1-29-2013

Block v. City of Lewiston Respondent's Brief Dckt. 39685

IN THE SUPREME COURT FOR THE STATE OF IDAHO

JOHN G. BLOCK, a single man,

Plaintiff-Appellant,

vs.

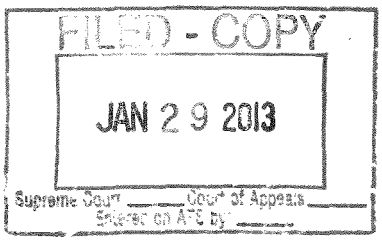
CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee LOWELL J. CUTSHAW, City of Lewiston Engineer,

Defendants-Respondents.

Docket No. 39685-2012

District Court Case No. CV 09-02219

RESPONDENTS' BRIEF



RESPONDENTS' BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County
Honorable Carl B. Kerrick, District Judge, presiding

Ronald J. Landeck
Danelle C. Forseth
LANDECK & FORSETH
693 Styner Avenue
P. O. Box 9344
Moscow, Idaho 83843
Telephone: (208) 883-1505
Facsimile: (208) 883-4593
E-mail – attorneys@moscow.com
Attorneys for Appellant

Brian K. Julian, ISB No. 2360
Stephen L. Adams, ISB No. 7534
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: bjulian@ajhlaw.com
sadams@ajhlaw.com
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

I. STATEMENT OF THE CASE

A. Nature of the Case

On or about August 10, 2005, Plaintiff/Appellant John Block (hereinafter referred to as "Block") purchased land from Jack Streibick (hereinafter referred to as "Streibick") and the estate of Streibick's deceased wife. *R. Vol. I*, p. 13. This property was within the City of Lewiston, Idaho. *Id.* After Block purchased the property, it was subdivided several times, and houses were built on the property. *R. Vol. I*, pp. 13 – 15. After the houses were constructed, defects were discovered in or around three of the properties, which, despite numerous repairs to the properties at issue, ultimately resulted in two of the three houses having to be removed from the properties and the third house having significant structural repair. *R. Vol. I*, pp. 57 – 58. Block alleges that the problems with these three houses resulted from a number of issues (including having built on property with improperly placed fill, having built on a landslide fault, etc.), but which he generally referred to as the property having a "defective condition". *R. Vol. I*, pp. 17 – 18, 20. Block also built a number of other houses on the properties that he purchased from Streibick, none of which suffered any physical damage, but for which Block is claiming lost value. *R. Vol. II*, pp. 348, 353 – 55.

Block brought claims against Streibick (and Streibick's deceased wife's estate) for misrepresentation, breach of the affirmative duty to disclose, breach of implied warranty, breach of the covenant of good faith and fair dealing, and negligence. *R. Vol. I*, pp. 20 – 23. Block also brought claims against the City of Lewiston (hereinafter referred to as the "City") and former City Engineer Lowell Cutshaw ("Cutshaw") for negligence and gross negligence. *R. Vol. I*, pp. 23 – 25.

This appeal only has to do with Block's negligence claims against the City and Cutshaw. The claims against Streibick were settled and Block agreed to dismiss those claims. *R. Vol. I*, p.

7; *Vol. IV*, pp. 727, 730. Summary judgment was granted in favor of the City and Cutshaw on all of Block's claims, on the grounds that the City and Cutshaw were immune under the Idaho Tort Claims Act, and that no duty was owed to Block. *R. Vol. IV*, p. 837.

B. Statement of the Facts

Block has presented a fairly exhaustive Statement of the Case in his opening brief. *Appellant's Brief*, pp. 7 – 17. Further, relevant facts were presented in the briefing on the various summary judgments. *R. Vol. I*, pp. 55 – 59; *R. Vol. II*, pp. 356 – 64. The City and Cutshaw present just those additional necessary facts, along with pointing out errors in Block's facts:

- With regard to Kenneth Morrison filling the canyon at issue (*Appellant's Brief*, p. 8), he testified that the fill was compacted and tested at the time it was done. *R. Vol. II*, p. 267 (Morrison Dep., pp. 25 – 26).

- Block contends that a landslide happened in Sunset Palisades No. 4 ("SP 4"), block 3, in 1999. *Appellant's Brief*, p. 9. However, there is no evidence which supports that contention. The facts show that in 1999, Terry Howard (an independent engineer), while doing work on another project for Nez Perce County, saw cracks in the earth in SP 4, took photographs, and provided the photographs to the City. *R. Vol. II*, p. 248. There was no study done by Howard or Streibick as to how old the crack was, when it occurred, what caused it, or whether it was the result of earth movement or some other cause. There is no doubt that the City put the photograph in the SP 4 subdivision file, as that is where Block found it when he searched the file in 2009. *R. Vol. II*, p. 278.

- With regard to the detention pond at issue, it was originally constructed as part of SP 4, not Sunset Palisades 8 ("SP 8"). *Appellant's Brief*, p. 8. However, it did not work well, and filled in. Streibick later had to repair it when he subdivided SP 4, block 3, into SP 8 in 2005. When Block later subdivided SP 8 into Canyon Greens ("CG"), at the suggestion of his engineer, he moved it to the bottom of the hill, where it currently sits.

- Block contends he purchased SP 8 from Streibick in December, 2005. *Appellant's Brief*, p. 10. This is incorrect. The purchase documents were signed August 10, 2005. *See R. Vol. I*, p. 13 (Verified Complaint, ¶ 11). SP 8 was not approved until later in August, 2005. *R. Vol. II*, pp. 257 – 58 (Administrative Plat for SP 8), 259 – 60 (Amended Administrative Plat for SP 8).

- Block contends that "could not have discovered evidence of the 1999 landslide by simply reviewing the City's files on the lots he purchased." *Appellant's Brief*, p. 15. However, as pointed out above, this is incorrect. Though Block may have intended to purchase lots 1 – 4 of SP 8, when he signed the purchase agreement on August 10, 2005, the plat for SP 8 had not been recorded or approved yet. *R. Vol. II*, pp. 368 – 69 (City Council meeting at

which approval took place did not occur until August 15, 2005). Therefore, the only subdivision file at which Block could have looked (if he had chosen to look at a City file, which he did not do), was SP 4, which, as Block later pointed out, had the Tim Richard memo in it. *R. Vol. I*, p. 17 (Complaint, ¶ 23).

- Prior to contracting for the installation of the helical piers to resolve the 2007 slope movement, Block was specifically told that without doing a slope stability analysis, it would be impossible to know whether installation of the helical piers would resolve the issues with his house. *R. Vol. I*, p. 82.

- The company Block hired to give him advice on his property in 2007 (Strata, Inc.), *Appellant's Brief*, p. 12, was the same company that Terry Howard worked for when he took the picture of the alleged slope movement in 1999. *R. Vol. II*, p. 296.

- Block states that the City did not inform him that fill had been placed on the property. *Appellant's Brief*, pp. 14 – 15. However, Block has admitted that he knew he was building on fill. *R. Vol. II*, p. 282 (Block Dep., pp. 195 – 96).

- Block contends he "did conduct reasonable due diligence" prior to purchasing the property. *Appellant's Brief*, p. 16. This contradicts his prior statements. Block has admitted that he purchased the lots without walking the properties and without doing any due diligence. *R. Vol. II*, pp. 279 – 80 (Block Dep., pp. 184 – 85).

- Block contends that he may have forgone purchase of the property had the City disclosed the defects in the property. *Appellant's Brief*, p. 16. However, Block provides no evidence that he ever communicated with the City about the property prior to signing the purchase documents in August, 2005.

- Block's expert testified that all of Block's losses were economic. *R. Vol. II*, pp. 344, 346 (Rudd Dep., pp. 41, 50 – 51). There was no allegation of physical damage to the houses which were built on Canyon Greens 2 ("CG 2"). *R. Vol. II*, p. 348 (Rudd Dep., pp. 112 – 13).

- Prior to 1997, the Lewiston City Subdivision Code had requirements for mandatory slope stability and/or geotechnical analysis. *See R. Vol. II*, pp. 387 – 440. In 1997, the City of Lewiston substantially revised the Subdivision Code pursuant to Lewiston City Ordinance 4177. *Id.* After Ordinance 4177, requirements for slope stability and/or geotechnical analysis of property was discretionary. *Id.* (specifically §§ 32-9(b)(2)(f), 32-20(c)(2) and 32-31(e)).

- All subdivision plats at issue were approved by the Lewiston City Council, and other entities with authority to approve such plans/designs. *R. Vol. II*, pp. 257 – 62 (plats of SP 8 and CG, and amended plat for SP 8).

C. Procedural History

Block filed a Notice of Tort Claim against the City and Cutshaw on or around August 26, 2009. *R. Vol. I*, p. 58. On or around October 22, 2009, he filed a Complaint. *R. Vol. I*, p. 11. This Complaint contained multiple breach of contract causes of action against Streibick. Against the City and Cutshaw, it only contained one negligence cause of action, *R. Vol. I*, pp. 23 - 25, though such negligence cause of action had numerous subparts, as follows:

> 55. The City of Lewiston, Cutshaw and/or Others had a duty to act with reasonable care under the circumstances and without negligence. The City of Lewiston, Cutshaw, the City Engineer(s) and Others, acting within the course of their employment or duties, breached that duty of care by
>
> (i) failing to notify and/or warn Block at the time he sought building permits for 153, 155 and 159 and Lots 1, 2, 3, 4, 5, 6 and 7 of canyon Greens No. 2 of earth movement that the City of Lewiston, Cutshaw and Others knew had occurred in 1999 within the area of 153, 155 and 159 and that such earth movement had neither been eliminated nor properly abated in any manner,
>
> (ii) failing to take any action to prevent, restrict or regulate development within the area of 153, 155 and 159 until such earth movement had been eliminated or properly abated,
>
> (iii) failing to require that such earth movement in the area of 153, 155, and 159 be eliminated or properly abated by Streibick and/or Others prior to Block's purchase of the Property,
>
> (iv) failing to prevent Streibick from developing and selling 153, 155, and 159 to Block without notice and/or warning to Block that such earth movement had occurred in 1999 or without having eliminated or properly abated such earth movement
>
> (v) failing to require Streibick to complete the required storm water improvements in 1994 for Palisades No. 4 subdivision and approving and allowing Streibick's construction of a storm water detention pond within the area of 153 where the City of Lewiston, Cutshaw and/or Others knew earth movement had occurred in 1999, thereby contributing to the instability of soil in that area,
>
> (vi) approving the plats of Canyon Greens and Canyon Greens No. 2 without notifying and/or warning Block that earth movement had occurred on 153, 155 and 159 in 1999 and had not been eliminated or properly abated;
>
> (vii) failing to require an approved design or plan incorporating engineering

standards applicable to the grading, filling, compacting of soil, detaining of storm water and constructing of residences on the Property and failing to approve such a design or plan and/or to require compliance with such design or plan prior to any such improvements being allowed by the City of Lewiston, Cutshaw and/or Others and/or undertaken to eliminate or properly abate such earth movement within the area of 153, 155 and 159;

(viii) failing to act with ordinary care to protect against the likely risks, danger and adverse consequences from such earth movement the City of Lewiston, Cutshaw and/or Others knew had occurred in the area of 153, 155 and 159 in 1999;

(ix) failing to require and/or compel Streibick to eliminate or properly abate the dangerous condition caused by and/or existing as a result of such earth movement in the area of 153, 155 and 159;

(x) failing to supervise Streibick's development activities within the area of 153, 155, and 159 between 1999 and 2006 thereby allowing concealment of such earth movement and the creation of a dangerous condition and risk of harm; and

(xi) failing to inspect and/or make an inadequate inspection of Streibick's development activities within the area of 153, 155, and 159 between 1999 and 2006 thereby allowing concealment of such earth movement and the creation of a dangerous condition and risk of harm.

R. Vol. I, pp. 23 – 25 (Complaint, ¶ 55).

The City and Cutshaw initially filed a Motion for Summary Judgment, which was denied. *R. Vol. I*, p. 179. After significant discovery, the City and Cutshaw filed a second Motion for Summary Judgment on June 28, 2011. *R Vol. I*, p. 213. The City and Cutshaw argued several reasons why summary judgment should be granted. A hearing on the second Motion for Summary Judgment was held on August 9, 2011. *Tr. Vol. I*, p. 4. On Oct. 14, 2011, Judge Kerrick issued a Memorandum Decision and Order granting the City's and Cutshaw's second Motion for Summary Judgment on several grounds. *R. Vol. IV*, p. 816.

On October 28, 2011 Block filed a Motion for Reconsideration. *R. Vol. IV*, p. 839. A hearing was held on Block's Motion for Reconsideration on November 29, 2011. *R. Vol. I*, p. 10. On January 4, 2012, Judge Kerrick issued a Memorandum Opinion on Block's Motion for

Reconsideration, affirming the prior Memorandum Decision. *R. Vol. V*, p. 1020. Judgment was entered on behalf of the City and Lowell Cutshaw on February 1, 2012. *R. Vol. V*, pp. 1033 – 34. Block filed a Notice of Appeal on February 9, 2012. *R. Vol. V*, p. 1023.

II. RESTATED AND ADDITIONAL ISSUES ON APPEAL

It is the understanding of the City and Cutshaw that Block is appealing each of the bases on which summary judgment was granted below (i.e. whether there was a duty owed to Block, whether the economic loss rule applied, and whether the immunities under *I.C.* §§ 6-904(1) and (7) and 6-904B(3) and (4) apply). The City and Cutshaw also state the following issues on appeal:

1. Can the Judgment in favor of the City and Cutshaw be affirmed on any grounds other than what was decided by Judge Kerrick?

2. Are the City and Cutshaw entitled to attorney fees on appeal pursuant to *I.C.* §§ 12-117, 6-918A, or any other applicable statute or rule?

3. Are the City and Cutshaw entitled to costs on appeal pursuant to *I.A.R.* 40, *I.R.C.P.* 54, or any other applicable statute or rule?

III. ARGUMENT

A. BECAUSE THE CITY AND CUTSHAW HAVE NO DUTY TO ALL FUTURE OWNERS OF A PROPERTY, BLOCK CANNOT PREVAIL ON ALLEGED NEGLIGENCE WHICH OCCURRED PRIOR TO PURCHASE OF THE PROPERTY.

The City and Cutshaw made two general duty arguments: there was no duty to Block before he owned the property, and there was no duty to protect against economic loss (discussed in more detail in § B below). With regard to the former, such arguments only applied to a portion of Block's claims, specifically Complaint ¶¶ 55 (iii – v, ix – xi). On this issue, Judge Kerrick concluded that "The City does not owe a duty to any person who may purchase land in Lewiston, from any current landowner, at a future date." *R. Vol. IV*, p. 827. Block now makes several arguments as to why a duty was owed to Block (though it is not clear that Block is limiting the

discussion of duty to the time prior to when he purchased the property). *Appellant's Brief*, pp. 18 – 25. The City will address each of Block's arguments in turn.

1. Block's Negligence Per Se Argument Should be Rejected Because it was Presented for the First Time on Appeal, and Because Block Cannot Establish Negligence Per Se.

First, Block makes a negligence per se argument, contending that the City Subdivision Ordinance should replace the standard duty of care. *Appellant's Brief*, pp. 19 – 21. This is the first time that negligence per se has been addressed in this case, as it was never plead in the Complaint.[1] Judge Kerrick's Memorandum Opinions (both on the original motion for summary judgment and the motion for reconsideration) never once mention negligence per se. *See R. Vol. IV*, pp. 820 – 27 (discussing negligence arguments) and *Vol. V*, pp. 1010 – 16 (discussing negligence arguments). Perhaps this was because Block never addressed it, in either his briefing on the motion for summary judgment or motion for reconsideration. *R. Vol. III*, pp. 459 – 75 (Opposition to Summary Judgment, discussion of duties), and *Vol. V*, pp. 965 – 68 (Amended Memo in Support of Motion for Reconsideration, discussing the City's duty). Block cannot now raise this issue for the first time on appeal. "The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal." *Barmore v. Perrone*, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008) (quoting *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007)). *See also Murray v. Spalding*, 141 Idaho 99, 101, 106 P.3d 425, 427 (2005) (same holding); *Row v. State*, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001) (holding the same). Block should not now be allowed to argue a new substantive issue on appeal which was never addressed to the Court below.

Even if the Court were to consider Block's negligence per se argument, Block cannot

---

[1] *See R. Vol. I*, pp. 23 – 25 (allegations against the City and Cutshaw). Failure to plead negligence per se is not always dispositive. *See Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 898-99, 188 P.3d 834, 840-41 (2008) (a party need not specifically plead negligence per se in order to receive a jury instruction on such issue).

show the four elements necessary to establish negligence per se. *See* O'Guin v. Bingham County, 142 Idaho 49, 52, 122 P.3d 308, 311 (2005) (discussing elements of negligence per se); *Obendorf*, at 899, 841 (same). First, Block points to language in Lewiston City Code §§ 32-2, 32-8, 32-9, and 32-31. *Appellant's Brief*, pp. 19 – 20. These sections either contain discretionary language or give general guidelines and do not "clearly define the required standard of conduct." *Obendorf* at 899, 841. For example, § 32-2 is titled "Purpose and Intent", and does not give any specific mandates. *R. Vol. II*, p. 387. Similarly, § 32-31 deals with "opinion[s] of the subdivision committee", *Appellant's Brief*, p. 20, which does not clearly define standards of conduct. As to § 32-9, the only action required is that the City "inspect the site", and then if the city engineer so requires, have certain additional studies done. *Appellant's Brief*, p. 20. Again, this discretion does not set forth clearly defined standards of conduct.

Block also cannot show that the Lewiston City Codes were designed to protect him. *Obendorf* at 899, 841. As one court has stated, "It is apparent from the language of the [building code], and from commentators that "[t]he primary purpose of such codes and ordinances is ... to protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals." Island Shores Estates Condo. Ass'n v. City of Concord, 136 N.H. 300, 307, 615 A.2d 629, 633 (1992). The Lewiston Subdivision Code was not intended to protect the developer, but the City and its residents. *See Lewiston City Code* § 32-2(a) (*R. Vol. II*, p. 387).

Block also can't establish the fourth element of negligence per se, in that he cannot show that the City's and/or Cutshaw's negligence was the proximate cause of his injury. *Obendorf* at 899, 841. Though not ruled on by Judge Kerrick[2], the City and Cutshaw contended that there was

[2] The City and Cutshaw still seek to have judgment affirmed on these grounds. "The respondent can seek to sustain a judgment for reasons that were presented to the trial court even though they were not addressed or relied upon by the trial court in its decision." Stapleton v. Jack Cushman Drilling & Pump Co. Inc., 39198-2011, 2012

no evidence before the District Court (nor is there in the record before this court) of what caused the slope movement which resulted in injury to Block's properties. *R. Vol. I*, pp. 201 – 02. Block's experts have admitted that without doing a geotechnical evaluation of the property (which they have not done), they cannot know what caused the slope movement. *R. Vol. IV*, pp. 713 – 14. There must be some evidence of causation, or else an essential element of a negligence claim is not met. *See* Walker v. Am. Cyanamid Co., 130 Idaho 824, 831 (1997); Nation v. State, 144 Idaho 177, 189 (2007) (essential element of negligence claim is causation); Esterbrook v. State, 124 Idaho 680, 683 (1993) (burden of proof for negligence is on Plaintiff). Because Block's own experts don't know what caused the slope movement, *see R. Vol. IV*, pp. 713 – 14, Block cannot establish that the City or Cutshaw proximately caused his injuries. Therefore, the City and Cutshaw request that this Court determine that negligence per se does not apply.

2. Block Incorrectly Argues that the Public Duty Rule Establishes a Duty to Him.

Next, Block addresses the public duty rule. Judge Kerrick found the "public duty rule" to be instructive, and determined that no liability could attach to the City and Cutshaw because no duty existed. Block attempts to argue that the City had a public duty to provide information and handle applications in a particular manner. *Appellant's Brief*, pp. 21 – 22. However, the public duty rule does not apply in the manner which Block states, nor does it create any duty to Block (or any potential future land owner) before the property is purchased. The existence of a duty is a question of law. Turpen v. Granieri, 133 Idaho 244, 247 (1999). "No liability arises from the law of torts unless the defendant owes a duty to the plaintiff." Udy v. Custer County, 136 Idaho 386, 389 (2001). Numerous Idaho cases have made it clear that a party cannot recover from a governmental entity for failure to perform a duty owed to the public at large. "[I]f the duty which

---

WL 6620615 at *6 (Idaho Dec. 20, 2012) (citing Walker v. Shoshone County, 112 Idaho 991, 993, 739 P.2d 290, 292 (1987)).

the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual, injury, and must be redressed, if at all, in some form of public prosecution." *Jacobson v. McMillan*, 64 Idaho 351, 359 (1943). *See also Worden v. Witt*, 4 Idaho 404, 406 – 07 (1895).

> Generally, a person has no common law duty to prevent a third person from injuring another unless there is some kind of special relationship. Applying this principle to governmental torts in what is called the "public duty rule" requires that a governmental unit owe the plaintiff a duty different from that owed to the general public in order for the governmental unit to be found liable.

Radke v. County of Freeborn, 694 N.W.2d 788, 793 (Minn. 2005) (cited in *Rees v. State*, 143 Idaho 10, 16 (2006)). Two cases illustrate this concept. In *Udy v. Custer County*, the plaintiff argued that a sheriff who saw rocks lying on a road (which later caused a motor vehicle accident) had a duty to clear the rocks or give notice to someone to move them. *Udy*, 136 Idaho at 389. This Court stated

> Udy's claims are in reality claims for negligent police protection for which there can be no recovery absent a special relationship with the victim. Here, the record does not establish, nor does Udy argue that he or his passengers were in a special relationship with Sheriff Roskelley. Thus, the fact that Udy's accident may have been prevented through reasonable law enforcement actions is insufficient to establish a duty to the Appellants or otherwise form the basis for Sheriff Roskelley's liability in tort.

Udy, 136 Idaho at 391. In other words, absent a special relationship, there was no duty owed to the plaintiff just because there may have been a duty to the public at large.

The New Hampshire Supreme Court has dealt with a similar issue. In *Island Shores Estates Condo. Ass'n v. City of Concord*, 136 N.H. 300, 615 A.2d 629 (1992), the plaintiff was a condominium association who sued the city for issuing occupancy permits after (allegedly) improperly inspecting the condominiums. *Id.* at 302, 630. The plaintiff contended that the city's failure to discover "a litany of flaws . . . constitutes gross negligence and the construction approved by defendant threatens the structural integrity of the units and the health and safety of

its occupants; that resultant harm to the owners of the units has occurred." *Id.* In dismissing the claims against the city, the New Hampshire Supreme Court stated the following:

> As developed, the public duty rule represents a limitation on liability for municipal acts that are carried out for the general welfare. In cases where by statute or ordinance a public official has a general duty to perform a function for the public's benefit, it has been held that liability will not be imposed for the negligent performance of this duty, unless the plaintiff can establish an individual duty owed him.

Id. at 303, 631. Ultimately, the New Hampshire Supreme Court did not even discuss whether the duty was public or not, because "a duty must exist before we reach the question of whether it is a public duty or a private duty. We do not reach any issues involving the public duty rule because we find the defendant had no duty to protect the plaintiff." *Id.* at 304, 631. The court went on to state that

> We note the countervailing interests in limiting the duty of the city. The defendant asserts the danger of making the city the insurer of every building project if the issuance of a certificate of occupancy is deemed a representation upon which the world can rely. The recognition of the dangers of such unlimited liability is not a vestige of municipal immunity, but is a consideration that must be a factor in every negligence analysis.
>
> The city is not engaged in the trade of inspecting buildings to help buyers determine the commercial feasibility of building ownership. Had the plaintiff wished to assure itself of the commercial feasibility of the construction, the duty was the plaintiff's, and could have been met by utilizing its own resources or by hiring private contractors. By using different standards and focusing on different aspects, the private contractor may well have presented information that caused the plaintiff's members to come to different conclusions as to the financial wisdom of purchasing their units. Such private business considerations are unrelated to the purpose of the municipality's inspection, which must remain focused on setting and enforcing sufficient standards to ensure the safety of structures.

Id. at 306-07, 633. With regard to the second allegation in *Island Shores* (that a duty arose under the city building codes), the court held that such codes no duty existed because the codes are to "protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals." *Id.* at 307, 633.

The same analysis should apply in this case. Despite Block's contentions that the City and/or Cutshaw owed him a duty to provide accurate information[3], there is no reason to make the City liable for acts done prior to Block's purchase of the property. Such a duty would create crushing burden on municipalities, and potentially subject them to enduring liability. *See* Rife v. Long, 127 Idaho 841, 846-47, 908 P.2d 143, 148-49 (1995) (imposing a duty on a school district to protect students after school hours would be debilitating). If, as in Rife and Summers v. Cambridge Joint Sch. Dist. No. 432, 139 Idaho 953, 956, 88 P.3d 772, 775 (2004), a school district has no duty to its students when they leave its custody, a city certainly should not have a duty to someone before they purchase property. In any case, Block's claims don't make logical sense. For example, Block contends that the City was negligent in failing to prevent Streibick from selling the property to Block. *R. Vol. I*, p. 24 (Complaint, ¶ 55(iv)). How the City could have prevented such a sale (absent exercising eminent domain) is impossible to guess, as cities are not generally notified before property is sold. Block certainly never provided the City with a chance to give him information about the property before he purchased it[4], because he never asked the City any questions about the property before signing the sales contract. *R. Vol. II*, p. 279. Therefore, the City and Cutshaw ask that this Court conclude that Judge Kerrick properly ruled no duty was owed to Block before he purchased the property.[5]

3. Block Cannot Show a Duty Arose Due to a Special Relationship Between Block and the City.

Block's third allegation is that there was a special relationship between the City/Cutshaw

---

[3] *See Appellant's Brief*, p. 22 (citing Rogers v. City of Toppenish, 596 P.2d 1096 (Wash. App. Div. 3, 1979)).

[4] This case is distinguished from Rogers based on the fact that the plaintiff in Rogers actually went and asked the city for information about the property before it was purchased. Rogers v. City of Toppenish, 23 Wash. App. 554, 555, 596 P.2d 1096 (1979). Block never made such a request for information from the City or Cutshaw until 2009, four years after he purchased the property. *R. Vol. II*, p. 279.

[5] To the extent that Block contends the City owed him a duty after he purchased the property, *see Appellant's Brief*, pp. 21 - 22, no duty exists to protect from economic loss. *See* § B, below.

and Block. *Appellant's Brief*, pp. 22 – 24. Block argues that this special relationship arose under the public duty rule, citing the four-part test utilized in Rees v. State, Dept. of Health & Welfare, 143 Idaho 10, 16, 137 P.3d 397, 403 (2006). However, that test applied to whether an affirmative duty arose to protect a child suspected of suffering from child abuse. Id. at 15, 402. Even if the test did apply, Block's contention that "there exists genuine issues of material fact" regarding the elements of the test (*see Appellant's Brief*, p. 24) would not bar summary judgment, as the existence of a duty is a question of law, not of fact. Ball v. City of Blackfoot, 152 Idaho 673, 675, 273 P.3d 1266, 1268 (2012). In any case, Block couldn't meet the elements of the Rees test. Block contends that the City had knowledge of a dangerous condition, i.e. the 1999 landslide. *Appellant's Brief*, p. 24. While Block can show that the City was notified of alleged earth movement in or around 1999, he cannot show that it actually was earth movement, when the earth movement occurred, whether anyone knew if it would occur again, what caused it, or if the movement had stabilized. Thus, he has nothing more than speculation that the condition, as it appeared in 1999, was dangerous. Second, Block cannot show that he relied on anything prior to purchasing the property, because he admits he never asked the City anything. Third, Block also cannot show that any ordinance was intended for his protection, as opposed to general protection of the public.[6] Thus, there was no special relationship with Block prior to his purchase of the property.

4. The City Could Not Assume a Duty to Block Six Years Before he Purchased the Property.

Finally, Block contends that the City assumed a duty to him by putting a memo with pictures of the 1999 earth movement in the SP 4 file. *Appellant's Brief*, p. 25. In essence, he

[6] Again, building codes "protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals." Island Shores Estates Condo. Ass'n, 136 N.H. at 307, 615 A.2d at 633.

argues the City assumed a duty to him in 1999, six years before he purchased the property. This makes little sense. Legally, a party cannot assume a general duty. *See* *Martin v. Twin Falls Sch. Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002) ("When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed."); *Udy*, 136 Idaho 386, 34 P.3d 1069 (by voluntarily removing rocks and other debris from the highway on other prior occasions, the county sheriff did not assume the duty of doing so on the night in question); *Brooks v. Logan*, 127 Idaho 484, 903 P.2d 73 (1995) (by helping some troubled students in the past, teacher did not assume the duty of helping a particular student who later committed suicide). In other words, the City could not have assumed a duty to every potential future owner (including Block) of the property just by putting a picture in a subdivision file in 1999. No favorable reading of the facts leads to the conclusion that the City and Cutshaw assumed a duty to Block.

In sum, Block has misconstrued the argument made by the City and Cutshaw with regard to duty. The only argument made is that the City and Cutshaw owed no duty to Block before he purchased the property at issue. Most of Block's arguments apply to after he purchased the property. Therefore, the City and Cutshaw request that this Court conclude that Judge Kerrick properly dismissed those of Block's claims which allege negligence prior to his purchase of the property.

B. THE ECONOMIC LOSS RULE APPLIES TO THIS CASE BECAUSE ALL OF BLOCK'S LOSSES WERE LOST PROFITS AND OTHER PURELY ECONOMIC LOSSES, AND NO EXCEPTION APPLIES.

In addition to the duty arguments discussed above, the City and Cutshaw contend that no duty was owed to Block because, under the economic loss rule, "Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action because there is no duty to prevent economic loss to another." *Stapleton v. Jack Cushman Drilling &*

Pump Co. Inc., 39198-2011, 2012 WL 6620615 at *7 (Idaho Dec. 20, 2012) (quoting *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005)). Stated another way, "this Court has adhered to a general rule prohibiting the recovery of purely economic losses in all negligence actions." *Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995). As all of Block's claims against the City and Cutshaw are negligence based, Block may not recover if he only suffered economic loss.

The City and Cutshaw contend that all of Block's loss constituted economic loss. Further, the City and Cutshaw contend that there is no exception to the economic loss rule. These issues will be discussed below.

1. The Economic Loss Rule Should Apply because the only Damage was to Property which was the Subject Matter of the Transaction between Block and Streibick.

Block contends that his losses are not economic because he suffered property damage, thus preventing the application of the economic loss rule. *Appellant's Brief*, p. 44. However, the facts, the law, and Block's own admissions result in the conclusion that all of Block's losses fall under the definition of economic loss. Block is trying to recover his contractual expectation damages against the City and Cutshaw under a negligence claim. This should not be allowed.

The history of the economic loss rule shows that the economic loss rule was created to prevent parties from seeking contract damages under tort claims.

> The purpose of the economic loss rule is to define the line between recovery in tort and recovery in contract, and it reflects an attempt to maintain the separation or distinction between contract law and tort law. The rule prevents the law of contract and the law of tort from dissolving one into the other.

63B Am. Jur. 2d Products Liability § 1797. As another source states,

> The economic-loss doctrine forbids a party from suing or recovering in tort for economic or pecuniary losses that arise only from breach of contract or are associated with the contract relationship. . . . The doctrine provides that a contracting party who suffers purely economic losses, which is the loss of the benefit of one's bargain, must seek his or her remedy in contract and not in tort as

such claims are instead governed by contract law.

74 Am. Jur. 2d Torts § 24. The Utah Supreme Court stated that "The economic loss rule is a judicially created doctrine that marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care." *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 242 (UT 2009). *See also Town of Alma v. Azco Const., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000) ("Broadly speaking, the economic loss rule is intended to maintain the boundary between contract law and tort law."); *Dewayne Rogers Logging, Inc. v. Propac Indus., Ltd.*, 299 S.W.3d 374, 382-83 (Tex. App. 2009) ("When the only loss or damage is to the subject matter of the contract, the plaintiff's action is ordinarily on the contract."). The Idaho Supreme Court has recognized that breach of contract and negligence claims "are two distinct theories of recovery." *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 790, 215 P.3d 505, 510 (2009). The Supreme Court of Colorado has summarized the rationale of the economic loss rule:

> Although originally born from products liability law, the application of the economic loss rule is broader, because it serves to maintain a distinction between contract and tort law. The essential difference between a tort obligation and a contract obligation is the source of the duties of the parties.
>
> Tort obligations generally arise from duties imposed by law. Tort law is designed to protect all citizens from the risk of physical harm to their persons or to their property. These duties are imposed by law without regard to any agreement or contract.
>
> In contrast, contract obligations arise from promises made between parties. Contract law is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining. Limiting tort liability when a contract exists between parties is appropriate because a product's potential nonperformance can be adequately addressed by rational economic actors bargaining at arms length to shape the terms of the contract. For example, a buyer may demand additional warranties on a product while agreeing to pay a higher price, or the same buyer may choose to assume a higher level of risk that a product will not perform properly by accepting a more

> limited warranty in exchange for a lower product price. Limiting the availability of tort remedies in these situations holds parties to the terms of their bargain. In this way, the law serves to encourage parties to confidently allocate risks and costs during their bargaining without fear that unanticipated liability may arise in the future, effectively negating the parties' efforts to build these cost considerations into the contract. The economic loss rule thus serves to ensure predictability in commercial transactions.
>
> . . .
>
> Determining when a contract action will lie and when a tort action will lie requires maintaining this distinction in the sources of the respective obligations. The phrase "economic loss rule" necessarily implies that the focus of the inquiry under its analysis is on the type of damages suffered by the aggrieved party. However, the relationship between the type of damages suffered and the availability of a tort action is inexact at best. Examining the type of damages suffered may assist in determining the source of the duty underlying the action (e.g., most actions for lost profits are based on breaches of contractual duties while most actions involving physical injuries to persons are based on common law duties of care).

Town of Alma, 10 P.3d at 1262-63. Thus, the essence of the economic loss rule is to prevent a party from attempting to recover contract based damages in tort.

Though the economic loss rule arose out of product liability law, the Idaho Supreme Court has recognized that it may apply outside of that realm. *See Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 26, 244 P.3d 166, 170 (2010) ("The economic loss rule applies to negligence cases in general; its application is not restricted to products liability cases."). Further, the Idaho Supreme Court has recognized the economic loss rule's applicability where there is not even a contract between the plaintiff and defendant. *See Duffin v. Idaho Crop Imp. Ass'n*, 126 Idaho 1002, 1005-06, 895 P.2d 1195, 1198-99 (1995) (no allegation of contract with the defendant Idaho Department of Agriculture, to whom the economic loss rule later applied).[7] Thus, the economic loss rule may apply in this case where there is no allegation of a contract between Block and the City/Cutshaw. The question is then whether Block's losses

[7] Block makes a great deal out of the fact that there is no contract between the City/Cutshaw and Block. *Appellant's Brief*, pp. 39 – 41. However, there is no case which states that the economic loss rule only applies when the defendant is a party to a contract. As *Duffin* points out above, the opposite is true. The economic loss rule may apply to parties, including governmental entities, even though they never had a contract with the plaintiff.

constitute economic loss.

The Supreme Court has stated that "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Salmon Rivers Sportsman Camps v. Cessna Aircraft Co.*, 97 Idaho 348, 351 (1975). This definition has been followed by a majority of cases addressing economic loss.[8] This definition makes sense considering the history of the economic loss rule, as contractual damages typically include replacement or repair of the subject of the contract and lost profits or loss of use. *See, e.g., Cuddy Mountain Concrete Inc. v. Citadel Const., Inc.*, 121 Idaho 220, 225, 824 P.2d 151, 156 (Ct. App. 1992) (lost profits allowed in contract actions); *I.C.* § 28-2-714 (damages in contract actions). The *Salmon River* definition supposes that in order for there to be economic loss there be defective property which is the subject of the transaction at issue in the lawsuit. *See Brian & Christie, Inc. v. Leishman Elec., Inc.*, 244 P.3d 166, 171 (Idaho 2010). In other words, this definition can apply to cases "involving the purchase of defective personal property and real property." *Id.* at 170. The Supreme Court has excluded from the definition of economic loss "damage to property other than that which is the subject of the transaction." *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 791, 215 P.3d 505, 511 (2009) (quoting *Ramerth v. Hart*, 133 Idaho 194, 196, 983 P.2d 848, 850 (1999)).[9] As the Supreme Court has recently stated, "Damages from harm to person or property are not purely economic losses. [E]conomic loss is recoverable in tort as a loss parasitic to an injury to person or property." *Stapleton*, 39198-2011, 2012 WL 6620615 at *7 (internal

---

[8] *See Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007 (1995); *Tusch Enters. v. Coffin*, 113 Idaho 37, 41 (1987); *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300 (2005); *Ramerth v. Hart*, 133 Idaho 194, 196 (1999); *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785, 790 (2009). *Cf. Brian & Christie, Inc. v. Leishman Elec., Inc.*, 244 P.3d 166, 170 (Idaho 2010) (holding that the definition provided of economic loss in the *Salmon Rivers* case does not apply to claims for economic loss related to services, as opposed to defective property).

[9] Also, a different standard applies when the contract involves services, as opposed to purchase of property. *See Brian & Christie, Inc.*., 150 Idaho at 27, 244 P.3d at 171; *Oppenheimer Indus., Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 426, 732 P.2d 661, 664 (1986).

citations and quotation marks omitted). The City and Cutshaw contend (and Judge Kerrick found[10]) that there was no damage to separate property which would prevent the application of the economic loss rule.

Block argues that because he only purchased bare property with an unknown defect in it, only damage to that bare property (as a result of the defect) would result in economic loss to Block. *Appellant's Brief*, p. 39. Block further contends that the improvements he made to the property suffered damage (cracks in house walls, warped floors, broken windows and gas lines, etc.), and because these improvements were not on the property when he purchased it, he has suffered damage to property which was not the subject of the transaction. *Appellants' Brief*, p. 44. Based on this, Block contends he is entitled to recover all of his damages (i.e. damages to both the improvements and to the property itself). *Appellant's Brief*, p. 17. This argument is unsupportable.

First, there is no case which Block has identified which indicates that damages to improvements to property (which Block has admitted is the subject of the transaction) constitutes damages to separate property. In fact, the opposite is quite true. For example, in Blahd v. Richard B. Smith, Inc., 141 Idaho 296, 299, 108 P.3d 996, 999 (2005), the plaintiffs contemplated purchasing a house which apparently had a defect in it (a crack in a concrete slab in the basement of the house). Id. Regardless, the plaintiffs purchased the home and added improvements (such as remodeling the house and adding slate tile to place over the crack). Id. When the newly laid tile cracked along the same lines as the original crack, the plaintiffs brought suit. Id. This court held that the negligence claims were barred by the economic loss rule. Id. at 301, 1001.

Similarly, in Duffin v. Idaho Crop Imp. Ass'n, 126 Idaho 1002, 1005, 895 P.2d 1195, 1198 (1995), the plaintiffs purchased seed potatoes which had been inspected by the State, but

---

[10] *R. Vol. IV*, p. 822.

which allegedly had bacterial ring rot. *Id.* The plaintiffs then planted the seed potatoes, and the potatoes grown from them were also infected. *Id.* Despite the fact that the new potato plants were damaged as a result of the defect in the subject matter of the contract (i.e. the seed potatoes), this Court held that the economic loss rule applied to the State. *Id.* at 1007, 1200.

Under Block's theory, if improvements to the property constituted other property (and damage to the improvements constituted property damage), then both *Blahd* and *Duffin* were decided wrong. In *Blahd*, improvements made to the property (i.e. slate tile in the basement) were damaged by a defect in the property. Under Block's theory, this would be property damage, and thus void the economic loss rule with regard to all damages. *See, e.g.*, *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200. The same is true with *Duffin*: under Block's theory, the damage to the new potatoes (which are by comparison the improvement to the seed potatoes) would constitute property damage, since the new potatoes were not the subject of the transaction. However, this Court has made it clear that damages to improvements to the "subject of the transaction" do not constitute property damage for purposes of the economic loss rule. Were this Court to accept such a proposition, the economic loss rule could simply be avoided by adding any minor or insignificant improvement to any property which was the "subject of the transaction", and when that improvement was damaged, sue in tort for what should have been contract damages.

In support of his argument, Block relies on *Aardema* and *Brian & Christie, Inc.* However, these two cases do not support the conclusion that the addition of improvements to property will allow for negligence claims when the improvements are damaged. In *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 24, 244 P.3d 166, 168 (2010), the subject of the transaction was not actual property, but the rendition of a service. *Id.* Unlike *Brian & Christie, Inc.*, there is no contract for services at issue in this case. Indeed, in *Brian & Christie, Inc.*, the Supreme Court states outright that the "district court's attempt to apply [the property based] formulation of the

[economic loss] rule to a case involving the rendition of services illustrates why it does not apply to such cases." *Id.* at 26, 170. This Court ultimately held that negligent provision of a service which damages property is not subject to the economic loss rule. *Id.* at 29, 173. Such a holding does not apply to a situation in which a plaintiff purchases property with an unknown defect in it, as happened in this case, *Blahd*, *Duffin*, *Tusch Enterprises v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1025 (1987), and a number of other cases.[11]

Block's reliance on *Aardema* is similarly faulty. *Aardema* at no point indicates that improvements to "the subject of the transaction" constitute separate property. In *Aardema*, the plaintiffs alleged that the milking system they had purchased caused damage to their cows. *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 788, 215 P.3d 505, 508 (2009). The disagreement was whether the milking system or the cows were the "subject of the transaction". *Id.* at 791, 511. There was no allegation of improvements to the milking system, and it was clear that the cattle were separate property. This court held that "the milking machines are the subject of the transaction." *Id.* There was no question in *Aardema*, as there is in this case (and as there was in *Blahd*) of improvements or attachments to the "subject of the transaction". Therefore, *Aardema* provides no guidance in this present case.

Second (in addition to Block's inability to point to a case holding that damage to improvements constitutes separate property damage) is the fact that Block cannot reasonably argue the houses and improvements are not the subject of the transaction. In this case, there is only one transaction: Block's purchase of property from Streibick. There is no other contract at issue. *R. Vol. I*, pp. 20 – 23 (breach of contract claims against Streibick all stem out of the sale of

---

[11] *See also* *State v. Mitchell Const. Co.*, 108 Idaho 335, 336, 699 P.2d 1349, 1350 (1984) (defective roof); *Clark v. Int'l Harvester Co.*, 99 Idaho 326, 332, 581 P.2d 784, 790 (1978) (defective parts for a tractor); *Ramerth v. Hart*, 133 Idaho 194, 196, 983 P.2d 848, 850 (1999) (defective airplane).

the property). Block relies on a footnote from *Aardema*[12] to show that the subject of the underlying transaction should only be considered to be "the four bare lots that comprised SP No. 8. . . . This real property is the subject of this lawsuit." *Appellant's Brief*, p. 39. As the *Aardema* footnote states, "the underlying contract that is the subject of the lawsuit is the subject of the transaction." *Aardema*, 147 Idaho at 791, 215 P.3d at 511 (fn. 2). Based on this footnote, the improvements which Block claims suffered property damage are still the subject of the transaction.

Block purchased the property on August 10, 2005, while the property was still designated as SP 4, block No. 3. *R. Vol. I*, p. 13.[13] In essence, Block was purchasing property which was being subdivided by Streibick, with the intent to subdivide it further. Block admits that he further subdivided SP 8 lots 1-4, and made at least 11 lots out of such properties. *R. Vol. I*, pp. 13 – 14. Block also admits he purchased the property with the intent to improve, develop, and build on the properties. *R. Vol. II*, p. 275 (Block Dep. p. 85). Block further admits that he purchased the property "for the purpose of constructing and selling single family residences." *Appellant's Brief*, p. 7. Block's admitted purpose in purchasing the property is similar, if not identical, to the situation in *Duffin*, where the plaintiffs purchased the seed potatoes with the understood intent that they would be planting the potatoes. *See Duffin*, 126 Idaho at 1005, 895 P.2d at 1198. If the underlying contract in *Duffin* had been deemed to merely be the purchase of the seed potatoes, then the economic loss rule should not have applied to the new potatoes (and potato plants) grown from such seeds, nor the resultant lost profits. In essence, the subject of the underlying

---

[12] Block cites to *Aardema v. U.S. Dairy Sys., Inc.*, 147 Idaho 785, 791, 215 P.3d 505, 511 (2009) (Fn. 2).

[13] Block contends that he was purchasing lots 1-4 of SP 8, which is what the purchase documents say. However, even though Block intended to by lots 1-4 of SP 8, no such subdivision had been recorded or approved on Aug. 10, 2005. The City Council meeting at which SP 8 was approved did not occur until August 15, 2005. *R. Vol. II*, p. 368 – 370. Thus, Block was purchasing property which he knew to be in the subdivision approval process, but which had not yet been approved.

transaction must take into consideration the intended use of the purchased property, or else the purpose of the economic loss rule is gutted.

For example, in *Tusch Enterprises v. Coffin*, 113 Idaho 37, 39, 740 P.2d 1022, 1024 (1987), the plaintiffs were interested in "purchasing the duplexes [which were the subject of the transaction] as investment property." When problems arose with the property, the plaintiffs sued for "damages for loss of rental value and costs of repair." *Id.* at 40, 1025. This becomes significant because the type of damages sought in *Duffin*, *Tusch*, and this case are all essentially contract damages (i.e. lost profits for crops, lost rental value, and in this case, loss of value and loss of profits on sale, *see Appellant's Brief*, p. 17). The intent of the contract, whether purchasing seeds to plant, duplexes to rent, or property to develop and then sell, matters because the damages being sought are contract damages (i.e. expectation damages), which the economic loss rule says one cannot obtain in a tort action. While the contract may identify the property purchased (as opposed to the reason purchased), it is not the sole subject matter of the transaction. If that were the case, then lost profits would never be allowed as contract damages, because they were not the subject of the contract.[14] Block simply cannot say that the subject matter of the transaction was just four lots of earth, because the lots of earth were never intended to remain so. *Appellant's Brief*, p. 7. If the Court were to accept Block's interpretation of "subject matter of the transaction", the economic loss rule would never apply. Any improvement to the property would be sufficient to create new property which would or could result in separate property damage, rendering the economic loss rule ineffective. The City and Cutshaw request that this Court reject Block's interpretation that the damage to the improvements to the property constitutes "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).

---

[14] We know this is not true, because lost profits are allowed in contract actions.

Third, basic property law principles show that damage to the houses, pools, retaining walls, and other improvements does not constitute property damage. After Block purchased the property, there is no question that he made improvements. *R. Vol. I*, p. 14 – 15. However, every improvement he made became a fixture to the property. In Idaho, anything which is "affixed to the land" becomes part of the real property. *I.C.* § 55-101. When Block built the houses, pools, retaining walls, windows, gas lines, etc., there is no doubt that he actually annexed such items to the property, with the intent to make it permanent and adapted to the property. *Everitt v. Higgins*, 122 Idaho 708, 711, 838 P.2d 311, 314 (Ct. App. 1992). Thus, even though at the time he purchased the property there were no improvements, at the time the defect manifested itself in 2007, and again in 2009, such defect affected only things which were affixed to the real property, which means that only the real property was damaged. Block cannot argue that separate property damage occurred when legally, the only things that were damaged were the fixtures on the real property, which Block admits was the subject matter of the transaction. *Appellant's Brief*, p. 39. By affixing the houses and other improvements to the property, Block himself intended the improvements to become part of the real property (as evidenced by the fact that he was trying to sell the developed property with the houses and improvements on it, *see R. Vol. I*, p. 14 (Complaint ¶ 16). If there were different facts, such as that the defect in the property had damaged something not affixed to the property (i.e. a car, or as discussed in *Aardema*[15], the cows which were not permanently affixed to the milking machines), a different discussion could be had. However, Block can point to no damages other than damages to what he built into and onto the property. Therefore, the only damage which has occurred affected the subject of the transaction itself (i.e. the real property), resulting in loss of value to the property. The City and Cutshaw request that this Court determine such damages are not recoverable under the economic

[15] *Aardema*, 147 Idaho at 791, 215 P.3d at 511.

loss rule.

Finally, aside from the issue of whether the damaged property is the subject of the transaction, the City and Cutshaw contend that a number of reasons support the conclusion that the economic loss rule applies to all of Block's alleged damages. First, as stated at the beginning of this section, the point of the economic loss rule is to prevent a party from seeking in tort what they should be seeking in contract. Block admits that his damages are construction and abatement expenses, loss of value, and inability to sell the properties (or lost profits). *Appellant's Brief*, p. 17. All of these damages fit the definition of economic loss stated in Salmon River: "costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). In essence, Block has brought a negligence action against the City and Cutshaw to recover contract damages. However, Block also had a source against which he could recover contract damages: Streibick.

In fact, the record shows that Block settled all of his claims with Streibick. *R. Vol. IV*, pp. 727 – 28. A similar situation arose in Excel Const., Inc. v. HKM Eng'g, Inc., 2010 WY 34, 228 P.3d 40 (Wyo. 2010), which involved a contract between a contractor and an engineer regarding replacing a city's water lines. Id. at 42. Though addressing construction contracts, the Wyoming Supreme Court stated

> that parties to a construction contract have the opportunity to allocate the economic risks associated with the work, and that they do not need the special protections of tort law to shield them from losses arising from risks, including negligence of a design professional, which are inherent in performance of the contract.

Id. at 45. Like the plaintiff in Excel Construction, Block "had the opportunity to allocate the risks associated with the costs of the work when it contracted with [Streibick] and, in fact, entered into

a detailed contract which allowed it the means, method and opportunity to recover economic losses allegedly caused by [the alleged] negligence." *Id.* Further, Block had a number of other contracts which he could have utilized to allocate his risk, such as with the company that did compaction[16] testing or his engineer Hasenoehrl[17] (who worked on subdividing the properties, and whom he has chosen not to sue). That Block did not allocate his risks better does not mean he should be allowed to recover his contract damages in tort claims against the City and Cutshaw. Thus, Block has been paid for his contract claims, and should not be allowed to continue to seek contract damages against the City and Cutshaw under negligence claims.

Block relies on a number of cases to show that the economic loss rule does not apply in this case. For example, Block relies on *Oppenheimer Indus., Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 732 P.2d 661 (1986). Though Block adequately states the facts of that case, Block fails to note the two essential distinguishing factors from this case: 1) the underlying contract was for provision of services, like *Brian & Christie, Inc.*[18], and 2) the plaintiff had had cattle stolen from him, not damaged. *Oppenheimer Indus., Inc.*, 112 Idaho at 424 – 26, 732 P.2d at 662 – 64. Neither of these features is present in this case. Block's situation is closer to *Duffin*, *Tusch*, *Ramerth*, *Blahd*, and all those cases in which the contract is for defective property. Further, as Block still acknowledges that he owns the property at issue, *Oppenheimer* does not apply.

What Block refuses to acknowledge is that this present case is similar, if not identical, to *Duffin*. As discussed above, in *Duffin*, the State Department of Agriculture (who was not a party to the sales contract) was sued in negligence for failing to identify a disease in seed potatoes. *Duffin*, 126 Idaho at 1006, 895 P.2d at 1199. The same is true here: Block seeks to recover

---

[16] The compaction testing was done by Allwest Testing, and notified Block of certain concerns and problems with the property. *See R. Vol. II*, p. 333.

[17] *See Appellant's Brief*, p. 14.

[18] There was no defective property at issue in *Oppenheimer*.

against a governmental entity (who was not a party to the sales contract) for negligent inspection and for improperly issuing permits. *R. Vol. I*, p. 23 – 25 (Complaint, ¶ 55 (allegations of the City's negligence)). Block seeks the same types of damages here (lost value, lost profits, repair costs) as were sought in *Duffin* (lost revenues, etc.). The City and Cutshaw contend that the result in this case should be no different than in *Duffin*. Block has suffered economic loss, and had the ability to sue under contract theories for these damages. He should not be able to recover the damages again in tort.

Plaintiff also ignores a case recently decided which has very similar aspects to this case. In *Stapleton v. Jack Cushman Drilling & Pump Co. Inc.*, 39198-2011, 2012 WL 6620615 (Idaho Dec. 20, 2012), the plaintiff contracted for a well to be drilled on his undeveloped property. *Id.* at *1. After the well was installed, the plaintiff built a house and landscaped the property. *Id.* When the well collapsed, the plaintiff sued the well driller. *Id.* The plaintiff contended that the economic loss rule did not apply because the well collapse caused damage to his property. *Id.* at *7. This Court found that the plaintiff's allegation that the only property which was damaged was the well itself and the cost of tearing out surrounding landscaping to repair the well was insufficient to show property damage. *Id.* The same analysis applies to this case: Block's only damage was to the property he purchased and that which he affixed to the property. Like the plaintiff in *Stapleton*, Block has not identified any property damage which would support a negligence claim.

The City and Cutshaw request that this Court affirm Judge Kerrick's determination that "the subject of the transaction is the property developed by Block which is contained within the subdivisions, as well as the houses built upon this property." *R. Vol. IV*, p. 822. The economic loss rule should apply to all of Block's damages, and all claims against the City and Cutshaw were properly dismissed.

2. No Exception to the Economic Loss Rule Applies in this Case.

There are three exceptions where economic loss may be recovered in negligence claims. The City and Cutshaw contend that Judge Kerrick rightly concluded that none of such exceptions apply.

First, "economic loss is recoverable in tort as a loss parasitic to an injury to person or property." *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200. As discussed above, there was no separate damage to person or property. All damage was to the "subject of the transaction." Therefore, this exception does not apply.

Next, "Economic loss might also be recovered in tort where the occurrence of a unique circumstance requires a different allocation of the risk." *Id.* at 1007 – 08, 1200 – 01. *See also Just's, Inc. v. Arrington Const. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978). Block makes no attempt to argue that such exception applies. Even if he did, there is no basis for this exception to apply. The purchase or subdivision of property is not a "'unique circumstance' requiring a re-allocation of the risk" any more than seed potato certification was in *Duffin*. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. As the Court stated in *Blahd*, "The purchase of a residential house is an everyday occurrence and does not create the type of unique circumstances required to justify a different allocation of risk, particularly where it appears there may be other defendants available to respond in contract damages." *Blahd*, 141 Idaho at 302, 108 P.3d at 1002. The same applies to subdivision, development, and sale of property. Therefore, this exception should not apply.

Finally, "an exception to the economic loss rule is applicable in cases involving a 'special relationship' between the parties." *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. Though Block does not argue the special relationship exception in his discussion of the economic loss rule, *see Appellant's Brief*, pp. 37 – 44, he does have a section titled "Special Relationship" in his

discussion of duty. *Appellant's Brief*, pp. 22 – 24. With regard to the special relationship exception, this Court has stated that

> There are only two situations in which this Court has found the special relationship exception applies. One situation is where a professional or quasi-professional performs personal services. . . . The other situation involving a special relationship is where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function.

Blahd, 141 Idaho at 301, 108 P.3d at 1001 (citing *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976), and *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201). Unlike *McAlvain*, the City and Cutshaw did not provide any professional services, nor does Block allege that they did so.

With regard to the second part of the special relationship test, Block does not discuss it. Instead he focuses on whether a duty arose under the "public duty rule", *Appellant's Brief*, p. 23, which is quite different from the circumstances outlined in *Blahd* and *Duffin*. In *Duffin*, one defendant was a private, non-profit corporation which the Court pointed out "held itself out as having expertise in the performance of a specialized function; it is the only entity which can certify seed potatoes in the state of Idaho", and had engaged in a marketing campaign to induce people to buy seed that it had certified. *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. Thus, this Court held that the exception applied to that defendant. *Id.* There is no allegation that the City or Cutshaw engaged in such behavior in this case. Instead, the City and Cutshaw are analogous to the State Department of Agriculture in *Duffin*, which the Court held did not hold itself out to the public as having expertise in a specific area. *Id.* Indeed, the City and Cutshaw did not hold themselves out as having expertise regarding a specialized function any more than did the Department of Agriculture in *Duffin*. *See Blahd*, 141 Idaho at 301, 108 P.3d at 1001. Therefore, even if Block were arguing that the City and Cutshaw had a special relationship with Block,

there is no evidence to support such a contention.

Based on the foregoing, the City and Cutshaw request that this Court find, as did Judge Kerrick, that "there is no evidence in this case that the City of Lewiston held itself out to the public as having expertise regarding a specialized function." *R. Vol. IV*, pp. 824 – 25. Because no exception to the economic loss rule applies, the City and Cutshaw request that this Court find that all of Block's damages are barred by the economic loss rule, and that summary judgment was properly granted.

C. JUDGE KERRICK PROPERLY DETERMINED THAT IMMUNITIES UNDER *I.C.* §§ 6-904(1) & (7) AND 6-904B(3) & (4) APPLIED.

This Court applies a three step analysis to determine whether summary judgment has properly been granted on the issue of immunities under the Idaho Tort Claims Act:

> When reviewing a motion for summary judgment against a governmental entity and its employees under the Idaho Tort Claims Act (ITCA), this Court must engage in a three step analysis. First, we must determine whether tort recovery is allowed under the laws of Idaho. This is essentially a determination of whether there is such a tort under Idaho Law. Second, this Court determines if an exception to liability under the ITCA shields the alleged misconduct from liability. Finally, if no exception applies, [we examine] whether the merits of the claim as presented for consideration on the motion for summary judgment entitle the moving party to dismissal.

Rees v. State, 143 Idaho 10, 14 – 15 (2006) (internal citations and quotation marks omitted). Defendants concede that negligence is a recognized tort in the state of Idaho, *see, e.g.,* Nation v. State, 144 Idaho 177, 189 (2007); Brooks v. Logan, 127 Idaho 484, 487 (1995), and therefore do not address this first step of the analysis. Judge Kerrick found exceptions to liability on all claims against the City and Cutshaw under *I.C.* §§ 6-904(1) and 6-904B(3) & (4), and to Complaint ¶ 55(vi) under *I.C.* § 6-904(7). *R. Vol. IV*, pp. 829 – 36. Block now contends that Judge Kerrick was mistaken on all these counts.

1. Judge Kerrick Correctly Determined that Both the Lewiston City Counsel and City Engineer Shawn Stubbers Made Discretionary Acts Under *I.C.* § 6-904(1).

There are two separate immunities in *I.C.* § 6-904(1): the statutory/regulatory function immunity, and the discretionary function immunity.[19]

> A governmental entity and its employees . . . shall not be liable for any claim which:
> 1. Arises out of any act or omission of an employee of the governmental entity exercising ordinary care, in reliance upon or the execution or performance of a statutory or regulatory function. . . **or** based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof.

I.C. § 6-904(1) (emphasis added). The "exercising ordinary care" requirement only applies to the statutory/regulatory function immunity, not discretionary function immunity.

> The "'regulatory function' and 'discretionary function' clauses of I.C. § 6–904(1) represented two different types of actions that might be immune under the ITCA but the same test applied to each." *Leliefeld v. Johnson*, 104 Idaho 357, 363, 659 P.2d 111, 117 (1983); *see also Sterling*, 111 Idaho at 229–30, 723 P.2d at 773–74. In *Jones v. City of St. Maries*, Justice Huntley noted that **the first clause of I.C. § 6–904(1) affords governmental employees immunity if they act with ordinary care and in accordance with policy decisions**. 111 Idaho 733, 745, 727 P.2d 1161, 1173 (1986) (Huntley, J., concurring).

Rees v. State, Dept. of Health & Welfare, 143 Idaho 10, 20, 137 P.3d 397, 407 (2006) (emphasis added). *See also Leliefeld v. Johnson*, 104 Idaho 357, 363, 659 P.2d 111, 117 (1983) ("While the creation of a governing policy might well be discretionary, nonetheless, a negligent failure in the furtherance of that policy could well be tortious and outside the screen of immunity."); *Lawton v. City of Pocatello*, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994) (inclusion of the word "or" in a statute meant in the alternative, as opposed to requiring both elements). In other words, enacting a discretionary function will be immune if it is truly discretionary, but an employee's act in executing or performing as a statute or regulation requires will only be immune if the employee acts with ordinary care. *I.C.* § 6-904(1). This is relevant because the City and Cutshaw only

---

[19] The immunities under this section will fail if there is malice or criminal intent. *I.C.* § 6-904. Block makes no allegation of malice or criminal intent, and so this issue is not discussed.

contended that they were entitled to discretionary function immunity under *I.C.* § 6-904(1), which is the immunity Judge Kerrick addressed in his rulings. *See R. Vol. IV*, pp. 831 – 35. Therefore, Block's discussion of whether the City and/or Cutshaw acted with ordinary care[20] is irrelevant.

"The discretionary function exception applies to governmental decisions entailing planning or policy formation." *Dorea Enterprises, Inc. v. City of Blackfoot*, 144 Idaho 422, 425, 163 P.3d 211, 214 (2007). "Routine, everyday matters not requiring evaluation of broad policy factors will more likely than not be 'operational.' Decisions and actions which involve a consideration of the financial, political, economic and social effects of a given plan or policy will generally be 'planning' and fall within the discretionary function exception." *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987). If the decision is discretionary, the Court then examines "the underlying policies of the discretionary function, which are: to permit those who govern to do so without being unduly inhibited by the threat of liability for tortious conduct, and also, to limit judicial re-examination of basic policy decisions properly entrusted to other branches of government." *Dorea Enterprises, Inc*, 144 Idaho at 425, 163 P.3d at 214.

Two decisions which were relevant to this case fall under the discretionary function immunity. First, in 1997, the Lewiston City Council adopted a revised subdivision code (pursuant to City Ordinance 4177) which removed all mandatory requirements for slope stability or geotechnical analyses, and instead gave the city engineer discretion when to require such studies. *R. Vol. II*, pp. 387 – 440 (specifically §§ 32-9(b)(2)(f), 32-20(c)(2) and 32-31(e)). Second, Lewiston City Engineer Shawn Stubbers made a decision, based on numerous policy factors, not to require a geotechnical/slope stability analysis of the property at issue. *R. Vol. IV*, p. 834. Block fails to address either of these discretionary decisions in his briefing, *see*

[20] *Appellant's Brief*, pp. 27 – 31.

Appellant's Brief, pp. 26 – 31, even though they are the basis of Judge Kerrick's determination that discretionary immunity applies. *R. Vol. IV*, pp. 831 – 35. Instead, Block discusses acts that show that the City did not act with reasonable care. However, as discussed above, this is irrelevant for purposes of discretionary function immunity.

The City contends that Block's alleged damages purportedly arise out of the fact that no geotechnical evaluation was required during subdivision of the property. *R. Vol. IV*, p. 834. Block confirms this. *Appellant's Brief*, p. 30 (failing to require geotechnical studies was negligent). Therefore, the change to the city codes and the decision not to require a geotechnical analysis are the decisions which allegedly lead to his damages. But the decisions should be deemed discretionary. Based on the changes to the Lewiston City Code, a policy shift occurred whereby mandatory slope stability analysis was no longer required. The enacting of city ordinances by a city council is clearly the type of policy or planning decision that should be treated as discretionary, and also fits the underlying policies of the immunity. *See* Dorea Enterprises, Inc., 144 Idaho at 425, 163 P.3d at 214 ("greater rank or authority will most likely coincide with greater responsibility for planning or policy formation decisions"); City of Lewiston v. Lindsey, 123 Idaho 851, 855, 853 P.2d 596, 600 (Ct. App. 1993) (city's decision when to purchase property was discretionary).

Similarly, the decision by Lewiston City Engineer Shawn Stubbers not to require a geotechnical analysis of the property during the subdivision process was also discretionary. This Court has several times recognized that governmental employee decisions can rise to the level of discretionary functions. For example, in Dorea, when a sewage department supervisor considered a number of factors, including "money, budgets, the amount of people that [they] had, [specifically,] the amount of educated people," when deciding how often to flush out the city's sewer system, that decision was deemed to be policy making and, ultimately, discretionary.

Dorea Enterprises, Inc., 144 Idaho at 426, 163 P.3d 211, 215 (2007). As this Court has stated, "decisions made under statutes and regulations which leave room for policy judgment in their execution are discretionary." *Crown v. State, Dept. of Agric.*, 127 Idaho 175, 181, 898 P.2d 1086, 1092 (1995). The Lewiston City Code language at issue gave the City Engineer broad discretion as to when to require a geotechnical or slop stability analysis. *R. Vol. II*, pp. 387 – 440 (specifically §§ 32-9(b)(2)(f), 32-20(c)(2) and 32-31(e)). Indeed, Mr. Stubbers decision was based on numerous policy factors: the limited time in which a subdivision application could be reviewed, staff training, budgetary concerns, discussion with outside experts, etc. *R. Vol. III*, pp. 645, 648 (Stubbers Dep., pp. 37 – 38, 52); *R. Vol. IV*, p. 834. This sort of decision also fulfills the underlying policies of discretionary immunity, in avoiding second guessing decisions made by the city engineer, and avoiding liability for decisions with regard to subdivision applications.

Based on the foregoing, the City and Cutshaw ask this Court to conclude that Judge Kerrick properly dismissed all of Block's claims under the discretionary function immunity. Numerous other discretionary functions[21] discussed in the briefing before the District Court, but not relied on in Judge Kerrick's Memorandum Decisions, will not be addressed at this point.

2. Because there are No Issues of Material Fact as to Gross Negligence, Judge Kerrick Properly Granted Immunity under *I.C.* § 6-904B(3) & (4).

Under *I.C.* §§ 6-904B(3) & (4), the City and Cutshaw are immune from any claim that "Arises out of the issuance . . . or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization," or "Arises out of the failure to make an inspection, or the making of an inadequate inspection of any property, real or personal, other than the property of the governmental entity performing the inspection," unless an employee acted with "malice or criminal intent and without gross negligence or reckless, willful and

[21] Such as the policy decision not to copy entire subdivision files to place in a new subdivision files. *See R. Vol. I*, p. 232 – 33, *Vol. IV*, p. 716.

wanton conduct." *See* Hoffer v. City of Boise, 151 Idaho 400, 403, 257 P.3d 1226, 1229 (2011) (allegations of malice, criminal intent, etc. only apply to employees, and not the city itself).

Judge Kerrick concluded that the language of *I.C.* § 6-904B(3) & (4) was broad enough to cover "any claims of negligence which are based on issuance of building or other permits, approving subdivision plats, and inspecting or not inspecting the property at issue." *R. Vol. IV*, p. 830. Because the underlying basis of all of Block's claims was the alleged failure to inspect, require studies, or the issuance of permits, the immunity under these statutes required dismissal of all claims. *Id.* at 829 – 30. Block now appeals on the basis that there is a question of fact as to whether "*the City* acted with gross negligence."[22] *Appellant's Brief*, p. 34 (emphasis added).

As a matter of law, a City cannot act with gross negligence. In Hoffer, the plaintiff sued the City of Boise for various tort claims under the I.T.C.A, alleging that various city employees acted with malice and criminal intent. Hoffer, 151 Idaho at 401, 257 P.3d at 1227. This Court upheld dismissal of the claims, in part, on the grounds that no city employee was named as a party to the lawsuit, stating

> Because Hoffer only appeals the dismissal of claims that are included within that section, and because he did not name any individual employee as a defendant, as a matter of law under I.C. § 6–904(3) he could not recover against the City. The district court was correct in dismissing those claims. If he had included an employee as a defendant, his claims against that employee alleging malice or criminal intent would have survived under I.C. § 6–904(3) because an employee is only immune from suit for those intentional torts if there is no allegation of malice and/or criminal intent.

Id., at 403, 1229. In other words, the umbrella language of *I.C.* § 6-904 stating that the immunities fail if there is malice or criminal intent only applies to city employees named as parties to the lawsuit; the city itself cannot have malice or criminal intent.

Though Hoffer dealt with *I.C.* § 6-904, the umbrella language of *I.C.* § 6-904B exactly

---

[22] Block does not discuss malice, criminal intent, or reckless, willful and wanton conduct in his brief, so they will not be discussed here.

mirrors the structure of *I.C.* § 6-904, but just adds "gross negligence" and "reckless, willful and wanton conduct" to the list of conduct that would preclude the immunity's application. Thus, the City of Lewiston cannot be grossly negligent; only its employees can. Block only named one Lewiston employee to this lawsuit, and that was former City Engineer Lowell Cutshaw. Taking this a step further, there is not a single issue of fact that Cutshaw acted with gross negligence. None of Block's alleged material facts listed on *Appellant's Brief*, pp. 34 – 36 identify any act or inaction of Lowell Cutshaw.[23] Block's statement of facts only mentions Cutshaw to indicate that he was an employee of the City, and that he attended a meeting with Block. *Appellant's Brief*, pp. 7, 16. In order to establish that Cutshaw acted with gross negligence, Block will have to show that Cutshaw did or failed to do

> an act which a reasonable person in a similar situation and of similar responsibility would, with a minimum of contemplation, be inescapably drawn to recognize his or her duty to do or not do such act and that failing that duty shows deliberate indifference to the harmful consequences to others.

I.C. § 6-904C(1). Though Block contends that the District Court improperly determined that Block had a high burden to overcome with regard to immunities[24], *Appellant's Brief*, pp. 33 - 34, Block cannot argue that he had no burden. Once a governmental entity contends that an immunity applies,

> the plaintiff must prove a claim which does not fall within the exception to governmental liability . . . and must establish that the governmental entity, or its employees acting within the course and scope of their employment, was negligent or [committed] otherwise wrongful acts or omissions which were the proximate cause of the plaintiff's injuries.

---

[23] Instead, they list comments by City Public Works Director Chris Davies, Building Official John Smith, Assistant City Engineer Shawn Stubbers, and a number of other former and current employees, none of whom are parties to this lawsuit.

[24] Block misconstrues Judge Kerrick's statement in this regard. The case Judge Kerrick relied on only stood for the proposition that an employee is presumed to be acting without malice or criminal intent, and so Block would have to overcome this presumption. *R. Vol. IV*, p. 830 (citing Boise Tower Associates, LLC v. Hogland, 147 Idaho 774, 784, 215 P.3d 494, 504 (2009)). As Block was not alleging malice or criminal intent, this did not become an issue. Block only had to meet his burden to show evidence of gross negligence.

Elce v. State, 110 Idaho 361, 364, 716 P.2d 505, 508 (1986) (internal quotation marks omitted). Thus, it is Block's burden to establish that Cutshaw acted or failed to act in a way that he should have been inescapably drawn to recognize as his duty, and acted with deliberate indifference to harmful consequences. So far, all Block has alleged was that Cutshaw was an employee, and had attended a meeting. This scintilla of information does not establish that Cutshaw had any particular duty (or should have been drawn to recognize a duty). Further, the fact that Cutshaw attended a meeting does not show deliberate indifference to the harmful consequences to Block, and is not sufficient to overturn entry of summary judgment on this issue. *See G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) ("plaintiff's case must be anchored in something more than speculation and a mere scintilla of evidence is not enough to create a genuine issue"). Therefore, as there is no evidence that the only employee sued acted with gross negligence, Block has not met his burden. Summary judgment was appropriately granted based on this immunity.

Even were this Court to determine (contrary to *Hoffer*) that the gross negligence exception applies to the City itself (or any unnamed employee), Block still cannot show that gross negligence occurred. All of Block's allegations of gross negligence revolve around the fact that the City failed to notify Block that the slope movement had apparently occurred. *Appellant's Brief*, pp. 34 – 36. However, failure to notify does not establish gross negligence on its own. Even if it is assumed that the City or some nameless employee had such a duty[25], there is no evidence that failing to notify Block resulted in deliberate indifference to the harmful consequences to Block. First, the City hid nothing. The memo regarding the earth movement was

[25] Block can point to no specific duty in either statute or city code which requires the City to search records and provide all information about a property to a subdivider; instead, he relies on comments made by City employees which are taken out of context to show a duty exists. *Appellant's Brief*, pp. 35 – 36.

prominently placed in a publicly available file[26], giving potential purchasers and developers (at least those who did due diligence and looked in such files prior to purchasing such property) all the notice they needed as to the issue. *See* 58 Am. Jur. 2d Notice § 7 ("Constructive notice is meant to protect innocent persons about to engage in lawful transactions, by encouraging diligence in protecting one's rights and preventing fraud. It is based on the premise that citizens have no right to shut their eyes or ears to avoid information and then say they had no notice.").

Second, and crucial to the determination of gross negligence, is an analysis of what the City could have known simply from the memo in the file. Looking at the memo, all a person would know is that in March, 1999, a non-city employee provided pictures of alleged earth movement to the City. *R. Vol. II*, p. 248. The memo does not say what caused the earth movement (or how it is known that the land in the photo has suffered earth movement), and does not state when the alleged earth movement occurred, whether it was stable or active, or a myriad of other factors that would affect any future decisions about the property. *Id.* It is impossible for the City to be indifferent to harmful consequences when there is no evidence that harmful consequences would or could result.[27] In other words, the City and its employees, just based on the memo in the file, had no knowledge that there was unstable ground in the area. All they had was a photograph of a crack in some ground, which a non-city employee claimed showed earth movement. But since no study was done on the property (by the owner of the property or by the photograph taker), and no study results were provided to the City, the City had no basis to believe the property shouldn't be developed or built on. Thus, Block cannot show that there was gross negligence as defined by *I.C.* § 6-904C(1).

---

[26] *See R. Vol. II*, p. 278, Block Dep., p. 180 (Block stated he found it immediately upon searching the SP4 subdivision file).

[27] If Block's own experts don't know what is causing the earth movement, *see R. Vol. IV*, p. 714, then it would be impossible for the City or its employees, based on a picture of a crack in the ground, to determine whether the situation is unsafe, or even whether the crack is 40 years old or more.

Third, what also is known from the file is that the then property owner (Streibick) was notified about the condition on the property. *R. Vol. II*, p. 249 – 51. Contrary to showing that the City was indifferent to harmful consequences, the City took action by notifying the current landowner so that he could address the issue. Instead, without notifying the City, Streibick covered up the cracks, and never attempted to find out how old they were or what caused them. *R. Vol. II*, p. 269 (Morrison Dep., p. 57). Block has presented no evidence that if the City did inspect the property any time between 1999 and 2005, it would have discovered slope movement (as such movement had been hidden).

The result is that Block has not met his burden to show that the City and its employees (especially Cutshaw) acted with gross negligence. This is not a situation like *S. Griffin Const., Inc. v. City of Lewiston*, 135 Idaho 181, 190-91, 16 P.3d 278, 287-88 (2000) where the city's failure to inspect a building about to be torn down resulted in missing the fact that adjacent buildings were connected (and thus creating an issue of fact whether gross negligence occurred). This case is more similar to *Crown v. State, Dept. of Agric.*, 127 Idaho 188, 190, 898 P.2d 1099, 1101 (Ct. App. 1994) (aff'd in part, rev'd in part[28], 127 Idaho 175, 898 P.2d 1086 (1995)), where a state inspector, despite having been notified of a potential deficit in inventory, failed to discover that a warehouse manager had fraudulently inflated the inventory of beans in the warehouse by putting hundreds of boxes full of dirt in the warehouse. After reviewing the record, the Idaho Court of Appeals concluded that "uncontroverted evidence sufficiently justified an inference that Mr. Sparrow [the inspector] did not act, or omit to act, with deliberate indifference, and hence that he was not grossly negligent as defined by I.C. § 6–904C." *Id.* at 193, 1104.

---

[28] *Crown* was not reversed based on any discussion of gross negligence. *See Crown v. State, Dept. of Agric.*, 127 Idaho 175, 179, 898 P.2d 1086, 1090 (1995).

In this case, Block has provided no evidence that a geotechnical evaluation would have discovered the hidden slope movement. As no geotechnical evaluation has ever been done on the property, there is no evidence that a geotechnical evaluation would have provided Block with any information regarding conditions on the property. Thus, the fact that the City and employees did not inform Block of a memo in a file is not sufficient to show gross negligence. The City and Cutshaw request that this Court find, as did Judge Kerrick, that there was no deliberate indifference to harmful consequences. *R. Vol. IV*, p. 830.

3. Judge Kerrick Correctly Determined that the Subdivision Plats Contained Public Property as used in *I.C.* § 6-904(7).

The immunity allowed under *I.C.* § 6-904(7) states that

> A governmental entity and its employees . . . shall not be liable for any claim which:
> . . .
> 7. Arises out of a *plan or design for construction or improvement to the highways, roads, streets, bridges*, or other *public property* where such plan or design is prepared in substantial conformance with engineering or design standards in effect at the time of preparation of the plan or design or *approved in advance of the construction by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.*

I.C. § 6-904(7) (emphasis added). Judge Kerrick found that the City and Cutshaw were immune under this provision only to Complaint ¶ 55(vi) (which alleged that the City was negligent in approving the subdivision plats for CG and CG 2). *R. Vol. IV*, pp. 835 – 36. Block contends that this immunity does not apply because there was no public property at issue, and argues that all property was private. *Appellant's Brief*, pp. 32 – 33. There is no dispute that each subdivision plat at issue (including SP 4, SP 8, CG and CG 2) contained easements dedicated to the City. The Administrative Plat for SP 8 contains city roads, storm sewer easements, a storm drain easement connected to a public easement for a detention pond, and stream easements. *R. Vol. II*, pp. 257 – 58. The Amended Administrative Plat for SP 8 shows the same, with additional public

easements. *Id.*, pp. 259 - 60. The Administrative Plat for CG shows the easements described above, with additional public easements, and specifically shows the detention pond, which is labeled as "Storm Drain Pond Easement". *Id.*, pp. 261 – 62. All of these plats were approved by the Lewiston City Council, and all of them were prepared by Block's own engineer Eric Hasenoehrl of Keltic Engineering. *Id.*, pp. 257 – 62. Thus, the plats are a plan, and either meet the substantial conformance requirement[29] or the approved in advance requirement. *See* Lawton v. City of Pocatello, 126 Idaho 454, 459, 886 P.2d 330, 335 (1994) (immunity is available if either substantial conformance or advance approval element is met). Thus, the only question is whether the easements constitute public property.

Block argues that this immunity only applies to "public projects". *Appellant's Brief*, p. 33. However, the statute does not use that language; instead, by its own plain language, it applies to "public property." *I.C.* § 6-904(7). All of the easements and rights-of-way on the plat maps constitute public property. The Lewiston City Code states that

> **Sec. 31-3. Right-of-way work – Permit required** No person shall dig up, break, excavate, obstruct, tunnel, undermine, or disturb any street or other public property, place any obstruction thereon or fill in, place, leave, or deposit upon the same any earth, rubbish, garbage, rock or other material that may obstruct, disturb or interfere with the free use thereof without first obtaining a permit therefor from the department.

Lewiston City Code § 31-3.[30] A right of way is defined as "improved or unimproved public property, dedicated or deeded to the city for the purpose of providing for vehicular, pedestrian and public use." *Id.* § 31-2. Rights-of-way include utility easements. *Id.* § 31-9. The City Code defines an easement as "A grant by the owner of the use of a parcel of land by the public,

---

[29] As the plans were prepared by Block's own engineer, Block cannot argue that the plans were not prepared in substantial conformance with engineering or design standards, or else he is admitting he submitted improper (and possibly) negligent plans to the City for approval.

[30] It is appropriate for Courts to take judicial notice of city ordinances. *See* City of Lewiston v. Frary, 91 Idaho 322, 328, 420 P.2d 805, 811 (1966). *See also I.C.* § 9-101(3).

corporation, or persons for a specified use and purposes and so designated on a plat." *Id.* § 32-4. Based on these codes, no structures may be built on utility easements, no property owner could have done work on the easements, and all storm and wastewater easements must be kept in a condition to provide access to the City. *See id.*, § 36-1. Indeed, this Court has recognized that a utility easement constitutes a taking, though not a compensable one. *See* Hughes v. State, 80 Idaho 286, 293, 328 P.2d 397, 401 (1958) (overruled by Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004)).

Based on the language in the Lewiston City Code, it is difficult to imagine that the storm water/sewer easements and dedications for public roads included on the subdivision plats do not constitute public property. Block could not interfere with or build on them, and had to maintain access for City use. Even utilizing Block's definition, *see Appellant's Brief*, p. 33, the easements were not restricted to any individual's use. Though an easement may run through an individual's property, it is dedicated to the City's use, and should be considered public property for the purposes of immunity under *I.C.* § 6-904(7). Therefore, the City and Cutshaw request that this Court affirm Judge Kerrick's ruling with regard to plan/design immunity.

D. THE CITY AND CUTSHAW CONTEND THAT THERE ARE OTHER BASES FOR AFFIRMING THE JUDGMENT ON APPEAL.

The Supreme Court has recently stated that, "The respondent can seek to sustain a judgment for reasons that were presented to the trial court even though they were not addressed or relied upon by the trial court in its decision." Stapleton v. Jack Cushman Drilling & Pump Co. Inc., 39198-2011, 2012 WL 6620615 at *6 (Idaho Dec. 20, 2012). *See also* Walker v. Shoshone County, 112 Idaho 991, 993, 739 P.2d 290, 292 (1987). The City and Cutshaw contend that there were several issues presented to the District Court which were not ruled on. *See R. Vol. IV*, p. 827 (fn. 3).

The City and Cutshaw contend that the following are issues (which were presented to the District Court) which show that granting summary judgment was appropriate:

1. Block could not establish what caused his damages because he could not establish what caused the earth movement. *R. Vol. I*, pp. 201 – 02; *Vol. IV*, p. 714 (the City and Cutshaw's briefing on such issue).

2. The City owed no duty to Block to require a geotechnical evaluation be done on the property. *R. Vol. I*, pp. 199 – 201; *R. Vol. IV*, pp. 711 – 12 (briefing on such issue).

3. The City had no affirmative duty to seek out and disclose every piece of information which was freely available in a public file. *R. Vol. V*, pp. 990 – 91 (briefing on this issue, which Block raised for the first time in his Motion for Reconsideration).

4. The decision by the City not to do research into a property for developers and not to put copies of all documents contained in prior subdivision files into new subdivision files (when an old subdivision is resubdivided) constitutes a discretionary decision for purposes of immunity under *I.C.* § 6-904(1). *R. Vol. I*, pp. 206 – 07; *R. Vol. IV*, pp. 715 – 16 (briefing on this issue).

As these issues have been previously briefed (see the citations to the record cited above), and as Block did not address these issues in his opening brief, these arguments will not be repeated at length. The City and Cutshaw request that the Court consider the briefing previously provided to the District Court on these issues as a basis for affirming the Judgment on other grounds.

E. THE CITY AND CUTSHAW ARE ENTITLED TO COSTS AND FEES ON APPEAL BECAUSE BLOCK'S APPEAL IS WITHOUT ANY BASIS IN LAW OR FACT.

The City and Cutshaw request attorney fees on appeal pursuant to *I.C.* §§ 12-117 and 6-918A. *I.C.* § 12-117 applies because the City is a political subdivision as defined by the statute, *see I.C.* § 12-117(5)(b), and *I.C.* § 6-918A applies because this case is brought under the Idaho Tort Claims Act. Both statutes have a similar standard. Under *I.C.* § 12-117, attorney fees shall be awarded if the court "finds that the nonprevailing party acted without a reasonable basis in

fact or law." I.C. § 12-117(1). Under *I.C.* § 6-918A, the Court may award attorney fees to the prevailing party if "the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action."[31]

Regardless of which statute applies, the City and Cutshaw contend that there is no basis for Block's appeal. As to the duty issues, Block's argument is that a duty was owed to him on several grounds, but ignores the fact that Judge Kerrick only decided that no duty was owed to Block before Block purchased the property at issue. There is no basis for Block to argue that a City owes a duty as to all future property owners. As to economic loss, Block can point to no Idaho or other state caselaw which supports his contention that the damage to his improvements to the property at issue constitutes anything other than economic loss.

On the issue of immunities, Block spends a majority of his argument on *I.C.* § 6-904(1) directed at the "ordinary care" issues under the statutory/regulatory function immunity, when Judge Kerrick did not even grant summary judgment under that immunity. As to the immunity under *I.C.* § 6-904B(3) & (4), Block points to absolutely no issue of fact which relates to whether the City and/or Cutshaw acted with gross negligence, and as a matter of law, the City itself cannot act with gross negligence. Finally, Block contends that immunity was improper under *I.C.* § 6-904(7) by trying to convince this court that dedications for public easements for water, sewer, streets, and other drainage issues do not constitute "public property". Block presents no new facts or law to this Court, and provides no reasonable basis on which to overturn Judge Kerrick's ruling. Therefore, his appeal is without reasonable basis in fact or law, and is in bad faith.

---

[31] There is some confusion as to whether one of these statutes applies over the other. *Compare* Beehler v. Fremont County, 145 Idaho 656, 658, 182 P.3d 713, 715 (Ct. App. 2008) (*I.C.* § 6-918A is exclusive over *I.C.* § 12-117) *with* Brown v. City of Pocatello, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010) (*I.C.* § 12-117 is exclusive as to *I.C.* § 6-918A). Brown does not discuss Beehler, nor explicitly overrule it, so it is unclear whether one statute is exclusive.

As to costs, if the City and Cutshaw prevail on appeal, they are entitled to costs pursuant to *I.R.C.P.* 54 and *I.A.R.* 40 as the prevailing party.

IV. CONCLUSION

Based on the foregoing, the City and Cutshaw respectfully request that this Court affirm Judge Kerrick's grant of summary judgment on all grounds.

RESPECTFULLY SUBMITTED this 30th day of January, 2013.

ANDERSON, JULIAN & HULL LLP

By _____
Brian K. Julian, Of the Firm
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January, 2013, I served a true and correct copy of the foregoing RESPONDENTS' BRIEF by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Ronald J. Landeck
Danelle C. Forseth
LANDECK & FORSETH
693 Styner Avenue
P. O. Box 9344
Moscow, Idaho 83843
Telephone: (208) 883-1505
Facsimile: (208) 883-4593
Attorneys for Plaintiff-Appellant

[X] U.S. Mail, postage prepaid
[ ] Hand-Delivered
[ ] Overnight Mail
[ ] Facsimile

_____
Brian K. Julian