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

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IN THE 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

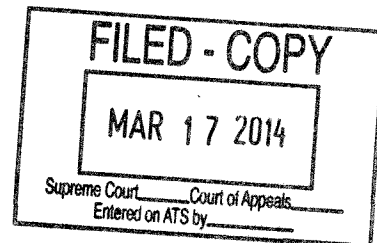
TAYLOR ENGINEERING, INC.,

Defendant-Third Party Plaintiff-
Cross Defendant-Respondent,

and

BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Liechtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; RYKER YOUNG, Trustee for the RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation, WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; THE TURF CORPORATION, an Idaho corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation;

Supreme Court Docket No. 40625-2013



COPY

PRECISION IRRIGATION, INC., an Arizona corporation; and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants-Cross Defendants,

and

IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company; INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation; CONCRETE FINISHING, INC., an Arizona corporation,

Cross Defendants,

and

STRATA, INC., an Idaho corporation; and SUNDANCE INVESTMENTS, LLP, a limited liability partnership,

Third-Party Defendants,

and

ACI NORTHWEST, INC., an Idaho corporation,

Third Party Defendant-Cross-Claimant.

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable John P. Luster presiding.

M. Gregory Embrey, ISB No. 6045
Mark A. Ellingsen, ISB No. 4720
WITHERSPOON KELLEY
608 Northwest Blvd. , Suite 300
Coeur d'Alene, ID 83814-2146
Telephone (208) 667-4000
Facsimile (208) 667-8470
Email: mge@witherspoonkelley.com
Email: mae@witherspoonkelley.com

Attorneys for Taylor Engineering, Inc.

Nikalous O. Armitage
Bradley C. Crockett
Layman Law Firm, PLLP
601 S. Division Street
Spokane, WA 99202
Telephone (509) 455-8883
Email: NArmitage@laymanfirm.com
Email: BCrockett@laymanfirm.com

Attorneys for BRN Development, Inc.

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STATEMENT OF THE CASE

I. Nature of the Case.

This appeal involves BRN Development, Inc.'s ("BRN") professional negligence claim for pure economic loss based upon non-engineering work which the District Court determined was barred by Idaho's economic loss rule. BRN entered into a verbal agreement with Taylor Engineering, Inc. ("Taylor") for Taylor to provide professional civil engineering and surveying services on the one thousand acre Black Rock North residential development overlooking Lake Coeur d'Alene in Kootenai County, Idaho. BRN failed to pay Taylor approximately \$150,000.00 in engineering fees and Taylor therefore pursued breach of contract and unjust enrichment claims against BRN. In response, BRN asserted cross-claims against Taylor for negligent misrepresentation, intentional misrepresentation, failure to disclose, and professional negligence. BRN's negligent misrepresentation claim was dismissed and summary judgment was granted in Taylor's favor on BRN's intentional misrepresentation and failure to disclose claims. A court trial was held on BRN's remaining claim of professional negligence. The District Court determined that Idaho's economic loss rule barred BRN's professional negligence claim for money damages and that the special relationship exception to the economic loss rule did not apply. BRN appeals the District Court's trial decision as well as the District Court's denial of BRN's motion for summary judgment.

II. Statement of Facts.

1. Marshall Chesrown was the Chief Executive Officer and an owner of BRN during development of the Black Rock North project. Tr. Vol. I, p. 71, L. 22 - p. 72, L. 5. Marshall

Chesrown had been involved in several prior developments in Kootenai County, Idaho such as Black Rock, Bellerive, Rivers Edge, the Ridge at Cougar Bay, and the Ridge at Sunup Bay. Tr. Vol. I, p. 80, L. 18 - p. 81, L. 16 and p. 144, L. 24 - p. 145, L. 20.

2. Kyle Capps was BRN's vice president of site development and project manager on the Black Rock North project. Tr. Vol. III, p. 15, L. 23 - p. 17, L. 1. Kyle Capps was involved in several of Marshall Chesrown's Kootenai County, Idaho developments which preceded the Black Rock North project such as the Club at Black Rock, Bellerive, River's Edge, and the Ridge at Sunup Bay. Tr. Vol. III, p. 16, L. 20 - p. 17, L. 1 and p. 88, LL. 8 - 24.

3. Kyle Capps performed a variety of land use planning tasks for BRN on the Black Rock North project which included all aspects of design, permitting, planning and construction of the project. Tr. Vol. III, p. 89, L. 22 - p. 90, L. 1, p. 111, L. 1 - p. 113, L. 5; Supp. Tr. p. 28, L. 12 - p. 34, L. 4, p. 277, L. 17 - p. 278, L. 15¹; Defendant's Exhibits E, F, G, H, J, K, L, M, N, O, P and Q.

4. Taylor and BRN entered into a verbal contract in the summer of 2005 for Taylor to provide civil engineering, utility design, surveying, construction staking, and limited construction inspection services to BRN. Tr. Vol. II, p. 141, LL. 10 - 17; Supp. Tr., p. 181, L. 11 - p. 182, L. 11.

¹ Citations herein to the "Supp. Tr." refer to the Supplemental Transcript on Appeal in which the August 6, 2012 and August 7, 2012 trial proceedings are transcribed.

5. No person associated with BRN asked Taylor to perform land use planning services on the Black Rock North project. Tr. Vol. II, p. 141, L. 18 - p. 142, L. 21; Supp. Tr. p. 209, LL. 2 - 8 and p. 211, LL. 18 - 20.

6. Taylor did not agree to provide land use planning services to BRN on the Black Rock North project. Tr. Vol. II, p. 142, LL. 14 - 17; Supp. Tr. p. 210, LL. 15 - 20.

7. Taylor's detailed budget and work estimate documents provided to BRN include no land use planning tasks and instead detail tasks within Taylor's scope of work which was civil engineering, utility design, surveying, construction staking, and limited construction inspection. Supp. Tr. p. 182, L. 12 - p. 209, L. 8; Defendant's Exhibit A, pp. 1-50.

8. Taylor did not invoice BRN for any land use planning work on the Black Rock North project. Tr. Vol. V, p. 117, L. 19 - p. 124, L. 7; Supp. Tr. p. 210, L. 21 - p. 211, L. 13; Defendant's Exhibit B, pp. 1-550.

9. Frank Ide is a land use planner employed by Taylor. Tr. Vol. V, p. 108, LL. 6 - 18. Frank Ide performed no land use planning work on the Black Rock North project. Tr. Vol. II, p. 147, LL. 16 - 18; Tr. Vol. V, p. 111, LL. 4 - 7, p. 117, L. 19 - p. 135, L. 3, and p. 124, L. 8 - p. 135, L. 3; Defendant's Exhibit B, pp. 423-424, 427-428, 431-437, 439. Frank Ide instead performed platting assistance tasks on the Black Rock North project. Tr. Vol. V, p. 110, L. 18 - p. 111, L. 3.

10. Ron Pace of Taylor did not at any time tell anyone associated with BRN that it was necessary to record a final plat in order to vest the PUD approval on the Black Rock North Project. Tr. Vol. II, p. 149, LL. 8 - 11.

11. BRN's Kyle Capps told Taylor's Ron Pace on several occasions that it was necessary to record a final plat in order to vest the PUD approval on the Black Rock North Project. Tr. Vol. II, p. 149, L. 12 - p. 151, L. 20.

12. A person is not required to satisfy any training, educational, licensing, certification or other requirements to work as a land use planner and no regulatory agencies oversee the activities of land use planners. Tr. Vol. III, p. 154, L. 3 - p. 155, L. 5; Tr. Vol. IV, p. 57, LL. 11 - 18; Tr. Vol. V, p. 117, LL. 10 - 18 and p. 150, LL. 3 - 10; and Supp. Tr. p. 26, L. 25 - p. 27, L. 22.

13. Several individuals and entities offer land use planning services in Kootenai County, Idaho such as Rand Wichman, Scott Brown, Brad Marshall, Lisa Key, Christine Fustin, and Verdis. Tr. Vol. III, p. 129, L. 5 - p. 130, L. 15; Supp. Tr. p. 12, LL. 3 - 11, p. 27, L. 23 - p. 28, L. 11.

14. Ron Pace of Taylor did not hold Taylor out to anyone from BRN as specializing in land use planning. Tr. Vol. III, p. 147, LL. 22 - 25.

15. Taylor's internet website was not part of an effort by Taylor to induce BRN to hire Taylor to perform land use planning services. Tr. Vol. III, p. 148, LL. 5 - 9. Marshall Chesrown of BRN did not view Taylor's internet website prior to hiring Taylor to do work on the Black Rock North project. Tr. Vol. III, p. 144, LL. 13 - 23.

16. Ron Pace made no effort to cause BRN to rely upon Taylor to provide land use planning services. Supp. Tr. p. 210, LL. 11 - 14.

17. No representative of Taylor made any effort to induce BRN to hire Taylor to perform land use planning work. Tr. Vol. III, p. 148, LL. 1 - 5.

18. Taylor opened an office in Coeur d'Alene, Idaho to service the Coeur d'Alene market and not to serve only the Black Rock North project. Tr. Vol. II, p. 152, LL. 13 - 17. Taylor's Coeur d'Alene office was initially staffed by professional engineer Eric Shanley who Taylor hired to perform professional engineering and not land use planning. Tr. Vol. II, p. 151, L. 21 - p. 152, L. 9.

19. Design Workshop, a Colorado land use planning firm, provided a master planned unit development ("PUD") plan to BRN for the Black Rock North project. Tr. Vol. III, p. 90, LL. 2 - 8.

20. BRN retained the law firm of Layman, Layman and Robinson, PLLP ("Layman Law Firm") in 2005 to perform a variety of land use planning services to BRN on the Black Rock North Project which included presenting land use applications to Kootenai County, researching land use ordinances, and communicating with various agencies regarding BRN's land use applications. Tr. Vol. I, p. 101, LL. 13 - 19, p. 145, L. 24 - p. 149, L. 18; Tr. Vol. IV, p. 75, L. 2 - p. 78, L. 11, p. 79, L. 6 - p. 88, L. 21, p. 89, L. 15 - p. 94, L. 2, p. 105, L. 18 - p. 106, L. 19, p. 155, L. 18 - p. 156, L. 10; Defendant's Exhibit TT, pp.1-143; Defendant's Exhibit SSS (PowerPoint Presentation).

21. From the Layman Law Firm, attorney Amie Anderson provided a variety of land use planning services to BRN on the Black Rock North Project which included researching land use ordinances, communicating with various agencies, coordinating with BRN regarding BRN's

land use applications, and attendance at hearings on BRN's land use application. Tr. Vol. IV, p. 75, L. 2 - p. 78, L. 11, p. 79, L. 6 - p. 88, L. 21, p. 89, L. 15 - p. 94, L. 2; Defendant's Exhibit TT, pp. 1-17; Defendant's Exhibit SSS (PowerPoint Presentation).

22. From the Layman Law Firm, attorney John R. Layman provided a variety of land use planning services to BRN on the Black Rock North Project which included communicating with various agencies, coordinating with BRN regarding BRN's land use applications, and attendance at hearings on BRN's land use applications. Tr. Vol. IV, p. 110, LL. 5 - 13, p. 155, L. 18 - p. 156, L. 10; Defendant's Exhibit TT, pp. 1-143.

23. BRN spent the sum of \$150,986.51 for land use related services provided by the Layman Law Firm. Defendant's Exhibit TT, pp. 1-143.

24. Attorney Kathryn McKinley worked with Marshall Chesrown on several Kootenai County, Idaho developments including the Ridge at Sun Up Bay, the Ridge at Cougar Bay, the Estates at Black Rock Bay, Black Rock and Bellerive. Tr. Vol. IV, p. 19, LL. 4 - 11, p. 20, L. 16 - p. 21, L. 1.

25. Attorney Kathryn McKinley assisted BRN on the Black Rock North project and provided a variety of land use planning services which included communicating with the Kootenai County Planning Department and researching and providing advice to BRN regarding BRN's PUD. Tr. Vol. IV, p. 29, L. 13 - p. 31, L. 14, p. 32, L. 6 - p. 35, L. 18, p. 41, L. 4 - p. 42, L. 19 and p. 53, L. 10 - p. 56, L. 9; Defendant's Exhibit Z, pp. 1-71. Marshall Chesrown relied upon Kathryn McKinley to provide advice on the legal status of the entitlements for the Black Rock North project. Tr. Vol. I, p. 103, LL. 2 - 16. Kathryn McKinley's land use planning

services were provided to BRN from 2006 through 2009 and BRN spent the sum of \$12,984.89 for these land use planning services. Defendant's Exhibit Z, pp. 1-71.

26. BRN failed to pay Taylor the total amount of \$153,448.77 for civil engineering services rendered by Taylor on the Black Rock North Project. R. Vol. III, pp. 1623-1627.

ARGUMENT

I. The District Court Properly Denied BRN's Motion for Summary Judgment Because Genuine Issues of Material Fact Remained Concerning Whether the Special Relationship Exception to the Economic Loss Rule Applied.

BRN presented the summary judgment argument that "if Taylor provided the disputed advice concerning what was necessary to vest the PUD" a special land use planning relationship was established between BRN and Taylor and summary judgment was therefore appropriate on Taylor's economic loss rule defense. R. Vol. III, p. 1761 (emphasis added). Taylor presented affidavits establishing that BRN did not ask Taylor to provide land use planning work and Taylor (1) did not agree to provide land use planning services to BRN, (2) did not perform land use planning work for BRN, and (2) did not bill BRN for land use planning work. R. Vol. III, p. 1826, LL. 12-25. Summary judgment was therefore properly denied because genuine issues of material fact remained as to whether a special land use planning relationship existed between BRN and Taylor.

A. Standard of Review.

The standard of review in an appeal from a trial court's summary judgment decision is the same standard employed by the trial court. *Kolln v. Saint Luke's Reg'l Med. Ctr.*, 130 Idaho 323, 327, 940 P.2d 1142, 1146 (1997). "[I]f the pleadings, depositions, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law” summary judgment is proper. I.R.C.P. 56(c). The burden is on the moving party to prove an absence of genuine issues of material fact. *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). In addition, the facts and inferences in the record are viewed in favor of the non-moving party. *Id.* The standard of review applicable to the District Court's denial of BRN's summary judgment motion is therefore whether a genuine issue of material fact remained as to the purported special relationship between BRN and Taylor.

B. The Special Relationship Exception.

The special relationship exception to Idaho's economic loss rule applies when the relationship between the parties is such that it would be equitable to impose a duty to prevent economic loss to another. *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 792, 215 P.3d 505, 512 (2009); *Duffin v. Idaho Crop Improvement Ass'n.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995)). It is an "extremely limited group of cases," however, "where the law of negligence extends its protections to a party's economic interest." *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005) (quoting *Duffin v. Idaho Crop Improvement Ass'n.*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995)). The special relationship exception is therefore an extremely narrow exception which applies only in limited circumstances. *Aardema*, 147 Idaho at 792, 215 P.3d at 512. The two circumstances in which Idaho Supreme Court has found a special relationship are: (1) "where a professional or quasi-professional performs personal services[;]" and (2) "where an entity holds itself out to the public as having

expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function." *Aardema*, 147 Idaho at 792, 215 P.3d at 512 (quoting *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005); see *McAlvain v. Gen. Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976); see also *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. Here, genuine issues of material fact remained as to whether the narrow special relationship exception applied, rendering summary judgment inappropriate.

C. Summary Judgment Was Properly Denied Because Genuine Issues of Material Fact Remained as to Whether Taylor Performed Personal Land Use Planning Services for BRN as a Professional or Quasi-Professional.

BRN argued in its motion for summary judgment that a special relationship existed between Taylor and BRN because Taylor's billing statements to BRN on the Black Rock North Project include the term "Professional Services." R. Vol. IV, p. 2008. The term "Professional Services" in Taylor's billing statements is not dispositive of whether a special relationship existed between Taylor and BRN with respect to Taylor's alleged provision of land use planning services for four reasons, each of which constitute a separate genuine issue of material fact sufficient to preclude summary judgment. First, no agent or person associated with BRN asked Taylor to provide land use planning work for the Black Rock North Project. R. Vol. IV, p. 2076, ¶ 4. Second, Taylor did not agree to provide land use planning services to BRN on the Black Rock North Project. R. Vol. IV, p. 2076, ¶ 2. Third, Taylor did not perform land use planning work for BRN on the Black Rock North Project. R. Vol. IV, p. 2076, ¶ 3; R. Vol. IV, p. 207, ¶ 3. Fourth, Taylor did not bill BRN for land use planning work on the Black Rock North Project. R. Vol. IV, p. 2076 ¶ 3. A special relationship between Taylor and BRN with respect to Taylor's

alleged provision of land use planning services to BRN thus could not have existed where (1) BRN did not ask Taylor to provide land use planning work; (2) Taylor did not agree to provide land use planning services to BRN; (3) Taylor did not perform land use planning work for BRN; and (4) did not bill BRN for land use planning work. Summary judgment was therefore inappropriate on the question of whether a special relationship existed between Taylor and BRN with respect to Taylor's alleged provision of land use planning services to BRN.

D. Summary Judgment Was Properly Denied Because Genuine Issues of Material Fact Remained as to Whether Taylor Held Itself Out and Knowingly Induced Reliance By BRN On Taylor's Performance Of Specialized Land Use Planning Services.

The efforts to induce reliance on a specialized function required to establish the special relationship exception were discussed in *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995) wherein the Idaho Crop Improvement Association was the only entity in Idaho authorized to certify seed potatoes. The Association held itself out to the public as having expertise in seed certification and induced reliance on that expertise. The Federal-State Inspection Service also inspected seed for diseases. A farmer relied on the Association's expertise and bought the certified seed. Later, it was discovered the seed was defective and the farmer suffered economic losses. The Idaho Supreme Court determined that a special relationship existed between the farmer and the certifying Association because the Association had "engaged in a marketing campaign...to induce reliance by purchasers on the fact that seed ha[d] been certified." *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. The Supreme Court explained, however, that the special relationship exception did not apply to the Federal-State

Inspection Service because there was no evidence in the record to "concluded that it ha[d] actively sought to induce reliance on the part of purchasers of certified seed." *Id.*

BRN argued at summary judgment that Taylor held itself out as having expertise in land use planning by virtue of Taylor's internet website and verbal representations Taylor purportedly made to BRN. R. Vol. IV, pp. 2013-2014. BRN, however, made no assertion that it relied upon the content of Taylor's internet website in allegedly hiring Taylor to provide land use planning on the Black Rock North Project. BRN also made no contention that Taylor's internet website was part of an effort by Taylor to knowingly induce reliance by BRN on Taylor's performance of land use planning. By contrast, Taylor established that it did not hold itself out to BRN or any party involved in the Black Rock North project as specializing in land use planning. R. Vol. II, p. 960, ¶ 5. Taylor also established that it made no effort to induce BRN to rely upon Taylor to provide land use planning work, advice or assistance on the Black Rock North project. R. Vol. II, p. 960, ¶ 6. Disputed issues of material fact therefore remained concerning whether Taylor held itself out as providing specialized land use planning services and knowingly sought to induce BRN's reliance on Taylor to provide such land use planning services.

- E. It Would Have Been Inequitable to Make the Summary Judgment Determination That A Special Relationship Existed Given the Remaining Issues of Material Facts And The Considerable Land Use Planning Experience of BRN's Representatives And Legal Counsel.

A special relationship exists where the relationship between the parties is such that it would be equitable to impose a duty to prevent economic loss to another. *Aardema*, 147 Idaho at

792, 215 P.3d at 512 (*citing Duffin*, 126 Idaho at 1008, 895 P.2d at 1201). Here, it would have been inequitable to determine at the summary judgment stage that a special relationship existed between Taylor and BRN with respect to the purported provision of land use planning services to BRN where representatives of BRN and BRN's legal counsel had significant land use planning experience in Kootenai County, Idaho. For example, Marshall Chesrown of BRN had been involved in the Bellerive, River's Edge, Black Rock, Ridge at Cougar Bay, and Ridge at Sunup Bay developments, several of which were PUD projects like the Black Rock North project. R. Vol. IV, p. 1837, ¶ 3 and pp. 1867-1877. Similarly, Kyle Capps, BRN's project manager, had been involved in the Bellerive, River's Edge, and Ridge at Sunup Bay developments. R. Vol. IV, p. 1837, ¶ 4 and pp. 1878-1893. In addition, one of BRN's attorneys, Kathryn McKinley also had significant land use experience in Kootenai County and worked on the Bellerive, Ridge at Cougar Bay, the Ridge at Sunup Bay developments as well as other PUD developments in Kootenai County. R. Vol. IV, p. 1837, ¶ 5 and pp. 1894-1903. The collective experience of BRN's representatives and legal counsel in Kootenai County land use planning matters made it inequitable to make the summary judgment determination that a special relationship existed between Taylor and BRN with respect to Taylor's alleged provision of land use planning to BRN.

II. The District Court Did Not Err In Applying Idaho's Economic Loss Rule To Preclude BRN's Professional Negligence Claim Because Taylor Had No Duty To Prevent BRN's Alleged Economic Loss.

A. Standard of Review

The economic loss rule and the first element of BRN's professional negligence claim involve the question of duty. Whether duty exists is a question of law subject to this Court's free review. *Summers v. Cambridge Joint School Dist.* 432, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004) (citing *Bramwell v. South Rigby Canal Co.*, 136 Idaho 648, 650, 39 P.3d 588, 590 (1991) and *Freeman v. Juker*, 119 Idaho 555, 556-557, 808 P.2d 1300, 1301-1302 (1991)).

B. Idaho's Economic Loss Rule Precludes BRN's Negligence Claim.

Idaho's economic loss rule prohibits recovery of pure economic loss in a negligence action because there is no duty to prevent economic loss to another. *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1002 (2005) (citing *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995)). Here, the parties agree with the District Court's factual finding that BRN seeks to recover pure economic loss under its professional negligence claim. BRN App. Br., p. 14; R. Vol. III, p. 1663. Idaho's economic loss rule therefore applies to bar BRN's professional negligence claim unless the special relationship exception to the economic loss rule applies. As discussed below and as determined by the District Court, the special relationship does not apply because Taylor did not perform personal land use planning services for BRN and because Taylor did not hold itself out and knowingly induce BRN to rely upon Taylor's purported provision of land use planning services.

C. The Special Relationship Exception To The Economic Loss Rule Does Not Apply Because Taylor Did Not Perform Personal Land Use Planning Services As A Professional Or Quasi-Professional And Because Taylor Did Not Hold Itself Out And Knowingly Induce Reliance By BRN On Its Performance Of Land Use Planning Services.

A special relationship exists where the relationship between the parties is such that it would be equitable to impose a duty to prevent economic loss to another. *Aardema v. U.S. Dairy Systems, Inc.*, 147 Idaho 785, 792, 215 P.3d 505, 512 (2009) (citing *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201). It is an "extremely limited group of cases where the law of negligence extends its protections to a party's economic interest." *Blahd*, 141 Idaho at 301, 108 P.3d at 1001 (quoting *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201). The Idaho Court of Appeals has stated that "[t]he 'special relationship' exception generally pertains to claims for personal services provided by professionals, such as physicians, attorneys, architects, engineers, and insurance agents." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 710, 99 P.3d 1092, 1100 (Ct. App. 2004) (citing *Eliopulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct. App. 1992)). The special relationship exception is therefore an extremely narrow exception which applies only in limited circumstances. *Aardema*, 147 Idaho at 792, 215 P.3d at 512. The Idaho Supreme Court has accordingly found a special relationship to exist in only the following two situations: (1) "where a professional or quasi-professional performs personal services[;]" and (2) "where an entity holds itself out to the public as having expertise regarding a specialized function, and by so doing, knowingly induces reliance on its performance of that function." *Aardema*, 147 Idaho at 792, 215 P.3d at 512 (quoting *Blahd*, 141 Idaho at 301, 108 P.3d at 1001; see *McAlvain v. Gen. Ins. Co. of Am.*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976); see also *Duffin*, 126 Idaho at

1008, 895 P.2d at 1201. The question of whether either of these two special relationship situations was present in this matter is examined below.

1. Taylor Did Not Perform Personal Land Use Planning Services for BRN As A Professional Quasi-Professional.

BRN's contention that Taylor's purported provision of land use planning services to BRN triggers application of the special relationship exception is factually inaccurate and legally flawed. With respect to the facts, no one from BRN asked Taylor to do land use planning and Taylor therefore did not agree nor perform any land use planning for BRN. Tr. Vol. II, p. 141, L. 18 - p. 142, L. 21; Supp. Tr. p. 209, LL. 2 - 8, p. 210, LL. 15 - 20 and p. 211, LL. 18 - 20. BRN's Kyle Capps testified that his understanding that land use planning was included within Taylor's scope of work was not based upon any specific statement made by Ron Pace of Taylor and was instead merely Kyle Capps' "impression." Tr. Vol. III, p. 120, LL. 12 - 22. The lack of involvement of Frank Ide, Taylor's land use planner, on any land use planning tasks underscores the fact that Taylor did not perform land use planning for BRN. Tr. Vol. II, p. 147, LL. 16 - 18, Tr. Vol. III, p. 142, L. 22 - p. 143, L. 23; Tr. Vol. V, p. 111, LL. 4 - 7, p. 116, L. 9 - p. 124, L. 7, and p. 124, L. 8 - p. 135, L. 3; Defendant's Exhibit B, pp. 423-424, 427-428, 431-437, 439. Taylor's detailed budget and estimate documents also include no land use planning tasks and instead detail the tasks within Taylor's scope of work which included civil engineering, utility design, boundary surveying, topographic surveying, construction staking and limited construction inspection. Supp. Tr. p. 182, L. 12 - p. 209, L. 8; Defendant's Exhibit A, pp. 1-50. Because Taylor did not do any land use planning, Taylor did not bill BRN for land use planning

work. Tr. Vol. V, p. 117, L. 19 - p. 124, L. 7; Supp. Tr. p. 40, L. 1 - p. 42, L. 17, p. 210, L. 21 - p. 211, L. 13; Defendant's Exhibit B, pp. 1-50. Taylor's billing statements to BRN therefore describe no land use planning tasks and instead detail the civil engineering, utility design, boundary surveying, topographic surveying, construction staking and limited construction inspection tasks performed by Taylor which were within Taylor's scope of work. Tr. Vol. V, p. 117, L. 19 - p. 124, L. 7; Supp. Tr. p. 40, L. 1 - p. 42, L. 17, p. 210, L. 21 - p. 211, L. 13; Defendant's Exhibit B, pp. 1-550. A special relationship between Taylor and BRN with respect to Taylor's alleged provision of land use planning services thus could not have existed where (1) BRN did not ask Taylor to provide land use planning work; (2) Taylor did not agree to perform land use planning services; (3) Taylor did not perform any land use planning work; and (4) Taylor did not bill BRN for land use planning work.

The contention that the special relationship exception applies because of Taylor's alleged provision of land use planning services is legally flawed because such services are well beyond the extremely narrow limits of the special relationship exception as articulated by the Idaho Supreme Court. In *Aardema*, the Idaho Supreme Court stated that a special relationship requires a professional or quasi-professional performing personal services. *Id.* The extremely narrow boundaries of the special relationship exception must be considered in determining whether a professional or quasi-professional has performed personal services for purposes of the special relationship exception. The Idaho Court of Appeals' opinion in *Nelson* is instructive in this regard wherein the Court of Appeals stated that "[t]he 'special relationship' exception generally pertains to claims for personal services provided by professionals, such as physicians, attorneys,

architects, engineers, and insurance agents." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 710, 99 P.3d 1092, 1100 (Ct. App. 2004) (citing *Eliopulos v. Knox*, 123 Idaho 400, 408, 848 P.2d 984, 992 (Ct. App. 1992)). The Court of Appeals decision in *Nelson* makes clear that what is contemplated in this first special relationship situation is a professional or quasi-professional, such as a physician, attorney, architect, engineer or insurance agent, performing personal services within the professional or quasi-professional's profession. What is not reasonably contemplated in this first situation is a professional, such as a physician, performing non-professional services, such as house painting. Accordingly, any land use planning work which BRN argues was performed by Taylor does not fall within this first special relationship situation because land use planners and those individuals offering entitlement advice cannot be placed in the same category as physicians, attorneys, architects, engineers, and insurance agents because land use planners do not have to satisfy any licensing, registration, regulatory, or minimum educational requirements as do physicians, attorneys, architects, engineers, and insurance agents and no regulatory body oversees the activities of land use planners. Tr. Vol. III, p. 154, L. 3 - p. 155, L. 5; Tr. Vol. IV, p. 57, LL. 11 - 18; Tr. Vol. V, p. 117, LL. 10 - 18 and p. 150, LL. 3 - 10; Supp. Tr. p. 26, L. 25 - p. 27, L. 22.

2. Taylor Did Not Hold Itself Out And Knowingly Induce Reliance By BRN On Its Performance Of Land Use Planning Services.

The efforts to induce reliance on a specialized function required by Idaho courts to establish the special relationship exception are detailed above. Here, Taylor presented evidence at trial establishing that it did not hold itself out to BRN or any party involved in the Black Rock

North Project as specializing in land use planning as part of any effort to knowingly induce BRN to rely upon Taylor for the provision of land use planning services. Tr. Vol. III, p. 147, LL. 22 - 25, and p. 148, LL. 1 - 9; Supp. Tr. p. 210, LL. 11 - 14. Marshall Chesrown significantly testified that he did not view Taylor's internet website before hiring Taylor for the Black Rock North project. Tr. Vol. III, p. 144, LL. 13 - 23. Moreover, any contention that Taylor opening an office in Coeur d'Alene staffed with professional engineer Eric Shanley does not reveal an effort to induce BRN to rely upon Taylor's provision of land use planning services because Eric Shanley is professional engineer who does not do land use planning. Tr. Vol. II, p. 151, L. 21 - p. 152, L. 9 and p. 152, LL. 13 - 17. In addition, there were multiple entities and individuals offering land use planning services in Kootenai County, Idaho which renders this matter factually distinguishable from *Duffin* in which the Idaho Crop Improvement Association was the only entity in Idaho authorized to certify seed potatoes. Tr. Vol. III, p. 129, L. 5 - p. 130, L. 15; Supp. Tr. p. 12, LL. 3 - 11 and p. 27, L. 23 - p. 28, L. 11. Taylor therefore did not hold itself out and knowingly induce BRN to rely upon Taylor's provision of specialized land use planning services.

3. It Would Be Inequitable To Determine A Special Relationship Existed Given The Land Use Planning Experience of BRN Representatives And Counsel And Given BRN's Failure To Pay Taylor's Invoices.

A special relationship exists only where the relationship between the parties is such that it would be equitable to impose a duty to prevent economic loss to another. *Aardema*, 147 Idaho at 792, 215 P.3d at 512 (citing *Duffin*, 126 Idaho at 1008, 895 P.2d at 1201. Here, it would be inequitable to find that a special relationship existed between Taylor and BRN with respect to the

alleged provision of land use planning services to BRN where representatives of BRN and BRN's legal counsel had significant land use planning experience in Kootenai County. For example, Marshall Chesrown of BRN had been involved in the development of Black Rock, Bellerive, River's Edge, the Ridge at Sunup Bay, several of which were PUD projects like the Black Rock North project. Tr. Vol. I, p. 80, L. 18 - p. 81, L. 16 and p. 144, L. 24 - p. 145, L. 20. Similarly, Kyle Capps, BRN's vice president of site development and project manager, was involved in prior Kootenai County projects such as Black Rock, Bellerive, River's Edge, and the Ridge at Sunup Bay. Tr. Vol. III, p. 16, L. 20 - p. 17, L. 1 and p. 88, LL. 8 - 24. In addition, one of BRN's attorneys, Kathryn McKinley, performed land use planning related work on the Black Rock North project and had significant land use experience in Kootenai County as a result of her work on the Ridge at Sunup Bay, the Ridge at Cougar Bay, the Estates at Black Rock Bay, Black Rock and Bellerive. Tr. Vol. IV, p. 19, LL. 4 - 11, p. 20, L. 16 - p. 21, L. 1. Marshall Chesrown in fact testified that he relied upon Kathryn McKinley to provide him with advice on the legal status of the entitlements for the Black Rock North project. Tr. Vol. I, p. 103, LL. 2 - 16. BRN also retained attorney John Layman and worked with multiple attorneys at the Layman Law Firm. Tr. Vol. I, p. 101, LL. 13 - 19, p. 145, L. 24 - p. 149, L. 18; Tr. Vol. IV, p. 75, L. 2 - p. 78, L. 11, p. 79, L. 6 - p. 88, L. 21, p. 89, L. 15 - p. 94, L. 2, p. 105, L. 18 - p. 106, L. 19, p. 155, L. 18 - p. 156, L. 10; Defendant's Exhibit TT, pp. 1-143. The billing statements from the Layman Law Firm reveal significant land use planning related work such as research into the Kootenai County PUD and Subdivision Ordinance as well as resolution of issues involving various Kootenai County agencies which commented on BRN's land use applications. The following are

representative billing statement entries by attorneys with the Layman Law Firm evidencing work on land use related topics during only the first six months of the Layman Law Firm's work on the Black Rock North project:

| | |
|----------|---|
| 9/21/05 | ...Perform research re PUD Application and process in Kootenai County |
| 9/23/05 | ...Begin researching Idaho Subdivision Ordinance and Public Hearing Rules to develop timeline of requirements and steps for completing approval of development |
| 9/27/05 | Organize and review elements for elements for PUD process |
| 10/17/05 | Research Kootenai County Ordinances re Black Rock North Rezoning Application |
| 10/18/05 | Continue to research rezoning and other ordinances for Kootenai County |
| 10/19/05 | ...Continue to research Kootenai County Ordinance re granting a zone change request |
| 10/24/05 | Research comprehensive plan on Kootenai County website... |
| 10/26/05 | Review CUP application for gravel pit |
| 10/27/05 | ...Perform legal research re statutes and ordinances referred to in staff report... |
| 11/2/05 | Review Kootenai County staff reports, comprehensive plan... |
| 11/17/05 | Review correspondence re hearing examiner recommendation... |
| 11/22/05 | Review scheduling and timing of hearings |
| 11/23/05 | Review Kootenai County Hearing Examiner's Report for Black Rock North... |
| 11/29/05 | Left detailed message with Mark Mussman re Conditional Use Permit exhibits. Contact Kootenai County Planning Department to confirm dates of Board deliberations for rezoning matter |

11/30/05 Review correspondence re Black Rock Pit IDL Application...

12/5/05 Left detailed message with Mark Mussman re submittals for Black Rock Mine CUP

12/8/05 Telephone conference with Mark Mussman re CUP exhibits

12/21/05 Review hearing examiner report for rezone request

12/30/05 ...Telephone call to Mark Mussman re CUP hearing

1/5/06 Attend meeting with Roger Nelson, Kyle Capps, and Joe Hassell to review CUP presentation and issues. Review rezoning presentation. Attend and present rezoning hearing. Attend CUP hearing

2/8/06 Review Worley Highway District letter and Traffic Impact Analysis...

2/15/06 Telephone conference with Jan Gera of Kootenai County Building and Planning re Kirk-Hughes staff report. Review staff report by Jan Gera

2/16/06 Review and revise strategy for Worley Highway District issue.

2/27/06 Meeting with Roger Nelson, George Schilliinger, Kyle Capps and Ron Pace planning for Worley Highway District meeting. Review materials and prepare presentation for meeting. Attend meeting. Attend Kootenai County Comprehensive Plan Meeting

2/28/06 Review Idaho statutes and regulations re: a highway district's authority to require developers to improve roadways

3/6/06 Review timing for updating agency submissions. Review strategy and correspondence for EMS and Worley Highway District

3/10/06 Review correspondence from Kootenai County EMS re ability to provide emergency services to Black Rock North. Review correspondence from Forest Shores Habitat Specialists, Department of the Army and IDL. Continue to review and revise letter from Kyle Capps to Kootenai County EMS

Defendants Exhibit TT, pp. 1-17. The collective experience of BRN's representatives and its several attorneys performing work on BRN's land use planning applications would make it inequitable to determine that a special relationship also existed between Taylor and BRN with respect to Taylor's alleged provision of land use planning to BRN.

Furthermore, BRN's unclean hands resulting from BRN's failure to pay Taylor the sum of \$153,448.77 should bar the equitable application of the special relationship exception as it would be inequitable to impose a duty upon Taylor to prevent alleged economic loss to BRN where BRN had not paid Taylor for the work Taylor performed on Black Rock North. R. Vol. III, pp. 1623-1627; *see Aardema*, 147 Idaho at 792, 215 P. 3d at 512 (citing *Duffin*, 126 Idaho at 1008, 895 P. 2d at 1201). The Idaho Supreme Court has determined that the doctrine of unclean hands allows a court to deny equitable relief to a litigant on the ground that his conduct has been inequitable, unfair, and dishonest, or fraudulent and deceitful as to the controversy at issue. *Campbell v. Kildew*, 141 Idaho 640, 648, 115 P. 3d 731, 739 (2005). In determining whether the doctrine of unclean hands applies, a court has discretion to evaluate the relative conduct of both parties and to determine whether the conduct of the party seeking equitable remedy should, in light of all the circumstances, preclude the relief. *Sword v. Sweet*, 140 Idaho 242, 251, 92 P. 3d 492, 501 (2004). Considering the equities in this matter, it would be inequitable to apply the special relationship exception to address BRN's alleged economic loss where BRN failed to pay Taylor \$153,448.77. The District Court's decision that the economic loss rule bars BRN's professional negligence claim and that the special relationship exception does not apply should therefore be affirmed.

III. The District Court Did Not Err In Finding No Applicable Statutory Duty Relating To Land Use Planning Services Because Taylor Did Not Agree To Provide Land Use Planning Services And Such Services Are Not Subject To Any Statutory Duty.

The Idaho Supreme Court has stated that "if a cause of action for breach of a duty based on a contractual promise could also be maintained without the contract by virtue of a statutory or common law duty, then the action is founded upon tort, not contract. *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 354, 93 P.3d 680, 685 (2004). Here, there can be no breach of a duty based upon an alleged contractual promise by Taylor to provide land use planning services because, as detailed above, (1) BRN did not ask Taylor to provide land use planning work; (2) Taylor did not agree to perform land use planning services; (3) Taylor did not perform any land use planning work; and (4) Taylor did not bill BRN for land use planning work. Second, there is no statutory or common law duty requiring Taylor to provide land use planning services or to satisfy a particular standard of care in doing so. BRN argues that the statutory source of Taylor's duty is the Idaho Rules of Professional Responsibility for professional engineers and that such rules apply because the statutory definition of engineering includes "planning." BRN App. Br., p. 34. "Planning" in the Idaho statutory definition of professional engineering does not contemplate land use planning. The following is the relevant portion of the Idaho statutory definition of professional engineering:

"Professional engineering" and "practice of professional engineering" mean any service or creative work offered to or performed for the public for any project physically located in this state, such as consultation, investigation, evaluation, planning, designing, teaching upper division engineering design subjects, and responsible charge of observation of construction in connection with any public or private utilities, structures,

buildings, machines, equipment, processes, works or projects or to certify elevation information, wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service requires the application of engineering principles and data

I.C. § 54-1202(10) (emphasis added). No statutory duty is therefore raised in a circumstance involving work, such as land use planning, which does not require application of engineering principles and data. This point is entirely consistent with BRN's engineer expert witness, Joe Hassell, who testified that the alleged representation by Taylor that a final plat had to be recorded to vest the PUD entitlement did not constitute engineering work subject to the Idaho Rules of Professional Responsibility. Supp. Tr., p. 290:13-22. Taylor's engineer expert witness similarly testified that the standard of care applicable to engineers in Idaho applies only when the engineer is performing engineering tasks. Supp. Tr., p. 152:17 - 154:8. The Idaho Rules of Professional Responsibility for engineers therefore do not supply a statutory or common law source of duty where non-engineering work is alleged such as the purported land use planning statement by Taylor that a final plat had to be recorded to vest the PUD approval. BRN has therefore failed to satisfy the duty element of its professional negligence claim. BRN's failure to establish a statutory or common law source of duty affords an alternative basis to affirm the District Court's decision, in addition to the economic loss rule which bars the professional negligence claim.

BRN relies upon *Stephen v. Sallaz & Gatewod, Chtd*, 150 Idaho 521, 248 P.2d 1256 (2011) to apparently contend that services a professional such as an attorney provides which do not require a professional license are subject to one standard of care. BRN supports the

contention by pointing out that the economic loss rule defense was not raised in *Stephen* where the attorney purportedly failed to value property in a divorce, a task not requiring a bar license. BRN's reliance on *Stephen* is misplaced as the district court's attorney malpractice decision and the Idaho Supreme Court's affirmation of that decision was based upon the attorney's failure to "investigate, inform and advise" his client regarding the value of property subject to a divorce where the client's ex-spouse had presented a property value significantly higher than the client's understanding of value. *Stephen*, 150 Idaho at 525-527, 248 P.2d at 1260-1262. The lack of an economic loss rule defense in *Stephen* does not support BRN's contention that a singular standard of care should apply in this matter to both engineering and non-engineering work such as land use planning.

IV. The District Court Did Not Fail To Enter Adequate Findings Of Fact And Conclusions of Law.

A court sitting as the trier of fact is charged with the duty of preparing findings of fact and conclusions of law in support of the decision reached. I.R.C.P. 52(a); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 225, 646 P.2d 988, 996 (1982). The purpose for this requirement is to afford the appellate court a clear understanding of the basis of the trial court's decision, so that it might be determined whether the trial court applied the proper law to the appropriate facts in reaching its ultimate judgment in the case. *Perry Plumbing Co. v. Schuler*, 96 Idaho 494, 497, 531 P.2d 584, 585 (1975). The absence of findings and conclusions may be disregarded by the appellate court only where the record is clear, and yields an obvious answer to the relevant question. *Id.*

BRN argues the district court failed to articulate its findings of fact and conclusions of law regarding the breach, causation and damage elements of BRN's professional negligence claim. BRN App. Br., p. 37. Findings and conclusions on the breach, causation and damage elements of BRN's professional negligence claim are, however, unnecessary for resolution of BRN's professional negligence claim because "[t]he economic loss rule limits the actor's duty so that there is no cause of action in negligence." *Brian and Christie, Inc. v. Leishman Electric, Inc.*, 150 Idaho 22, 28, 244 P.3d 166, 172 (2010). The District Court's findings and conclusions on the economic loss rule and on the special relationship exception to the economic loss rule are thus dispositive of the professional negligence claim, rendering further analysis of breach, causation and damage unnecessary. The dispositive nature of the economic loss rule is illustrated in several Idaho Supreme Court decisions wherein summary judgment on a claimant's negligence cause of action was upheld based upon dispositive application of the economic loss rule without review of any findings or conclusions on negligence elements of breach, causation and damages. *See, e.g. Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300-302, 108 P.3d 996, 1000-1002 (2005); *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 710-712, 99 P.3d 1092, 1100-1102 (2004); *Ramerth v. Hart*, 133 Idaho 194, 196-197, 983 P.2d 848, 850-851 (1999); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 40-41, 740 P.2d 1022, 1025-1026 (1987).

V. Remand Is Unnecessary Because The Economic Loss Rule Precludes BRN's Professional Negligence Claim, The Special Relationship Exception Does Not Apply, And BRN Has Not Established The Duty Element of Its Professional Negligence Claim.

As detailed above, remand is unnecessary because the district court properly determined the economic loss rule precludes BRN's professional negligence claim and the special

relationship exception does not apply. Remand is also unnecessary because BRN has not established statutory or common law source of duty to satisfy this element of its professional negligence claim as detailed above. The district court's decision should therefore be affirmed.

ADDITIONAL ISSUES PRESENTED ON APPEAL

I. Attorney Fees And Costs On Appeal Should Be Awarded To Taylor Under Idaho Appellate Rule 41, Idaho Code § 12-120(3), And Idaho Rule Of Civil Procedure 54(e)(1).

Taylor respectfully submits that in the event Taylor prevails on this appeal, an award of attorney fees and costs to Taylor is appropriate pursuant to Idaho Code § 12-120(3), I.R.C.P. 54(e)(1), and Idaho Appellate Rule 41. Idaho Appellate Rule 41(a) provides that "[a]ny party seeking attorney's fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5)" Taylor therefore asserts its request for an award of attorney fees and costs on appeal in this Respondent's Brief as an additional issue on appeal. Taylor is entitled to an award of attorney's fees and costs on appeal under Idaho Code § 12-120(3) as Taylor's provision of professional engineering services to BRN constitutes a commercial transaction. Taylor is further entitled to an award of fees and costs on appeal as the prevailing party pursuant to I.R.C.P. 54(e)(1).


CONCLUSION

Based upon the foregoing, Taylor respectfully requests this Court affirm the District Court's denial of BRN's motion for summary judgment because genuine issues of material fact remained as to whether the special relationship exception to the economic loss rule applied. Taylor further requests the District Court's trial decision be affirmed because Idaho's economic loss rule bars BRN's professional negligence claim and the special relationship exception does

not apply. In addition, BRN has not established the duty element of its professional negligence claim. As a prevailing party on this appeal, Taylor requests this Court award Taylor its reasonable attorney fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 14th day of March, 2014.

WITHERSPOON KELLEY


M. Gregory Embrey, ISB No. 6045
The Spokesman Review Building
608 Northwest Boulevard, Suite 300
Coeur d'Alene, Idaho 83814-2146
*Attorneys for Respondent Taylor
Engineering, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2014, I caused two true and correct copies of the foregoing RESPONDENT'S BRIEF to be served by the method indicated below, and addressed to the following:

Nikalous O. Armitage
Bradley C. Crockett
Layman Law Firm, PLLP
601 S. Division Street
Spokane, WA 99202

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|-------------------------------------|---|
| <input type="checkbox"/> | U.S. Mail |
| <input checked="" type="checkbox"/> | Hand Delivered |
| <input type="checkbox"/> | Overnight Mail |
| <input type="checkbox"/> | Facsimile: (509) 624-2902 |
| <input checked="" type="checkbox"/> | Email: NArmitage@laymanfirm.com BCrockett@laymanfirm.com |



Nichole Cansino