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American Bank v. BRN Development, Inc. Appellant's Brief Dckt. 40625

SUPREME COURT OF THE STATE OF IDAHO

AMERICAN BANK, a Montana banking Corporation, Plaintiff-Cross Defendant, v. BRN DEVELOPMENT, INC., Defendant-Cross Defendant-Cross Claimant-Appellant, And TAYLOR ENGINEERING, INC., Defendant-Third Party Plaintiff-Cross Defendant-Respondent.	)	Supreme Court Case No. 40625-2013

BRIEF OF APPELLANT BRN DEVELOPMENT

Appeal from the District Court of the
First Judicial District of the State of Idaho
In and for the County of Kootenai
Docket No. 2009-2619

HONORABLE JOHN P. LUSTER
Presiding District Judge

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III. Statement of the Case

A. Nature of the Case

BRN Development, Inc. ("BRN") appeals the Trial Court's verdict for Taylor Engineering, Inc. ("Taylor") and asks that this Court reverse and remand with instructions to enter judgment for BRN and fix damages in the amount of $7,112,046.64 plus attorney's fees and costs. Taylor is a professional engineering and land planning firm BRN retained to provide those services for a golf course and residential development in Kootenai County known as Black Rock North (the "Project"). BRN alleged that Taylor provided negligent services and advice concerning the Project's land use entitlements. Specifically, BRN alleged that Taylor was negligent in 2007-2009 when, in the course of winding the Project down, Taylor advised BRN that it had to record its 56 lot final plat in order to vest the Project's Planned Unit Development ("PUD"). In reliance on Taylor's advice, BRN unnecessarily spent more than $7 million. The Trial Court concluded that BRN's damages were barred by the economic loss rule. BRN contends that the Trial Court should have applied the special relationship exception because Taylor is a professional engineering firm whose services were negligently rendered.

B. Course of Proceedings

The Trial Court bifurcated the dispute between BRN and Taylor from numerous other disputes arising from the Project involving American Bank, Wadsworth Golf Construction

Company, et al.[1] Taylor's cross claims against BRN were resolved and dismissed before trial. The Trial Court's Decision inaccurately states that "BRN seeks to offset the amount owed based upon a remaining claim for professional negligence." (R. Vol. 7, p. 3787 (3777), Decision on Court Trial). In fact, Taylor dismissed its claim for nonpayment of services in exchange for BRN dismissing a claim of negligence distinct from the issues ultimately tried.

BRN and Taylor each moved for summary judgment regarding Taylor's economic loss rule defense. The Trial Court denied both parties' motions. Thus, a seven day bench trial went forward on BRN's claim for damages arising from Taylor's alleged professional negligence. In a written verdict, the Trial Court applied the economic loss rule to conclude that Taylor owed no duty to prevent BRN's economic loss. The Trial Court refused to apply the special relationship exception to the economic loss rule, which applies where, as here, a professional or quasi professional performs personal services, or where, also as here, an entity holds itself out has having expertise to perform a specialized function and knowingly induces reliance on performance of that function. The verdict being in error, BRN appeals.

C. Statement of Facts

1. Background Facts

Marshall Chesrown was BRN's CEO. (Tr. Vol. 1, p. 71 ln. 22-24). However, by the time of trial, Mr. Chesrown had no further ownership interest in BRN. (Tr. Vol 1, p. 72 ln. 6-8). Mr. Chesrown grew up in the Spokane area (Tr. Vol. 1, p. 72 ln. 12) and had a successful career

[1] The Trial Court's judgment in the American Bank v. Wadsworth et al. case was recently reversed by the Idaho Supreme Court. *See* Docket No. 39415, 2013 Opinion No. 89, Filed August 16, 2013.

managing and eventually owning car dealerships (Tr. Vol. 1, p. 72 ln. 23-p. 73 ln. 21). After his career in the car business, Mr. Chesrown purchased property above Lake Coeur d'Alene with plans to build a ranch. (Tr. Vol. 1, p. 73 ln. 22-p. 74 ln. 5). A friend suggested that the property was ideal for a golf course and residential development. (Tr. Vol. 1, p. 74 ln. 12-p. 75 ln. 18). Mr. Chesrown was intrigued, but had no development experience and did not play golf, let alone know how to build a course. (Tr. Vol. 1, p. 74 ln. 15-pg 76 ln. 9).

Mr. Chesrown recruited a team including: engineers to provide engineering services and guidance through the land use entitlement process, architectural and design experts, and construction professionals. (Tr. Vol. 1, p. 76 ln. 10- ln. 24). Soon after, the Club at Black Rock ("Club") was born, complete with a championship golf course surrounded by beautiful homes with views of Lake Coeur d'Alene.

Initially, the Club was more successful than anticipated. (Tr. Vol. 1, p. 80 ln. 13-17). Home lots sold ahead of projections and it appeared there would be a demand for substantially more. (*Id.*). To the north of the Club, Robert Samuel owned a ranch. (Tr. Vol. 1, p. 92 ln. 9-23). With the perceived demand for additional home lots, Mr. Chesrown and Mr. Samuel partnered to build a second course (Black Rock North) that would be surrounded by additional homes on Mr. Samuel's property and property acquired by Mr. Chesrown. (Tr. Vol. 1, p. 93 ln. 4-22). To proceed they formed BRN Development, Inc. ("BRN").

Mr. Chesrown employed Kyle Capps on the Club at Black Rock project and other developments that Mr. Chesrown's entities later pursued. Mr. Capps graduated from Colorado State University with a degree in landscape horticulture. (Tr. Vol. 3, p. 12 ln. 12-23). He had

experience in landscape maintenance, golf course maintenance, and some golf course construction before coming to work with the Black Rock entities. (Tr. Vol. 3, p. 12 ln. 24-p. 13 ln. 20). He was initially hired as the golf course superintendent at the original Black Rock Development, but over time his duties expanded to include some project management on other property developments pursued by Mr. Chesrown. (Tr. Vol. 3, p. 15 ln. 3-p. 17 ln. 1).

Mr. Chesrown did not employ in-house engineers or land planners so, for the Club at Black Rock, he hired Taylor's competitor, Inland Northwest Consultants, Inc., to provide engineering and land planning services. (Tr. Vol. 1, p. 77 ln. 23-p. 78 ln. 17). Recognizing the growing market in North Idaho, Taylor opened a satellite office in Coeur d'Alene and lobbied for Mr. Chesrown's work. Taylor hired Eric Shanley, an engineer, and Ron Pace, a principal at Taylor, represented to Mr. Capps that Mr. Shanley had a thorough understanding of all Kootenai County ordinances and land use requirements. (Tr. Vol 3, p. 28 ln. 9-p. 29 ln. 23).

Mr. Chesrown and Mr. Capps worked with Taylor on at least three projects after the Club at Black Rock and before the BRN Project: 1) the Ridge at SunUp Bay—a residential development in Kootenai County; 2) Legacy Ridge—a residential development in Liberty Lake, WA; and 3) Bellerive—a residential development in the City of Coeur d'Alene. (Tr. Vol. 3, p. 20 ln. 1-p. 24 ln. 5). On each project Taylor provided engineering and land planning guidance through the land use entitlement process. (*Id.*). Over the course of its relationship with Mr. Chesrown's entities, Taylor collected $4.1 million in fees. (Tr. Vol. 1, p. 90 ln. 10-13).

2. Taylor's role at the Black Rock North Project

In 2005, representatives from Taylor and BRN met to discuss Taylor's engagement for the Black Rock North Project. (Tr. Vol. 1, p. 87 ln. 7-14). It was clear to Mr. Capps and Mr. Chesrown that Taylor would handle the Project's civil engineering and would guide BRN through the entitlement process consistent with the services Taylor provided on the previously cited developments. (Tr. Vol. 1, p. 95 ln. 3-16; p. 99 ln. 19-p. 100 ln. 6; Tr. Vol. 3 p. 26 ln. 6-p. 28 ln. 8).

Throughout the Project, Taylor submitted budget proposals (Plaintiff Exhibit 4, 6), invoices, and correspondence. The undisputed evidence demonstrates that Taylor, on its letterhead, held itself out as performing "Civil Design" and "Land Planning." (Plaintiff Exhibit 29). Each of the budget proposals demonstrates that Taylor was providing "overall management of civil aspects" of the BRN Project including, without limitation, "attending various meetings through the design process with the Owner, governing agencies, consultants and other stakeholders." (Plaintiff Exhibit 4, 6). Additionally, Taylor's budgets showed that Taylor undertook "coordination with Kootenai County necessary to add the Preliminary Plat into the ongoing PUD process." (Plaintiff Exhibit 4 at p. 1521). Taylor also assumed responsibility for assuring that BRN's submittals would be in conformity with the applicable Kootenai County ordinance. (Plaintiff Exhibit 4 at p. 1521).

Consistent with its budget documents and "Land Planning" letter head, Taylor prepared outlines for meetings with government officials (Plaintiff Exhibit 13), met with those officials, and left those officials believing that Taylor was advising and guiding BRN through the land planning/entitlement process. (Tr. Vol. 3, p. 134 ln. 5-16; Defendant Exhibit UUU, Mussman

Perpetuation Deposition p. 40 ln. 22-41 ln. 2). When it came to technical assignments, including compiling documents or assuring compliance with ordinances, Taylor undertook those responsibilities. (Tr. Vol. 3, p. 33 ln. 16-p. 34 ln. 13; p. 36 ln. 24-p. 37 ln. 19). Moreover, when BRN had questions about the entitlement process, it directed those questions to Taylor. (Tr. Vol. 3, p. 37 ln. 7-10; Plaintiff Exhibit 76; Plaintiff Exhibit 203; Defendant Exhibit J). As the Trial Court found, contrary to Taylor's repeated assertions at trial that it performed no land use planning functions, it was clear that Taylor took on planning-related duties. (R. Vol. 7, p. 378). This conclusion was supported by Taylor's own billing summaries which repeatedly described land planning activities Taylor performed on the Project and charged for time performed by Taylor's Senior Land Planner. (e.g. Defendant's Exhibit B pp. 2-3, 9-10, 12-13, 17, 25, 33-34, 40-41, 53, 55-56, 59-60, 63-64, 76-77, 81, 245, 247, 254, 260, 421, 423, 427, 431, 433, 435, 437).

3. Critical Juncture: Late 2007-January 2008

By the end of 2007 the golf course was partially finished but BRN had not yet developed home lots to bring to market. At that time, BRN realized that the market was changing and the velocity of real estate sales was slowing (Tr. Vol. 1, p. 106 ln. 1-13). In late 2007, BRN's principals, Mr. Chesrown and Mr. Samuel, had numerous meetings about the Project's direction and whether the timing was right to move forward with home lot development. (Tr. Vol. 1, p. 106 ln. 1-p. 107 ln. 19). After much discussion, Mr. Chesrown and Mr. Samuel agreed that the best option was to "mothball" the Project. (Tr. Vol. 1, p. 108 ln. 4-23).

Mr. Chesrown and Mr. Samuel knew that the value of the Project as it stood was in the land use entitlements (zone change, PUD). (Tr. Vol. 1, p. 109 ln. 1-9). Indeed, BRN spent millions of dollars navigating through the Kootenai County's processes to obtain a zone change and preliminary approvals for increased density to make residential development possible. As Mr. Chesrown put it, without the entitlements all they had was "a piece of farm ground with a half-built golf course on it." (Tr. Vol. 1, p. 109 ln. 21-25). Thus, in mothballing the Project, the goal was to do what was necessary to vest the PUD entitlement so future development would be possible when the market became ripe for it. (Tr. Vol. 1, p. 108 ln. 7-p. 110 ln. 2).

In the same time frame that Mr. Chesrown and Mr. Samuel were considering the Project's future, they received an email string from Mr. Ide, Taylor's senior land planner. (Plaintiff Exhibit 200). That email stated:

> I'll verify with Planning, but **the PUD overlay typically does not get implemented or show up in the zoning books until a final plat is recorded**. Then it's on a phase-by-phase basis. **This is because the PUD overlay is conditional. Only when the conditions of the PUD are met will be the PUD be approved**.

(Plaintiff Exhibit 200, Bates TAY029857)(emphasis added). There was no testimony that Mr. Ide actually verified this opinion. Regardless, Mr. Ide's opinion was fundamentally wrong and, as further detailed below, formed the basis for unnecessary development costs of more than $7 million.

Having decided to mothball the Project, Mr. Chesrown emailed his team on January 14, 2008 and set a meeting. (Plaintiff Exhibit 54). Mr. Chesrown made the purpose of the meeting clear:

> For the Thursday meeting @ 10:30 with ACI **we also need Taylor there.** I am confused as usual and **want to make sure everyone understands what we need and when we need it with cash flow considerations as the driving force.** We also need to discuss with everyone the platting plan in detail....

(Plaintiff Exhibit 54)(emphasis added).

There is no dispute about what was discussed at the meeting. As the Trial Court found:

> Of particular concern to Chesrown was to vest the PUD in hopes that if the market improved the entitlements would be secure and the project could continue at some future time.

(R. Vol. 7, p. 3784, Decision on Court Trial).

At trial, Taylor's Senior Land Planner, Frank Ide, spelled out the proper analysis for Taylor at this critical juncture. First, it was incumbent on Taylor to understand BRN's goal. (Tr. Vol. 5, p. 140 ln. 13-18). Second, based on that goal, Taylor should have determined the status of the land use entitlements. (Tr. Vol. 5, p. 140 ln. 19-22). And finally, Taylor had to determine what BRN's entitlement alternatives were for achieving its goal. (Tr. Vol. 5, p. 140 ln. 23-p. 141 ln. 5). Unfortunately, Taylor did not undertake this analysis.

Mr. Pace attended the critical January 14, 2008 meeting on Taylor's behalf. At trial, Mr. Pace confirmed that he understood the purpose of the meeting was to determine how to spend the minimum possible on the Project given the changing market and BRN's unexpected lack of financing. (Tr. Vol 2, p. 103 ln. 25-p. 104 ln. 8). As the Trial Court found, "**At the conclusion of the meeting, BRN had a clear impression that it was necessary to record a final plat.**" (R. Vol. 7, p. 3784)(emphasis added).

However, at trial, all sides agreed that the PUD was, in fact, already vested as of January 2008 and recording a final plat was not necessary. As the Trial Court found, the PUD was vested based on preliminary approval and BRN's substantial construction. (R. Vol. 7, p. 3785, Decision on Court Trial). In other words, with the proper advice, at the time of the critical January 14, 2008 meeting, BRN could have completely shut the Project down without spending another dime on construction and infrastructure. As Mr. Capps, Mr. Chesrown and Mr. Samuel all confirmed, had they known the PUD was vested in January 2008, BRN would have stopped all construction and mothballed the Project immediately. (Tr. Vol. 1, p. 108 ln. 20-23; Tr. Vol. 3, p. 53 ln. 12-19; Tr. Vol. 5, p. 89 ln. 14-18). Instead, as the Trial Court found, "**[d]uring the January 2008 meeting, Taylor left BRN with the impression that the additional work was needed to vest the PUD.**" (R. Vol. 7, p. 3785, Decision on Court Trial) (emphasis added).

That additional work amounted to $7,112,046.64 towards completion of the infrastructure that was necessary[2] before BRN could record the Phase I final plat of 56 lots (also known as the "Panhandle plat"). (Plaintiff Exhibit 86, 94; Tr. Vol. 3 p. 87 ln. 6-13). Indeed, Given BRN's stated goal to mothball the project as of January 2008, all sides agree that BRN's subsequent expenditure of more than $7 million was unnecessary. In fact, the completed infrastructure detracts from the Project's overall value because it removed flexibility to alter lot sizes, densities, and structure types to match future market demands. (Tr. Vol. 3 p. 48 ln. 22-p. 49 ln. 4).

[2] As Taylor's expert, Sandra Young confirmed, to record the Panhandle plat, BRN had to complete the infrastructure within the plat, or obtain a bond for the work. (Tr. Vol. Supp. p. 109 ln. 16-23). Given the market, bonding was not a realistic possibility. (Tr. Vol. 1 p. 120 ln. 22-p. 123 ln. 8; Tr. Vol. 1 p. 126 ln. 8-19).

Even if going to final plat had been necessary (it was not), Taylor also failed to recognize that BRN could have finalized and completed a smaller four (4) lot plat ("Phase II") that was nearly complete by the critical January 2008 meeting.[3] Taylor's own witnesses confirmed that BRN could have completed and filed the Phase II plat by renaming it as Phase I, all for less than $35,000.00 and possibly as low as $24,000.00. (Tr. Vol. Supp. 45 ln. 17- p.46 ln. 10) Of course, this advice would also have saved BRN more than $7 million. However, there was little incentive for Taylor to provide the correct advice as completing the Phase II plat or ceasing all work entirely would have eliminated considerable billings for itself in a rapidly declining economic time.

4. Spring 2009

By spring 2009, BRN had incurred over $7 million in construction costs that it undertook to record a plat under the mistaken advice that it was necessary to vest the PUD. During this time, BRN fell behind in its payments to Taylor by about $150,000.00. Mr. Chesrown and Mr. Pace discussed Taylor's outstanding balance, and the amount of additional work Taylor would need to perform to finalize the final plat before the County's recording deadline of May 29, 2009. (Tr. Vol. 1, p. 116 ln. 2-p. 117 ln. 4). Mr. Chesrown testified that in light of the urgency Taylor expressed about the May 29, 2009 deadline, he and Mr. Pace reached an agreement. Mr. Chesrown promised to personally pay the approximately $7,000.00 it would take for Taylor to finish up the work necessary to record the Panhandle Plat (believing Taylor's representations that

[3] Not only did Taylor fail to spot the issue that the Phase II plat could have been renamed and recorded first with minimal expenditure, Ron Pace affirmatively advised that the Panhandle plat had to be recorded first. (Plaintiff Exhibit 76).

this was necessary to vest the PUD), and that he and his partners and investors would subsequently work to pay Taylor's remaining $150,000.00 balance. (*Id.*).

Taylor did not abide by this agreement. Having created a false sense of urgency about the May 29, 2009 recording deadline, Taylor believed that it was in a position of strength to collect the $150,000.00 BRN owed Taylor. To that end, Taylor enlisted the services of attorney William Hyslop. Through Mr. Hyslop, Taylor accomplished two things: 1) all interested parties including American Bank, BRN, Taylor, and the various contractors, were put in irreconcilable conflict with one another; and 2) Taylor confirmed its "considered opinion" that BRN had to record the Panhandle Plat in order to vest the PUD and protect that valuable entitlement.

Those accomplishments started with a squeeze play. With $150,000 outstanding, Mr. Pace emailed Mr. Hyslop: **"Do you see a problem with us just letting the amended lien submittal and bank foreclosure process play out until the May plat deadline approaches and see if Black Rock pays us? I would like to hold off on extensive research effort on your part until the next card is dealt by either Black Rock or the Bank..."** (Plaintiff Ex. 7 (7.052)) (emphasis added).

As May 29, 2009 approached, Taylor clearly understood that vesting the PUD also had considerable value to American Bank who held a lien of approximately $15 million. Thus, Taylor directed Mr. Hyslop to send a demand letter to American Bank, BRN, and Mr. Samuel stating, in pertinent part:

> .... **if the final subdivision approval is not completed and recorded by May 29, 2009, the PUD and preliminary plat approval will expire, the PUD and**

> **plat will not vest in the recorded ownership to the real property involved**, and the property will revert to its prior zoning and density.
> ....
>
> The preliminary plat approval allows the use of the property and the density of use outlined on the attached map. If the preliminary plat expires on May 29, 2009, the use and the density of use will revert back to that which existed prior to preliminary approval.
> ....
>
> If the preliminary subdivision is not completed and recorded by May 29, 2009, this flexibility to assign higher density to certain areas with less density to others will be lost and the property will not be able to be developed as presently shown.
> ....
>
> **Taylor Engineering, Inc. has been very involved with the survey, design, and preliminary approval process for this property since 2005. It has obviously invested a great deal of work product and holds a great deal of knowledge and expertise regarding this property**. Once paid the amount set forth below, Taylor Engineering, Inc., is prepared to complete the necessary documents, request signatures from Kootenai County.... and deliver the documents to whoever pays the amount owed.

(Plaintiff Exhibit 2)(emphasis added).

Mr. Hyslop followed the May 18, 2009 letter with several communications with American Bank's counsel, Nancy Isserlis, and reiterated by email on May 20, 2009 that:

> **"[t]he May 29, 2009 recording deadline is for recording the documents to vest the preliminary plat and PUD for the ENTIRE property....**
> **....**
>
> **There is great value to an owner to vest the PUD and plat.... that new owner is in a much stronger position to at least have the vested rights that will be achieved with the May 29, 2009 recording rather than having lost those rights and having to start over...**
> **....**
>
> **Starting over carries great uncertainty, cost, and time, with no certainty whether any development will be approved at all....**

....

> **Taylor Engineering has a great deal of expertise and knowledge with the Black Rock North project.... It is <u>their considered opinion</u> that it would be a very costly mistake for a new owner to allow the May 29, 2009 deadline to expire."**

(Plaintiff Ex. 212 (BRD 024771-BRD024773); Plaintiff Exhibit 7.061-7.062 (emphasis added)).

Critically, the Hyslop correspondence reiterated Taylor's advice that BRN had relied on since at least January 2008. Specifically, it was always Taylor's position that BRN had to record the Panhandle Plat in order to vest the Project's PUD, and thus, it was necessary for BRN to complete infrastructure work to the tune of more than $7 million. The parties now agree that Mr. Hyslop's representations in that regard, made at Taylor's direction and based on its "considered opinions," were incorrect. In fact, the PUD was already vested and there was no risk that the affected property would revert to its prior zoning and density on May 29, 2009. BRN discovered this fact after retaining counsel to respond to Mr. Hyslop's demand letter. With that discovery, BRN also realized that it had unnecessarily spent more than $7 million.

IV. Issues Presented on Appeal

A. Did the trial court err in refusing to apply the Special Relationship Exception to the Economic Loss Rule in this case where a Professional Engineering Firm held itself out as an expert in the specialized field of land use planning and negligently provided personal services related to land use planning and entitlements that resulted in substantial economic harm?

B. Did the trial court err in failing to clearly articulate its findings of fact and conclusions of law for the elements of breach, causation and damages in this matter?

C. Is remand necessary where the evidence at trial clearly demonstrated that Taylor's negligent advice caused BRN to unnecessarily spend over seven million dollars?

V. Attorney Fees on Appeal

As this case arises out of a commercial contract dispute, BRN requests the Court award attorneys fees on this appeal pursuant to Idaho Code §§ 12-120 and 12-121, Rule 54 of the Idaho Rules of Civil Procedure and Idaho Appellate Rule 41.

VI. Argument

A. Economic Loss Rule: The Trial Court erred in applying the economic loss rule as a bar to BRN's damages and should have granted BRN's motion for summary judgment to dismiss the defense.

The parties agree that BRN seeks economic loss as damages. At trial, Taylor urged the Trial Court to apply Idaho's economic loss rule to bar BRN's damages. The Trial Court erred in doing so. Application of the economic loss rule goes to the question of duty. *Duffin v. Idaho Crop Improvement Assoc.,* 126 Idaho 1002, 1007, 895 P.2d 1195 (1995) ("ordinarily a party would owe no duty to exercise due care to prevent the [economic loss] suffered by the Duffins."); *Blahd v. Richard B. Smith,* 141 Idaho 296, 300, 108 P.3d 996 (2005)("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.")(emphasis

added). The appellate court reviews all questions of duty de novo. *See Harrigfield v. Hancock,* 140 Idaho 134, 138, 90 P.3d 884 (2004).

Idaho's economic loss rule generally prohibits recovery of "purely economic losses" in negligence actions. *Duffin,* 126 Idaho at 1007. However, this Court has clearly established that the economic loss rule does not bar recovery simply because the damages at issue can be measured monetarily. *Brian and Christie, Inc. v. Leishman Elec. Inc.,* 150 Idaho 22, 244 P.3d 166 (2010). Instead, a special relationship exception applies in at least two situations: 1) where a professional or quasi professional performs personal services; or 2) where an entity holds itself out to the public as having expertise regarding a specialized function and knowingly induces reliance on its performance of that function. *Aardema v. U.S. Dairy Systems, Inc.,* 147 Idaho 785, 792, 215 P.3d 505 (2009). As *Nelson v. Anderson Lumber Co.,* makes explicit, the special relationship exception generally pertains to claims for personal services provided by professionals including, without limitation, engineers. 140 Idaho 702, 710, 99 P.3d 1092 (2004).

1. Taylor negligently performed personal services as a professional.

At summary judgment, Taylor did not dispute the fact that its principals and employees are professionals who performed personal services for BRN at the Project. Taylor billed all work, including the disputed work at issue, as "professional services." (R. Vol. 3, p. 1686-1698,) Aff. Crockett in Support of BRN Development Inc.'s Motion for Partial Summary Judgment re: Taylor Engineering's Economic Loss Rule Defense, Exhibit A (See specifically paragraph 4 on 1688-9, and pp. 1696-1698.) This undisputed fact, in and of itself, created a special relationship and should have ended the economic loss rule inquiry with summary judgment awarded to BRN.

Even if judgment as a matter of law was not appropriate on BRN's motion for summary judgment, the facts revealed at trial did not provide a basis for the Trial Court to apply the economic loss rule. The Trial Court determined that the services Taylor negligently rendered were planning services and not engineering services. (R. Vol. 7, p. 3790, Decision on Court Trial). Relying on its distinction between "planning" and "engineering," the Trial Court then concluded that the "planning" work Taylor engaged in is not a professional service and thus not within the special relationship exception. (R. Vol. 7 p. 3790, Decision on Court Trial). The Trial Court then concluded that the common definition of a "professional" would extend to "virtually anyone" including a "hot dog vendor." (R. Vol. 7 p. 3790, Decision on Court Trial). Searching for what it means to be a "professional," the Trial Court relied on Black's Law Dictionary and restated its definition as: "a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." (R. Vol. 7, p. 3790, Decision on Court Trial). Then, the Trial Court wrote into this definition a requirement of "some type of specialized higher education degree in occupations that render 'professional services.'" (R. Vol. 7 p. 3791, Decision on Court Trial).

The Trial Court's analysis contains numerous errors. First, there is no legal or factual support to segregate out what the Trial Court referred to as "planning" work from the overall scope of engineering services Taylor provided. Second, even if you apply the Trial Court's definition of "professional," the special relationship exception applies in this case. Third, adding a higher education degree requirement before services qualify as "professional services" is unsupported in law or fact. Fourth, even if the Trial Court was correct in segregating out

Taylor's planning services from its engineering, there is no dispute that these services are, at a minimum, "quasi-professional" in nature thus implicating the special relationship exception. Each error will be addressed in turn.

a) The Trial Court erred in segregating "planning" services from engineering services.

Central to the Trial Court's determination that the special relationship exception did not apply was its effort to segregate out and label as "non-engineering" the discrete task Taylor negligently performed (answering the critical question posed in January 2008 about what was necessary to protect the Project entitlements). Idaho case law does not support this discrete task analysis.[4]

In *Blahd, supra* at 301, the Supreme Court concluded that real estate developers (including a real estate brokerage company) "may arguably be considered 'quasi-professionals,'" but concluded there was no evidence that the property developers provided any personal services to the plaintiffs or that they held themselves out as having special or unique expertise or made marketing representations on which the plaintiff relied. The case does not support a conclusion that only the specific services coming within the scope of a professional's license should be considered "personal services" to which the exception would apply.

[4] Washington case law is also inapposite. *See Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 2013 Wash. Lexis 934; 2013 WL 6022171. In *Donatelli,* the Washington Supreme Court reversed the trial court's summary dismissal of a negligence claim where economic loss resulted from an engineer's land planning work. Notably, the Washington Supreme Court made no attempt to segregate the planning tasks from pure engineering tasks for different treatment under Washington's version of the economic loss rule.

In *Graef v. Vaughn*, 132 Idaho 349, 972 P.2d 317 (1999), the Supreme Court analyzed whether the special relationship could apply to negligent misrepresentation claims brought against a seller's real estate agent by the buyer. The court determined that, at common law, a seller's real estate agent owed fiduciary duties only to the seller and that there could therefore be no special relationship with the buyer. The Supreme Court did not suggest that services of a real estate agent were not professional or quasi-professional or that the special relationship would not exist with the agent's principal.

In *McAlvain v. General Ins. Co. of America,* the Court applied the special relationship exception to an insurance agent who recommended and obtained coverage for its client that later turned out to be insufficient to cover the total loss of the client's business inventory. 97 Idaho 777, 554 P.2d 955 (1976). The discrete task that was negligently performed in *McAlvain* was the failure to adequately inventory the client's property in recommending coverage limits. The Supreme Court did not suggest that this discrete act required an insurance license, or that only an insurance agent could decide and perform this function. Instead, the Court focused on the fact that this was the type of service an insurance agent customarily provides. BRN contends that the Court should apply the same analysis to this case.

In doing so, it is evident that the planning task Taylor negligently performed (advising what was necessary to protect the Project entitlements) is part of the usual and customary work of an Engineer practicing in Kootenai County. In fact, Taylor's letterhead reads: "Taylor Engineering, Inc. Civil Design and **Land Planning**." (Defendant Exhibit A-4) (emphasis added). Moreover, Taylor's website states: "We also provide a full-range of **planning**, landscape

architecture, inspection, and **construction management services**." (Plaintiff Exhibit 1) (emphasis added). Taylor's retained expert, Darius Ruen, admitted that Taylor also performs both engineering and planning tasks for its clients. (Tr. Vol. Supp., p. 166, ln. 9-14). As Joe Hassell, BRN's engineering expert explained, it is beneficial for the developer to use an engineering firm to advise on the land planning issues because planning takes into account a number of engineering principles (Tr. Vol. 4, p. 216, ln. 9-17), because it saves costs (Tr. Vol. 5, p. 16, ln. 1-23), and because the engineer is uniquely equipped to understand the client's goals, feasibility, construction costs, timing issues, and jurisdictional hurdles. (Tr., Vol. 5, p. 16, ln. 1-23). In fact, testimony established that there is often no clear distinction between engineering and land planning services (Tr. Vol. 4, p. 216, ln. 6-p. 219, ln. 1).[5]

Moreover, the definition of Engineering in Idaho law includes Planning. *See* IC 54-1202. This is consistent with the testimony of Joe Hassell who testified that answering the critical question posed in January 2008 (what work is required to protect the Project entitlements?) is an engineering service. (Tr. Vol. Supp. p. 285 ln. 13-p. 287:17). As Mr. Hassell explained, the engineering principles involved in answering the critical question included: 1) knowing and understanding the applicable codes and ordinances; 2) understanding and evaluating the jurisdictional process and timing requirements; 3) understanding and evaluating construction costs; 4) protecting the construction site from the elements; and 5) protecting the public from possible hazards on the site. (*Id.*). To the same point, Taylor's expert, Darius Ruen, could not

[5] Taylor's Planner, Frank Ide, agreed that engineering and planning "go hand in hand on many projects." (Tr. Vol. 5, p. 140 ln. 9-12).

escape his deposition testimony where he agreed that the engineering standard of care applies to all work being overseen by the engineer. (Tr. Vol. Supp. p. 168 ln. 11-22).

This evidence makes clear that planning (an unlicensed service) and engineering (a licensed service) are, at a minimum, inextricably and irrevocably intertwined in the same fashion as the services of the insurance agent in *McAlvain* who negligently prepared an inventory of his client's property (an unlicensed service) for the purpose of procuring the appropriate coverage (a licensed service). Because of the related nature of the services involved, it is improper to attempt to segregate out an engineer's discrete task for different treatment when that task is part of the engineer's customary scope of services.

That point is made clear by *Stephen v. Sallaz & Gatewood, Chtd.,* 150 Idaho 521, 248 P.2d 1256 (2011). There, an attorney was found to have committed legal malpractice in a divorce action by failing to value property that made up part of the divorce estate. *Id.* at 523. Without question, valuing property does not require the attorney's license or particular set of professional skills. Nonetheless, as the Supreme Court found:

> [B]ecause Pamela retained the firm for assistance with her divorce proceedings, **this representation implicitly included assistance with the valuation** of the Crescent Rim home. In providing such assistance, Gatewood owed Pamela the duties of competent and diligent representation, as well as adequate communication.

Id. at 526 (emphasis added). Given that the attorney's unlicensed service was an implicit part of his licensed services, it should come as no surprise that the economic loss rule was not raised as a bar to the plaintiff's damages.

The Trial Court's discrete task analysis would bar the plaintiff's damages in *Stephen.* Other untenable results would follow: a plaintiff could not recoup his economic loss where an attorney negligently drafts an easement or negligently performs a real estate closing because unlicensed title insurance employees can complete this same work.

Even if the Trial Court's discrete task analysis were adopted and applied here, the testimony at trial established that the task at issue (determining what was necessary to vest land use entitlements) required Taylor to apply engineering principles, which brings the task within the statutory definition of engineering. *See* IC 54-1202(10). To be more specific, the discrete task at issue here was responding to the question posed by BRN at the meeting called by Marshall Chesrown on January 14, 2008. (Plaintiff Ex. 54). That question was: how do we mothball the project and spend the minimum necessary while protecting the Project's PUD? Taylor's "considered opinion" was that BRN must record its 56 lot final plat to vest the PUD. Because the service involved engineering principles, the discrete advice at issue was, by statutory definition engineering—a professional service. As such, the economic loss rule does not bar BRN's claims even under the Trial Court's improper and unprecedented "discrete task" analysis.

b) The special relationship exception applies under Black's definition of "professional" cited by the Trial Court.

As indicated above, in attempting to analyze whether the planning services it segregated out were those of a "professional" for purposes of the special relationship exception, the Trial Court cited Black's and concluded that a "professional" is "a person who belongs to a learned

profession or whose occupation requires a high level of training and proficiency." (R. Vol. 7, p. 3790, Decision on Court Trial) (Citing Black's Law Dictionary, 7th Edition).

Under that definition, there is no doubt that planning work, even if segregated from pure engineering, is the work of a professional, thereby implicating the special relationship exception. Taylor billed all of its service as "professional services," including the work done by its Senior Land Planner, Frank Ide. (Defendant Ex. B, including but not limited to pp 245, 247, 254, 260, 421, 423, 427, 431, 433, 435, 437). For his part, Frank Ide confirmed that successful land planning requires specialized knowledge and skill. (Tr. Vol. 5, p. 138 ln. 5-11). Ron Pace from Taylor confirmed that providing land planning services requires "an engineer or other **expert.**" (Tr. Vol. 2, p. 96 ln. 6-22) (emphasis added). Attorney Kathryn McKinley agreed and testified that advising a client on land entitlements requires specialized knowledge about the county processes and ordinances, as well as familiarity with government agencies. (Tr. Vol. 4, p. 16, ln. 6-16). In fact, the only professionals performing planning services are attorneys, engineers, and consultants who are typically former employees of the County Building & Planning Department. (Tr. Vol. 4, p. 16 ln. 17-25). Taylor's own planning expert, Sandra Young, testified that it takes specialized expertise to be a land planner including knowledge of the local ordinances and the ability to apply them to set a clear path for the client to obtain an entitlement. (Tr. Vol. 4, p. 210 ln. 18-p. 211 ln. 18).

The testimony presented by both sides demonstrates that planning requires a high level of training, expertise, and proficiency, placing those who customarily perform the work squarely

within Black's definition of a "professional." Thus, the special relationship exception applies under the definition cited by the Trial Court.

c) There is no factual or legal support to add a higher education degree requirement to the definition of a professional.

As previously indicated, after citing Black's definition of "professional," the Trial Court then added to Black's an additional requirement of specialized higher education. (R. Vol. 7, p. 3791, Decision on Court Trial). In doing so, the Trial Court relied on *Sumpter v. Holland,* 140 Idaho 349, 93 P.3d 680 (2004), a case in which the Supreme Court was asked to determine whether or not the two year statute of limitations for professional malpractice applied against a real estate agent. The Supreme Court determined it did not because a real estate agent does not have the same type of education as those listed as professionals in I.C. 30-1303(1) and I.C. 53-615(8)(a). The Trial Court relied on this holding and concluded that because planning work can be performed by individuals who do not have a higher education degree, these services are not "professional services" under the special relationship exception.

The faulty nature of this analysis is readily apparent. First, I.C. 30-1303(1) and I.C. 53-615(8)(a) also omit insurance agents, yet *McAlvain* applied the special relationship exception to an agent who negligently performed services on behalf of his client. Moreover, while *Sumpter* says that real estate agents are not "professionals" for purposes of the professional statute of limitations, *Graefe, supra,* indicates that a real estate agent can be brought within the special relationship exception to the economic loss rule consistent with the professional nature of the relationship in existence between a principal and his/her realtor. In short, *McAlvain* and *Graefe*

make *Sumpter* off point for purpose of the special relationship analysis. The question is not whether the services fall within the statutory definition of "professionals," but whether the service is one customarily provided by a person/entity, like Taylor, with a superior level of skill and expertise. *See Stephen, supra.* Therefore, by relying on *Sumpter* and injecting a higher education degree requirement to the definition of "professional" the Trial Court erred.[6]

d) Even if planning were segregated from engineering, it is a quasi-professional service.

As was previously stated, the special relationship exception applies to services performed by both professionals and quasi-professionals. *Aardema, supra.* According to *Black's,* Seventh Ed., "quasi" means "seemingly but not actually; in some sense; resembling; nearly." The Trial Court's Decision does not explain why it did not consider planning work to be "quasi-professional" in nature.

At trial and on summary judgment, there was no dispute between the parties: planning, even if segregated from engineering, requires the skills of an attorney, engineer, or person with years of experience in the County's Building & Planning Department such that the person can identify and understand the appropriate codes/ordinances and walk the client through, as Sandra

[6] It should also be noted that all work by Taylor at the Project was overseen by Ron Pace, a licensed engineer, who does meet the higher education requirement the Trial Court required. Thus, the Trial Court's entire analysis hinges on its misguided efforts to segregate out the discrete task of answering BRN's critical question posed in January 2008, as a task that does not involve engineering.

Young called it, the "bureaucratic maze" involved in obtaining entitlements.[7] Even the Trial Court stated:

> an experienced land use planner can be critical in guiding a developer through the complexities of land development, especially as it relates to working with government agencies and securing entitlements.

(R. Vol. 7, p. 3791, Decision on Court Trial).

At a minimum, planning services resemble the services provided by a professional. In fact, apart from consultants like Sandra Young with years of employment with the County planning department, only professionals (attorneys and engineers) provide land planning services. The Trial Court erred in failing to conclude that the negligent services at issue here were, at a minimum, "quasi-professional" services falling within the ambit of the special relationship exception.

2. Taylor also meets the second exception to the economic loss rule in that Taylor held itself out to the public as having expertise to perform the specialized functions involved in answering the question posed by BRN in January 2008.

The special relationship exception is not limited to cases involving a professional or quasi professional. *Duffin,* 126 Idaho at 1008. Rather, a special relationship also exists where the defendant holds itself out as an expert in a specialized function and knowingly induces reliance on its performance of that function. *Id.*; *see also Aardema,* 147 Idaho at 792.

[7] The Trial Court stated, "Anyone can provide land-use planning services." (R. Vol. 7 p. 3791, Decision on Court Trial). To the extent this is a factual finding by the Trial Court, it is not supported by competent evidence, and contradicts its own statements about the critical role of a planner in guiding a developer through the complexities of land development.

Again, witnesses from both sides agree that planning and entitlement advice involves specialized knowledge and skill. (Tr. Vol. 4, p. 210 ln. 18-p. 211 ln. 18; *see also* Tr. Vol. 5, p. 138 ln. 5-11). There is no question that Taylor held itself out to the public as being an expert in planning. As indicated above, Taylor's letter head reads: "Taylor Engineering Civil Design and Land Planning." Taylor's website further spells out its expertise in the field. (Plaintiff Exhibit 1). Taylor's correspondence through Mr. Hyslop in May 2009 reiterates Taylor's expertise in planning and entitlement matters and offers Taylor's "considered opinions" based on that expertise (Plaintiff Exhibit 2).

Having intentionally created a website and letterhead advertising its planning expertise, Taylor knowingly induced reliance on performance of its planning services. Moreover, the undisputed testimony at trial and on summary judgment established that BRN did, in fact, rely on Taylor in that regard. (R. Vol. 2, p. 1352-1353, Dep. Capps ("And we counted on Taylor to provide us that information")). On that point, Taylor asked the Trial Court to analyze the facts related to BRN's reliance in a vacuum without considering the parties' prior dealings with one another. Mr. Capps and Mr. Chesrown confirmed that Black Rock related entities including BRN relied on their engineers for land planning services in every project they had done. (Tr. Vol. 1, p. 81 ln. 17-p. 83 ln. 1; Tr. Vol. 3, p. 17 ln. 22-p. 18 ln. 2). Indeed, Mr. Chesrown's entities worked with Taylor on several projects and Taylor had always provided the entitlement guidance and advice on those projects. (Tr. Vol. 1, p. 82 ln. 2-p. 83 ln. 15; Tr. Vol. 3, p. 21 ln. 9-p. 24 ln. 5). Moreover, BRN had no one in their internal group with the training or ability to perform the planning functions. (Tr. Vol. 1, p. 142 ln. 7-10). Taylor did not refute Mr. Chesrown

and Mr. Capps' testimony which showed that Taylor and the Black Rock entities had a long working relationship stretching out over the course of several projects where Taylor provided the same planning and entitlement services that established a course of dealing between the two. Then, in January 2008, Mr. Chesrown, BRN's President made it clear in an email received by Taylor that he wanted to meet to determine what BRN had to do with "cash flow considerations as the driving force." (Plaintiff Exhibit 54). Mr. Chesrown left little doubt who he was relying on: "**we also need Taylor there**." (*Id.*) (emphasis added). BRN relied on Taylor's planning expertise.

Given that Taylor held itself out as an expert on planning and engineering, those services involve specialized knowledge and skill, and Taylor induced reliance on its services in that regard, the Trial Court erred in failing to apply the special relationship exception.

3. Equity

The only remaining question with respect to the economic loss rule is whether it is equitable to apply the special relationship exception in the context of this case. *See Duffin,* 126 Idaho at 1008. On that question, the Trial Court again erred in concluding that equity did not favor applying the special relationship exception. The Trial Court reached this conclusion without citing a single case reaching a similar result in the context of a professional or quasi-professional relationship. Although not clear from its verdict, the Trial Court apparently reasoned that it would be inequitable to impose a duty because Mr. Chesrown, BRN's President, was an experienced developer, Kyle Capps from BRN had regular contact with the county, BRN had competent attorneys available to it that it could have asked about the status of the

entitlements, and Taylor was engaged without written contract defining job responsibilities. Finally, without a single shred of evidence presented by either party on the subject, the Trial Court stated that a poor market set off by an economic recession caused BRN's economic loss which, according to the Trial Court, made it inequitable to apply the special relationship exception. (R. Vol. 7, p. 3792, Decision on Court Trial). To the extent the Trial Court's conclusions in this regard constitute findings of fact, those findings are not supported by competent evidence.

The evidence demonstrated that Mr. Chesrown had relatively little experience with real estate development at the time of the Project. His background was in the car business, not complex real estate development. (Tr. Vol. 1, p. 75 ln. 25-p. 76 ln. 9). In fact, his first residential real estate development opened at the Club at Black Rock only two years before starting the BRN Project. (Tr. Vol. 1, p. 77 ln. 18-22). Knowing his limitations, Mr. Chesrown put together a team of experts. Engineers were always a key part of that team. On the Club at Black Rock Project, Mr. Chesrown's group hired Inland Northwest Consultants, a local engineering firm, to guide it through the entitlement process. (Tr. Vol. 1, p. 77 ln. 23-p. 80 ln. 17). BRN hired Taylor to fulfill that same role on projects in between. (Tr. Vol. 3, p. 21 ln. 9-p. 24 ln. 5). Further, it was undisputed that neither Mr. Chesrown nor any of his entities had pursued a development under Kootenai County's new ordinance. (Tr. Vol. 1, p. 152 ln. 16-25). Far from the expert, Mr. Chesrown was a "big picture guy" that went out and hired professionals like Taylor to guide him through the process.

Regardless, Mr. Chesrown's experience or lack of experience in real estate development is not relevant to the question. If experience with the work at issue were relevant, it would suggest that an attorney who represented another attorney could not be held liable for economic loss suffered by his/her client in a legal malpractice action. Factoring experience could similarly result in a bar to economic loss where a real estate or insurance agent is negligent in performing services for individuals with experience in those fields. Clearly, those results make no sense and do not comport with Idaho law. As such, the Trial Court erred in relying on Mr. Chesrown's development experience as part of its equity analysis.

The same is true regarding the Trial Court's reliance on Mr. Capps' contacts with the county and the relevant agencies. The evidence about Mr. Capps' expertise was undisputed: he had no planning or engineering experience. (Tr. Vol. 3, p. 17 ln. 6-p. 18 ln. 2). Rather, Mr. Capps' background was in golf course maintenance and construction. (Tr. Vol. 3, p. 12 ln. 18-p. 14 ln. 20). His relative inexperience with the entitlement process and reliance on Taylor was exhibited by his emails to Frank Ide (Plaintiff. Exhibit 203; Defendant Exhibit J), which Mr. Ide characterized as "out of the blue" and "common sense" issues for anybody knowledgeable about planning and entitlements. (Tr. Vol. 5 p. 145 ln. 13-p. 146 ln. 13). As Mr. Capps himself confirmed, he relied on Taylor as his guide through the complex entitlement process. (Tr. Vol. 3, p. 21 ln. 9-p. 24 ln. 5). Moreover, the frequency of Mr. Capps' contact with the County and the relevant agencies is not determinative. Taylor presented no competent evidence that Mr. Capps was looking to the County and/or any agency for an answer to the critical question posed

in January 2008. Further, there is no disputing that a client is entitled to rely on the advice from its engineer without the need to confirm and/or seek another opinion.

In effect, the Trial Court's reasoning with respect to Mr. Capps would allow for the recovery of economic loss only where the professional or quasi-professional's client was apathetic, lacking conscientiousness, and completely uninvolved. This policy makes little sense. The opposite should be encouraged; equity should swing in favor of the client who, like Mr. Capps, is active in the subject of the transaction but clearly relies on the expertise of a retained professional on critical questions. The Trial Court erred when it cited Mr. Capps' involvement with the county as a basis for its equity analysis.

BRN's access to legal counsel as part of the equity analysis is similarly off point and irrelevant. First and foremost, it is clear that no attorney was present at the critical meeting Taylor attended when BRN asked how it could protect its entitlements at minimal cost. Further, the Trial Court's reasoning would impart a duty on the client to double check the advice of an engineer or land planner with the client's attorney any time the client makes a planning/entitlement decision. This proposed rule is contrary to the undisputed testimony that a client is entitled to rely on the advice of its engineer/planner. Moreover, the Trial Court's rule would have the undesirable effect of insulating engineers, planners, title insurers, real estate agents, and architects for any negligent advice that an attorney might render if one is available. Yet again, the Trial Court's analysis in this regard must be rejected.

The lack of a written contract between Taylor and BRN is also not determinative in the equity analysis. There is no legal authority that requires a written contract between the parties in

this type of engagement. Moreover, it makes no sense why fault, if any, for not preparing a written contract, should be directed only to BRN and not the experienced professional engineering and planning firm that it retained. Further, while a written contract may not exist, there are numerous writings between the parties that indicate Taylor undertook planning and entitlement aspects of the Project. For example, and most importantly, Mr. Chesrown's January 14, 2008 email made it clear that "**we need Taylor there**" and we need to know "**what we need and when we need it with cash flow considerations as the driving force. We also need to discuss with everyone the platting plan in detail.**" (Plaintiff Exhibit 54)(emphasis added). Additionally, Taylor submitted budget proposals to BRN stating that it was providing "overall management of civil aspects" of the Project including, without limitation, "attending various meetings through the design process with the Owner, governing agencies, consultants and other stakeholders." (Plaintiff Exhibit 4, 6). The budgets drafted by Taylor further state that Taylor undertook "coordination with Kootenai County necessary to add the Preliminary Plat to the ongoing PUD process." (*Id.*).

There is no ambiguity in these documents: managing the PUD and plat process in conformity with the legal requirements and advising and guiding BRN about entitlement requirements was an "aspect" attendant to Taylor's overall management of the "civil" work. In other words, in no way was Taylor's work scope limited purely to engineering. To the extent the language from the cited documents is ambiguous, it must be construed against Taylor as the drafter. *See Suchan v. Suchan,* 113 Idaho 102, 108, 741 P.2d 1289 (1987).

Regardless of whether Taylor contracted to perform planning services or not, it was clear that Taylor was, in fact, advising BRN about the planning and entitlement aspects of the project. Numerous documents confirm this. For example, when Mr. Capps had questions about the entitlements, he asked them of Mr. Pace and Mr. Ide. (Plaintiff Exhibits 76, 200, 203; Defendant. Exhibit J). Taylor confirmed its role after the parties' relationship broke down by sending correspondence through its counsel to American Bank and others which recited Taylor's "considered opinion" about the entitlements based on its "great deal of knowledge and considerable expertise regarding this property." (Plaintiff Exhibit 2). As such, even if it were proper to consider the lack of a written contract as part of the equity analysis, the written work scope documents presented at trial show that Taylor was providing the very services that led to BRN's unnecessary construction costs.

The Trial Court's final contention in its equity analysis was that the fall of the Project was the result of the poor economy. Neither party presented this evidence. What did come into evidence on the subject of the economy was the slowing velocity of sales that led to the decision to mothball the project which, in turn, made it important to find out what had to be done to protect the entitlements. Indeed, it was precisely because the economy was slowing that Taylor's advice was so critical.

Further, the ultimate success of the Project is completely beside the point. The Trial Court was confronted with the question of whether or not Taylor's negligence was a proximate cause of BRN's unnecessary construction expenditures of more than $7 million. BRN lost substantially more than $7 million on the project, but the $7 million caused by Taylor's

negligence was avoidable and would have allowed BRN to pay multiple subcontractors who were entitled to compensation for the work they performed thus reducing the tangled web of litigation that arose from the Project. In truth, whether the Project ultimately failed or was a grand success has no bearing on the issue. In fact, it would make more sense to excuse on equitable grounds a mistake by the engineer when the project was profitable notwithstanding the professional error.

More to the point, there is nothing inequitable in holding a professional or quasi-professional liable for its negligence. Engineers, doctors, architects, attorneys, and the like, fill key roles in the community. *McAlvain* recognized that such professionals or quasi-professionals should face liability for their negligence. That conclusion makes good sense because the community must rely on the expertise and experience of these professionals and quasi-professionals for guidance through complex problems. Additionally, the position held by these professionals comes with unique levels of responsibility because professional errors can sometimes lead to catastrophic results. With that burden comes a high level of prestige and compensation; on this Project alone, Taylor was paid $1.8 million for its "considered opinions." (Tr. Vol. 1, p. 90, ln. 14-p. 92 ln. 8; Plaintiff Exhibit 8). In total, on all projects, the various Black Rock entities paid Taylor $4.1 million. (Tr. Vol. 1, p. 90 ln. 10-13; Plaintiff Exhibit 8). These professionals and quasi-professionals must take the good with the bad. They charge a premium for their services, but when they make errors, the only equitable solution consistent with Idaho law is to make the damaged client whole. As such, the Trial Court erred in

concluding that equity did not support application of the special relationship exception to the economic loss rule.

B. Duty

With the special relationship exception imposing a duty on Taylor to prevent economic loss, the issue becomes: what was Taylor's duty? "The existence of a duty is a question of law." *Harrigfield v. Hancock,* 140 Idaho 134, 138, 90 P.3d 884 (2004). The Idaho Rules of Professional Responsibility for Engineering spells out an engineer's duty: "Each Licensee and Certificate Holder shall exercise such care, skill and diligence as others in that profession ordinarily exercise under like circumstances." (Plaintiff Exhibit 35).

The Trial Court erred in refusing to apply the engineer's duty of care when an engineer confronts, as Taylor did in January 2008, the question of what is necessary to protect land use entitlements with minimum expenditures. Using its 'discrete task analysis', the Trial Court concluded that in responding to this question, Taylor engaged in work of a planner and not an engineer, thus implicating something other than an engineer's standard of care. As indicated above, that analysis does not comport with the Supreme Court's decision in *Stephen, supra,* and it ignores the fact that Idaho's statutory definition of engineering explicitly includes "planning." IC 54-1202(10).

Additionally, BRN's expert, Joe Hassell, testified that numerous engineering principles are necessary to evaluate the key question posed in January 2008. Specifically, Mr. Hassell testified that answering BRN's question required researching and understanding the applicable codes and ordinances, understanding and evaluating the jurisdictional process and timing

requirements, understanding and evaluating constructions costs, analyzing how to protect the site from the elements, and looking at how to protect the public from possible hazards on the site. (Tr. Vol. Supp., p. 285 ln. 17-287 ln. 17). While answering the critical question may not require an engineer's license or stamp, both sides agree that providing this advice is part of the scope of services engineers customarily provide on development projects in Kootenai County, Idaho. Furthermore, Taylor had, in fact, provided advice concerning land use entitlements to Black Rock entities on other projects. Thus, like the defendants in *McAlvain* and *Stephens* who were held to their professional standards of care when it came to valuing client property—a service not requiring their respective licenses—Taylor must also be held to its professional standard of care when providing advice about land use entitlements.

The Trial Court not only applied the "general duty of care" when it should have applied the engineering standard care, but more critically, it failed to correctly articulate what either standard required in the context of this case. Again, all sides agree that an important fork in the road was presented in January 2008. Mr. Chesrown, BRN's President, called a meeting and made it clear to all that BRN wanted to "mothball" the project, and spend the minimum necessary while still protecting the Project entitlements, most notably, the PUD. The Trial Court concluded, without any competent evidence, that Taylor did not "specifically advise[] BRN that a final plat had to be recorded to vest the PUD entitlement." (R. Vol. 7, p. 3788, Decision on Court Trial). The Trial Court's statement in this regard is not only factually wrong, unsupported by evidence, but misconstrues Taylor's duty.

Similar to a doctor or lawyer, Taylor was confronted in late 2007 and early 2008 with a fact pattern and an articulated goal from its client. In response, it was Taylor's duty to 1) spot the pertinent issues, and 2) provide the correct advice. The Trial Court failed to impart and analyze the first aspect of that duty. Indeed, even if Taylor did not "specifically advise[]" BRN that BRN had to record a final plat to vest the PUD, it is undisputed that Taylor failed to even consider that the PUD was already vested or that BRN could have recorded a smaller four lot plat for about $30,000.00 or less. In this regard, Mr. Pace testified that he did not recall ever even discussing the option of doing no construction at all. (Tr. Vol. 2, p. 107, ln. 15-18). Mr. Pace further admitted that it would have been less expensive, given the budget constraints, to only move forward with BRN's alternative four lot plat, but that he did not discuss the option with BRN at the January 2008 meeting or at any point in time until he responded via email to Mr. Capps some nine months and $7 million later. (Tr. Vol. 2, p. 111 ln. 2-21). Notably, even then, Mr. Pace incorrectly advised that BRN could not finalize the four lot plat before the 56 lot plat. (Plaintiff Exhibit 76).

In sum, the evidence demonstrates that BRN wanted to mothball the project in early 2008 while protecting the land use entitlements. Both parties agree that BRN communicated that desire to Taylor. Even if Taylor had not been the source of the incorrect advice, it had a duty to recognize and advise that its client, by undertaking extensive construction work, was pursuing a path inapposite to the client's goals. As will be further illustrated below, Taylor breached its duties both by incorrectly advising that BRN needed to record a final plat to vest the PUD, but also by not recognizing that further construction was unnecessary as of January 2008.

C. Inadequate Findings of Fact and Conclusions of Law

In light of the Trial Court's conclusion that Taylor did not owe a duty to BRN, it did not clearly articulate findings on the remaining issues of breach, causation and damages. IRCP 52(a) establishes that:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment;... If an opinion or memorandum decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. A written memorandum decision issued by the court may constitute the findings of fact and conclusions of law only if the decision expressly so states or if it is thereafter adopted as the findings of fact and conclusions of law by order of the court.

ICRP 52(a).

Inadequate findings on factual issues that are material to resolving the case normally require the appellate court to set aside the judgment and remand the case. *See Donndelinger v. Donndelinger*, 107 Idaho 431, 690 P.2d 366 (1984); *Huerta v. Huerta,* 122 Idaho 278, 833 P.2d 911 (1992). However, the appellate court may disregard a lack of adequate findings if the record is clear and yields an obvious answer to the relevant factual questions. *Donndellinger, supra.*

Here, the Trial Court's memorandum decision does state that it was intended to constitute Findings of Fact and Conclusions of law, but the Trial Court failed to clearly articulate its findings of fact and conclusions of law on the issues of breach, causation and damages. (R. Vol. 7, p. 3777, Decision on Court Trial). However, a review of the record yields obvious answers on those questions. For that reason, we address those issues below and contend only one conclusion

can be reached: Taylor breached its duty to BRN and that breach caused BRN damages in an amount of $7,112,046.64.

D. Breach

Although the Trial Court did not clearly articulate its findings on the issue of breach, the court did determine that Taylor breached its responsibilities by providing inaccurate advice on the issue of what work was necessary for BRN to protect its entitlements. The standard of review for the findings of fact on breach is "clear error standard," which "will not be found to exist if the findings are supported by substantial evidence." *Meldco, Inc. v. Hollytex Carpet Mills,* 118 Idaho 265, 268, 796 P.2d 142, (Ct. App. 1990); *citing Treasure Valley Plumbing and Heating, Inc. v. Earth Resources Co., Inc.*, 115 Idaho 373, 766 P.2d 1254 (Ct.App.1988). On appeal, the court exercises free review with respect to applying the law to the facts found. *Meldco,* 118 Idaho at 268-69; *citing Baldwin v. Leach*, 115 Idaho 713, 769 P.2d 590 (Ct. App. 1989).

Taylor Engineering breached its duty to provide competent advice in January of 2008 when Ron Pace, as Taylor's representative, advised BRN that it needed to record a final plat in order to vest the PUD. (R. Vol. 7, p. 3785, Decision on Court Trial). This advice was given in response to a meeting BRN called to identify how to protect its existing PUD entitlement while minimizing costs. (Plaintiff Exhibit 54). This advice was inaccurate and constitutes a breach of the standard of care. The Trial Court recognized this stating that Mr. Pace cannot escape a measure of fault. (R. Vol. 7, p. 3786, Decision on Court Trial). The Trial Court further stated:

"[d]uring the January 2008 meeting, Taylor left BRN with the impression that the additional work was necessary to vest the PUD." (R. Vol. 7, pg. 3785, Decision on Court Trial).

BRN's engineering expert, Joe Hassell, testified that the standard of care of an engineer required Mr. Pace to know the status of the entitlements in order to answer the questions presented by BRN during the meeting in January 2008. Mr. Hassell further testified that in the context of such a meeting, the engineer is required to know the costs, timing issues, safety issues, and ordinance requirements, all of which involve engineering principles or data. (Tr. Vol. Supp, p. 285 ln 13- p. 286, ln 24). Taylor's own land planning expert confirmed that when providing Land Use Planning services, the first step is to determine the client's goals, then to identify the status of the client's entitlements and then to determine what steps the client needs to take to reach its goals and advise on alternatives. (Tr. Vol. 5, p. 140 ln. 13-p. 141 ln. 5).

Unfortunately, the critical advice and guidance provided by Taylor on the subject of the entitlements was wrong. Taylor's own land planning expert, Ms. Young, confirmed in her testimony that the PUD ordinance and the subdivision ordinance in Kootenai County are completely separate and distinct. (Tr. Vol. Supp, p.24 ln. 18-25). Ms. Young's testimony demonstrates that if Taylor had complied with its duty of care by properly researching the ordinances, and providing overall management for all "civil aspects" of the project including gaining an understanding of the steps necessary in order to finalize the various entitlements, Taylor would have learned that BRN could have vested the PUD as early as Christmas 2006. (Tr. Vol. Supp, p. 47 ln. 12- p.48 ln.5). Had Taylor properly fulfilled its obligation, and advised BRN that no further construction was needed to protect its PUD entitlements, BRN would not

have planned or pursued construction work of any kind from late 2007, through January 2008, and moving forward. As Mr. Capps, Mr. Chesrown and Mr. Samuel all confirmed, that advice would have stopped all construction and BRN would have mothballed the project with a vested PUD. (Tr. Vol. 1, p.107 ln.13-p.108 ln. 23; Tr. Vol. 3, p.53 ln. 12- 19; Tr. Vol. 5, p.79 ln 12-p.80 ln. 25).

After the January 2008 meeting, Taylor reiterated the inaccurate advice that it provided. Specifically, in February 2008, Mr. Ide advised Mr. Capps how BRN should structure the plat and what property to include to complete the process. (Plaintiff Ex. 203). In May 2008, Mr. Capps sent Mr. Pace an email confirming that he did not know how the PUD plan would be filed with the final plat. (Def. Ex. J). Later in 2008, Mr. Pace confirmed in an email that BRN had to finalize the "Panhandle Plat" before the Four Lot Plat. (Plaintiff Ex. 76). This was also inaccurate. (Plaintiff Exhibit 115) Taylor should have advised BRN that it could record plats in any order that it wanted, by simply changing the plat names to reflect the order of filing.

Even if Mr. Pace was not competent to advise BRN on the issue presented, the standard of care required him to identify the issue and advise BRN that it needed to get an expert involved who was capable of answering the question. Taylor did not make this disclosure or recommendation and instead led BRN to believe that recording a plat was necessary to vest the PUD.

Finally, Taylor confirmed its negligent advice in a letter that it sent through its attorney, William Hyslop, to try to compel BRN to make payments. The letter from Taylor stated "if the final subdivision approval is not completed and recorded by May 29, 2009, the PUD and

preliminary plat approval will expire, the PUD and plat will not vest in the recorded ownership to the real property involved, and the property will revert to its prior zoning and density." (Plaintiff Exhibit 2). Mr. Hyslop's letter leaves no doubt as to Taylor's position on the critical issue and there is no dispute that said position was wrong.

E. CAUSATION

As a result of Taylor's negligent advice, the record is clear that after the critical January 2008 meeting, BRN incurred $7,112,046.64 in additional construction costs for the Project, including approximately $150,000 for Taylor's continued engineering and planning services. (Plaintiff Exhibit 86, 94; Tr. Vol. 3 p. 87 ln. 6-13).

While the Trial Court did not specifically articulate its findings on causation, the court alludes to the conclusion that any damages suffered by BRN were caused by the downturn in the economy. The Trial Court's statements in this regard are not supported by substantial evidence and miss the point of the entire case: Taylor's advice was sought ***because*** of the downturn in the economy and BRN's corresponding desire to cease further work and the substantial expense that came with it. Indeed, the downturn in the economy is why Taylor's negligent advice was so critical.

Moreover, BRN did not seek damages for the total amount lost in the project (over $74 million) (Plaintiffs Exhibit 108, Tr Vol. 1, p. 179, ln 18- pg 181, ln 2). Instead, BRN only sought and continues to seek damages for the unnecessary expenses that it incurred after it decided to minimize costs while protecting the PUD entitlement. (Plaintiff Exhibit 86, 94; Tr. Vol. 3 p. 82 ln. 22- p. 87, ln. 9)

Additionally, the Trial Court stated that "blame is shared among the players for BRN's misguided understanding in regards to the status of their entitlement when they made critical financial business decisions to continue to work on the project." (R. Vol. 7, pg. 3786, Decision on Court Trial). This finding is not supported by competent evidence. [8] Moreover, the Trial Court erred in permitting Taylor to present evidence of non-party fault as Taylor never alleged non party fault as an affirmative defense. (R. 2893-2977, BRN's Motion in Limine re: Third Party Fault and supporting documents).

Regardless, the evidence at trial demonstrated that Taylor was the sole professional present at the critical January 2008 meeting. As it was entitled to do, BRN relied on the incorrect advice Taylor provided until May of 2009 when, through William Hyslop, Taylor sent a demand letter necessitating involvement of legal counsel to review the demand's assertions, including the assertion that BRN would lose the entire project if BRN did not record the final plat by May 29, 2009. In doing so, BRN learned, for the first time, that Taylor's representations about what was necessary to vest the PUD had been and were inaccurate. (R. Vol. 7, pg. 3786, Decision on Court Trial). By then, BRN had already incurred the $7,112,046.64 of unnecessary construction costs.

Given that 1) Taylor was the only expert present when BRN asked the critical question in January 2008, 2) Taylor led BRN to believe that additional work was necessary, and 3) BRN

[8] Moreover, as indicated, to the extent the Trial Court did make findings, they were not specially made with separate conclusions of law as required under IRCP 52(a).

had no duty to seek a second opinion to verify Taylor's representations, Taylor was the sole cause of BRN's stated damages.

F. Damages

In a tort case like this one, the plaintiff is entitled to recover that amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by the defendant's negligence. IDJI 9.01. In analyzing the "but for" consequences of Taylor's actions, it is crucial to reiterate that, had Taylor properly advised BRN pursuant to specific questions in January of 2008, BRN would not have spent over $7,000,000.00. Although BRN lost the entire project, BRN did not seek damages for this entire loss at trial. BRN spent approximately seventy four million dollars on this project. (Tr. Vol. 1, p.179 ln 5- p 181 ln 3; Plaintiffs Exhibit 108). While the funds spent on construction after January 2008 (more than $7 million) would have been available for BRN to continue to pay interest on its loan and likely avoid eventual default and loss of the Project, BRN seeks from Taylor only the $7,112,046.64 that was spent unnecessarily as a result of Taylor's negligence.

Undisputed evidence demonstrates that, from and after the January 2008 meeting involving Taylor and BRN, Mr. Capps and Mr. Chesrown worked with Mr. Pace to minimize their costs and do no more than was necessary to protect their entitlements. BRN's accountant, Chad Rountree, prepared a cost run identifying all costs incurred from January 2008 moving forward (Plaintiff Ex. 86). Mr. Capps reviewed Exhibit 86 and identified only those expenditures that BRN would have avoided if they had known they did not need to proceed with plat development in order to vest their PUD. Mr. Capps highlighted those expenditures. Some

suggestions were made that BRN did not need to incur some of those items, such as costs incurred for comfort stations. As Mr. Capps explained in rebuttal, however, BRN understood that it had to incur the expenditures for the comfort station in order to finalize the substantially completed golf course because Taylor told BRN that those improvements were necessary in order to finalize the plat and vest the PUD. (Tr. Vol. 7, p. 274, ln. 15-p.275 ln.3).

From Plaintiff's Exhibit 86, a compilation summary was prepared as Plaintiff's Exhibit 94. Mr. Capps and Mr. Rountree compared Exhibits 86 and 94 and confirmed that the compilation amounts show only those expenditures identified by Mr. Capps as the unnecessary expenditures that BRN could have avoided. The total damage amount was calculated at $7,112,046.64.

VII. Conclusion

Contrary to the Trial Court's conclusion, Taylor owed a duty to BRN to provide advice and services consistent with the engineering standard of care. Because the advice and services were provided in Taylor's professional and/or quasi-professional capacity, the special relationship exception applies and therefore the economic loss rule does not bar BRN's $7,000,000.00 damage claim. Had BRN been able to avoid the $7,000,000.00 in unnecessary expenditures and successfully mothball the project as desired in January 2008, BRN could have paid the numerous contractors, subcontractors and vendors who have since pursued claims and obtained judgments against BRN. While the Trial Court failed to specially make findings and separate conclusions, the evidence presented at trial establishes that BRN is entitled to have this

case remanded with an order to enter judgment in its favor in the amount of $7,112,046.64 plus attorneys fees and costs.

DATED this 3rd day of February, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 4th day of February, 2014, I caused a true and correct copy of Brief of Appellant BRN Development to be hand delivered to the following person:

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