6-7-2019

Brunobuilt, Inc. v. Strata, Inc. Appellant's Brief Dckt. 46638

IN THE SUPREME COURT OF THE STATE OF IDAHO

BRUNOBUILT, INC.,
an Idaho corporation,

Plaintiff-Appellant,

vs.

STRATA, INC., an Idaho corporation**; CHRIS M. COMSTOCK, H. ROBERT HOWARD,** and **MICHAEL WOODWORTH**, individuals,

Defendants-Respondents.

SUPREME COURT NO. 46638-2018

APPELLANT'S OPENING BRIEF

Appeal From The District Court Of The Fourth Judicial District
In And For The County Of Ada
District Court Case No. CV01-17-17395

Honorable Steven Hippler, District Judge, Presiding

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STATEMENT OF THE CASE

A. Nature of the Case.

This appeal involves a claim of professional negligence brought by Appellant BrunoBuilt, Inc. ("BrunoBuilt") against Respondents Strata, Inc., Chris M. Comstock, H. Robert Howard and Michael Woodworth (collectively "Strata"). BrunoBuilt alleges that when rendering engineering services for the Terra Nativa Subdivision ("Subdivision"), Strata negligently failed to, *inter alia*, identify a pre-existing landslide and negligently failed to recommend construction of infrastructure that would stabilize and prevent further landslides in the Subdivision. Upon re-activation of the pre-existing landslide, a home BrunoBuilt was contracted to build ("Dwelling") was damaged as was the Lot on which the Dwelling was located. This appeal arises from the district court's dismissal of BrunoBuilt's claim based on (1) an erroneous finding that the parties entered into an enforceable settlement agreement and (2) an erroneous application of the "economic loss rule."

B. Course of Proceedings.

BrunoBuilt filed a Complaint and Demand for Jury Trial on December 19, 2016, designated Case No. CV01-16-22915 ("*Kleinfelder*"), naming as defendants Strata and several other persons and entities. R. 56-64. Because BrunoBuilt and Strata were engaged in settlement discussions, BrunoBuilt did not attempt to obtain service on Strata. On August 8, 2017, Strata filed Strata Defendants' Motion To Dismiss For Failure To Effectuate Timely Service Of Process. Over BrunoBuilt's objection, the district court issued an Order Dismissing Strata Defendants Without Prejudice on September 20, 2017. R. 24, ¶ 25; R. 118-120.

BrunoBuilt then filed, on September 19, 2017, a Complaint and Demand for Jury Trial against Strata, designated Case No. CV01-17-17395 ("*Strata*"). R. 9-14. On July 11, 2018, the

district court issued a Memorandum Decision and Order on Motion to Enforce Settlement Agreement or, Alternatively, for Summary Judgment and Motion for Relief Under 56(d) ("*Initial Order*"). R. 316-345. With its *Initial Order*, the district court granted Strata's Motion to Enforce Settlement, or Alternatively, Motion for Summary Judgment based on erroneous conclusions that (1) BrunoBuilt and Strata had entered into a binding and enforceable settlement agreement and (2) BrunoBuilt's claim was barred by the economic loss rule.

The finding that an enforceable settlement agreement was entered was based upon the district court's determination that an agreement was initially reached and then subsequently modified. R. 329-333.

The findings and conclusions that BrunoBuilt's claims were barred by the economic loss rule were partially set forth in the district court's *Initial Order*. The district court incorporated its findings and conclusions set forth in a order granting summary judgment to several defendants in *Kleinfelder* ("*Kleinfelder Order*"). R. 341. The district court determined that BrunoBuilt's claim was not based on rendition of negligent services, but upon a defective product. R. 1593-1595. The district court then held that because the Dwelling had not been damaged by the defective property, *i.e.* Lot, the economic loss rule barred BrunoBuilt's claims if, as agreed upon the parties, the Lot was the subject of the transaction. R. 1596. The district court continued on to hold that once the Dwelling was constructed on the Lot, the Dwelling became an integral part of the Lot and therefore the Dwelling was also the subject of the transaction. R. 1596-1597.

On August 21, 2018, the district court signed an Order, ("*Settlement Order*") which was not filed or issued to the parties until September 4, 2018, instructing the parties to, among other things, "exchange mutual releases as contemplated in the settlement agreement." R. 346-347. The

Settlement Order stated that "when these exchanges are complete [the] Court will enter judgment dismissing the claims with prejudice unless either party files an objection to the entry of judgment in the intervening period." The parties did not exchange mutual releases. In response to the *Settlement Order*, BrunoBuilt filed its Objection to Entry of Judgment on September 18, 2018. Aug. p. 4-7.

Also on September 18, 2018, BrunoBuilt filed Plaintiff's Motion for Reconsideration of the *Initial Order*. R. 348-725. Strata filed Defendants' Opposition to Plaintiff's Motion to Reconsider on October 2, 2018. R. 726-760. The district court issued a Memorandum Decision and Order on Motion to Reconsider ("Reconsideration Order"), on November 6, 2018, affirming *in part* the Initial Order. R. 761-772.

On December 18, 2018, BrunoBuilt filed Plaintiff-Appellant's Notice of Appeal. R. 773-826. The appeal was conditionally dismissed on January 8, 2019, for lack of a final judgment. The district court entered a final Judgment, dismissing with prejudice BrunoBuilt's claims against Strata, on January 10, 2019. R. 845. Accordingly, on January 16, 2019, the conditional dismissal was withdrawn. BrunoBuilt filed Plaintiff-Appellant's Amended Notice of Appeal, on January 28, 2019. R. 846-901.

C. Statement of Facts.

1. Strata's involvement in the development of the Terra Nativa Subdivision.

In approximately 1992, owners of land located in the Boise Foothills began the process of developing a multiple phase subdivision that ultimately would become known as the Terra Nativa Subdivision ("Subdivision"). *See* R. 353, ¶ 8 and R. 424-453. Strata was integral in the engineering of the Subdivision. This involvement began in 1992 when Strata's predecessor,

Howard Consultants, Inc., prepared a "Preliminary Soil & Geologic Evaluation" report for Subdivision. R. 19, ¶ 7; R. 227-251; R. 424-453. Over the next two decades, Strata issued multiple supplemental reports and proposals related to the Subdivision, including the following:

- "Geologic and Soil Engineering Evaluation" report related to infrastructure improvements, February 20, 1998. R. 252-292; R. 463-536.
- "Supplement to Geologic and Soil Engineering Evaluation," August 20, 1998. R. 537-540.
- "Geotechnical Services and Testing During Construction" report, January 6, 1999. R. 546-551.
- "Geotechnical Engineering Discussion and Recommendations," October 6, 1999. R. 554-557.
- "Letter Report" regarding Geotechnical Engineering Assessment for Subdivision No. 2, April 9, 2002. R. 567-570.
- "Response" to 3rd Party Review of Geotechnical Engineering Evaluation Report, March 4, 2004. R. 574-605.
- "Verif[i]cation of Grading and Construction Recommendations," August 12, 2005. R. 606.

See also, R. 19-21, ¶¶ 6-11; R. 126-128, ¶¶ 3-14. In 2012, Strata prepared a series of "Soil & Foundation Evaluation" reports for individual residential building lots in the Subdivision. R. 618-639, 641-647. One of these reports was sent to BrunoBuilt, though not in connection with the building lot at issue here.[1] R. 629-633. Strata performed additional site-specific geotechnical inspection services as recently as 2015. R. 128, ¶ 14. None of these reports identified the conditions in the Subdivision that ultimately rendered the land unsuitable for residential construction, particularly evidence of a historic landslide and likelihood of further earth movement.

[1] The Strata report sent to BrunoBuilt related to Lot 23, Block 6, Nativa Terra Subdivision No. 4. R. 629.

2. BrunoBuilt Acquired A Lot In The Subdivision And Subsequently Constructed A Dwelling Thereon.

BrunoBuilt entered into a construction contract to build a home for William and Amy Dempsey in the Subdivision located on Lot 16, Block 6, Terra Nativa Subdivision No. 4, Ada County, Idaho, also known as 238 N. Alto Via Court, Boise, Idaho ("Lot"). R. 19, ¶ 1 & R. 1555, ¶ 4. The Dempseys quitclaimed the vacant Lot to BrunoBuilt on July 10, 2015, as a deposit on the construction contract. *Id*., ¶¶ 4-5; R. 19, ¶ 2. BrunoBuilt was to construct a dwelling ("Dwelling") on the Lot, upon completion of which BrunoBuilt was to reconvey the Lot and the Dwelling to the Dempseys in exchange for the contract price. R. 19, ¶ 2. BrunoBuilt constructed the Dwelling pursuant to its contract with the Dempseys. *Id*., ¶ 3.

3. The Lot And Dwelling Were Damaged By Earth Movement.

Earth movement became evident in the Terra Nativa Subdivision in or around February 2016, when the majority of the construction of the Dwelling had been completed. *Id*., ¶ 4; R. 183, ¶ 5; R. 1556, ¶ 7. Sometime between April and June 2016, cracking became visible in the Lot in front of the Dwelling. R. 183, ¶ 5; R. 1556, ¶ 7. As a result of the earth movement, utility, highway district, and fire department services were all terminated, and the City of Boise withheld its certificate of occupancy. R. 1556, ¶ 9. Portions of the utility lines were physically damaged and/or severed by the earth movement. *Id*.

The earth movement eventually caused physical damage to the Dwelling itself. Civil and Geotechnical Engineer and Geophysicist Patrick Shires inspected the property on July 16 and 17, 2018. R. 664, ¶ 24. During his inspection, Shires heard a loud pop emanating from the residence consistent with a wood-framed structure being compromised by gradual slope movement. *Id*., ¶ 24(a). The driveway exhibited a long arcuate crack parallel to the landslide headscarp, upper

garage door trim was pulled apart in multiple locations, and the stucco exterior had suffered significant cracking and separation consistent with wracking from slope movement. R. 665, ¶¶ 24(b)-(d). Shires further identified two vertical foundation cracks adjacent to the landslide headscarp. *Id*., ¶ 24(e). Inside the Dwelling, Shires observed nail heads that had popped out of the drywall, another condition consistent with wracking due to slope movement. R. 666, ¶ 24(g). Shires concluded that "the landslide was and is a substantial factor in causing these damages" and that "the house should be removed from the lot and the lot abandoned." *Id*., ¶¶ 24, 27. As a result of the earth movement, the Dempseys refused to tender the purchase price, so BrunoBuilt retains title to the Lot and the Dwelling. R. 22, ¶ 15.

4. BrunoBuilt Sues Strata For Professional Negligence And The Parties Engage In Settlement Negotiations.

BrunoBuilt commenced this action against Strata, asserting a claim for professional negligence. Specifically, BrunoBuilt alleged that Strata failed, among other things, to identify a pre-existing landslide on the site of the Terra Nativa Subdivision, to review and consider available studies and reports that identified hazardous slope and soil conditions, and to recommend construction processes that would stabilize the Subdivision and prevent further earth movement. R. 12, ¶ 19. BrunoBuilt's alleged damages include increased cost of construction, increased interest costs, lost market value of the Property and the improvements thereon, and other expenses that would not have been incurred but for the earth movement. *Id*., ¶ 20.

Prior to constructing of the Dwelling, BrunoBuilt constructed a residence for Paul and Becky Rowan in the Terra Nativa Subdivision. R. 34; R. 67; R. 185, ¶ 11. The Rowans' residence was also damaged by earth movement. R. 68; R. 185, ¶ 11. The damage to the Rowans' residence

was the subject of a separate lawsuit titled *Matthew and Stacy Sericati, et al. v. Strata, Inc., et al.*, Ada County Case No. CV-OC-2016-9068 ("*Sericati*"). R. 21, ¶ 13; R. 34.

In October 2016, the Rowans sent to BrunoBuilt a formal notice of claim pursuant to the Idaho Notice and Opportunity to Repair Act ("NORA"), I.C. §6-2501, *et. seq.*, in connection with the earth movement. R. 67-68. BrunoBuilt's attorney, Wyatt Johnson, tendered the NORA notice to Strata's attorney, Kevin Scanlan, demanding that Strata defend and indemnify BrunoBuilt with respect to the Rowans' claim. R. 65-66. Scanlan rejected Johnson's demand. R. 69-70. At the time BrunoBuilt filed its complaint in *Kleinfelder* on December 19, 2016, Scanlan was negotiating a settlement in *Sericati*. R. 51, ¶¶ 6-7.

Scanlan and Johnson met in person on January 3, 2017 to discuss BrunoBuilt's claims in *Kleinfelder*. R. 51, ¶8.; R. 172, ¶ 3(a). At that meeting, Scanlan requested that Johnson dismiss *Kleinfelder* in its entirety, with prejudice. R. 51, ¶ 8. In exchange for the dismissal, Scanlan proposed to obtain from the Rowans, as part of the settlement in *Sericati*, a written and executed covenant not to sue BrunoBuilt and to provide the covenant not to sue to BrunoBuilt. R. 28; R. 51, ¶ 8; R. 172, ¶ 3(a). Scanlan made it clear that "the sole consideration Strata was offering in exchange for BrunoBuilt's agreement to dismiss its pending claims against Strata in [*Kleinfelder*] was Strata's agreement to secure a covenant from the Rowans that they would not file suit against BrunoBuilt for the landslide damages caused to their home[.]" R. 173-174, ¶ 3(d). Johnson "understood this was an attractive option to Strata because if Strata could secure a covenant from the Rowans that they would not sue BrunoBuilt, Strata would then be assured that it would not have to defend against any future contribution claim from BrunoBuilt…." R. 173, ¶ 3(c). Thus, the "consideration" offered by Strata was at least arguably more beneficial to Strata than to

BrunoBuilt. Nevertheless, Johnson agreed to discuss the proposal with BrunoBuilt. R. 174, ¶ 3(e). It is undisputed that no settlement agreement had been reached as of January 3, 2017.

On January 5, 2017, Scanlan and Johnson spoke by telephone. R. 174, ¶ 3(f). Johnson advised that BrunoBuilt "was still thinking about Strata's offer." *Id*. Scanlan then proposed new settlement terms:

1. BrunoBuilt would dismiss all claims against all defendants in *Kleinfelder* in exchange for Strata obtaining a release of the Rowans' claims against BrunoBuilt, or

2. BrunoBuilt would dismiss only its claims against Strata and provide Strata with a *Pierringer* release[2] in exchange for Strata obtaining a release of the Rowans' claims against BrunoBuilt.

R. 174, ¶ 3(g). These offers of settlement were to automatically expire unless accepted by January 9, 2017. *Id*., ¶ 3(f). Johnson advised Scanlan that he would discuss this second proposal with BrunoBuilt. *Id*., ¶ 3(g).

Scanlan and Johnson spoke again on January 9, 2017. R. 174-175, ¶ 3(h). Johnson rejected Strata's offer and made a counteroffer that included two additional terms:

1. BrunoBuilt would dismiss all claims against Strata in *Kleinfelder*; and

2. Strata would obtain a release from the Rowans that:

    a. provided BrunoBuilt a direct and independent right to enforce a signed covenant obtained from the Rowans in *Sericati*; and

    b. expressly stated that BrunoBuilt was an intended third-party beneficiary of the Rowans' covenant not to sue.

Id. These proposed terms were material to BrunoBuilt. Johnson advised Strata that BrunoBuilt would not dismiss its claims unless it had "something in writing signed by the Rowans." *Id*.

[2] See *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963).

Scanlan and Johnson spoke again on January 10, 2017, discussing whether "any settlement agreement reached between the parties would contain a *Pierringer* release from BrunoBuilt to Strata." R. 175-176, ¶ 3(j). At least three material terms remained unresolved at that point: (1) whether to include a *Pierringer* provision; (2) whether the covenant not to sue to be executed by the Rowans would expressly identify BrunoBuilt as an intended third-party beneficiary; and (3) whether the executed covenant not to sue would be provided to BrunoBuilt. Johnson reasonably expected that Scanlan would provide a written covenant not to sue, but it is now clear that Scanlan had no intention of doing so.

According to Scanlan, "the parties in the *Sericati* action executed a Confidential Release of All Claims & Indemnity Agreement" on January 12, 2017. R. 52, ¶ 9.[3] Scanlan further asserts that the *Sericati* release "included a covenant by Paul and Becky Rowan not to institute suit against BrunoBuilt as a result of its construction of their home…." *Id*. Notably, Scanlan did not inform Johnson that the *Sericati* settlement agreement had been signed. R. 178, ¶3(s).

On January 20, 2017, Johnson appears to have advised Scanlan that BrunoBuilt had agreed to the *Pierringer* provision. R. 176, ¶ 3(l).

On February 9, 2017, Scanlan sent a draft release agreement to Johnson. R. 176, ¶ 3(m). The draft release agreement *did not* reflect an agreement on all material terms. Most notably, while the draft agreement contained the aforementioned "passing reference to a covenant not to sue," the draft release agreement did not expressly identify BrunoBuilt as a third-party beneficiary. R. 176-

[3] Strata and the *Sericati* plaintiffs actually reached a settlement agreement on or about January 5, 2017. R. 756.

177, ¶¶ 3(m)-3(n). Moreover, the draft agreement included confidentiality provisions that the parties had never discussed, much less agreed to. *Id*., ¶ 3(p).

On March 1, 2017, BrunoBuilt rejected Strata's draft settlement agreement. Johnson informed Scanlan that it was rejected because (1) Strata had not provided a covenant not to sue signed by the Rowans and (2) the proposed release included a confidentiality clause to which BrunoBuilt had not agreed. R. 176-177, ¶ 3(n)-3(q).

Scanlan sent a letter to Johnson, dated March 3, 2017, in which he provided the following excerpt from the release purportedly signed by the Rowans in *Sericati*:

> C. Strata, Inc., through its employees, including, but not limited to, Michael Woodworth, provided site-specific geotechnical engineering services for the homes located at 289 N. Alto Via Ct., Boise, Idaho, owned by Matthew and Stacy Sericati; 241 N. Alto Via Ct., Boise, Idaho, owned by Paul and Becky Rowan; 186 N. Alto Via Ct., Boise, Idaho, owned by Ross Lamm and Leslie Preston; and 205 N. Alto Via Ct., Boise, Idaho, owned by Eric and Tiffany Rossman in the 2012 and 2013 timeframe pursuant to contracts with homebuilders and engineers, including, but not limited to, Brunobuilt, Inc.; Roth Construction, Inc.; Shadow Mountain Homes, Inc.; Northern Construction; and Briggs Engineering, Inc. (hereinafter referred to as "Builders").
>
> . . .
>
> 1.5 Plaintiffs further agree that they shall not institute any suit or other legal actions, or otherwise assert any claims, against Builders based upon or arising out of the events as set forth in the Recitals above and shall withdraw or dismiss any claims, demands, or causes of action previously asserted against Builders, including, but not limited to, the October 6, 2016, demand made by Paul and Becky Rowan to Robert Bruno and Brunobuilt, Inc.

R. 88. Johnson's receipt of this letter was the first time he had seen the terms of the covenant not to sue. R. 178, ¶ 3(s).

On March 9, 2017, Johnson again made a counteroffer on behalf of BrunoBuilt, which included additional terms. Johnson informed Scanlan on March 9, 2017 that BrunoBuilt was willing to resolve its claims against Strata on the following terms:

1. BrunoBuilt would:
    a. dismiss all claims against Strata in *Kleinfelder*; and
    b. provide a *Pierringer* release to Strata; and
2. Strata would:
    a. provide the signed covenant not to sue from the Rowans; and
    b. mutually release any claims Strata may have against BrunoBuilt.

R. 178, ¶ 3(t). Scanlan rejected this offer on March 14, 2017, as Strata would not agree to a mutual release of claims. *Id*., ¶ 3(u). On the same day, Johnson advised Scanlan that BrunoBuilt was no longer interested in providing Strata with a *Pierringer* release. *Id*., ¶ 3(v); R. 93.

Scanlan's associate, Kevin Griffiths, sent Johnson another proposed settlement agreement on May 10, 2017, proposing settlement on the following terms:

1. BrunoBuilt would:
    a. dismiss all claims against Strata in *Kleinfelder*; and
    b. provide a *Pierringer* release to Strata; and
2. Strata:
    a. had secured a covenant not to sue from the plaintiffs in *Sericati*; and
    b. would release any claims Strata may have against BrunoBuilt.

R. 179, ¶ 3(w); R. 53, ¶ 14; R. 93-106. Griffiths asked Johnson to "let us know whether this meets with your approval so that we can circulate it to our clients for signature." *Id*. This settlement proposal did not meet with Johnson's approval because it included the *Pierringer* release that

Johnson had previously withdrawn from consideration. R. 179, ¶ 3(w). It also contained the confidentiality provision to which Johnson had previously objected and said nothing about Strata providing the covenant not to sue to BrunoBuilt.

On June 20, 2017, Griffiths sent a follow-up e-mail as to "the status of the Release agreement in this matter," asking "[h]as your client agreed to sign?" R. 53, ¶ 15; R. 107-108. This is an odd inquiry – "has your client agreed to sign?" – if Griffiths and Scanlan truly believed that the parties had reached a settlement agreement. Griffiths sent a similar e-mail on July 31, 2017, asking "[w]here do we stand on getting Mr. Bruno's signature on the release agreement?" R. 53, ¶ 17; R. 109-110.

On August 2, 2017, attorney Christine M. Salmi, on behalf of BrunoBuilt, sent a letter to Scanlan explaining in considerable detail that no settlement agreement had been achieved between the Strata Defendants and BrunoBuilt. R. 53, ¶ 53; R. 111-117.

II.
ISSUES PRESENTED ON APPEAL

1. Did the district court err in holding that the parties reached an enforceable settlement agreement?
2. Did the trial court err in holding that the "economic loss rule" bars BrunoBuilt's professional negligence claim against Strata?

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III.
ARGUMENT

A. The Parties Did Not Reach An Enforceable Settlement Agreement.

1. Proceedings.

The district court concluded that the parties reached a settlement agreement on January 9, 2017 or, alternatively, on January 20, 2017. R. 329-331. BrunoBuilt asserts that this finding was in error.

2. Standard of Review.

"In an appeal from an order of summary judgment, this Court's standard of review is 'the same as the standard used by the trial court in ruling on a motion for summary judgment.'" *Budget Truck Sales, LLC v. Tilley*, 163 Idaho 841, 846, 419 P.3d 1139, 1144 (2018) (citation omitted). "This Court freely reviews the entire record that was before the district court to determine whether either side was entitled to judgment as a matter of law and whether inferences drawn by the district court are reasonably supported by the record." *Borley*, 149 Idaho at 177, 233 P.3d at 108.

3. Argument.

A settlement agreement is a contract that "stands on the same footing as any other contract and is governed by the same rules that are applicable to contracts generally." *Suitts v. First Sec. Bank, N.A.*, 125 Idaho 27, 32-33, 867 P.2d 260, 265-266 (Ct. App. 1993). The general rules for the formation of a binding contract have been summarized as follows:

> In order to constitute a contract, there must be a distinct understanding common to both parties. The minds of the parties must meet as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract. An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or

> not. An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offerer in order to constitute a binding contract.

C.H. Leavell & Co. v. Grafe & Assocs., 90 Idaho 502, 511-512, 424 P.2d 873, 877 (1966), quoting *Phelps v. Good*, 15 Idaho 76, 96 P. 216 (1908) (citations omitted). "Generally the determination of the existence of a sufficient meeting of the minds to form a contract is a question of fact to be determined by the trier of facts." *Fannie Mae v. Hafer*, 158 Idaho 694, 702, 351 P.3d 622, 630 (2015).

"Whether the parties to an oral agreement or stipulation become bound prior to the drafting and execution of a contemplated formal writing is largely a question of intent." *Vanderford Co. v. Knudson*, 150 Idaho 664, 672, 249 P.3d 857, 865 (2011). "The best evidence to support the parties' intent to contract is to look at the words of counsel and their clients." *Seward v. Musick Auction, LLC*, 164 Idaho 149, 426 P.3d 1249, 1259 (2018). "An oral agreement is valid if the written draft is viewed by the parties as a mere record; the oral agreement is not valid if the parties view the written draft as a consummation of the negotiation." *Thompson v. Pike*, 122 Idaho 690, 696, 838 P.2d 293, 299 (1992).

"A motion for the enforcement of a settlement agreement is treated as a motion for summary judgment when no evidentiary hearing has been conducted." *Vanderford*, 150 Idaho at 671, 249 P.3d at 864. In deciding a motion to enforce a settlement agreement, "the trial court as the trier of fact is entitled to arrive at *the most probable* inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting

inferences." *Borley v. Smith*, 149 Idaho 171, 176-177, 233 P.2d 102, 107-108 (2010) (italics added). This Court has cautioned, however, that "[t]here is a fine line between drawing the most probable inferences and weighing the evidence…." *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 416, 283 P.3d 728, 733 (2012). "Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party." *Losee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009).

(a) <u>The District Court Erred By Finding That An Enforceable Settlement Agreement Was Formed On January 9, 2017 Despite The Existence Of Disputed Facts</u>.

As set forth at length above, counsel for BrunoBuilt and Strata had multiple communications between January 3, 2017 and January 9, 2017 regarding resolving BrunoBuilt's claims against Strata. At summary judgment, these communications must be viewed as an exchange of counteroffers, not an unconditional acceptance. The district court nonetheless concluded that the parties had entered into an enforceable settlement agreement at that point. R. 330. The district court erred in two respects.

i. As Of January 9, 2017, Strata Had Not Agreed To BrunoBuilt Being Expressly Identified As A Third-Party Beneficiary Of The Covenant Not To Sue To Be Obtained From The Rowans.

No enforceable agreement occurred because there was no "meeting of the minds" as to whether BrunoBuilt would be expressly identified as a third-party beneficiary of the covenant not to sue or whether BrunoBuilt would be afforded a direct and independent right to enforce the covenant. Citing *Suitts*, the district court seems to have concluded that expressly identifying BrunoBuilt in the covenant not to sue would be superfluous, since BrunoBuilt could presumably enforce the covenant with or without such identification. But *Suitts* is readily distinguishable. In

that case, it was undisputed that the parties entered into an oral settlement agreement. When it came time to reduce the agreement to writing, however, a dispute arose when the defendants proposed to specify that the settlement agreement "constitute[s] a full and final settlement of all causes of action alleged in the Plaintiffs' complaint." Suitts objected to this language. The court, enforcing the settlement agreement, held that the parties' agreement constituted a full and final settlement, and had the same legal effect, with or without the defendants' proposed language.

Here, on January 9, 2017, Johnson demanded that BrunoBuilt be expressly identified in the covenant not to sue *as an essential term of any settlement agreement*. Johnson did not, as did the defendants in *Suitts*, attempt to add an additional term to an *existing* settlement agreement. The district court concluded that the covenant not to sue would be enforceable without regard to whether BrunoBuilt was expressly identified. R. 330. But the fact that the covenant not to sue might be enforceable without expressly identifying BrunoBuilt ignores the settlement terms that were proposed by BrunoBuilt. The critical fact is that BrunoBuilt's counteroffer *demanded* such a provision as a condition of settlement, and Scanlan did not accede to Johnson's demand, at least not on or before January 9, 2017.

As noted above, "[a]n acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer. An acceptance which varies from the terms of the offer is a rejection of the offer…." *C.H. Leavell*, 90 Idaho at 511, 96 P. at 877. Here, Johnson's purported January 9, 2017 "acceptance" of Scanlan's offer was not identical with the offer and unconditional. To the contrary, Johnson introduced at least one new term that Scanlan did not immediately agree to – i.e., that BrunoBuilt be expressly identified in the covenant not to sue. This new term constituted a rejection of Scanlan's offer.

ii. As Of January 9, 2017, Strata Had Not Agreed To Provide The Executed Covenant Not To Sue To BrunoBuilt.

As of January 9, 2017, Strata had not agreed to provide a covenant not to sue, signed by the Rowans, to BrunoBuilt. On the contrary, Strata subsequently admitted that it did not even have the authority to provide the covenant not to sue to BrunoBuilt: "the *Sericati* release agreement in which the Rowan covenant not to sue is contained is subject to a comprehensive confidentiality clause, requiring specific consent from all parties to the release agreement before it could be disclosed to BrunoBuilt." R. 737. Strata acknowledges that only the "language of that covenant" – not the covenant itself – "was ultimately provided to BrunoBuilt in the course of negotiation of the settlement agreement in this case," but not until March 3, 2017. R. 35; R. 178, ¶ 3(s).

Where the primary consideration for an offer is a written covenant, surely the offeree can reasonably assume that it will receive the written covenant. Indeed, Johnson described Scanlan's proposed settlement as a dismissal of *Kleinfelder* "in exchange for BrunoBuilt *receiving* a covenant" not to sue from the Rowans. R. 172, ¶ 3(a). Scanlan similarly described the purported settlement agreement as a release of Strata "in exchange for the covenant not to sue." R. 51, ¶ 8. Thus, Strata's assertion that it "gave adequate and full consideration for the exchange when, as agreed, it secured the Rowans' covenant not to sue BrunoBuilt" is incorrect. R. 35. Securing the covenant not to sue was only part of the promised consideration. BrunoBuilt has never seen the covenant not to sue purportedly executed by the Rowans. R. 177, ¶ 3(o); R. 186, ¶ 14.

It is not reasonable to conclude that Johnson agreed to dismiss *Kleinfelder* in exchange for a covenant not to sue that would not be provided to BrunoBuilt and the existence and terms of which BrunoBuilt had no way of proving. Much more reasonable is Johnson's "intent and

understanding that, in consideration for any promise BrunoBuilt made to release its pending claims against Strata, Strata would provide BrunoBuilt with a written covenant not to sue signed by the Rowans that expressly stated that BrunoBuilt was an intended third-party beneficiary of the covenant." R. 176, ¶ 3(k).

Accordingly, no enforceable settlement agreement was reached on January 9, 2017. Strata admitted as much in its Statement of Undisputed Facts: "The parties continued to negotiate between the terms of the terms of [sic] BrunoBuilt's release of claims between January 10, 2017, and February 9, 2017…." R. 23, ¶ 17.

(b) The District Court Erred By Finding That An Enforceable Settlement Agreement Was Formed On January 20, 2017 Despite The Existence Of Disputed Facts.

Scanlan and Johnson spoke on January 10, 2017 to discuss whether "any settlement agreement reached between the parties would contain a *Pierringer* release from BrunoBuilt to Strata." R. 175-176, ¶ 3(j). On that date, agreement had yet to be made on at three material terms remained unresolved at that point: (1) whether to include a *Pierringer* provision; (2) whether the covenant not to sue to be executed by the Rowans would expressly identify BrunoBuilt as an intended third-party beneficiary; and (3) whether the executed covenant not to sue would be provided to BrunoBuilt. Johnson reasonably expected that Scanlan would provide a written covenant not to sue, but it is now clear that Scanlan had no intention of doing so.

Strata asserted that "the parties in the *Sericati* action executed a Confidential Release of All Claims & Indemnity Agreement" on January 12, 2017 and that the *Sericati* release "included a covenant by Paul and Becky Rowan not to institute suit against BrunoBuilt as a result of its

construction of their home…." R. 52, ¶ 9.[4] Apparently relying solely on Scanlan's say-so, the district found that "[i]ncorporated therein" – i.e., in the *Sericati* release – "was a provision containing the Rowans' covenant not to sue BrunoBuilt." R. 323. Even if the covenant not to sue had been included in the *Sericati* release BrunoBuilt had no way to prove the existence of the covenant not to sue, much less its terms, because the purported covenant was not provided to Johnson or BrunoBuilt. R. 177, ¶ 3(o). It was reasonable for Johnson to withhold agreement until after he had reviewed the covenant's exact terms and conferred with BrunoBuilt regarding the same. In fact, it could be considered legal malpractice to do otherwise.

As of January 20, 2017, Scanlan had not informed Johnson that the *Sericati* settlement agreement had been signed. R. 178, ¶3(s). Instead, Scanlan continued to use the covenant not to sue as a bargaining chip to induce Johnson to dismiss *Kleinfelder*. As past events generally do not constitute proper consideration for a future promise, there was at the very least a question of fact as to whether the covenant not to sue that had already been signed, unbeknownst to Johnson, could serve as consideration for dismissal of BrunoBuilt's claims against Strata. *See*, *Collord v. Cooley*, 92 Idaho 789, 792, 451 P.2d 535, 528 (1969) ("A promise is never held to be made enforceable by reason of past events unless those events have such a relation to the promise as to constitute its inducing cause").

Johnson's January 20, 2017 communication to Scanlan arguably advised Scanlan that BrunoBuilt had agreed to the *Pierringer* provision. R. 176, ¶ 3(l). However, the other outstanding terms/issues remained unresolved. Yet the district court found that on or before January 20, 2017,

[4] Strata and the *Sericati* plaintiffs actually reached a settlement agreement on or about January 5, 2017. R. 756.

BrunoBuilt and Strata "reached an enforceable agreement that BrunoBuilt would provide the Strata Defendants with a *Pierringer* release in exchange for the Strata Defendants obtaining a covenant not to sue from the Rowans specific to BrunoBuilt." R. 333. The district court appears to have based its finding, at least in part, on Johnson's declaration that his "intent and understanding [was] that Mr. Scanlan would prepare and send to me a draft agreement memorializing the release terms the parties had agreed upon and that my client would then have an opportunity to review the agreement and sign it, *to the extent that it accurately reflected the parties' agreed-upon terms*." R. 176, ¶ 3(l) (italics added).

The draft release provided by Scanlan to Johnson on February 9, 2017 is further evidence that an agreement had not been reached prior to that time. R. 176, ¶ 3(m). The draft release agreement *did not* reflect an agreement on all material terms. Most notably, while the draft agreement contained the aforementioned "passing reference to a covenant not to sue," the draft release agreement did not expressly identify BrunoBuilt as a third-party beneficiary – a term that BrunoBuilt had expressly stated was a required term of settlement. R. 176-177, ¶¶ 3(m)-3(n). Moreover, the draft agreement included confidentiality provisions that the parties had never discussed, much less agreed to. *Id*., ¶ 3(p). Accordingly, no enforceable settlement agreement had been reached on January 20, 2017.

(c) No Enforceable Settlement Agreement Was Formed After January 20, 2017.

On March 1, 2017, BrunoBuilt rejected Strata's draft settlement agreement. Johnson informed Scanlan that it was rejected because (1) Strata had not provided a covenant not to sue signed by the Rowans and (2) the proposed release included a confidentiality clause to which

BrunoBuilt had not agreed. R. 176-177, ¶ 3(n)-3(q). After receiving Scanlan's March 3, 2017 letter that provided an excerpt from the release purportedly signed by the Rowans, Johnson provided yet another counteroffer on March 9, 2017 that included additional terms. As there had not yet been any meeting of the minds, BrunoBuilt was entitled to include additional terms. *C.H. Leavell*, 90 Idaho at 511-512. Scanlan rejected this offer on March 14, 2017, as Strata would not agree to a mutual release of claims. *Id*., ¶ 3(u). On the same day, Johnson advised Scanlan that BrunoBuilt was no longer interested in providing Strata with a *Pierringer* release. *Id*., ¶ 3(v); R. 93. Thus, when viewed in the light most favorable to BrunoBuilt, a reasonable inference exists that the parties still had not reached a settlement agreement.

Likewise, the events that occurred following March 14, 2017 demonstrate that a genuine issue of material fact existed as to whether a settlement agreement had been, or ever was, reached. When Strata provided another proposed written settlement agreement on May 10, 2017, Johnson was asked to "let [Strata's counsel] know whether this meets with your approval so that we can circulate it to our clients for signature." *Id*. The inquiry of "whether this meets with your approval" indicates that BrunoBuilt had not yet agreed to the proposed terms. If all material terms had been agreed upon, there is no need to ask if BrunoBuilt approved or for Strata's counsel to wait to obtain its own clients' signatures.

The record before the Court also establishes that the May 10, 2017 proposed settlement agreement was rejected by Johnson because (1) it included the *Pierringer* release that Johnson had previously withdrawn from consideration, as well as the confidentiality provision to which Johnson had previously objected and (2) it said nothing about Strata providing the covenant not to sue BrunoBuilt. R. 179, ¶ 3(w).

Strata's counsel's e-mail of June 20, 2017 to Johnson indicates that no agreement had been reached. This e-mail expressly asked: "[h]as your client agreed to sign?" R. 53, ¶ 15; R. 107-108. Similar to the May 10, 2017 communication, if BrunoBuilt had expressly agreed to accept the terms proposed by Strata, or *vice versa*, there is no need to inquire as to whether BrunoBuilt would sign the agreement. The same can be said of Griffith's July 31, 2017 e-mail that asked "[w]here do we stand on getting Mr. Bruno's signature on the release agreement?" R. 53, ¶ 17; R. 109-110.

Finally, Ms. Salmi's August 2, 2017 letter, which detailed why no settlement agreement had been achieved is further evidence that a genuine issue of fact existed as to whether a prior agreement had been reached. R. 53, ¶ 53; R. 111-117. Based upon the foregoing facts and authorities Salmi was correct – BrunoBuilt and Strata never entered into an enforceable settlement agreement. At the very least there are outstanding questions of fact whether an enforceable settlement agreement was reached. Accordingly, BrunoBuilt respectfully submits that the district court erred in finding the existence of such an agreement as a matter of law.

(d) <u>The District Court Made Improper Inferences</u>.

The consideration offered by Strata was that "the Strata Defendants would seek to secure a covenant not to sue BrunoBuilt from the Rowans as part of the settlement of the *Sericati* action." R. 51, ¶ 8. The district court concluded that "the most reasonable inference" to be drawn "is that the Rowans' covenant would be specific to BrunoBuilt." R. 765. Yet, as noted above, Scanlan was "reluctant to agree" that BrunoBuilt be made an express third-party beneficiary of the covenant not to sue when Johnson spoke to him on January 9, 2017. R. 175, ¶ 3(i).

On June 9, 2017, Griffiths sent an e-mail to Johnson, inquiring as to the status of a draft release agreement that Griffiths had sent to Johnson on May 10, 2017. R. 93-108. The draft release

agreement neither (1) set forth the terms of the covenant not to sue nor (2) indicated that Strata would "tender" the covenant not to sue to BrunoBuilt. Johnson replied five days later: "I'm just trying to get [Robert Bruno] chased down for signature." R. 110. The district court concluded that "[t]he only reasonable inference to be drawn from this statement is that the May Draft was an accurate statement of the settlement terms reached." R. 332. But that is simply not the case. An equally reasonable inference is that Johnson had not analyzed the draft release agreement in detail but would do so when he sat down with his corporate client "to review the agreement and sign it, to the extent that it accurately reflected the parties' agreed-upon terms." R. 176, ¶ 3(l).

BrunoBuilt respectfully submits that the district court, in making these inferences and others, crossed the "fine line between drawing the most probable inferences and weighing the evidence." *Capstar*, 153 Idaho at 416, 283 P.3d at 733. In *Capstar*, this Court reversed the district court's order granting summary judgment:

> Summary judgment was not a proper method to dispose of a case with so much conflicting evidence. No request for a jury trial has been made in the case at hand. Although the court, as the trier of fact, may draw the most probable inferences from the undisputed evidence, there are enough genuine issues of material fact to warrant deciding the merits of the case at trial. There is a fine line between drawing the most probable inferences and weighing the evidence, and this Court holds the belief that the district court should have allowed the case to go to trial in order to weigh the conflicting evidence and test the credibility of the witnesses.

Id. The same reasoning and result pertain here. The evidence reflects that there are genuine issues of material fact as to whether the parties reached an enforceable settlement agreement. It is not reasonable to infer that Johnson's offhand remark in an e-mail – that he was trying to get his client "chased down for signature" – is proof that all issues of fact had been resolved. As such, BrunoBuilt respectfully submits that this Court should reverse the district court's finding that the

parties entered into an enforceable settlement agreement and remand the matter for further discovery and trial.

B. The "Economic Loss Rule" Does Not Bar BrunoBuilt's Negligence Claim.

1. Proceedings.

The district court held that BrunoBuilt's claim of negligence was based on defective property and not from the rendition of services. R. 1593-1595. This conclusion was reached despite the fact that this case involves Strata's rendition of professional services. The district court continued on to hold that the economic loss rule barred BrunoBuilt's negligence claim against Strata because (1) the Dwelling had not sustained damage and (2) both the Lot and the Dwelling constituted the subject of the transaction. R. 769-770 & 1595-1597.

These holdings of the Court were in error.

2. Standard of Review.

> "When reviewing a grant of summary judgment, this Court employs the same standard as the district court." *Idaho Youth Ranch, Inc. v. Ada Cty. Bd. of Equalization*, 157 Idaho 180, 182, 335 P.3d 25, 27 (2014). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). "Disputed facts should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party." *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "However, the nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Intermountain Real Props., LLC v. Draw, LLC*, 155 Idaho 313, 316-17, 311 P.3d 734, 737-38 (2013) (quoting *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012)).

> "[W]hen reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, this Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). "This means the Court reviews the district court's denial of a motion for reconsideration de novo." *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014).

Taylor v. Taylor, 163 Idaho 910, 915-916, 422 P.3d 1116, 1121-1122 (2018).

3. <u>Argument</u>.

"The economic loss rule is a judicially created doctrine that applies to negligence cases. Unless an exception applies, the economic loss rule prohibits recovery of ***purely*** economic losses in a negligence action because there is no duty to prevent economic loss to another." *Id.* at 919, 422 P.3d at 1125 (citations omitted) (emphasis added). *See also, Brian & Christie, Inc., d/b/a Taco Time v. Leishman Elec., Inc.*, 150 Idaho 22, 28, 244 P.3d 166, 172 (2010) ("The economic loss rule does not limit the damages recoverable in a negligence action," but rather "limits the actor's duty so that there is no cause of action in negligence.") The exceptions to the general rule are "(1) where a special relationship exists between the parties, or (2) where unique circumstances require a reallocation of the risk." *Aardema v. U.S. Dairy Sys.*, 147 Idaho 785, 792, 215 P.3d 505, 512 (2009).

"Economic loss is not simply damages that can be measured monetarily." *Brian & Christie, Inc*, 150 Idaho at 27, 244 P.3d at 171. "Economic loss" has been defined "as including 'costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.'" *Duffin v. Idaho Crop Ass'n*, 126 Idaho 1002, 1007, 895 P.2d 1195, 1200 (1995) quoting *Salmon Rivers*

Sportsman Camps, Inc. v. Cessna Aircraft Co., 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). On the other hand, "'property loss' encompasses 'damage to property other than that which is the subject of the transaction.'" *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200 quoting *Salmon Rivers*, 97 Idaho at 351, 544 P.2d at 309. Moreover, "[d]amages from harm to person or property are not ***purely*** economic losses. '[E]conomic loss is recoverable in tort as a loss parasitic to an injury to person or property.'" *Brian & Christie, Inc.*, 150 Idaho at 28, 244 P.3d at 172 quoting *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200.

The economic loss rule's application had been expanded from product liability cases to all claims sounding in negligence. *Duffin*, 126 Idaho at 1007, 895 P.2d at 1200. This application lead to confusion as to the applicability of the rule, *i.e.* what was defined as the "subject of the transaction." This confusion was addressed by the Court in *Aardema*. 147 Idaho 785, 789, 215 P.3d 505, 509 (2009) ("Due to the confusion regarding application of the economic loss rule, this Court accepted this permissive appeal and offers this opinion, per the district court's request, on the application of economic loss rule.")

Aardema recognized that the Court had "not defined the 'subject of the transaction,' [but] instead [had] rel[ied] on factual comparisons from previous decisions." *Id*. at 791, 215 P.3d at 511. The Court noted that its decisions "delineate[d] a clear pattern that this Court has implicitly defined the 'subject of the transaction' by the subject matter of the contract.'" *Id*. This Court explained further "that the *underlying contract* that is the subject of the lawsuit is the subject of the transaction." *Id*. at 791 n.2, 215 P.3d at 511 n.2 (emphasis in original).

Additional clarification of the economic loss rules applicability was provided a year later in *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 244 P.3d 166 (2010). In that case, this Court discussed the definition of economic loss as defined in *Salmon Rivers*, *i.e.*:

> … the difference between property damage and economic loss was: "Property damage encompasses damage to property other than that which is the subject of the transaction. Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use."

Brian & Christie, Inc., 150 Idaho at 26, 244 P.3d at 170 quoting *Salmon Rivers*, 97 Idaho at 351, 544 P.2d at 309. After reaffirming that it is "black letter law that a cause of action in negligence is available for one whose chattel is lost or destroyed through the negligence of another[,]" this Court continued on to restricte application of the economic loss rule by holding that the *Salmon Rivers* definition of economic loss "does not apply in cases involving negligent rendition of services because such cases do not involve the purchase of defective property." *Id*.

(a) <u>BrunoBuilt's Claim Is Based Upon The Rendition Of Negligent Services, Not A Defective Product</u>.

"In circumstances involving the rendition of personal services the duty upon the actor is to perform the services in a workmanlike manner." *Brian & Christie, Inc.*, 150 Idaho at 28. "If the actor negligently damages another's property in performing those services, the actor is liable for such damage." *Id*. Providers of professional services must adhere to an even more stringent standard of care. Architects have "a duty to exercise such reasonable care, technical skill and ability, and diligence as are ordinarily required of architects in the course of their plans, inspections, and supervisions during construction for the protection of any person who foreseeably . . . might be injured by the failure to do so." *Stephens v. Stearns*, 106 Idaho 249, 256 (1984).

As such, Strata owed a duty to BrunoBuilt to exercise the ordinary skill of its profession and it is a jury question whether that duty was breached. *Id*.

This Court's decision in *Oppenheimer Indus. v. Johnson Cattle Co.*, 112 Idaho 423, 732 P.2d 661 (1986) and *Brian & Christie, Inc*., 150 Idaho 22, 244 P.3d 166 (2010), illustrate why BrunoBuilt's claims should be viewed as a claim based on the negligent rendition of services.

In *Oppenheimer*, the plaintiff had contracted with a cattle company for care of the plaintiff's cattle. 112 Idaho at 424, 732 P.2d at 662. The plaintiff claimed that the cattle company had sold its cattle without permission and sued the State Brand Board on the basis that it had negligently inspected the cattle prior to sale. *Id*. The district court held that the economic loss rule barred plaintiff's claim because it was based on economic damages, *i.e.* loss of the cattle. *Id*. at 425, 732 P.2d at 663. This Court reversed, holding that the plaintiff had lost its property and noted that "[i]t is also black-letter law that a cause of action in negligence is available for one whose chattel is lost ***or destroyed*** through the negligence of another." *Id*. at 425-426, 732 P.2d at 663-664 (emphasis added).

The plaintiff in *Brian & Christie* purchased two used neon signs, transformers and wiring from a third party and contracted with the sign company to install the products. 150 Idaho at 24, 244 P.3d at 168. The company repaired and installed the signs in the plaintiff's restaurant. *Id*. One of the signs was not properly grounded and a transformer lacked secondary ground fault protection in violation of code. *Id*. Prior to connecting the items to electrical power the Subcontractor did not check the wiring installed by the sign company or whether the transformers compiled with code. *Id*. The items installed then caused a fire that damaged the plaintiff's building. *Id*. The district court applied the economic loss rule to preclude the plaintiff's claim on

the basis that the subject of the transaction was the restaurant/building remodeled, not the services provided during the remodel. *Id*. at 26, 244 P.3d at 170. This Court reversed, noting that "[c]orrectly quoting, that definition states, '[E]conomic loss includes costs of repair and replacement of ***defective*** property which is the subject of the transaction . . . .'" *Id*. quoting *Slamon Rivers*, 97 Idaho at 351, 544 P.2d at 309 (emphasis in original. This Court continued:

> The restaurant was not defective property. It did not spontaneously combust. Rather, [plaintiff]'s claim is that Subcontractor's negligence in connecting the signs to electrical power caused a fire that extensively damaged the restaurant and its contents. In this case, there was no defective property which was the subject of the transaction.

Brian & Christie, *Inc*. 150 Idaho 26, 244 P.3d at 170. As such, the economic loss rule did not bar the plaintiff's claim. *Id*. at 29, 244 P.3d at 173.

Similar to the inspector in *Oppenheimer* case, it is undisputed that Strata's involvement in this case arises out of the performance of services, *i.e.* professional engineering services, that it performed on behalf of the developer of the Subdivision. Strata did not sell anyone property, defective or otherwise. Nor did BrunoBuilt have a contractual relationship with Strata. Similar to the *Brian & Christie, Inc*. case, the Dwelling did not spontaneously become damaged. The Dwelling became damaged because Strata failed to properly perform engineering services for the Subdivision. As such, it is not incumbent upon this Court to protect the economic expectations of the parties to any transaction and the economic loss rule does not apply. *Adams v. United States*, 449 Fed. Appx. 653, 659 (9th Cir. 2011) (applying Idaho law).

BrunoBuilt's claims against Strata arise out of its rendition of professional services—they do not arise out of any transaction between BrunoBuilt and Strata. BrunoBuilt respectfully submits

that the district court erred when it determined that this is a defective product case instead of a rendition of services case.

(b) <u>Alternatively, If BrunoBuilt's Claim Is Based On A Defective Product, The District Court Erred By Concluding That The Economic Loss Rule Precludes Recovery For Damages To Property Other Than The Land Constituting The Lot.</u>

Having determined that BrunoBuilt's claim was based on a defective product, *i.e.* the Lot, the district court held that the economic loss rule barred BrunoBuilt's claim because, upon completion, the Dwelling became an integral part of the Lot and therefore both the Lot and the Dwelling constituted the "defective product" that was the subject of the transaction. In so holding, the district court misapplied the "integrated whole" concept enunciated by this Court in *Tusch Enters. v. Coffin*, 113 Idaho 37, 740 P.2d 1022 and *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 108 P.3d 996 (2005).

In *Tusch Enterprises v. Coffin*, the plaintiff purchased, in a single transaction, a lot that had three duplexes and a parking area constructed upon it. 113 Idaho at 38-40, 740 P.2d at 1023-1025. Approximately one (1) month after purchasing the lot, duplexes and parking area, one duplex unit began showing signs of damage. *Id*. at 40, 740 P.2d at 1025. The plaintiff filed suit against the developer and builder contractor. *Id*. The plaintiff's negligence claim was supported by expert opinion "that the foundation was improperly constructed given the fill dirt conditions." *Id*. While not mentioning the economic loss rule explicitly, this Court upheld dismissal of the negligence claim because:

> The structural defects have caused damage to the duplexes themselves and to the parking lot, and have caused losses in rental income, but Tusch Enterprises has suffered no personal injuries and

> has suffered no damage to property ***other than that which was the subject of the duplex sales transaction***.

Id. at 40-41, 740 P.2d at 1025-1026 (emphasis added).

Similarly, in *Blahd v. Richard B. Smith, Inc*., the plaintiffs purchased a lot with a home that had been constructed approximately eight years prior to the purchase. 141 Idaho at 299, 108 P.3d at 999. Prior to construction of the home, the sellers had retained Robert P. Jones, P.E. ("Jones") to examine the lot to determine if it was suitable for residential construction. *Id*. Prior to purchasing the lot and home, the plaintiffs observed a crack in the basement slab. *Id*. The plaintiffs hired Briggs Engineering, Inc. ("Briggs") to inspect the crack. *Id*. Briggs advised that the crack appeared to be a shrinkage crack and that the slab appeared to be in stable condition. *Id*. The plaintiffs then purchased the lot and home in a single transaction. *Id*. Approximately three (3) years after purchasing the lot and home, the plaintiffs hired Strata[5] to inspect the home due to continued cracking and sinking. *Id*. After Strata concluded that the cracks were caused by improperly packed fill dirt supporting the house, the plaintiffs sued the seller, Jones, and Briggs. *Id*. This Court affirmed dismissal based on the economic loss rule because "[t]he Blahds purchased the house and lot ***as an integrated whole***. Like the leveled lot and duplex in *Tusch Enterprises*, the subject of the transaction in this case is both the lot and the house." *Id*. at 301, 108 P.3d at 1001 (emphasis added).

The holdings in *Tusch Enterprises* and *Blahd* demonstrate that the lot and home were only treated as an integrated whole because they were purchased together pursuant to the underlying

5 Use of the term "Strata" in reference to the facts of the *Blahd* decision is not intended to be a reference to all respondents in this matter but is merely a recitation of the name used in the *Blahd* decision to identify the engineering firm used by the plaintiffs.

contract and as such, they were both the subject of the transaction. The facts of the case at bar differ materially from the facts in *Blahd* and *Tusch Enters*.

The Lot was unimproved bare ground when BrunoBuilt obtained legal title to the Lot. It was not until ***after*** that transaction that BrunoBuilt constructed the Dwelling on the Lot. Because the Lot and the Dwelling were not purchased together, *i.e.* they were not an integrated whole at the time BrunoBuilt obtained legal title, the district court erred when holding that the Lot and the Dwelling were the subject of the transaction.

Moreover, there is no evidence in this case that the BrunoBuilt Dwelling was defectively constructed. The evidence before the district court upon reconsideration demonstrated that damage to the Dwelling was caused by defects in the Lot caused by Strata's negligence. Strata performed engineering services to Terra Nativa for the construction of the Subdivision. Strata did not review and was not otherwise involved in any engineering for the construction of the BrunoBuilt Home. BrunoBuilt, at the cost of hundreds of thousands of dollars, constructed a home which has been damaged by the Landslide and no longer has any value. The damages to the BrunoBuilt Home constitutes damage to property that is not the subject of the transaction. *Brian & Christie*, 150 Idaho at 26.

Decisions of this Court establishes that the damage to the Dwelling is damage to property that is not the subject of the transaction. "[P]roperty damage encompasses ***damage to property other than that which is the subject of the transaction***. *Brian & Christie, Inc.* 150 Idaho at 25 (emphasis added); *see also inter alia*: *Aardema*, 147 Idaho at 791; *Stapleton v. Jack Cushman Drilling*, 153 Idaho 735, 742, 291 P.3d 418 (2012); *Blahd*, 141 Idaho at 300; *Ramerth v. Hart*, 133 Idaho 194, 196 (1999); *Duffin*, 126 Idaho at 1007; *Salmon River*, 97 Idaho at 351 (1978).

The *Aardema v. U.S. Dairy Systems, Inc.* decision provides a good example of the distinction between unrecoverable damage to property constituting economic loss, and damages to property that is not the subject of the transaction. 147 Idaho 785. In that case, Aardema Dairy Farm contracted with U.S. Dairy Systems for the purchase and installation of an automated milking system. *Id*. at 791. The milking system did not function properly and Aardema sued the manufacturer of the machine and the electrician installing the machine for lost milk production, reduction in milk quality, lost profits, and damage to the cattle that were milked. *Id*. at 791-92. This Court explained that "[m]erely alleging dissatisfaction with the quality of the milking system, such as lower milk quality or production than expected, would constitute purely economic loss [because] [w]ithout any physical damage to separate property, the loss is merely the product's failure to meet Aardema Dairy's expectations." *Id*. However, the alleged damages to the cows constituted damages to property that was not the subject of the underlying contractual transaction, which created a genuine question of fact for trial. *Id*. at 791-792.

U.S. Dairy attempted to argue that the cattle were part of the subject of the transaction because the milking system was intended to be used on the cattle. *Id*. The Idaho Supreme Court rejected this argument as "strained," explaining that,

> [T]he milking machines are the subject of the transaction. Aardema Dairy did not contract with any of the defendants for the cattle, but for the purchase, installation and operation of the milking system. In this case, the subject matter of the contract is the milking system and not the cattle that are milked.

Id.

The damages to the cows in *Aardema* are directly analogous to the damages that BrunoBuilt has suffered to the Dwelling. The Lot and the Dwelling were not purchased as part of

the same transaction. The Lot was purchased and then the Dwelling was constructed on the Lot. The Lot is the defective property that is the subject of the underlying contractual transaction. The Dwelling is separate property that was damaged by Strata's defective rendition of engineering services. The services Strata provided were for the construction of the Lot not the Dwelling. As such, BrunoBuilt's damages are not barred by the economic loss rule under Idaho law.

C. BrunoBuilt Should Be Awarded Attorney Fees And Costs On Appeal.

Pursuant to I.C. § 12-120(3), BrunoBuilt respectfully requests an award of its attorney fees and costs on appeal to the extent that such fees and costs were incurred in connection with the alleged settlement agreement. Under Idaho law, a party may recover attorney fees if the alleged contract is deemed to be unenforceable or even non-existent:

> Where a court holds a contract is unenforceable, the prevailing party may nonetheless be entitled to an award of attorney fees under the contract. "It is of no consequence that the underlying contractual obligation is unenforceable. A prevailing party may recover attorney fees even though no liability under a contract was established or where no contract was, in fact, ever formed."

Allied Bail Bonds, Inc. v. County of Kootenai, 151 Idaho 405, 258 P.3d 340 (2011) (citations omitted). Thus, BrunoBuilt's contention that no settlement agreement was ever reached does not preclude its recovery of attorney fees and costs.

IV.
CONCLUSION

Based on the foregoing, BrunoBuilt requests that the Memorandum Decision and Order on Motion to Enforce Settlement Agreement or, Alternatively, for Summary Judgment and Motion for Relief Under 56(d) filed on July 11, 2018 and the Memorandum Decision and Order on Motion to Reconsider filed on November 6, 2018 be reversed, that the Judgment filed on January 10, 2019 be vacated, and that the matter be remanded to the district court for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of June 2019.

McCONNELL WAGNER SYKES & STACEY PLLC

BY: */s/ Chad M. Nicholson*
Chad M. Nicholson
Attorneys for Plaintiff-Appellant
BrunoBuilt, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of June 2019, a true and correct copy of the foregoing document was served ***via* iCourt E-File** upon the following party(ies):

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