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

SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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. Restatement of the Case

A. Legal Issues

Engineers are held in high esteem in our communities and are retained to provide specialized services. Accordingly, when individuals and businesses hire engineers, they understand and expect a higher level of care. Some tasks that an engineer performs can only be completed by an engineer while there are other tasks that could be performed by other individuals, but are nonetheless tasks regularly provided by engineers as a related service. Typically, the client does not distinguish between work the engineer provides that requires a "stamp," and those related services that the engineer routinely performs but that could actually be completed by an individual without an engineering license. This case demonstrates the need to clarify the scope and application of the Special Relationship Exception to the Economic Loss Rule as it applies to services that are inextricably intertwined with services that only an engineer can perform. Specifically, the questions raised in this case are:

1. **Whether under Idaho's Special Relationship Exception to the Economic Loss Rule, a civil engineer has a duty to exercise reasonable care in advising a client about how to protect entitlements while winding down a development project;**
2. **If so, did the Trial Court err in failing to clearly articulate its findings of fact and conclusions of law for the remaining elements of breach, causation and damages in this matter; and**

3. **Is remand necessary where the evidence at trial clearly establishes that Taylor's advice was inaccurate and caused BRN to unnecessarily incur over seven million dollars in damages.**

B. Clarification of the Facts

BRN Development, Inc. (hereinafter "BRN") disputes the presentation of facts by Taylor Engineering, Inc. ("Taylor") in Respondent's Brief. Specifically, Taylor offers several conclusory statements that are not supported by the record. BRN offers the following evidence to highlight the discrepancies in some of the key areas.

1. **Taylor provided personal services for the Project for three years, totaling 1.8 million dollars.**

In Respondent's Brief Taylor attempted to downplay its role on the Project. It is clear that Taylor was heavily involved in the Project from the very outset of the development until the bitter end. Taylor was retained at the outset and over the course of the project provided a wide variety of services. In addition to traditional engineering services, Taylor provided "overall management of civil aspects" of the Project. (Plaintiff Exhibit 4, 6). Also, Taylor attended weekly meetings with BRN representatives, and met with consultants and government agencies. (*Id.*). Taylor prepared agendas before the meetings (Tr. Vol. 2, p. 83 ln. 20-p. 84 ln. 2), and prepared minutes during the meetings (Tr. Vol. 2, p. 83 ln. 2-19). Taylor coordinated with Kootenai County to add the preliminary plat to 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). Representatives of BRN spoke with Taylor regularly throughout the life of the project.

(Tr. Vol. 3, p. 103 ln. 6-8). As the Trial Court found, it was clear that Taylor took on planning-related duties. (R. Vol. 7, p. 3788).

Taylor's level of involvement is highlighted by the extensive paperwork it generated related to the case but also by its level of compensation. In all Taylor was paid over $4.1 million in fees for services on various Black Rock projects (Tr. Vol. 1, p. 90 ln. 10-13), including $1.8 million for the Black Rock North Project alone. (Tr. Vol. 1, p. 90, ln. 14-p. 92 ln. 8; Plaintiff Exhibit 8). Taylor's expertise and involvement in the Project are perhaps best exemplified through the words of counsel it retained at the time of the project, William Hyslop: **"Taylor Engineering has a great deal of expertise and knowledge with the Black Rock North project....It is their considered opinion that it would be would be a very costly mistake ...to allow the May 29, 2009 deadline to expire...the final plat recording on May 29, 2009 vest the rights of the PUD and preliminary plat for all the property."** (Plaintiff Ex. 2). Mr. Hyslop goes on to reiterate the inaccurate advice that Taylor provided, that if BRN failed to record a plat **"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."** (*Id.*).

2. Taylor was compensated for all work by the time of trial.

Despite the undisputed evidence about the amount of compensation Taylor received, Taylor claims that "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." (Respondent's Brief pg. 7, para 26). These fees are part of BRN's claimed damages that were incurred after the critical date in January 2008 when BRN asked Taylor to advise it

as to the options for minimizing costs while protecting the PUD entitlement. (Plaintiff Ex. 86, 92; Tr. Vol. 3, p. 83 ln. 3-p. 86 ln. 4). It is BRN's contention that the entire $153,448.77 that Taylor billed after that point in January, were unnecessary expenses incurred due to Taylor's negligence.

Furthermore, Respondent's Brief fails to mention that prior to trial in this matter, BRN and Taylor entered into a Stipulation and Memorandum of Settlement. (R. Vol. 6 pp. 3563-3569). In that Stipulation, the parties identified Taylor's claim for compensation of the $153,448.77 as "Claim 1," and other claims of negligence that BRN alleged against Taylor as "Claim 2." The parties agreed that "Claim 1 and Claim 2 are hereby abandoned, that Claim 1 and Claim 2 are requested to be dismissed with prejudice." (R. Vol 6 p. 3566, para 3). Furthermore, the Stipulation states that "neither party will offer testimony at trial for the purpose of establishing Claims 1 and 2." (R. Vol. 6 p. 3567, para 5). BRN did not present evidence at trial related to its other negligence claims against Taylor and yet, in Respondent's Brief Taylor argues that BRN failed to pay the $153,448.77. The record demonstrates that BRN compensated Taylor for the $153,448.77 it claims it was owed by releasing Taylor from other claims of negligence.

3. Taylor held itself out as providing land use planning/entitlement services.

The heart of BRN's claim is that in January of 2008, Taylor gave inaccurate advice about what was necessary to vest the PUD. During the course of the trial various individuals described the service of advising a developer on obtaining and protecting entitlements, such as the PUD, as land use planning, land planning or land use entitlement services. Despite Taylor's persistent denial that it those services on this

project, the trial record demonstrates that Taylor held itself out as providing land planning services and actually provided such services to BRN on this Project.

It is undisputed that Taylor intentionally held itself out as having specialized skill in all aspects of project development, including land planning. This is apparent through a review of its website which boasts that Taylor "provide(s) a full range of planning, landscape architecture, inspection and construction management services." (Plaintiff Exhibit 1, third page in sequence). Mark Aronson, one of the principal engineers at Taylor Engineering testified that Taylor holds itself out as providing land planning services, including advising on project entitlements. (Tr. Vol. 5, p. 154 ln. 10-p. 155 ln. 16). Taylor's land planning specialist, Frank Ide, also admitted that Taylor holds itself out as a providing land planning services to the public and that they hold themselves out as experts in the field. (Tr. Vol. 5, p 135 ln. 7-21). Despite these admissions and the public representations, Taylor claims the "website was not part of an effort by Taylor to induce BRN to hire Taylor to perform land use planning services."(Respondent's Brief p. 4 para 15).

Taylor also repeatedly sent correspondence to BRN on its letterhead, including the over 250 invoices that it sent to BRN with each correspondence representing "Taylor Engineering, Inc. Civil Design and Land Planning." (See e.g. Defendant Exhibit A-2, A-4, A-10, A-27, and Defendant's Exhibit B 1-550). Taylor also submitted documents to the governmental entities on behalf of BRN proclaiming its expertise in land planning. (See e.g. Plaintiff's Exhibit 29 and 30). Yet, Taylor claims that "Ron Pace of Taylor did not hold Taylor out to anyone from BRN as specializing in land use planning." (Respondent's Brief p. 4, para 14).

In the same way a review of Taylor's billing statements reflect that Taylor included entries under "Professional Services" for time for both "SR LAND PLANNER," and "PRINCIPAL/PROJ. MGR." (See e.g. select Taylor Invoices at Plaintiff's Exhibit 50, Bates labeled "BRN INVOICES" pp. 239, 242, 243, 245-248, 250, 253, 256-257, 260, 266, 268, 270, 272). Taylor's engineering expert, Darius Ruen, testified that an engineer has a responsibility to communicate with its client about the services he is providing and a duty to not bill for services that he is not performing. (Tr. Supp. Vol. p 175 ln. 1-13). Darius Ruen further testified that he reviewed the bills and found that Taylor billed for land planning work on this project. *Id.* Despite these facts, Taylor asserts that it "did not invoice BRN for any land use planning work on the Black Rock North project." (Respondent's Brief p. 3 para 8).

Based on the testimony and evidence presented at trial, the court concluded that Taylor actually provided land entitlement/planning services to BRN on the Project. The Trial Court stated: "Taylor, however, did provide planning services on the project as reflected in the limited billings as well as the conduct of Ron Pace and his involvement in those areas that inherently create a connection with engineering and land-use planning." (R. Vol. 7, p. 3788).

4. Taylor's advice concerning land use entitlements was inextricably intertwined with the civil engineering services it provided.

In light of the evidence that Taylor provided land use entitlement advice, Taylor seeks to then segregate out the land use entitlement advice from the engineering services that it provided. This Court should resist Taylor's argument that this case turns on whether or not Taylor provided "land use planning" services because the factual predicate

of BRN's claims is that Taylor was negligent in advising BRN what its options were for minimizing its costs while protecting the PUD entitlement. At trial, it was apparent that, based on BRN's years of experience with Taylor and other engineers, BRN did not perceive a distinction between the land use entitlement and engineering services that Taylor was providing. This was demonstrated by the testimony of Kyle Capps who understood the entitlement work on the project was just a component of the engineering task for the project. (Tr. Supp. Vol., p. 262 ln. 12- p.263 ln. 5).

This is a common experience as attested to by Taylor's own engineer Mr. Aronson, who admitted that engineering services and planning services are interrelated (Tr. Vol. 5, p. 159 ln. 4-7), and clients regularly ask the engineer for entitlement advice. (Tr. Vol. 5, p. 165 ln. 14-20). Furthermore, Taylor's land planner, Frank Ide, testified that clients don't normally call up and say "I'd like to speak to a land planner," instead, they will say that they want to develop their land. (Tr. Vol. 5, p. 139 ln. 22-140 ln. 5). Mr. Ide further admitted that this contact is often made through the engineer, which is why it makes sense to have civil engineering and land planning together, because they "go hand in hand on many projects." (Tr. Vol. 5, p. 140 ln. 6-12).

More to the point, BRN's expert, Joe Hassell testified that the question presented to Ron Pace of Taylor Engineering in January of 2008 about what options BRN had for minimizing costs while protecting the PUD entitlement, implicated land planning questions that were interwoven into the engineering principles that had to be applied to the question. (Tr. Vol. Supp. p. 285 ln. 13-p. 286 ln. 24). Mr. Hassell further offered uncontroverted testimony that, based on BRN's e-mail about what would be discussed at the January meeting, the standard of care of an engineer required Taylor to determine

whether or not the PUD was vested. (Tr. Vol. 5, p. 36 ln 21- p. 38 ln. 3). Mr. Hassell clearly testified that Taylor's duty to understand the status of the entitlements arose whether or not anyone from BRN asked the specific question about whether the PUD was vested. (Tr. Vol. 5, p. 39, ln. 9-19).

5. Land use entitlement services require specialized knowledge and expertise.

Contrary to Taylor's claim that land planning services are not professional or quasi professional in nature, Taylor's own witnesses admitted that land use entitlement/planning advice requires specialized knowledge and expertise. Mark Aronson, a principal engineer with Taylor, admitted that a person must have experience and expertise to provide planning services. (Tr. Vol. 5, p. 159 24-p. 160 ln. 3). Frank Ide, Taylor's own in-house land planner, testified that he considers himself to be a professional and furthermore, that he considers land planning services to be professional services. (Tr. Vol. 5, p. 149 ln. 16-20). Mr. Ide further confirmed that land planning requires specialized knowledge and skill. (Tr. Vol. 5, p. 138 ln. 5-11).

Likewise, Taylor's expert land planner, Sandra Young, testified that to be a private land use planner requires special skill and a certain amount of expertise. (Tr. Vol. Supp. p. 54 ln. 17-22). It is undisputed that providing land planning services requires specialized knowledge and expertise.

6. Taylor was the only one asked to provide advice as to the critical question posed in January 2008: what is the minimum amount that must be spent to protect the PUD?

BRN's claims arise out of advice Taylor gave in January 2008 when BRN sought information as to the minimum amount BRN could spend while protecting the approval of the PUD entitlement. While Taylor attempts to cloud the issue by alleging that other professionals were available to advise BRN as to the status of the PUD, the record is clear that Taylor was present when this critical question was asked, and Taylor's presence was requested specifically for the purpose of obtaining an answer.

Marshall Chesrown testified that he relied on the expertise of Ron Pace of Taylor in forming the understanding that BRN had to record a plat in order to vest the PUD. (Tr. Vol. 1, p. 142 ln. 2-6). It is undisputed that Ron Pace was the only professional with entitlement expertise present at this critical meeting in January of 2008. (Tr. Vol 1, p. 142 ln. 7-10). Rather than focusing on this critical time period and the critical question presented, Taylor attempts to deflect blame to attorneys who did work for BRN in 2005 and 2006. Taylor presents no evidence, that any third person or entity was asked the critical question when the decision was made to mothball the project in late 2007 and early 2008. Indeed, it is undisputed that there was no attorney, land planner or architect present during the January 2008 meeting when the issue was addressed. (*Id.*) It is also undisputed that Taylor never advised BRN that they should seek advice from a third party about what was necessary to vest the PUD. (Tr. Vol. 1, p. 142 ln. 23-p. 143 ln. 9). Nor did Taylor ever advise BRN that it was not providing land planning services and/or advice about land entitlements. (Tr. Vol. 2 p. 45 ln. 6-16). Based on the testimony at trial, the Trial Court specifically found that as a result of 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).

It clear is that BRN specifically requested Mr. Pace to advise BRN on how it could spend the least amount possible in order to move forward and protect the BRN Project PUD and that, at the conclusion of the meeting, it was his recommendation that the only realistic alternative they had was to move forward and record the Panhandle Plat (also referred to as the "56 Lot Plat") so as to vest the PUD. (Tr. Vol. 3, p. 52 ln. 21-p. 55 ln. 1). 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 January 2008 meeting. (Tr. Vol. 5, p 36 ln. 16- p. 38 ln. 20).

Mr. Hassell further testified that in the context of such a meeting, the engineer would be required to know the costs, timing issues, safety issues, and ordinance requirements, all of which involve engineering principles or data. (Tr. Supp. Vol., p 285 ln. 17- p. 287 ln. 17). As Mr. Hassell confirmed, if an engineer is assisting a developer through the entitlement process, the engineering standard of care applies, (Tr. Vol. 5, p. 23 ln. 6-9) as do the Idaho Rules of Professional Responsibility. (Tr. Vol. 5, p. 41 ln. 2-25). Moreover, as confirmed by Mr. Hassell at trial, and Mr. Ruen, Taylor's Engineering expert in deposition, the engineering standard of care applies to all work being overseen by the engineer. (Tr. Vol. 5, p. 15 ln. 4-25; Tr. Supp. Vol., p. 167 ln. 3 -168 ln. 16).

7. It is foreseeable that negligent entitlement advice may cause substantial harm to a developer.

Finally, the Trial Court found that "the evidence establishes that 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 in securing

entitlements." (R. Vol. 7, p. 3791). Taylor admitted this fact through Mark Aronson, a principal engineer who testified that entitlement issues are an important part of a real estate development project and that whether a developer obtains the entitlements it needs can have a large impact on the success of a project. (Tr. Vol. 5, p. 159 ln. 17- 23).

IV. Argument

The general rule in Idaho is that defendants are not responsible for purely economic losses caused by their negligence. This general rule was created in large part to prevent individuals from bearing unforeseeable liability. However, the Special Relationship Exception was developed in Idaho to allow recovery for purely economic damages against service providers that offer the type of personal services that people rely on due to the specialized nature of the field. This exception has long been recognized for those well-established professions, such as doctors, lawyers and engineers. However, the Court has extended the application to other professionals and quasi professionals that provide personal services including accountants, architects, surveyors, title companies and even notaries. The Court has also expanded the exception to cover situations where a service provider holds itself out as an expert and induces others to rely on its expertise, such as potato seed certifiers.

This case presents the opportunity to clarify the scope of the exception as it applies to a recognized profession, engineering, when the professional provides related services. The undisputed evidence demonstrates that BRN presented Taylor Engineering with the question of how BRN could minimize its expenses while protecting the PUD entitlement. Expert testimony establishes that in addressing this question, Taylor had a duty to understand the status of the entitlements and advise BRN accordingly. Taylor

breached this duty by improperly leaving BRN with the impression that a plat had to be recorded in order to vest the PUD. It is fair and equitable to hold Taylor responsible for the economic damages it caused through the negligent advice that it provided to BRN. This is consistent with the existing case law as well as the policy behind those decisions.

A. History and current application of the Special Relationship Exception

The Economic Loss Rule was established to prevent purely economic losses in tort cases when such loss might "impose too heavy and unpredictable a burden" on defendants. *Just's v. Arrington Constr. Co.*, 99 Idaho 462, 468, 583 P.2d 997, 1003 (June 30, 1978). Stated another way, it is unfair to hold a defendant responsible for damages that are not foreseeable. However, the Court recognized the need for exceptions to this general rule, particularly involving negligence by certain individuals whom society holds to a higher standard of care based on the person's profession or when an individual has knowingly induced reliance. *Duffin v. Idaho Crop Improvement Ass'n*, 126 Idaho 1002, 1007-8, 895 P.2d 1195, 1201 (1995). In *Duffin,* the court emphasized the relationship between the parties was such that it would be equitable to impose such a duty. *Id.*

Over the years, Idaho has specifically applied the Special Relationship Exception to professionals, and furthermore Idaho has consistently applied tort standards of liability to a broad range of professionals including **accountants,** (*see Mack Fin. Corp. v. Smith*, 111 Idaho 8, 720 P.2d 191 (1986)); **architects** (*see Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 644 P.2d 341 (1982)); **attorneys** (*see Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); **surveyors** (*see Williams v. Blakely*, 114 Idaho 323, 757 P.2d 186 (1988)); **notary publics** (*Osborn v. Ahrens*, 116 Idaho 14, 773 P.2d 282 (1989)); and **title companies** (Merrill v. Fremont Abstract Co., 39 Idaho 238, 227 P. 34

(1924)). These professionals were held liable despite the contractual source of the relationship between the parties and the fact that the losses were purely economic.

Later, in *McAlvain v. General Insurance Co. of America*, the Court specifically applied the Special Relationship Exception to an insurance agent who had insured a business at the client's request but failed to properly value the business. 97 Idaho 777, 554 P.2d 955 (1976). When the business was lost in a fire, the client suffered an economic loss in the way of inadequate insurance coverage. *Id.* The court focused on the fact that a person in the business of selling insurance holds himself out to the public as being experienced and knowledgeable in a complicated and specialized field. The Court reasoned that ordinarily an insured will look to his agent, relying on his expertise in placing the insurance problem in the agent's hand. Clearly, the business owner in *McAlvain* could have sought valuation services from another professional. Likewise, since the owner had recently purchased the business, he had obviously placed a value on the business in the amount that he was willing to pay and was in a position to develop his own opinion as to the amount of coverage that was appropriate. The Court did not use these facts to prevent recovery.

In the same way, developers ordinarily rely on civil engineers that provide advice about land use entitlements. The developers look to these firms for their expertise in planning and executing the development of the property. Taylor consistently held itself out as an expert in this field and BRN relied on that expertise. Based on Taylor's specialized knowledge and expertise, the relationship between BRN and Taylor was extensive and long-lasting.

Based on Taylor's extensive involvement in the project and BRN's reliance on Taylor for guidance throughout, it was foreseeable to Taylor that if it provided negligent advice as to what work had to be done, then BRN would suffer economic losses by way of unnecessary expenditures. In this case, BRN asked Taylor to identify what work and expenditures would be required to protect the PUD entitlement. Engineers typically provide budget estimates for work and frequently provide advice about protecting entitlements. The risk of harm from inaccurate advice was clearly foreseeable to Taylor.

Accordingly, in reviewing the history of the law, this is precisely the type of case where the Special Relationship Exception warrants holding Taylor responsible for the full economic impact that its negligent advice had on BRN. Stated another way, Taylor had a duty to 1) ensure the advice it provided about the entitlements was accurate, and 2) evaluate BRN's options in the face of its desire to minimize costs while protecting the PUD entitlement, and 3) speak up if BRN pursued a path inapposite to that goal.

B. Analogous situations

While this Court has not directly addressed the situation of a civil engineer that provides advice about land use entitlements, the Court has reviewed other cases where a professional or quasi-professional provides personal services that are related to the profession but are not services that only that profession can provide. These prior cases offer a better comparison to the current matter than the hypothetical analogies proposed by Respondent's brief. For example, in *McAlvain*, the negligent service that the insurance agent rendered was the valuation of the business. *Supra*, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976). The claim was not that the agent had failed to obtain any insurance but rather that the amount of insurance was inadequate. *Id.* Valuation of a business is not a

service that only an insurance agent can provide. There is no license or special education requirement to perform a business valuation. Yet, the Court in *McAlvain* held the agent liable for this service. *Id.*

Likewise, in *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, the Court allowed a claim of negligence against an architect for construction management services that it provided. 103 Idaho 19, 644 P.2d 341 (1982). The construction supervision did not require the architect's "seal," and these services could have been provided by someone who only had construction experience. This is very similar to the private land use planners who have developed expertise based on experience.

Despite this clear history of holding professionals liable for negligence in related services, Taylor argues that the Special Relationship Exception does not apply. Specifically, Taylor argues that applying the Special Relationship Exception in this case would be like holding a physician liable for a negligent paint job. (Respondent's Brief p. 17). This is a false analogy that fails on multiple levels. First, as BRN's expert Joe Hassell pointed out, the question that BRN presented to Taylor: "What are the options for minimizing costs while protecting the PUD?" was in fact an engineering question that required the application of engineering principles. However, even if it was a purely "land use planning" question, it is the type of related service that engineers regularly provide and one that clients do not understand to be separate from an engineer's other services. Nobody goes to a doctor's office expecting to have their house painted, but land developer's do ask civil engineers for advice on protecting entitlements. Furthermore, painting a house is not the type of personal service that land planning is. As admitted by Taylor's owners and experts, land planning and entitlement advice requires not only

expertise but also extensive communication with the developer to understand objectives and then provide guidance throughout the process. Finally, the analogy fails as to the foreseeability of the harm. Again, Taylor's owners and experts agree that the economic harm from improper land planning advice is foreseeable, whereas the economic harm caused by an improperly performed paint job is not reasonably foreseeable to a doctor. In the context of this case, the potential harm was foreseeable to Taylor because of its specialized knowledge in the field and ongoing and close relationship to the developer and the project.

Also inaccurate is the trial court's statement that BRN's interpretation of professional or quasi professional would result in a hot dog vendor qualifying for the exception. Again, these situations are readily distinguishable. A land planner requires specialized knowledge and experience to offer services. Those services are very personal in nature, that is, they are provided in an ongoing relationship with the client, not in a single transaction such as the purchase of a hot dog. *See* Dale D. Goble, *All Along the Watchtower: Economic Loss in Tort*, 34 Idaho L. Rev. 226, 246-47 (1997). Furthermore, while there is not a licensing requirement for land planners, these services have historically been provided by lawyers and engineers, two professions that do require education and licensing. It is only recently that former government employees with experience in land development have begun offering these services, but they still require the type of professional skill and expertise contemplated under the Special Relationship Exception. This would bring land planners into the realm of "quasi-professional," in that they provide services historically provided by professionals, but do not have the same professional requirements.

Applying the rule proposed by Taylor and apparently applied by the Trial Court would create absurd results. For example, under Taylor's argument and the Trial Court's decision, an attorney would not be responsible for an improper legal description in a real estate transaction because those services could be offered by a nonprofessional. Likewise, an architect would not be liable for negligence in construction supervision because those services can be provided by a "non-professional" with simple construction experience.

Holding an engineering firm responsible for the negligent advice it provided in related services is consistent with prior case law and in line with the policy rationale behind the Special Relationship Exception. That is, individuals who offer specialized knowledge and experience are responsible for the foreseeable economic harm they cause their clients.

C. Duty

A corollary of the application of the Special Relationship Exception is the determination of Taylor's duty. Contrary to Taylor's argument, reversing the Trial Court's decision does not require this Court to determine that one providing entitlement services is a professional or quasi professional for the purposes of the Special Relationship Exception. Instead, the relevant question is whether a civil engineer that provides related planning/entitlement services in conjunction with engineering services falls within the Special Relationship Exception.

Although the Trial Court concluded that "Taylor left BRN with the impression that the additional work was needed to vest the PUD," the Trial Court contradicts its own finding by concluding that "it has not been established that Taylor specifically advised BRN that a final plat had to be recorded to vest the PUD entitlement." This latter

conclusion by the Trial Court is not supported by substantial evidence as Mr. Capps and Mr. Chesrown both testified that Mr. Pace of Taylor was the direct source of this advice.

Taylor relies on the fact that Mr. Capps and Mr. Chesrown could not pinpoint the specific conversation, other than the January 2008 meeting, when Mr. Pace made the statement that recording the plat was necessary to vest the PUD. However, this is easily understood from the fact that Mr. Capps spoke with Mr. Pace nearly every day during the course of this three year project. Regardless, both Mr. Capps and Mr. Chesrown confirmed that at the January 2008 meeting, they asked Taylor how they could minimize the costs but protect the entitlements. Mr. Pace had a duty to advise them of BRN's options at that time, which he failed to do.

Furthermore, the same specific advice that Taylor provided to BRN through the course of the project was reiterated through Taylor's counsel in the letters and e-mails that he sent when Taylor was attempting to collect additional payments.

Regardless of whether Taylor specifically advised BRN that it had to record a final plat to vest the PUD, omission in the face of a duty is also negligence. Joe Hassell offered the uncontroverted opinion that the engineering standard of care required Taylor to spot the issue at the critical meeting where BRN asked for options on minimizing costs. Taylor had a duty to understand the status of the entitlements at that point and to provide advice based on that status. In light of Taylor's distinctive expertise and intimate knowledge of the project, Taylor was uniquely suited to answer this question. This is precisely the type of case where the Special Relationship Exception upholds a professional's duty to exercise reasonable care.

D. Unclean hands and equity

Determining that Taylor is a professional that provided extensive personal services on the project and had a duty to be accurate in the advice it provided, supports the conclusion that it is equitable to hold Taylor liable for the full economic losses it caused. However, in an attempt to avoid liability, Taylor claims that BRN has unclean hands because it did not pay Taylor for the last $153,448.77 of services that Taylor billed on the project. This argument fails for several reasons. First, the $153,448.77 in fees was all for services provided after Taylor gave the negligent advice about what was necessary to vest the PUD. Had Taylor provided accurate advice, BRN would never have incurred those expenses or the other seven million dollars in construction costs. Notably, Taylor fails to cite any law in its brief where nonpayment for disputed services is considered "unclean hands" that prevent a party from bringing a claim. If anything, Taylor is the one with unclean hands in this regard.

Furthermore, Taylor was compensated for this work prior to trial. BRN had other negligence claims against Taylor for professional malpractice. In exchange for a release of those claims, Taylor agreed to dismiss its claim for the nonpayment of $153,448.77. Despite that clear agreement settling these claims, Taylor now argues that it would be inequitable to hold Taylor responsible for its negligence because it was not paid. Taylor has been compensated and there is nothing inequitable about holding an engineering firm responsible for the foreseeable damages it caused through the negligent advice that it gave.

Next, Taylor's attempts to confuse the facts by claiming that other professionals, such as attorneys and other land planners, were available to provide advice to BRN if

they had asked. Notably, Taylor did not plead third party fault as an affirmative defense in this case. Regardless, the undisputed fact remains that Taylor was the only professional present at the critical meeting when BRN asked for advice on its options to minimize costs while protecting entitlements. If attorney Kathryn McKinley had been present at this meeting, then Taylor would have an argument that the blame should at least be shared between these professionals. However, the testimony at trial demonstrated that Kathryn McKinley was not brought in until after BRN had incurred the seven million dollars in unnecessary costs. At that point, Taylor had stopped working on the project and advised BRN that if it didn't pay Taylor's bill that BRN would lose not only the PUD, but the rezone approval that BRN had obtained with Taylor's assistance. Again, Taylor cites no evidence that BRN consulted with any third person or entity about the critical question posed at the January 2008 meeting. Rather, BRN relied on Taylor's advice that the 56 lot plat had to be completed with associated expenditures of more than $7 million. This is precisely the type of case where it is equitable to hold a professional responsible for its negligence when it causes a client substantial economic harm.

E. Inadequate Findings of Fact and Conclusions of Law

BRN agrees that if the Court upholds the Trial Court's decision that the Special Relationship Exception does not apply to a professional engineering firm that provided over $1.8 million worth of services on a project, then there is no need to address the remaining issues of breach, causation and damages. However, if the Court determines that the Special Relationship Exception applies to Taylor and therefore Taylor had a duty to understand the status of the entitlements and to provide accurate advice, then the Court's findings of fact and conclusions of law do not adequately address these

remaining issues. Normally this would require a remand to the Trial Court for further findings; 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. *See Donndelinger v. Donndelinger*, 107 Idaho 431, 437, 690 P.2d 366, 372 (Idaho Ct. App. 1984).

A review of the record demonstrates that if the Special Relationship Exception applies to Taylor, then it is responsible for the $7 million in damages that it caused when it inaccurately advised BRN that it had to record a plat to vest the PUD.

V. Conclusion

Taylor Engineering is a professional civil engineering and land planning firm that holds itself out as capable of assisting developers in projects from start to finish, including not only the engineering aspects, but the project management and land planning/entitlement components. Taylor was involved in this project from the outset developing the strategy for the project and helping BRN pursue that strategy throughout. In all, Taylor was paid over $1.8 million for the services it provided on this Project alone. As Taylor's counsel indicated in an e-mail to American Bank in May of 2009 **"Taylor Engineering has a great deal of expertise and knowledge with the Black Rock North project....It is their considered opinion that it would be would be a very costly mistake ...to allow the May 29, 2009 deadline to expire...the final plat recording on May 29, 2009 vest the rights of the PUD and preliminary plat for all the property."** (Plaintiff Ex. 12, BRD 024772). This is the advice that Taylor gave to BRN throughout the project and most importantly what Taylor advised at the critical juncture in January 2008 when BRN was looking to minimize its costs but protect the entitlements.

Unfortunately, this advice was wrong and as a direct result BRN spent over $7 million in unnecessary construction costs. BRN requests that this court remand the case to the Trial Court with directions to enter verdict in favor of BRN in the amount of $7,112,046.64 plus an award of attorneys' fees and costs pursuant to IC §§ 12-120 and 12-121, Rule 54 of the Idaho Rules of Civil Procedure, and Idaho Appellate Rule 41.

DATED this 3rd day of April, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of April, 2014, I caused a true and correct copy of Brief of Appellant BRN Development to be mailed and faxed to the following person:

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