3-12-2013

# Block v. City of Lewiston Appellant's Reply Brief Dckt. 39685

IN THE SUPREME COURT OF THE STATE OF IDAHO

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| JOHN G. BLOCK, a single man,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CITY OF LEWISTON, a municipal corporation of the State of Idaho, and its employee, LOWELL J. CUTSHAW, City of Lewiston Engineer,<br><br>Defendants-Respondents. | ) | Docket No. 39685-2012<br><br>APPELLANT'S REPLY BRIEF |

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


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## Introduction

Block's overriding factual basis for this lawsuit is the City's failure, during two (2) statutorily mandated subdivision approval processes in 2005 and 2006, respectively, to inform Block, as property developer and applicant, of a hazardous site condition, namely slope instability from a landslide that occurred in 1999, which was known to the City and documented in its subdivision records and which made the site unsuitable for residential development and use. Without knowledge of the prior landslide and following the City's 2006 approval of the Canyon Greens subdivision, Block constructed three (3) custom homes on the hazardous site between 2006 and 2008 at an out-of-pocket cost far exceeding one million dollars only to suffer the total loss of two (2) of those homes and substantial damage to the third home when a 2009 landslide occurred in the same location as the 1999 landslide.

These circumstances show that genuine issues of material fact exist in support of negligence and gross negligence claims against the City and Cutshaw for breach of their duty of care. The district court erred as a matter of law by concluding (i) that the City owes no duty to Block, (ii) that City's actions are entitled to immunity or exceptions to liability under the Idaho Tort Claim Act ("ITCA") and (iii) that Block's claims are barred by the economic loss rule.

## Negligence, Generally

In order to establish negligence, Block must prove the existence of each element: "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Fragnella v. Petrovich*, 153 Idaho 266, 281 P.3d 103, 109 (2012), reh'g denied (Aug. 1, 2012).

The existence of a duty of care is a question of law over which this Court exercises free review. *Coghlan v. Beta Theta Pi Fraternity,* 133 Idaho 388, 400, 987 P.2d 300, 312 (1999); *Turpen v. Granieri,* 133 Idaho 244, 247, 985 P.2d 669, 672 (1999). Block argues that the City owed him a duty under i) general negligence principles, ii) a statutory duty theory, iii) a special relationship theory, and based on iv) the City's assumption of duty. Block has provided sufficient evidence to establish a duty of care under each of these theories.

This Court has held that "every person, in the conduct of his or her business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others." *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011), *Turpen,* 133 Idaho at 247, 985 P.2d at 672. "Foreseeability is a flexible concept which varies with the circumstances of each case. Where the degree of result or harm is great, but preventing it is not difficult, a relatively low degree of foreseeability is required. Conversely, where the threatened injury is minor but the burden of preventing such injury is high, a higher degree of foreseeability may be required." *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 300-01, 796 P.2d 506, 509-10 (1990).

It was clearly foreseeable that residential construction upon a known landslide area would result in physical injury and/or property damage if the City did not exercise reasonable care to prevent such harm and/or damage. The burden upon the City to preserve and timely disclose to Block the information regarding the 1999 landslide was *de minimis*, yet the City failed to do so. Block, as the owner and developer of such land, suffered substantial physical damage to the homes he built upon the landslide area proximately caused by the City's breach of its duty to Block.

The City believes it owes no duty to Block because he is a member of the "public at large." (Respondents' Brief at 9). The City's public duty argument is premised on the assumption

that Block's negligence claim is based on the City's "acts done prior to Block's purchase of the property." (Respondents' Brief at 9-10). However, this is not the thrust of Block's negligence claims. Block's negligence claims are primarily based on the City's actions in connection with the City's approval of the Canyon Greens subdivision in 2006, after Block had purchased the property. It was the City's approval of the Canyon Greens subdivision that created the three (3) building lots upon which the homes on 153, 155 and 159 Marine View Drive were constructed and, thereafter, damaged by the 2009 landslide. The City has attempted to confuse the Court by referring to claims related to Block's purchase of the property that are not being asserted by Block in this appeal. The City seems to concede in a footnote that "[t]o the extent that Block contends the City owed him a duty after he purchased the property, see Appellant's Brief at 21-22, no duty exists to protect from economic loss. See § B, below." (Respondents' Brief at 12, fn. 5). Block's further discussion regarding the district court's misapplication of the economic loss rule is set forth below.

The City's reliance on *Udy v. Custer County* is misplaced and actually supports Block's claim. In *Udy*, the court concluded that the public entity with exclusive custody and control over the state highway had a duty to the public for the maintenance of that highway not the county sheriff. *Udy v. Custer County*, 136 Idaho 386, 390, 34 P.3d 1069, 1073 (2001). In addition, the court noted that the county sheriff had not increased the risk associated with the road. *Id.* In Block's situation, the City had exclusive control over its subdivision process and Block's development and the City's breach of its duty contributed to the physical damage to Block's homes and his substantial out-of-pocket losses.

Negligence Per Se

The City begins its argument regarding negligence per se by misleading this Court in asserting that "Block never addressed" (Respondents' Brief at 6) negligence per se arising from duties imposed by the City Subdivision Ordinance. This statement is not true. First, in his Complaint, Block pled the City's failure to warn Block of site conditions during the plat approval process for Canyon Greens subdivision and the City's failure to require or approve a plan to abate the site conditions. R. Vol. I, pp. 23-25 (Complaint, ¶ 55). Further, in opposing the City's Second Motion for Summary Judgment, Block made numerous references to his claim of a duty arising from the City's failure to discharge its responsibilities under Section 32-9 of the City Subdivision Code. R. Vol. III, pp. 460-62, 466-67, 469-72, 522-27, 665; R. Vol. IV, pp. 691-93.

Moreover, a party is not required to plead negligence per se when alleging a cause of action for ordinary negligence. See *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 898-99, 188 P.3d 834, 840-41 (2008) (Party is not required to specifically plead negligence per se in their complaint when alleging a cause of action for ordinary negligence. Thus, Respondents were not required to amend their complaint as a condition precedent to the district court's consideration of their request that the jury be instructed as to negligence per se.)

Block argues that a duty arose and was breached under negligence per se principles. "The effect of establishing negligence per se through violation of a statute is to conclusively establish the first two elements of a cause of action in negligence." *O'Guin v. Bingham Cnty.,* 142 Idaho 49, 52, 122 P.3d 308, 311 (2005) (The elements of duty and breach are taken away from the jury). Here, Block argues that the City violated two (2) different Lewiston City Ordinances, §§ 32-8 and 32-9. R. Vol. V, pp. 882-87, 894-95.

The existence of negligence per se is an issue of law over which this Court exercises free review. *O'Guin,* 142 Idaho at 51, 122 P.3d at 310. In order for negligence per se to apply, a plaintiff must show that: (1) the statute or regulation clearly defines the required standard of conduct; (2) the statute or regulation is intended to prevent the type of harm the defendant's act or omission caused; (3) the plaintiff is a member of the class of persons the statute or regulation was designed to protect; and (4) the violation was the proximate cause of the injury. *Id.* at 52, 122 P.3d at 311 (citing *Ahles v. Tabor,* 136 Idaho 393, 395, 34 P.3d 1076, 1078 (2001)).

The City maintained the photograph and memorandum related to the 1999 landslide in two different locations in its records with the intent to act upon that information at the appropriate time. Based on the Subdivision Ordinance, **City staff was required** to i) **discuss with the developer** any site conditions (the 1999 landslide) that may require special consideration or treatment, ii) **identify** any unusual problems with the site (the 1999 landslide), iii) **review and discuss with the developer** the need for special studies as a result of the site conditions (the 1999 landslide), and iv) **advise the subdivider** of the results of the City's actions. The City did none of these and, in so failing, approved Block's Canyon Greens subdivision, thereby allowing Block to construct the three (3) homes and proximately causing the damage to those homes, which, but for the City's approval, would neither have been constructed nor damaged.

Thus, the facts of this case do establish that all elements of a claim for negligence per se have been met, the standard of conduct being clearly defined by Subdivision Ordinance § 32-8 and/or § 32-9, which ordinance(s) is/are intended to prevent precisely what occurred to Block as a subdivision developer and intended beneficiary of the protections of the ordinance(s), and the violation which proximately caused physical damage to Block's homes.

The City argues that causation has not been proven, but this is a question of fact and Block has raised material issues of fact as to this issue through his expert engineer Eric Hasenoerhl has testified "I concluded that the fault line of the 2009 slope movement that is, the line from which the slope broke away and moved, is almost identical to the fault line of the 1999 slope movement" and John "Hank" Swift has testified

> The City's failure to require a geotechnical evaluation and implement the recommendations of that evaluation for earthwork and stormwater drainage facilities in an area where a known landslide had occurred, the City's failure to supervise and/or inspect development that concealed a landslide, the City's failure to require proper abatement of a landslide, the City's failure to prevent, restrict or regulate development in the area of a landslide, the City's failure to act with ordinary care to protect against the risks of a landslide, and the City's failure to warn of a landslide at the time of subdivision of property encompassing such landslide area and/or at the time the City issued building permits for the affected property in 2006 and thereafter, contributed to the instability of the property Block purchased and which instability ultimately caused his damage.

R. Vol. I, p. 118; R. Vol. IV, p. 701.

"[T]o establish liability in a negligence action, a plaintiff must prove a causal connection between the defendant's breach of duty and the plaintiff's injuries." *Allen v. Burggraf Constr. Co.,* 106 Idaho 451, 453, 680 P.2d 873, 875 (Ct.App.1984) (citing *Alegria v. Payonk,* 101 Idaho 617, 619 P.2d 135 (1980)). There is sufficient evidence to show the City owed a duty to Block. Although the district court did not reach the issue of causation, Block has offered sufficient evidence proving a causal connection between the City's breach of duty and his injuries.

Special relationship

Block had a special relationship with the City which obligated the City to protect him. An affirmative duty to aid or protect arises only when a special relationship exists between the parties. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399, 987 P.2d 300, 311 (1999). Determining whether a special relationship exists "sufficient to impose a duty requires an

evaluation of 'the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.'" *Id.* citing W. Prosser, Law of Torts 333 (3d ed.1964).

The City's and Block's relationship is not contractual. The City had a substantial level of control over the behavior of Block. The City is a repository of information and the source of guidance for developers as to site specific conditions that may or could pose problems for a developer. Block could not subdivide his property without the City's approval. Block could not construct homes on his property without the City's approval. The City had knowledge of an unreasonable risk of harm and the right and ability to control the party's conduct. Further, Block participated in City-mandated process and heard and heeded the City's advice and counsel in relation to his conduct.

The City had actual knowledge of the 1999 landslide evidenced principally by two photographs and a memo placed in City records by the City Engineer and maintained by City staff for the purpose of avoiding harm. Block reasonably relied on City staff's statements and conduct in the preapplication meeting for SP8 and Canyon Greens subdivisions. The Subdivision Ordinance requires the City to meet with developers and to guide them through the subdivision process. *See*, *Williams v. Thurston County*, 997 P.2d 377 (Wash. App. Div. 2 2000) (A duty may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information.) There exist genuine issues of material fact as to whether the City exercised due care in actions as demonstrated in the depositions of Eric Hasenoehrl and Bud Van Stone and the affidavit of John ("Hank") Swift. Mr. Hasenoehrl, a licensed civil engineer, testified that a licensed engineer working for the City has an obligation to bring forward those things that have

potential harm and to take action so that the information is used and addressed in the future. R. Vol. V, pp. 911-12. In addition, Mr. Van Stone, former City public works director, testified that by failing to warn Block during the City's subdivision and/or building review processes the City acted unreasonably and failed to exercise reasonable care because it is the City's duty to review documents of record that are relevant to a subdivision or re-subdivision. R. Vol. V, p. 945. Furthermore, Mr. Swift, a licensed civil engineer, testified that the City's failure to warn of the 1999 landslide contributed to the instability of the property and, ultimately, caused Block's damage. R. Vol. IV, p. 701.

*See, Rees v. State, Dept. of Health & Welfare*, 143 Idaho 10, 19, 137 P.3d 397, 406 (2006) (There is a genuine issue of material fact as to whether Ott and the Department exercised due care in their investigation. Therefore, we conclude that under these circumstances the Department and Ott owed to Tegan a duty to competently investigate the reported child abuse because of the special relationship created once the report of suspected abuse was received.) In Block's case, genuine issues of fact exist as to whether a special relationship existed between the City and Block from which a duty of care arose.

Assumption of duty

Block has alleged facts sufficient to warrant a reasonable inference that the City assumed a duty of care toward Block through its actions. This Court has recognized that it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner. *Bowling v. Jack B. Parson Cos.*, 117 Idaho 1030, 1032, 793 P.2d 703, 705 (1990). "A duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is

reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking." *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 351, 179 P.3d 309, 314 (2008). See, *Baccus*, 145 Idaho at 352, 179 P.3d at 315 (Since AmeriPride assumed the duty of placing mats at Bechtel for what was clearly a safety purpose and since the risk of harm to third parties was reasonably foreseeable, it is immaterial whether AmeriPride negligently performed its duties in an affirmative way or whether it simply failed to perform its duties. Its conduct would amount to negligence in either event.); *Coghlan*, 133 Idaho at 400, 987 P.2d at 312 (Plaintiff alleged that the University was present to supervise Plaintiff, that the University knew or should have known of harm from underage drinking, that the University knew or should have known of Plaintiff's intoxication and that University should have acted before Plaintiff's injury. Thus, the court found that Plaintiff's evidence supported an inference that the University assumed a duty to exercise reasonable care to safeguard plaintiff from acts of which University employees had knowledge.)

Liberally construed, the factual record in this case supports inferences that the City assumed a duty of care to the ultimate developer of the property in that the memorandum and photographs relating to the 1999 landslide were placed by the then City Engineer, Mr. Richards, into the City's SP4 subdivision file and an "address file" in 1999 for the expressed purpose and intent of ensuring that this hazardous site condition would be appropriately addressed at the time of future development of the landslide area. The factual record supports the inferences that the City was grossly negligent in 2005 and 2006 as part of the SP8 and Canyon Greens subdivision review processes when members of City staff met with Block, and failed to retrieve and to notify Block of this critical information.

Genuine issues of material fact exist with respect to Block's gross negligence claim.

The Idaho Tort Claim Act ("ITCA") at Idaho Code § 6-903 states:

> Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the state of Idaho, provided that the governmental entity is subject to liability only for the pro rata share of the total damages awarded in favor of a claimant which is attributable to the negligent or otherwise wrongful acts or omissions of the governmental entity or its employees.

The purpose of the ITCA is to provide "much needed relief to those suffering injury from the negligence of government employees." *Sterling v. Bloom,* 111 Idaho 211, 214, 723 P.2d 755, 758 (1986). The ITCA is to be construed liberally, consistent with its purpose, and with a view to "attaining substantial justice." *Id.* at 214–15, 723 P.2d at 758–59. Therefore, under the ITCA liability is the rule and immunity is the exception. *Id.*

Block has alleged that the City is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties. Block has set forth undisputed facts to support his allegations.

Pursuant to Idaho Code § 6-904B, "[a] governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:

> 3. Arises out of the issuance, denial, suspension or revocation of, or failure or refusal to issue, deny, suspend, or revoke a permit, license, certificate, approval, order or similar authorization.

> 4. 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.

Prior case law has not established that the gross negligence exception set forth above only applies to a named defendant. See, *Crown v. State, Dept. of Agric.*, 127 Idaho 188, 192-93, 898 P.2d 1099, 1103-04 (Ct. App. 1994) *aff'd in part, rev'd in part*, 127 Idaho 175, 898 P.2d 1086 (1995) (Mr. Sparrow was not a named defendant, but the Growers argue that the evidence in the record was sufficient to create a genuine issue of fact concerning whether Mr. Sparrow conducted his inspection of the Hawkins Warehouse "without gross negligence. "In its memorandum decision, the trial court expressly found gross negligence on the part of Mr. Sparrow to be lacking. After reviewing the record, including the deposition testimony of Mr. Sparrow, we conclude that uncontroverted evidence sufficiently justified an inference that Mr. Sparrow 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. Accordingly, we uphold the district court's finding that gross negligence did not exist in this case.") (emphasis added); *Renzo v. Idaho State Dept. of Agr.*, 149 Idaho 777, 779, 241 P.3d 950, 952 (2010) (Renzo claimed that the Department acted maliciously and/or recklessly, willfully and wantonly, and/or with gross negligence.) (emphasis added); *Cafferty v. State, Dept. of Transp., Div. of Motor Vehicle Services*, 144 Idaho 324, 327, 160 P.3d 763, 766 (2007) (After the accident, Camilla Cafferty filed a complaint alleging gross negligence against the DMV.) (emphasis added).

To establish gross negligence under the ITCA, "there must be evidence showing not only the breach of an obvious duty of care, but also showing deliberate indifference to the harmful consequences to others." *S. Griffin Const., Inc. v. City of Lewiston*, 135 Idaho 181, 16 P.3d 278 (2000) (failure to inspect building prior to demolition could be considered grossly negligent

given the lengthy amount of time that had passed prior to act of demolition, the condition of the buildings after the fire, whether people were entering the buildings and whether defendant should have known methods of construction of building). *Id.* at 190-91, 16 P.3d at 287-88.

Once a question of gross negligence is present, it is proper for the jury to decide it. *Hayslip v. George*, 92 Idaho 349, 442 P.2d 759 (1968); *Smith v. Sharp*, 85 Idaho 17, 375 P.2d 184 (1962); *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 317, 460 P.2d 739, 742 (1969). A conflict in affidavits respecting issues of fact preclude summary judgment. *Hansen v. Howard O. Miller, Inc.*, 93 Idaho 314, 317, 460 P.2d 739, 742 (1969). Only in clear cases, that is to say, where the facts are not in dispute and reasonable men can reasonably draw but one inference from the facts, will the trial court pass on the question of negligence. All others should be submitted to the jury.

The City's contention that this Court in *Hoffer* upheld dismissal of the claims because no city employee was named as a party to the lawsuit is a misstatement. This Court in *Hoffer* affirmed the district court's dismissal of Hoffer's claims of tortious interference with contract and defamation under the ITCA on the alternative ground that the plain language of I.C. § 6–904(3) exempts governmental entities from liability for tortious interference with contract rights and defamation. *Hoffer v. City of Boise*, 151 Idaho 400, 403, 257 P.3d 1226, 1229 (2011).

In this case, Block has named an individual defendant, Cutshaw. Block has previously set forth numerous facts demonstrating that genuine issues of material fact exist as to whether the City acted with gross negligence and sets forth the following additional facts related to Cutshaw.

- Lowell Cutshaw testified that during his time as City Engineer he was not even aware of the Tim Richards' memo from the SP4 files even though he was responsible for engineering duties at the City during such time of that subdivision's approval. R. Vol. III, p. 533.

- As City Engineer, Cutshaw had authority to require a soil stability analysis but failed to do so on land slated for development at the site of a previous landslide. R. Vol. III, p. 522.

- Cutshaw testified that had he known of the information Mr. Richard placed in the file of SP4 on the re-subdivisions of SP4 he would have required a geotechnical report. R. Vol. III, p. 522.

- Cutshaw testified that had he known of the Tim Richards' memo, he would have required a geotechnical report be completed by Block. R. Vol. III, p. 522.

- Cutshaw personally inspected the detention pond in disrepair. R. Vol. III, p. 523.

- Cutshaw stated that had he had the 1999 Tim Richards information he could have provided a recommendation regarding the use of the land. R. Vol. III, p. 527.

- Cutshaw stated that at the building permit stage the City would have a duty to let someone know about sensitive areas posed for development. R. Vol. III, p. 527.

- Cutshaw was the City Engineer and approved the Administrative Plat of Canyon Greens. R. Vol. III, p. 541.

The City does not have immunity under Idaho Code § 6-904(1).

Idaho Code § 6-904 states, in part, that a "governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent 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, whether or not the statute or regulation be valid, 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, whether or not the discretion be abused. . . .

Pursuant to this test, discretionary or planning functions of government are exempt from liability in tort, whereas operational functions conducted without "ordinary care" do not give rise to governmental immunity. I.C. § 6-904(1). *Oppenheimer Indus., Inc. v. Johnson Cattle Co., Inc.*, 112 Idaho 423, 425, 732 P.2d 661, 663 (1986). Decisions made under statutes and

regulations which leave room for policy judgment in their execution *are* discretionary. *Id.* However, when the plaintiff alleges that a government official has negligently acted in not complying with the policy constituted in a statute, regulation, or court order, then there is no immunity. *Sterling v. Bloom*, 111 Idaho 211, 231, 723 P.2d 755, 775 (1986).

To determine if a governmental action qualifies as a discretionary function, the Court uses the "planning/operational" test first adopted in *Sterling v. Bloom,* 111 Idaho 211, 723 P.2d 755 (1986). Under this standard, "[r]outine matters not requiring evaluation of broad policy factors will likely be 'operational,' whereas decisions involving a consideration of the financial, political, economic, and social effects of a particular plan are likely 'discretionary' and will be accorded immunity." *Tomich v. City of Pocatello*, 127 Idaho 394, 397, 901 P.2d 501, 504 (1995). Under the discretionary function prong, a governmental entity is entitled to absolute immunity regarding claims arising from the performance of a "discretionary function." However, under the operational prong a government entity can be liable if it fails to exercise ordinary care in implementing a pre-established policy. *Lawton v. City of Pocatello*, 126 Idaho 454, 460, 886 P.2d 330, 336 (1994).

The situation in *Lawton* is similar to that in Block's case. In *Lawton*, the challenged conduct was the decision not to use a raised median at the site of the accident. The court determined that this determination involved the routine implementation of the City's pre-determined policies. Since it did not involve basic policy considerations, this court concluded that the decision was not a discretionary function within the meaning of I.C. § 6-904(1). *Lawton v. City of Pocatello*, 126 Idaho 454, 461, 886 P.2d 330, 337 (1994). In Block's situation, the City had codified pre-determined policies in the City Subdivision Ordinance, and the routine implementation of these policies is not a discretionary function entitled to immunity. The

discretionary-function exception does not apply when a statute, regulation, or policy specifically prescribes a course of action that the government employee must follow. *See Ignatiev v. United States,* 238 F3d 464, 467 (DC Cir 2001) (internal policy guidelines); *Miles v. Naval Aviation Museum Found., Inc.,* 289 F3d 715,722 (11th Cir 2002) (federal regulations).

The facts in this record, at the very least, raise a genuine issue as to whether City staff, including its engineer Cutshaw, exercised ordinary care in the performance of their function(s) under City Subdivision Code Ordinance Sections 32-8 and/or 32-9. Here, the City, which maintains subdivision files as part of its routine, day to day, operations, failed to include critical site information in its then pending Canyon Greens subdivision application file and also failed to search or cross-reference Canyon Greens' predecessor subdivision files, SP4 and SP8, all the while being charged with operational responsibility under the City Subdivision Ordinance to meet with Block at a preapplication conference, to inspect the site, to identify any unusual problems and review and discuss with Block the potential need for a slope stability study to address site conditions. These rudimentary tasks, prescribed by this ordinance, were performed absent the exercise of ordinary care. Again, at the very least, material issues of fact exist as to this issue.

Even when a statute or regulation permits the exercise of choice at an operational level that is based on the same policies as that statute or regulation, there is a presumption that the discretionary immunity defense shields the conduct from liability. This presumption may be overcome, however, by a showing that safety concerns were not adequately considered. *See, e.g., George v. United States,* 735 F. Supp. 1524, 1533 (MD Ala. 1990) (Forest Service did not have discretion to decide whether policy considerations of protecting alligators and their natural surroundings outweighed safety of persons using designated swimming area); *ARA Leisure*

*Services v. United States,* 831 F.2d 193, 195 (9th Cir. 1987) (failure to maintain safety of road is not discretionary when conduct involves safety considerations under established policy rather than competing public policy considerations).

Block contends that the City is not entitled to discretionary immunity for the mandated implementation of its Subdivision Code. The preapplication process is perfunctory, a routine task, and not a planning activity. Even if implementation of the Subdivision Code were considered discretionary – then such an action is not entitled to immunity because the obvious safety concerns arising from development and construction on the site of a landslide were not considered and certainly outweigh other policy concerns.

The City does not have immunity under Idaho Code § 6-904(7).

The City contends that the exception to liability provided by paragraph 7 of Idaho Code section 6-904 applies to the City's issuance of subdivision plats because the subdivision plats contained easements dedicated to the City. Respondent's Brief at 40.

Idaho Code § 6-904 states, in part, that a "governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent 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.

The focus of the immunity is on the claim at issue. Block's claim in this regard is that the City had a duty to him during the preapplication and subdivision platting process. Block's claim does not arise out of a subdivision plat or other plan or design for construction of improvement

to public property. Block's claim has nothing to do with the plat itself. To the contrary, had the City exercised ordinary care in the preapplication meeting and subdivision platting process there either would have been no plat or the plat would have been prepared in a manner that would have abated or mitigated the deleterious effects of the site condition that rendered Canyon Greens subdivision unsuitable for development. The district court's liberal and overly-broad application of this exception to liability is in error.

The Economic Loss Rule was erroneously applied by the District Court.

The City continues to contend it owed no duty to Block because the economic loss rule prohibits recovery of purely economic losses in a negligence action. Respondent's Brief at 14. What the City continually fails to acknowledge is obvious - Block did not suffer **purely** economic loss and, as a consequence, the economic loss rule does not apply to Block's case. The City conflates the issue by stating "Block is trying to recover his contractual expectation damages against the City and Cutshaw under a negligence claim." Respondent's Brief at 15. It is unclear what the City is asserting by this statement. At no time did Block enter into a contract with the City; Block did not have any contractual expectations with the City because he had no contract with the City.

The land Block purchased from Streibick would be considered "transactional property," as that term has been applied by the Idaho Supreme Court in cases invoking the economic loss doctrine, in a suit between Block and Streibick, but it is not transactional property in the suit between Block and the City because no "transaction" occurred between Block and the City. As this court discussed in *Brian & Christie, Inc. v. Leishman Electric, Inc.,* 150 Idaho 22, 244 P.3d 166 (2010), plaintiffs [Taco Time] purchased a used neon sign (a "transaction") that was defective and employed defendant to install it. Before installing the sign, defendant failed to

check whether the sign complied with code requirements. The sign caused a fire that destroyed Taco Time's restaurant. The trial court dismissed the claim on the ground that the claim was barred by the economic loss rule because the "defective property", the sign, caused the fire. This court reversed, noting that plaintiff could recover for defendant's negligence in connecting the sign and stating "there was no defective property which was the subject of the transaction [because] Taco Time did not purchase those items from [defendant]." *Id.* at 26 & n.3, 244 P.3d at 170 & n.3.

The district court in the case at bar made the same error. It held - as did the court in *Brian & Christie* - that property (the sign in *Brian & Christie* and a parcel of land in this case) - was transactional property despite the fact that the City did not sell the defective land to Block. Just as in *Brian & Christie*, the City had a duty (and an opportunity) to prevent the "non-economic" losses Block incurred building three (3) beautiful custom homes after obtaining subdivision approval and building permits the City had negligently and gross negligently provided to him.

The City is correct that Block's damages would be characterized as expectation damages *if* there had been a contract between Block and City for the sale of the land. But there was no such contract. The fact that the measure of Block's loss as a result of the City's breach of duty in negligence and gross negligence is the loss of the value of the land and its improvements does not transmute that loss into a contract claim: Block did not have a contractual relationship with either the City or its engineer. If *A* purchases a piece of property and builds a house on it intending to sell it, and *A*'s neighbor negligently fails to keep control of a fire and it destroys the house. *A*'s loss is legally indistinguishable from Block's. Neither can accurately be characterized as "contractual expectation damages" because there was no contractual relationship between *A* and her neighbor.

The City is also incorrect when it claims that the purpose of the economic loss rule is "to prevent parties from seeking contract damages under torts claims." This is a misstatement of the economic loss rule. The foundational case for this branch of the doctrine is *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978). Clark had purchased a tractor that failed to meet his needs. Rather than suing for breach of purchase contract, however, he sued in negligence. This court held that a disappointed buyer cannot abandon his contract claim against the seller and seek instead to recover under torts. As the court wrote,

> The law of negligence requires the defendant to exercise due care to build a tractor that does not harm person or property.... [T]he law of negligence does not impose on International Harvester a duty to build a tractor that plows fast enough and breaks down infrequently enough for Clark to make a profit in his custom farming business. This is not to say that such a duty could not arise by a warranty -- express or implied -- by agreement of the parties or by representations of the defendant, but the law of negligence imposes no such duty.

*Id.* at 336, 581 P.2d at 794. Since there was no contract between Block and the City there is no concern with "contract law drowning in a sea of tort." *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (evaluating the various state positions on the line between tort and contract when the claim is for a defective product and adopting the position this court announced in *Clark*).

The City seeks to circumvent the definition of transactional property discussed in *Brian & Christie* by pointing to *Duffin v. Idaho Crop Improvement Ass'n,* 126 Idaho 1002, 895 P.2d 1195 (1995), in which the court applied the economic loss rule despite the absence of a contract between the plaintiff and defendant. The City fails to note that this court has described *Duffin* as an exception to the general rule because the defendant was an entity that "held itself out to the public as having expertise regarding a specialized function, and by so doing, induce[d] reliance on that its performance of that function." *See Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296,

301, 108 P.3d 996, 1001 (2005). The Court of Appeals has noted that "the Supreme Court explained in its holding that this principle applies only to an 'extremely limited group of cases.'" *Nelson v. Anderson Lumber Co.,* 140 Idaho 702, 710-11, 99 P.3d 1092, 1100-01 (2004). The City seeks to have an exception swallow the general rule that a contract for the sale of the defective property must exist between the parties before the economic loss rule applies to subsequent damage to the property.

Block did not suffer and is not seeking to recover from purely economic losses as a result of the City's negligence. Therefore, since this case does not involve "pure" economic loss, Block's parasitic economic loss caused by the City's breach of duty in negligence is recoverable. *See, e.g., Brian & Christie, Inc. v. Leishman Electric, Inc.,* 150 Idaho 22, 28, 244 P.3d 166, 172 (2010); *Duffin v. Idaho Crop Improvement Ass'n,* 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995); *Just's v. Arrington Construction Co.,* 99 Idaho 462, 469 n.1, 583 P.2d 997, 1004 n.1 (1978).

Any citation by the City to *Duffin* as being analogous to Block's situation is erroneous. The economic loss rule applied in *Duffin* because the Duffins suffered purely economic losses. *Duffin* involved the sale of certified seed potatoes subject to statutory regulation. *Duffin,* 126 Idaho at 1004, 895 P.2d at 1197. The Duffins agreed to purchase seed potatoes that were inspected by the State of Idaho, Department of Agriculture, Federal–State Inspection Service ("FSIS"). *Id.* at 1005, 895 P.2d at 1198. Potatoes grown by the Duffins from the seed potatoes were infected with bacterial ring rot ("BRR"). BRR results in reduced yields and, once potatoes are infected, their storage time is reduced. *Id.* The Duffins claimed the seed potatoes were infected when they received them and, as a result, they suffered substantial losses. "The losses claimed consisted of (1) the excess of the price paid for the seed [potatoes] because [they were]

'certified;' (2) lost revenues which resulted from reduced yields; and (3) lost revenues which resulted from having to sell the crop immediately upon harvest, rather than by way of more lucrative contracts the Duffins had already negotiated, or by waiting until the open market prices were higher." *Id.* Based on market prices prevailing at the time when the Duffins would have marketed their crop, they estimate they lost $314,418.80 due to the fact that they had to sell earlier than anticipated. *Id.*

The Duffins sought to recover for purely economic losses, recoupment of price paid for a product and lost profits, in their negligence action against FSIS. The Duffins sought to recover damages from FSIS for negligence and negligent misrepresentation in the inspection and certification of the seed. *Id. at* 1005-06, 895 P.2d 1195, 1198-99 (1995). FSIS moved for summary judgment on the ground that the Duffins' negligence claims were barred because purely economic loss cannot be recovered in tort. The district court agreed and granted both motions. *Id.* at 1006, 895 P.2d at 1199. This court affirmed.

The product in Duffin did not perform as expected. The product did not produce as many potatoes as the Duffins expected and those potatoes that were produced could not be stored as long as the Duffins expected. These facts are inapposite to the circumstances that resulted in Block's damages. The bare land Block purchased was defective. The City knew of such defect. The City had a duty to inform Block of that defect and failed to do so. Block constructed extensive improvements on the bare land, these extensive improvements were damaged and lost when the concealed defect in the property became apparent. Block's case against the City has nothing to do with contractual expectations. The bare land did not produce three (3) houses. The bare land did not produce three (3) houses of a different quality than Block expected. Block's

losses in this case are the more than one million dollars from his own pocket that he invested after the City had grossly breached its duty to him. The City's reliance on Duffin is misplaced.

Block did suffer property damage to other property.

Block did suffer property damage other than to the real property he purchased from Streibick. The economic loss rule is clearly inapplicable on this basis as well. Block's situation is analogous to that of the plaintiff in *Oppenheimer*. In *Oppenheimer Indus., Inc. v. Johnson Cattle Co.,* 112 Idaho 423, 732 P.2d 661 (1986), the plaintiff claimed that negligence on the part of the State Brand Board resulted in the theft of its cattle. This Court took a literal view of the term "property loss" and allowed the plaintiff to recover. In distinguishing *Clark,* this Court held that, "[u]nlike the plaintiff in *Clark,* Oppenheimer is not still in possession of defective goods. Rather, Oppenheimer has suffered the *loss* of its *property* (i.e. the cattle)...." *Id.* at 426, 732 P.2d at 664 (emphasis in original). Thus, "property loss" was equated with a loss of physical possession of one's property, even if that property was the subject of the transaction.

This Court has explained what is NOT property loss. In *Duffin*, this Court stated that "[a]lthough the existence of BRR in the seed may have resulted in a reduced crop yield, terming this loss a 'property loss' would be the same as saying that the plaintiff in *Clark* suffered a property loss because the use of his defective tractor also resulted in reduced crop yields." *See also G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 527, 808 P.2d 851, 864 (1991) (a reduced crop yield resulting from the use of an inadequate irrigation system is not a property loss).

Block clearly suffered injury and destruction to tangible property caused by an occurrence.

The City is not entitled to an award of costs and/or fees on appeal.

Under Idaho Code § 12-117(1), "[u]nless otherwise provided by statute, in any proceeding involving as adverse parties a . . . political subdivision and a person, . . . the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law."

Under Idaho Code § 6-918A, "reasonable attorney fees may be awarded to the claimant, the governmental entity or the employee of such governmental entity, as costs, in actions under this act, upon petition therefor and a showing, by clear and convincing evidence, that 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. . . . The right to recover attorney fees in legal actions for money damages that come within the purview of this act shall be governed exclusively by the provisions of this act and not by any other statute or rule of court, except as may be hereafter expressly and specifically provided or authorized by duly enacted statute of the state of Idaho." (emphasis added).

In *Tomich v. City of Pocatello*, 127 Idaho 394, 400, 901 P.2d 501, 507 (1995), this Court explained that the legislature added § 6–918A to the ITCA two years after the enactment of I.C. § 12–121. This Court stated "[t]o the extent of any conflict between I.C. § 12–121 and I.C. § 6–918A, we apply I.C. § 6–918A. It is not only the later statute, but also a more specific statement of the legislature's intent about the award of attorney fees in tort claims cases." *Id.* citing *Mickelsen v. City of Rexburg,* 101 Idaho 305, 307, 612 P.2d 542, 544 (1980) (holding that to the extent of conflicts, later or more specific statutes control over earlier or general statutes). *See also Beehler v. Fremont County*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008) ("The

Respondents request attorney fees on appeal pursuant to I.C. § 6–918A or I.C. § 12–117. Section 6–918A is the exclusive provision for awarding attorney fees under the ITCA, including claims on appeal.") Although this Court in *Brown v. City of Pocatello*, 148 Idaho 802, 811, 229 P.3d 1164, 1173 (2010), stated that Idaho Code § 12-117 is the exclusive means for awarding attorney fees for the entities to which it applies, it is unclear whether this Court considered the appeal from an award of summary judgment granted to the City of Pocatello on plaintiff's claims of nuisance and inverse condemnation, as falling under the ITCA and the associated attorney fee provision in I.C. § 6-918A, because plaintiff's ITCA notice and claim was solely for negligence.

Block contends that Idaho Code §6-918A is the appropriate statute to be considered in this instance.

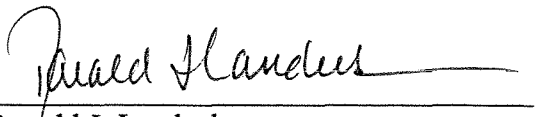
The City argues that because Block presents no new facts or law to this Court, there is no basis for Block's appeal and therefore this appeal "is in bad faith". Respondent's Brief at 44. This Court has defined bad faith as "dishonesty in belief or purpose." *Cordova v. Bonneville Cnty. Joint Sch. Dist. No. 93,* 144 Idaho 637, 643, 167 P.3d 774, 780 (2007) (citing *Cobbley v. Challis,* 143 Idaho 130, 135, 139 P.3d 732, 737 (2006)). The City has not directed this Court to an instance of dishonesty in belief or purpose on the part of Block. Thus, no attorney fees or costs should be awarded to the City on this appeal. *See Renzo v. Idaho State Dept. of Agr.*, 149 Idaho 777, 781-82, 241 P.3d 950, 954-55 (2010) ("This Court does not award attorney fees and costs to the Department pursuant to I.C. § 6–918A. The Department has not directed this Court to an instance of dishonesty in belief or purpose on the part of Plaintiff. Moreover, while Plaintiff may have asked this Court to second-guess the findings of the trial court, the Department has not provided authority or argument demonstrating how such action was dishonest or made in bad faith.")

Conclusion

Based on briefing and the record, Block requests that this Court reverse the district court's grant of summary judgment in this case and remand this case, with proper instruction, to the district court for a trial on the merits. Block also respectfully requests that this Court deny the City's request for attorney fees.

RESPECTFULLY SUBMITTED this 8th day of March, 2013.

LANDECK & FORSETH



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