

STATE OF IDAHO
 COUNTY OF KOOTENAI
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 CLERK, DISTRICT COURT
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
 IDAHO IN AND FOR THE COUNTY OF KOOTENAI

AMERICAN BANK, a Montana banking corporation,
 Plaintiff,

vs.

BRN DEVELOPMENT, INC., an Idaho corporation; BRN INVESTMENTS, LLC, an Idaho limited liability company; LAKE VIEW AG, a Lichtenstein company; BRN-LAKE VIEW JOINT VENTURE, an Idaho general partnership; ROBERT LEVIN, Trustee for the ROLAND M. CASATI FAMILY TRUST, dated June 5, 2008; E. RYKER YOUNG, Trustee for the E. RYKER YOUNG REVOCABLE TRUST; MARSHALL CHESROWN, a single man; IDAHO ROOFING SPECIALIST, LLC, an Idaho limited liability company; THORCO, INC., an Idaho corporation; CONSOLIDATED SUPPLY COMPANY, an Oregon corporation; INTERSTATE CONCRETE & ASPHALT COMPANY, an Idaho corporation; CONCRETE FINISHING, INC., an Arizona corporation; THE TURF CORPORATION, an Idaho corporation; WADSWORTH GOLF CONSTRUCTION COMPANY OF THE SOUTHWEST, a Delaware corporation; POLIN & YOUNG CONSTRUCTION, INC., an Idaho corporation, TAYLOR ENGINEERING, INC., a Washington corporation; PRECISION IRRIGATION, INC., an Arizona corporation; and SPOKANE WILBERT VAULT CO., a Washington corporation, d/b/a WILBERT PRECAST,

Defendants.

And

CASE NO. CV-09-2619

MEMORANDUM OPINION AND ORDER RE: TAYLOR ENGINEERING INC.'S MOTION FOR SUMMARY JUDGMENT ON BRN DEVELOPMENT INC.'S CROSS-CLAIMS OF INTENTIONAL MISREPRESENTATION AND FAILURE TO DISCLOSE

TAYLOR ENGINEERING, INC., a
Washington corporation,)
)

Third-Party Plaintiff,)
)

vs.)
)

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

Third-Party Defendants.)
)

And)
)

ACI NORTHWEST, INC., an Idaho)
corporation,)
)

Cross-Claimant,)
)

vs.)
)

AMERICAN BANK, a Montana banking)
corporation; BRN DEVELOPMENT, INC., an)
Idaho corporation; BRN INVESTMENTS, LLC,)
an Idaho limited liability company; LAKE VIEW)
AG, a Lichtenstein company; BRN-LAKE VIEW)
JOINT VENTURE, an Idaho general partnership;)
ROBERT LEVIN, Trustee for the ROLAND M.)
CASATI FAMILY TRUST, dated June 5, 2008;)
E. RYKER YOUNG, Trustee for the E. RYKER)
YOUNG REVOCABLE TRUST; MARSHALL)
CHESROWN, a single man; THORCO, INC., an)
Idaho corporation; CONSOLIDATED SUPPLY)
COMPANY, an Oregon corporation; THE TURF)
CORPORATION, an Idaho corporation;)
WADSWORTH GOLF CONSTRUCTION)
COMPANY OF THE SOUTHWEST, a Delaware)
corporation; POLIN & YOUNG)
CONSTRUCTION, INC., an Idaho corporation,)
TAYLOR ENGINEERING, INC., a Washington)
corporation; PRECISION IRRIGATION, INC.,)
an Arizona corporation,)
)

Cross Claim Defendants.)
)

Defendant / Cross-claimant BRN Development, Inc. has cross-claimed against Defendant / Cross-defendant Taylor Engineering, Inc., alleging that Taylor Engineering, Inc., misrepresented requirements for vesting a PUD approval and misrepresented the scope of the services that Taylor Engineering, Inc., provided BRN Development, Inc. Taylor Engineering moves for summary judgment on the claims of intentional misrepresentation and failure to disclose.

Bradley C. Crockett, LAYMAN LAW FIRM, PLLP, for BRN Development, Inc.

M. Gregory Embrey, WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S. for Taylor Engineering, Inc.

I. SUMMARY OF FACTS AND PROCEDURE

The parties do not dispute that Taylor Engineering, Inc. (“Taylor”) was retained by BRN Development, Inc. (“BRN”) to perform professional engineering services on the Black Rock North Project, and that the parties entered into a written agreement regarding this work.¹ BRN filed cross-claims against Taylor in its “Amended Answers and Affirmative Defendants of Cross Defendant’s BRN Development, Inc., BRN Investments, LLC,” on May 18, 2010 (“BRN’s Amended Cross-Claim”). These claims concern the possibility of a separate agreement, or a special relationship, between BRN and Taylor whereby Taylor either agreed or was obligated to provide “land use planning services.” Specifically, BRN’s allegations concern the formation of such an agreement or a special relationship, the scope of services and/or agreement terms, and the possibility of breach.

BRN alleged in its second cross-claim, titled “Negligent Misrepresentation,” as follows:

26. Taylor Engineering had a duty to BRN Development and Chesrown to be complete, objective, and truthful in all communications with BRN Development and Chesrown.

¹ Taylor cross-claimed against BRN for breach of the written agreement alleging BRN failed to pay Taylor for work performed. BRN admitted breach of the written agreement at a July 26, 2011, hearing. On July 27, 2011, this Court granted Taylor’s Motion for Summary Judgment on the breach of contract claim in the amount of \$153,448.77 plus interest, but allowed BRN to pursue offset through their cross-claims. This Court entered an Order on September 9, 2011.

27. Taylor Engineering, through its negligence, breached its duty to be complete, objective, and truthful in all communications with BRN Development and Chesrown, and misrepresented material facts regarding the scope of Services required by BRN Development and Chesrown to preserve the economic value of Black Rock North.

(BRN's Amended Cross-Claim, pp.18-19.) BRN's third cross-claim titled "Intentional Misrepresentation," provided that Taylor "misrepresented material facts regarding the scope of services required by BRN Development and Chesrown to preserve the economic value of Black Rock North," and therefore breached a "duty to BRN Development and Chesrown to be complete, objective and truthful in all communications with BRN Development and Chesrown." (BRN's Amended Cross-Claim, p.19.)

BRN's fourth cross claim for "Failure to Disclose," includes the allegations that "Taylor Engineering undertook to advise BRN in its business and financial dealing related to Black Rock North and, as a result, had a duty to BRN to use reasonable care to disclose," certain matters as set forth in the cross-claim. (BRN's Amended Cross-claim., pp.20-21.) BRN further alleges that Taylor breached this duty by failing to disclose that "its advice and representations were based on Spokane County ordinances, not the applicable Kootenai County ordinances, and that Taylor had not investigated or researched the applicable Kootenai County ordinances in order to accurately advise requiring their provisions and requirements." (BRN's Amended Cross-claim, p.21.) BRN further claims that "Taylor Engineering breached its duties by failing to disclose that it was unfamiliar with and/or ignorant of the applicable Kootenai County ordinances," and that "Taylor Engineering knew that the proper and necessary disclosures would justifiably induce BRN to act or refrain from acting with respect to the ongoing business transaction between the parties." (BRN's Amended Cross-claim, p.21.) Taylor denies the claims.

This Court dismissed BRN's second cross-claim for negligent misrepresentation in its June 1, 2011 "Order Granting Taylor's Motion to Dismiss Claim for Negligent Misrepresentation and Denying Taylor's Motion to Dismiss BRN's Claims of Intentional Misrepresentation and Failure to Disclose." At the hearing on Taylor's request to dismiss BRN's claims of "Intentional Misrepresentation" and "Failure to Disclose," this Court acknowledged that it was questionable as to whether BRN met the pleading requirements for intentional misrepresentation and failure to disclose, but denied Taylor's request on the basis of I.R.C.P. 12(b)(6) and did not evaluate the pleadings as per I.R.C.P. 56(c).²

On August 1, 2011, Taylor filed a "Motion for Summary Judgment on BRN Development, Inc.'s, Cross-claims of Intentional Misrepresentation and Failure to Disclose," ("Taylor's Motion") and supported the motion with multiple affidavits and extensive documentation. BRN timely responded, and supported its arguments with affidavits and extensive documentation.

It appears from the parties' pleadings that the "Intentional Misrepresentation" and "Failure to Disclose" claims center on a final plat recordation and whether it vested the planned

² BRN's first cross-claim against Taylor is entitled "Professional Negligence." In that claim BRN alleges that

Taylor Engineering had a duty to BRN Development and Chesrown to exercise such care, skill and diligence in the performance of the services others in its profession would ordinarily exercise under like circumstances, in accordance with the standard of care for the profession of Professional Engineers and Professional Land Surveyors within the State of Idaho.

BRN claims that when performing "engineering or land surveying services through a business entity," Taylor breached its "duty to exercise such care, skill and diligence to BRN Development and Chesrown." (BRN's Amended Cross-claim, pp.17-18.) The "Professional Negligence" claim appears to have evolved to include not only the design of a reservoir, but the land use planning allegations set forth in BRN's other cross claims.

This Court has addressed BRN's professional negligence claim. On September 9, 2011, this Court entered six orders as a result of the July 26, 2011 and July 27, 2011 hearings on three of Taylor's motions for partial summary judgment and motions in limine. On September 13, 2011, this Court entered another order regarding the professional negligence claim.

unit development (“PUD”) entitlement for the Black Rock North Project. Generally, BRN seems to claim that Taylor, through its employees, agents, and/or transactional counsel, represented to BRN that a recordation of a final plat was necessary to vest the PUD entitlement and that this representation caused BRN to spend money on the Black Rock North Project it may not have otherwise spent, resulting in damage to BRN. BRN also seems to claim that Taylor failed to disclose that it could not perform land use planning work that Taylor either agreed to perform, or was obligated by a special relationship to perform.

Central to BRN’s argument is a letter from Taylor’s transactional counsel William Hyslop to BRN, dated May 18, 2009. This letter states:

We are advised that if the final subdivision approval is not completed and recorded by May 29, 2009, the PUD and preliminary plat approval will expire, the PUD and plat will not vest in the recorded ownership to the real property involved, and the property will revert to its prior zoning and density.

(Affidavit of Gregory Embrey, ¶ 2, Ex. A, p.91, L. 19 – p.91, L.9; ¶5, Ex. D.) Four days later, on May 22, 2009, in response to Mr. Hyslop’s letter, the attorney for Mr. Chesrown, Barry Davidson, transmitted a letter to Taylor stating that Mr. Chesrown did not believe Mr. Hyslop’s statements in his May 18, 2009 letter. (Aff. Embrey, ¶4, Ex.C.) In pertinent part, Mr. Davidson’s letter provides:

Kootenai County Ordinance No. 394 re-designated the prior Kootenai County Ordinance No. 344 as Title 10, Kootenai County Code. Section 10-2-1.C.m., at the second paragraph, states:

Preliminary subdivision approval shall be valid for two (2) years. . . . At any time prior to expiration of the approval, the Applicant may made a written request to the Director for a single extension of up to two (2) years, according to the extension process provided in Section 10-2-5. For phased developments, one automatic two year extension will be granted when the first phase is recorded. Subsequent extensions for phased developments may be requested in accordance with Section 10-2-5.

The two year period following preliminary plat approval will expire on October 24, 2009. We have confirmed with the Kootenai County planner that the PUD remains vested, and that the preliminary plat does not expire if there is no plat submitted next Friday.

Id.

Interestingly, the parties do not dispute that the final plat recordation was not required to vest the PUD entitlement, and it appears that the final plat was in fact recorded and the PUD entitlement did vest. Also, Taylor admits that it researched and applied the applicable Kootenai County Idaho ordinances in performing civil engineering, utility design, boundary surveying, topographic surveying, construction staking and limited construction observation services as part of its contract with BRN. (Affidavit of Ron Pace, ¶ 7.) Taylor does not admit that it performed “land use planning services,” or that it agreed to perform the services as per an agreement with BRN or as part of a special relationship between the parties.

This Court heard from the parties on August 30, 2011, and requested additional briefing before taking the matter under advisement. The parties timely submitted additional briefing by September 9, 2011. After reviewing the record, the pleadings and the arguments of the parties, this Court hereby issues this memorandum decision and order.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” IRCP 56(c). “Once the movant has established a prima facie case that, on the basis of uncontroverted facts, the movant is entitled to judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial and cannot merely rest on the pleadings.” *McVicker v. City of Lewiston*,

134 Idaho 34, 37, 995 P.2d 804, 807 (2000), citing IRCP 56(e); *Theriault v. A.H. Robins Co. Inv.*, 108 Idaho 303, 306, 698 P.2d 365, 368 (1985).

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

IRCP 56(e). A "mere scintilla of evidence of only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 556, 212 P.3d 982 (2009).

"In order to survive a motion for summary judgment, the non-moving party must 'make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial.'" *Jones v. Starnes*, 150 Idaho 257, ___, 245 P.3d 1009, 1012 (2011), (quoting *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988)). It is the duty of the moving party to establish that no genuine issue of material fact exists. *Van*, 147 Idaho at 556, 212 P.3d at 986. The Court construes the record in the light most favorable to the party opposing the summary judgment motion. *Id.* Generally, "all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Beus v. Beus*, 151 Idaho 235, ___, 254 P.3d 1231, 1234 (June 29, 2011) (quoting *Harrison v. Binnion*, 147 Idaho 645, 650, 214 P.3d 631, 636 (2009)). However, "when an action will be tried before the court without a jury, 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." *Id.* (quoting *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). "The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences." *Id.*

III. ANALYSIS

A. Taylor Engineering, Inc. is entitled to Summary Judgment on BRN Development, Inc.'s Cross-Claim of Intentional Misrepresentation

To establish “Intentional Misrepresentation”, i.e. fraud, the alleging party must establish the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that the representation should be acted upon by a person and in the manner reasonable contemplated; (6) the hearer’s ignorance of its falsity; (7) his reliance on the representation; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (quoting *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986)). “The absence of any one of the elements is fatal to recovery.” *Id.*

1. BRN’s Claim that Taylor Misrepresented the Requirement to Record a Final Plat to Vest the PUD Approval.

By Affidavit, Ronald G. Pace, President of Taylor, asserts that no employee or agent of Taylor ever informed BRN that a final plat must be recorded to vest the PUD entitlement for the Black Rock North Project. The Pace Affidavit further provides that during the course of Taylor’s work for BRN, Taylor had no knowledge of the falsity of the representation alleged by BRN, and also was not ignorant of the truth of the alleged representation. The Pace Affidavit also provides that Taylor did not intend for BRN to rely upon any representation by Taylor that a final plat had to be recorded to vest the PUD entitlement, and that, in contrast to BRN’s assertions that Taylor applied Spokane County ordinances, Taylor provided its engineering services to BRN via application of the Kootenai County, Idaho ordinances.

BRN’s responds that:

After conducting discovery in this case, it appears that Taylor did not intentionally misrepresent what was necessary to vest the PUD at the outset;

however it has become apparent that Taylor made several other intentional misrepresentations including Taylor's qualifications, the scope of work it undertook and, in May of 2009, Taylor intentionally misrepresented what would happen to BRN's entitlements if BRN failed to record a final plat.

BRN's Response to Taylor's Motion for Summary Judgment on Intentional Misrepresentation and Failure to Disclose Claims, at 5 (emphasis added). Thus, BRN admits that Taylor did not intentionally misrepresent that recordation of a final plat was necessary to vest the PUD entitlement. Regardless of the admission, there is no evidence in the record that Taylor knew of the falsity of any such representation, or was ignorant of its truth either. Therefore, Taylor is entitled to summary judgment.

2. BRN's Claim that Taylor Misrepresented Its Qualifications and Capabilities.

BRN's claim has clearly continued to evolve. BRN next argues that Taylor misrepresented its qualifications and ability to advise BRN on the land use planning aspects of the Black Rock North Project. Essentially, BRN asserts that Taylor represented that it could perform the entire land use planning portion of the project as the primary land use planner, knowing that Taylor could not perform the work. In support, BRN cites to Paragraphs 1 and 2 of its Statement of Disputed Facts, but does not provide any citations to an affidavit setting forth factual assertions. Taylor argues BRN fails to show any genuine issue of material fact as to elements two through nine of a claim for "Intentional Misrepresentation."

Remarkably, the record does not reflect that Taylor agreed to perform the land use planning services, or that there was a special relationship giving rise to a duty to perform the services. Regardless, there is nothing in the pleadings that shows that Taylor was incapable or capable of performing the land use planning portion of the project. Thus the second element (the falsity of the misrepresentation) and the fourth element (knowledge of falsity or ignorance of truth) lack any factual support.

Further, only speculation supports a conclusion that Taylor had knowledge of its inability to perform land use planning or that Taylor was ignorant as to the truth of its assertion that it was capable. This claim sounds similar to the “Negligent Misrepresentation” claim that this Court has already dismissed. Thus, BRN has failed to set forth sufficient facts to withstand summary judgment for intentional misrepresentation and Taylor is entitled to summary judgment.

3. BRN’s Claim that if Taylor did not Provide Land Use Planning Services, then Taylor Misrepresented the Scope of the Services Taylor was Providing on the Project to BRN.

BRN next argues that if Taylor did not perform land use planning services, then Taylor misrepresented the scope of the services Taylor could perform. This Court notes that it remains unclear whether Taylor agreed to perform certain land use planning services or all the land use planning services, or whether BRN and Taylor had any special relationship giving rise to a duty to perform the land use planning services. Regardless, BRN argues that Taylor’s actions and statements throughout the project led BRN to believe that Taylor was in fact providing such services and was acting in the primary capacity for land use planning. In support, BRN cites to Paragraphs 3, 4 and 5 of its Statement of Disputed Facts. Taylor argues that BRN has failed to set forth material facts supporting elements 5, 6, 8 and 9 of a claim for intentional misrepresentation.

While there are facts in the record which could support a conclusion that Taylor advised BRN that BRN did not need to retain any additional land use professionals besides Taylor to provide land use planning services, BRN takes the alleged misrepresentation and makes a circular argument, stating:

Taylor knew at the time that it was not providing land use planning advice but intended that BRN rely on the statements that it was providing these services, as demonstrated by the fact that Taylor advised BRN that BRN did not need to retain any additional professionals to provide land use planning services. BRN was

unaware of the falsity of the statement and instead rightfully relied on the fact that Taylor was covering this important aspect of the project. Taylor's misrepresentation was the proximate cause of BRN's damages, specifically the substantial unnecessary expenditures that BRN incurred to protect the entitlements, despite the fact sufficient work had been completed to vest the PUD.

BRN's Response to Taylor's Motion for Summary Judgment on Intentional Misrepresentation and Failure to Disclose Claims, at 7.

BRN's continually evolving, circular argument is unpersuasive. BRN has admitted that Taylor did not intentionally misrepresent what was required for the PUD entitlement to vest. Even so, BRN now argues that it is nevertheless entitled to damages suffered by Taylor's unintentional misrepresentation because Taylor advised BRN that it did not need to retain any additional land use planning professionals. The speculative synapse required to bring this argument full circle is that, if another land use professional had been retained,³ Taylor would not have misrepresented what was required to safeguard the PUD entitlement and that the other professional hired would have accurately assessed that filing a final plat was unnecessary to achieve vestment. There is no evidence for this speculative conclusion in the record. Therefore, BRN has failed to set forth facts to support element nine because there are no facts in the record tending to show consequent and *proximate* injury.

Taylor also argues that elements five, six and eight are lacking (i.e., (5) Taylor's intent that the representations should be acted upon by BRN; (6) BRN's ignorance of the falsity of the representation; and (8) BRN's right to rely thereon). It could be that there are adequate facts in the record, including reasonable inferences to be drawn therefrom, which could raise a genuine issue of material fact on these elements. BRN did allege facts that BRN indeed believed that

³ This Court notes that it denied BRN's "Motion to Quash" filed August 16, 2011, seeking to quash a subpoena duces tecum issued by Taylor to BRN's counsel in this matter John Layman. When this Court denied the Motion to Quash, it noted that Taylor has provided evidence that Mr. Layman and others at his law firm provided BRN with land use planning services during the period in question, and billed BRN for those services. Mr. Layman continues to represent BRN as its legal representative in this action as of the date of this Order.

Taylor was providing land use services and has at least raised the prospect that if Taylor provided billing statements which included a list of land use planning services, then Taylor could surely expect BRN to act upon these billing statements by paying Taylor for its services. BRN certainly would have been entitled to rely upon Taylor's billing statements when deciding how much was due and owing to Taylor as a result of its work. Nevertheless, this Court need not evaluate the factual basis for elements five, six, and eight because there is no genuine issue of material fact as to element number nine, i.e. consequent and proximate injury.

Importantly, another drawback plagues this argument. Intentional misrepresentation is, of course, a claim which is not satisfactorily plead through notice pleading practice, but must instead be plead with particularity. As noted during this Court's previous consideration of Taylor's Motion to Dismiss on April 20, 2011, and the order of June 1, 2011, BRN's Cross-claim for intentional misrepresentation does not allege with particularity fraud premised upon a misrepresentation by Taylor as to the land use planning services Taylor provided. Instead, BRN's claim appears to be not only evolving beyond the pleadings, but has come full circle in its attempt to revive the negligent misrepresentation claim that this Court previously dismissed. Therefore, in light of the foregoing reasons, BRN has failed to set forth sufficient facts to withstand Taylor's Motion for Summary Judgment.

4. Intentional Misrepresentation via Hyslop's May 18, 2009 Letter.

BRN also asserts that it has stated a cognizable ground for intentional misrepresentation based upon Mr. Hyslop's May 18, 2009 letter. Taylor argues that the letter transmitted on May 22, 2009, by Mr. Chesrown's attorney, Barry Davidson, effectively shows that by May 22, 2009, Chesrown's counsel, and in effect BRN, was aware that Mr. Hyslop's representations were false.

Thus, in order for this letter to create a valid claim for fraud, BRN would need to show that it relied on, and sustained damage, between May 18, 2009 and May 22, 2009.

Mr. Davidson's May 22, 2009 letter supports a conclusion that Mr. Hyslop's letter was determined to be untruthful as of that date. Thus, as of May 22, 2009, BRN did not suffer from ignorance as to the falsity of Mr. Hyslop's representations. In light of these facts, BRN must set forth admissible evidence showing some reliance and some damage resulting from Mr. Hyslop's representations between May 18, 2009 and May 22, 2009.

BRN argues that it was damaged to the extent that Mr. Hyslop's letter required BRN to hire counsel to research the veracity of the assertions made therein. Taylor argues in its reply that BRN failed to establish any facts with regard to the seventh element for a claim of intentional misrepresentation, i.e., BRN's reliance upon Mr. Hyslop's representations in his letter.

BRN does not make any assertion that it actually relied on any of the representations of Mr. Hyslop's letter in any specific manner. Further, given that BRN employed transactional counsel and other counsel for purposes of providing land use planning services, the attorney fees incurred could reasonably be seen as the continuing cost of doing business. Most notably, the fact that BRN questioned Mr. Hyslop's letter so quickly after receipt shows that BRN most likely did not ever believe Mr. Hyslop's assertions about vestment of the PUD entitlement. Thus, while BRN may have incurred attorney fees in order to second guess the veracity of Mr. Hyslop's letter, BRN has not asserted that it in any specific way relied on or took any action in reliance on Mr. Hyslop's assertions between May 19, 2009, and May 22, 2009. Therefore, insufficient facts have been set forth to raise a genuine issue of material fact on this issue and Taylor is entitled to summary judgment.

B. Taylor Engineering, Inc. is entitled to Summary Judgment on BRN Development, Inc.'s Cross-Claim of Failure to Disclose Because BRN Cannot Establish any Failure to Disclose by Taylor Engineering, Inc.

A claim for failure to disclose may stand in particular circumstances as set forth in the Restatement (Second of Torts § 551 (1997)). The Restatement provides, in pertinent part:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

...

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.'

Tusch Enterprises v. Coffin, 113 Idaho 37, 42, 740 P.2d 1022, 1027 (1987).

The rationale for recognizing this cause of action was explained in *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966), where the court cited *Kaze v. Compton*, 283 S.W.2d 204, 207 (Ky. 1955):

It cannot be controverted that actionable fraud or misrepresentation by a vendor may be by concealment or failure to disclose a hidden condition or a material fact, where under the circumstances there was an obligation to disclose it during the transaction. If deception is accomplished, the form of the deceit is immaterial. And the legal question is not affected by the absence of an intent to deceive, for the element of intent, whether good or bad, is only important as it may affect the moral character of the representation.

Tusch Enterprises, 113 Idaho at 42, 740 P.2d at 1027. “[A]ctual intent to deceive need not be shown where the seller knew of facts which would have apprised a person of ordinary prudence of the truth: if a reasonable person would have been so apprised, the seller was under a duty to inform the buyer of the concealed facts, then intent to deceive is not necessary to make a prima facie showing.” *Id.* at 43, 740 P.2d at 1028 (citation omitted).

BRN’s cross-claim for failure to disclose is predicated on Taylor’s employment of Spokane County ordinances and failure to investigate and research applicable Kootenai County ordinances. Taylor has set forth facts showing that it did not rely upon Spokane County ordinances, and that it did rely on Kootenai County ordinances in performing its duties as per the written agreement for engineering services. BRN’s responsive briefing argues that Taylor had a duty to disclose the scope of the engineering services it was providing and any limitation or expansion on those services into land use planning, and that Taylor represented that BRN was required to record a final plat.

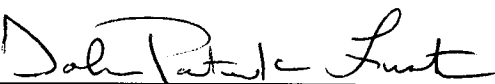
Taylor correctly asserts that the arguments set forth in BRN’s response are not actually pled in BRN’s cross-claim. Even if sufficiently pled, however, summary judgment is still proper. First, it is difficult for this Court fathom, much less conclude, that there was an agreement or special relationship between the parties to perform certain land use planning work, but that BRN was unaware of the agreement’s terms because Taylor alone failed to disclose the scope of work that BRN asked Taylor to perform. Second, while there may be an issue of fact as to whether Taylor represented that it would provide land use planning services to BRN, this issue concerns actual representations, as opposed to failures to disclose. Last, as explained in detail above, BRN has not shown that if Taylor agreed to or represented that it would perform land use planning services, that Taylor was unable perform land use planning services, thereby triggering

the need for a disclosure. Therefore, summary judgment is granted in favor of Taylor on BRN's claim of failure to disclose.

IV. CONCLUSION

Cross-Defendant Taylor Engineering, Inc.'s Motion for Summary Judgment is hereby GRANTED. Cross-Claimant BRN Development's claims of Intentional Misrepresentation and Failure to Disclose as set forth in the Amended Answers and Affirmative Defenses to Cross Claims of Taylor Engineering, Inc. and Cross Claim of BRN Development, Inc., pp.19-21, and as argued in the pleadings filed with this Court as of September 12, 2011, are hereby dismissed with prejudice.

DATED this 14th day of September, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I certify that on this 14 day of September, 2011, I caused a true and correct copy of MEMORANDUM OPINION AND ORDER RE: TAYLOR ENGINEERING INC.'S MOTION FOR SUMMARY JUDGMENT ON BRN DEVELOPMENT'S CROSS-CLAIMS OF INTENTIONAL MISREPRESENTATION AND FAILURE TO DISCLOSE to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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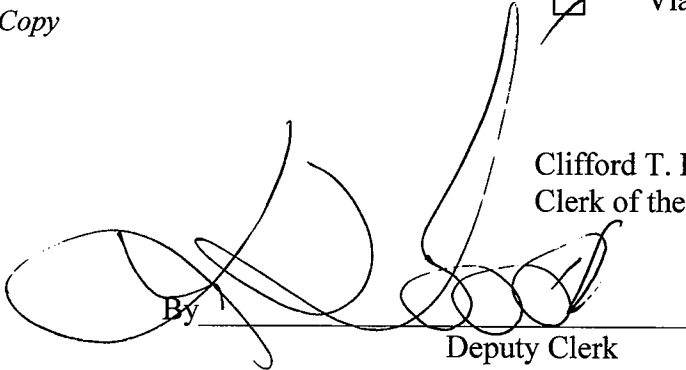
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Deputy Clerk

Clifford T. Hayes
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