTRINE PRECLUDES PLAINTIFF'S CLAIMS

A. Javier Alvarado is *not* Plaintiff's Property.

Plaintiff argues in its Opposition that the economic loss doctrine does not apply because Plaintiff suffered physical damage to its business assets, namely Javier Alvarado. As set forth in the Motion to Dismiss, "[t]he well established common law rule is that absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss." Local Joint Executive Board vs. Stern, 98 Nev. 409, 410, 651 P.2d 637 (1982). Plaintiff makes no allegation that its person or property suffered an injury. To avoid the obvious result that this case must be dismissed, Plaintiff makes the surprisingly unsupported claim that Javier Alvarado, the injured employee, is Plaintiff's property.

Plaintiff argues that Jack's negligently repaired the Jeep, which then entered Plaintiff's construction site and hit a front-end loader, amputating Javier Alvarado's leg. Since there is no allegation that the loader itself was damaged, Plaintiff is forced to argue that its employee, Mr. Alvarado, is actually the *property* of Plaintiff. Such an argument has not found a sympathetic ear since Dred Scott v. Sandford, 19 How. 393, 15 L.Ed. 691 (1856). As an indication of the absurdity of this proposition, Plaintiff fails to cite any decision which would support the proposition that an employee is property of the employer, entitling the employer to maintain an action for injury to the employee.

Plaintiff's only attempt at citation to an authority for this proposition is a quote from Collins v. State, 113 Nev. 1177, 946 P.2d 1055 (1997): "'Property in a thing consists not merely in its

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ownership and possession, but in the unrestricted right of use, enjoyment, and disposal.'" *Id.* at 1183. Plaintiff extends this language to assert that Javier Alvarado is the property of Plaintiff since Plaintiff enjoys the fruits of his labors, uses his labor, and has a right to terminate him in his labors. Such an interpretation requires an incredibly liberal reading of the Court's decision.

In Collins, the Court was examining whether security codes constitute personal property and whether they are therefore subject to larceny. *Id.* at 1183. The Court determined that the legislature intended proprietary information, intangible property, to fall within the definition of personal property under NRS 193.021. *Id.* In no event was the Court speaking of the ownership of a living, breathing individual. Further, the Court's statement, quoted by Plaintiff in support of his proposition that Mr. Alvarado is someone else's property, merely recites the bundle of rights regarding one's property. A person may own, possess, use, enjoy, *and* dispose of property. Plaintiff conveniently glosses over the first two sticks in that bundle, since they clearly indicate that Javier Alvarado is *not* the property of Plaintiff.[1]

In short, Plaintiff has provided no authority to support its position that Mr. Alvarado is somehow Plaintiff's property. Since purely economic damages are not recoverable in negligence absent damage to person or property, and since Plaintiff cannot show either personal injury or that Mr. Alvarado is its property, Plaintiff's Complaint must be dismissed pursuant to the economic loss doctrine.

B. The economic loss doctrine is not limited to products liability and construction defect cases.

Plaintiff next contends that the economic loss doctrine is limited to products liability or construction defect cases. However, neither his cited cases, *i.e.*, Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000), nor relevant precedent support such a position.

The Calloway Court began its analysis by recognizing that a plaintiff may not recover economic loss under theories of strict products liability or negligence. *Id.* at 259. The economic loss doctrine shields a defendant from unlimited liability for all of the economic consequences of a

[1]Given the astounding position taken by Plaintiff, it is remarkable Plaintiff did not also allege "Trespass to Chattel" or "Conversion" against Jack's.

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negligent act. *Id.* at 260 (quoting Stern, *supra*, at 411). "Permitting plaintiffs to recover in tort for purely economic losses would result in open-ended liability, since it is virtually impossible to predict all the economic consequences of a given act." *Id.* (citing State of La. ex Rel. Guste v. M/V Testbank, 752 F.2d F.2d 1019, 1022 (5th Cir. 1985)). The Court concluded from this language that the doctrine precludes recovery "for strictly economic losses in tort - regardless whether such damages are sought from an injurious product." *Id.* at 261. Clearly, this language does not limit the economic loss doctrine only to products liability cases and construction defect cases.

The Court cited Stern, *supra*, for the proposition that Nevada has applied the economic loss doctrine outside of the product liability context. Calloway, at 261. As set forth in the Motion to Dismiss, the Stern case involved a Plaintiff labor union that sued certain defendants who were involved in the design or construction of the MGM Hotel in Las Vegas. The plaintiffs claimed that they lost salaries and employment benefits while they were unemployed following the disastrous fire at the Hotel that occurred in November 1980. The plaintiffs sued the defendant on both negligence and strict tort liability theories. In its opinion, Nevada Supreme Court first dealt with the negligence claims. In a short and concise statement of law, the Court held that there could be no recovery in negligence for economic losses. The Court's precise language was as follows:

> The well established common law rule is that absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss.

Stern, at 410-411 (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); Kingston Shipping Co. Inc. v. Roberts, 667 F.2d 34 (11th Cir. 1982); Clark v. International Harvester Co., 581 P.2d 784 (Idaho 1978); Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App. 1946); Restatement (2d) of Torts § 766C (1979)). Interestingly, many of the cases cited by the Stern Court (which, in turn, was heavily relied on by Calloway), deal with situations in which the economic loss doctrine applies to actions outside the product/construction defect line of cases.

For instance, in Flint, the plaintiff was under charter with the owner of a boat to receive monies each time the boat was used. The defendant used the boat, but negligently caused damage to the propeller which necessitated a fifteen day loss of use of the steamer. During that period, no one used the boat and the plaintiff therefore received no income. *Id.*, 275 U.S. at 307. Accordingly,

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the plaintiff brought an action against the defendants for negligently damaging the propeller causing loss in income to the plaintiff. *Id.*

The Court, led by Justice Holmes, considered the question of whether the plaintiff had an interest protected by the law against intentional injuries inflicted on the vessel by third persons who knew nothing of the charter. *Id* at 308. Justice Holmes concluded that "a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong." *Id.* at 309. Accordingly, defendant was not liable to plaintiff for negligently injuring the propeller.

Clearly, this was not a products liability or construction defect case.

In Roberts, *supra*, two large boats collided in the main ship channel of the port of Tampa, blocking the channel and precluding deep draft vessels from either entering or departing until the wreckage was cleared about 26 days later. Roberts, 667 F.2d at 35. Owners of the delayed vessels brought an action for damages incurred as a result of the delayed passage. *Id.* The Court, following Flint, determined that the owners of the delayed vessels were not entitled to damages not associated with physical damages. *Id.* Accordingly, their suit was dismissed.

This too, was not a products liability or construction defect case.

In Stevenson, *supra*, defendant stored liquified natural gas on its premises. *Id.*, 73 N.E.2d at 201. However, by reason of defendant's negligence, a fire developed at defendant's plant, causing a general conflagration with the result that for the remainder of the day and for eight consecutive days thereafter, plaintiff was unable to pursue his daily work. *Id.* Plaintiff brought an action against defendant for off-work damages. The court cited Flint, *supra*, describing the economic loss doctrine as "lucidly stated by Justice Holmes." *Id.* at 203. The court wisely recognized that if economic losses were allowed, the results would be "appalling:"

> Cases might well occur where a manufacturer would be obliged to close down his factory because of the inability of his supplier due to a fire loss to make prempt [sic] deliveries; the power company with a contract to supply a factory with electricity would be deprived of the profit which it would have made if the operation of the factory had not been interrupted by reason of fire damage; a man who had a contract to paint a building may not be able to proceed with his work; a salesman who would have sold the products of the factory may be deprived of his commissions; the neighborhood restaurant which relies on the trade of the factory employees may suffer a substantial loss.

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Id. at 203-04.

The decisions in Stevenson, Flint, and Roberts all reflect the fact that the economic loss doctrine is not limited to products liability and construction defect cases. In fact, these cases indicate the reason the Court in Calloway took such pains to show the economic loss doctrine applied in construction defect cases; a construction defect case is analogous to a negligence action, but not quite the same, and while the economic loss doctrine clearly applies in negligence cases, a court must be thorough if it desires to extend the doctrine beyond its already firmly established applicability.

From the holding in Calloway, it is clear the economic loss doctrine applies beyond pure construction defect cases, *i.e.*, that it also applies to simple negligence causes of action. In Calloway, the Court considered whether the City of Reno would be liable for negligent inspection of the homes. It was never alleged that the City took part in the planning or construction of the townhomes, but rather that the City had breached a duty of due care in the inspection of the homes. Even though there were no construction defect claims against the City, the Court found that the economic loss doctrine also applied to bar the claims against the City for negligent inspection. Calloway, *supra*, at 267.

C. Application of the economic loss doctrine here furthers public policy.

Plaintiff voices concern that it does not have recourse against Jack's under a warranty or contract theory, so it must be allowed to proceed under a negligence theory. This argument, however, does not comport with legal precedent in the State of Nevada. The Stern Court refused to grant damages to the plaintiffs *because* there was no privity of contract or injury to person or property. Stern, *supra*, at 410. The doctrine against recovery of purely economic loss bars negligence actions as against public policy.

Plaintiff attempts to make a public policy argument against applying the economic loss doctrine here. It states "[p]ermitting the Defendant to use the economic loss doctrine to escape liability, when the public's safety is at stake, would encourage similar wrongful conduct." Opposition at 12. What Plaintiff fails to recognize, however, is that if Jack's was indeed negligent, the owner of the vehicle (the United States of America) and Mr. Alvarado himself would have

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negligence, contract, or warranty actions against Jack's. Thus, Jack's would not be "escaping liability," but would rather be liable to those whom it had allegedly harmed, either in person, property, contract, or warranty. Application of the economic loss doctrine in this case merely furthers the long-standing policy in the State of Nevada to "keep the risk of liability reasonably calculable." Calloway, at 260 (quoting Stern, *supra*, at 411). As shown in Stevenson, *supra*, if purely economic losses were recoverable in a negligence cause of action, the results would be "appalling." Stevenson, at 203-204.

With the foregoing in mind, it is necessary to return to the allegations of Plaintiff's Complaint dealing with the damages that are being claimed. Those damages, once again, are set forth in Paragraph 11 of the Claim for Relief of Plaintiff's Complaint.

The first item of claim damage is loss of production at the scene of the accident because Plaintiff and its crews and sub-contractors could not resume work due to loss of job site access, etc. Very clearly, those words implicate economic losses and nothing else.

The second claimed item of damage is loss of work production. Such loss is the very essence of an economic loss.

The third claimed item of damage is additional overtime man-hours incurred by Plaintiff to meet the construction schedule. Once again, it is impossible to argue that such an item of damage is not a claimed economic loss.

The fourth item of damage is the costs incurred in connection with inspecting the loader struck by the Jeep including the losses incurred due to the fact the loader was unusable for three days while the inspection took place. Once again, there was no hint or allegation that the loader was actually damaged in the accident.

The fifth element of damage is related to overhead costs associated with the handling of insurance and worker's compensation claims. Those words, as written, obviously implicate economic losses and nothing else.

The sixth claimed item of loss is associated with the costs to train injured worker Javier Alvarado to perform new job duties. Once again, such costs are completely economic in nature.

The seventh item of claim damage is the costs associated with increased insurance premiums.

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It is simply impossible to contend that such costs are anything other than economic losses that are non-recoverable in tort.

The eighth and final claimed item of damage is rather amorphous and related to apparently speculative losses incurred by Plaintiff in the event Plaintiff lost its business licence as a result of the accident. It has been approximately three years since the accident so Plaintiff must surely know by now whether its business licence is in jeopardy in any way, shape or form. More fundamentally, however, it is again impossible to contend that such losses, if actually incurred, are anything other than economic in nature and not recoverable in tort.

In light of the foregoing, it is obvious that Plaintiff has alleged nothing other than economic losses as damages in this case. It is a fundamental proposition of law that damages are one of the four necessary elements to the tort of negligence. In other words, without damages there is no possible tort of negligence. *See,* Scialabba v. Brandise Construction Co., 112 Nev. 965, 921 P.2d 928 (1996). Accordingly, it is manifestly evident from even a casual reading of Plaintiff's Complaint that the only legal claim being alleged against Jack's is the tort of negligence, and one of the fundamental elements of that tort, damages, is not available as a matter of law under the economic loss doctrine.

In light of the foregoing, it is respectfully submitted that Plaintiff's negligence claim against Jack's must be dismissed because it fails to state a claim against Jack's upon which relief can be granted.

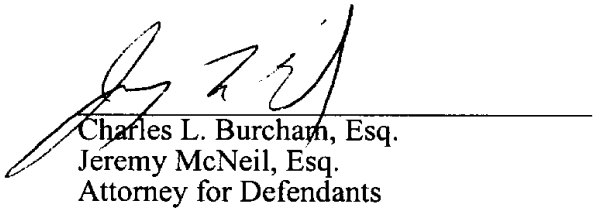
IV.

CONCLUSION

Jack's Motion to Dismiss should be granted.

Respectfully submitted this 18th day of June, 2003.

THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER



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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and that on this date I caused the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS with POINTS AND AUTHORITIES** to be served on all parties to this action by placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada, fully addressed as follows:

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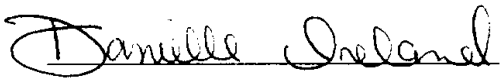
DATED this 18 day of June, 2003



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