

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

\*\*\* FILED \*\*\*  
05/02/2001

04/30/2001

CLERK OF THE COURT  
FORM V000A

THE HONORABLE SHERRY HUTT

S. Morris  
Deputy

CV 1999-018294

FILED: \_\_\_\_\_

AMERICAN NUTRITION INC, et al.

JEFFREY B SMITH

v.

MILLING MACHINERY INC, et al.

JOHN C GEMMILL

MINUTE ENTRY

IN CHAMBERS: This is the time set for oral argument on a Motion for Summary Judgment and a Motion to Dismiss. Plaintiffs are represented by counsel, Jeffrey Smith. Defendant is represented by counsel, Mary Isban.

Court Reporter, Lynn Cronin, is present.

Counsel argue Defendant's Motion to Dismiss Breach of Contract Claim and Motion for Summary Judgment on Heinz damages.

IT IS ORDERED taking this matter under advisement.

Matter concludes.

**LATER:**

This matter having been taken under advisement,

THE COURT FINDS that Defendant was welding in performance of its contract. Plaintiffs claim breach of the implied contract term of workmanlike performance of its duties. The damages

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herein arise from the fire which occurred during the performance of the contract. The contract terms are severable from the tort claims. The damages are alleged to have occurred due to the negligent manner in which the brace was installed. Plaintiffs allege there was an oral agreement not to affect bin #2, therefore, any impact to bin #2 would be a breach of contract.

THE COURT FINDS, taking the facts as asserted by Plaintiffs, the Plaintiffs put Defendant on notice of damages should they impact bin #2. The Plaintiffs' action sound in tort.

IT IS ORDERED granting Defendant's Motion to Dismiss the contract claims, Count II, second claim for relief.

Counsel then argued the Motion for Summary Judgment re: economic loss rule as to Heinz.

Defendant argues that certain damages have been paid, loss of product. Heinz is also claiming other costs of shipping and handling of replacement product available from one of its other sources. Defendant argues Heinz does not have commercial remedies against Defendant. Heinz does not have damage in fact or law. Heinz continued on with its business calling up product from any number of locations.

Defendant does not deny the obligation to pay for product of Plaintiffs or held by Plaintiffs belonging to others, including Heinz, or to Heinz directly. Defendant objects to the action for additional and speculative damages beyond property damage.

Plaintiffs assert damages for costs of shipping from other plants other than this location, lost profits from this product, notwithstanding product available from other bins. That is, for second party loss of convenience due to property damage.

The economic loss rule operates to limit loss to only that which relates to the damages which are foreseeable. Heinz is not claiming personal injury or property damage. It is claiming

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damages for pursuing alternative means of production. Heinz does not claim unique product was lost or that there were no alternative avenues available. Plaintiffs argue where there is harm and loss, all compensation due to Plaintiffs should be explored.

The issue of what categories of compensation are available to Plaintiff Heinz is an issue of law to be resolved by the Court.

Assuming Heinz lost pet food in the fire and there is no dispute that Heinz should be compensated for the lost product, what other compensation may be claimed herein? Heinz claims unspecified damages as it was required to shift to shipping product from another location and that it lost profit on the unsold goods. There is no claim that the goods were unique or scarce or that sales were lost or that Heinz was unable to stock retail outlets.

The Court will not examine on summary judgment whether any damages could be proved as a matter of fact but whether Heinz' business nuisance claim is compensable as a matter of law.

Arizona recognizes first party damages from tort actions resulting in pain and suffering and loss of enjoyment of daily life due to tort injury. In property damage, the cost of purchasing replacement goods is not compensable, where the goods are ordinarily traded in the marketplace.

In this case, Heinz did not have a contract with Defendant but does claim economic loss other than loss of the product destroyed in the fire. It is unknown what the losses may be other than those speculated about such as the cost of ordering pet food from another facility, alternative procurement, or lost profits from the goods being replaced or for which compensation was paid, lost specific opportunity costs, not actually lost profits.

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Heinz discussed a number of potential losses to property which limit the economic loss rule, such as loss of use, diminution of value of a unique item, cost of repair, cost of money in business transactions, none of which Heinz claims in this instance.

In each instance where a category of damages has been devised to expand recovery for property damage, there was a cognizable loss not otherwise remedied in contract or tort, but for which the Plaintiff was found to have suffered as a direct result of Defendant's negligence.

Heinz requests to be allowed to claim damages for doing business around the harm. The claim is novel, not recognized as compensable in Arizona, and lacks a sound basis in policy to extend current law.

IT IS ORDERED granting Defendant's Motion for Summary Judgment re: Heinz economic loss.