

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

CASE NO. CV-09-2619

**MEMORANUM OPINION AND ORDER
 RE: BRN DEVELOPMENT, INC.'S
 PARTIAL MOTION FOR SUMMARY
 JUDGMENT RE: TAYLOR
 ENGINEERING'S ECONOMIC LOSS
 RULE DEFENSE**

**MEMORANUM OPINION AND ORDER RE: BRN DEVELOPMENT, INC.'S PARTIAL
 MOTION FOR SUMMARY JUDGMENT RE: TAYLOR ENGINEERING'S ECONOMIC LOSS
 RULE DEFENSE**

Washington corporation, d/b/a WILBERT
PRECAST,

Defendants.

And

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;

**MEMORANUM OPINION AND ORDER RE: BRN DEVELOPMENT, INC.'S PARTIAL
MOTION FOR SUMMARY JUDGMENT RE: TAYLOR ENGINEERING'S ECONOMIC LOSS
RULE DEFENSE**

It is undisputed that cross-defendant Taylor was retained by cross-claimant BRN to perform professional engineering services on the Black Rock North Project, and that the parties entered into an agreement regarding the engineering work. Taylor cross-claimed against BRN for breach of the agreement alleging BRN failed to pay Taylor for the engineering work performed. This Court has already determined that BRN breached the agreement. On July 27, 2011, this Court granted Taylor's Motion for Partial Summary Judgment on the breach of contract claim in the amount of \$153,448.77 plus interest, but allowed BRN to pursue offset through its cross-claim of professional negligence.

BRN's remaining cross-claim against Taylor is set forth in the "Amended Answers and Affirmative Defenses of Cross Defendant's BRN Development, Inc., BRN Investments, LLC," dated May 18, 2010. The cross-claim is set forth in the pleading as follows:

Taylor Engineering had a duty to BRN Development and [BRN Owner Marshall] Chesrown to exercise such care, skill and diligence in the performance of the services that 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 recognizes that there is no written agreement that was executed between the parties defining the scope of the work that Taylor would provide on the project. BRN claims, however, that BRN hired Taylor to provide engineering and related services including land use planning relating to a zone change, platting and PUD processes for the BRN project. The claims advanced by BRN are rather general in that the assertion is that Taylor was leading and directing land use and entitlement issues for the BRN project. In

support of this claim BRN refers to the fact in the record that on May 18, 2009, Mr. Hyslop, the transactional attorney for Taylor, sent a letter to BRN stating that unless the final plat of the Black Rock North Project was filed by May 29, 2009, the preliminary plat would expire and the Planned Unit Development (“PUD”) entitlement would no longer be vested.

BRN further asserts that land use planning requires specialized knowledge and/or expertise and that Taylor held itself out to the public as having expertise regarding land use planning. BRN points to the Taylor webpage that references land use planning. During the work provided by Taylor on the project BRN claims it reasonably relied upon the land use planning advice provided by Taylor which resulted in unnecessary expenditures of \$7 million dollars.

Taylor on the other hand claims that Taylor never agreed to provide land use planning services to BRN on the project and that no one from BRN ever asked Taylor to provide such services. Taylor’s position is that it provided civil engineering, utility design, boundary surveying, topographical surveying, construction staking and limited construction observation on the project. Taylor further asserts that no employee or agent held themselves out to anyone from BRN as specializing in land use planning and no evidence was offered to show that anyone from BRN ever was aware of Taylor’s webpage or the reference to land use planning on the webpage. Taylor also notes that the current attorney for BRN, John Layman (and formerly Catherine McKinley of Mr. Layman’s firm), were hired by BRN to perform land use planning services and worked with a land use planning firm from Colorado on the BRN entitlement for the PUD.

Taylor has also noted, and as discussed in this Court's prior opinion, that four days after the "Hyslop letter," was sent to BRN, the attorney for BRN sent a letter to Mr. Hyslop stating that under the Kootenai County Ordinance in effect, the preliminary plat would not expire until October 29, 2009, and that the PUD entitlement remained vested. It is undisputed that the final plat was filed in time and that the PUD entitlement vested and remained vested.

II. LEGAL STANDARDS FOR SUMMARY JUDGMENT

Idaho Rule of Civil Procedure **56(c)** provides for summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, based on the "pleadings, depositions, and admissions on file, together with any affidavits." Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 405 (Ct. App. 1987). Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. Zehm v. Associated Logging Contractors, Inc., 116 Idaho 349, 775 P.2d 1191 (1988). "If the adverse party desires to serve opposing affidavits the party must do so at least 14 days prior to the date of the hearing. The adverse party shall also serve an answering brief at least (14) days prior to the date of the hearing." I.R.C.P. **56(c)**. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. Roell v. City of Boise, 130 Idaho 197, 938 P.2d 1237 (1997); Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991).

III. DISCUSSION

BRN seeks summary judgment with respect to Taylor's economic loss rule defense to BRN'S professional negligence allegations on the basis that a special relationship exist between the parties as a matter of law. In this motion BRN asks this Court to rule as a matter of law that if Taylor provided the disputed advice concerning what was required to vest the PUD, the services involved in providing such advice come within the special relationship exception to the economic loss rule.

This Court has previously ruled that the damages suffered by BRN are "purely economic losses." This means that BRN did not suffer any personal injury or injury to its property, but instead suffered only the loss of money because it claims to have unnecessarily spent \$7 million dollars on the project.

It is axiomatic that a negligence claim requires the showing of a duty, a breach of that duty, causation and damages. Blacks Law Dictionary, 7th Edition. The economic loss rule prohibits recovery of purely economic losses in a negligence action because a party generally owes no duty to prevent economic loss to another. The reason for this rule is that allowing the recovery of economic loss would impose too heavy and unpredictable burden on a defendant's conduct. Duffin v. Idaho Crop Improvement Association, 126 Idaho 1002, 895 P.2d 1195 (1994). An exception to the rule exist where a special relationship exist between the parties.

A special relationship exists where the relationship between the parties is such that it would be equitable to impose a duty to prevent economic loss to another. Aardema v. US Dairy Systems, 147 Idaho 785, 215, P.3d 512 (2009)(citing Duffin v. Idaho Crop

Improvement Association, 126 Idaho 1002, 895 P.2d 1202 (1995). It is an “**extremely limited** group of cases where the law of negligence extends its protections to a party’s economic interest.” Blahd v. Richard B. Smith, Inc., 141, Idaho 296, 108 P.3d 996 (2005)(quoting Duffin).

The Idaho Supreme Court has found a special relationship to exist in only two situations: First, where a professional or quasi professional performs personal services. For example, a special relationship may exist where an insurance agent with specialized knowledge and experience negligently performs services related to insurance coverage for an insured. McAlvain v. General Insurance Company of America, 97 Idaho 777, 554 P.2d 955 (1976). Second, where an entity holds itself out to the public as having expertise regarding a specialized function and by doing so, knowingly induces reliance on its performance of that function. For example, a special relationship existed where a seed certification was entered by the only entity in Idaho authorized to certify seed potatoes. Duffin v Idaho Crop Improvement Association, *supra*.

Taylor previously moved for summary judgment on this cross-claim and this Court has previously denied Taylor’s motion for summary judgment at a hearing on July 27, 2011. During those proceedings, BRN argued that whether there is a special relationship between BRN and Taylor is a question of fact and there is a genuine issue of material fact as to whether the special relationship existed. This Court denied Taylor Engineering’s motion for summary judgment on this cross-claim. Specifically this Court’s order set forth the following:

1. That Taylor Engineering, Inc.’s Motion for Partial Summary Judgment against BRN Development Inc. on that part of BRN Development Inc.’s

Cross Claim of professional negligence which is premised upon the standard of care applicable to a land use planner **is denied as there remains a genuine issue of material fact as to whether there was a special relationship between Taylor Engineering, Inc. and BRN Development, Inc.** with respect to the land use planning work BRN Development, Inc. alleges Taylor Engineering, Inc. performed for BRN Development, Inc. on Black Rock North.

2. That the Court **shall enter a finding of fact** that BRN Development, Inc. seeks to recover purely economic loss under its' Cross-Claim of professional negligence against Taylor Engineering for land use planning advice.

Notably, it was BRN that prepared this Order for this Court's signature.

It is clear from the foregoing statement of claims above that there is a factual dispute between the parties regarding the extent of professional or quasi professional services involved between the parties on this project. BRN argues that Taylor acted as the lead in providing land use planning services. Taylor has consistently argued that Taylor never agreed or was obligated to provide any land use planning services to BRN and that Taylor acted only as a professional engineer on the project. Taylor also argues that land use planning services are not professional services and that a mere reference on its website to "land use planning" does not create a special relationship.

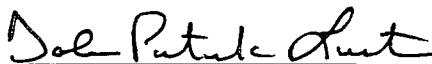
BRN attempts to seek a conditional ruling from this Court, but such a request is an inappropriate application of the summary judgment process. BRN asks this Court to rule as a matter of law that *if* Taylor provided the disputed advice and services concerning what was required to vest the PUD, the services involved in providing such advice come within the special relationship exception to the economic loss rule. BRN is essentially seeking an advisory opinion on a set of disputed facts by way of summary judgment.

BRN sets forth a number of “undisputed facts” in its memorandum that are in fact disputed by Taylor. This Court is entrusted with the task at trial to make a number of factual determinations in connection with the project and the parties’ dealings. Mr. Chesrown, the principle for BRN, appears to be a sophisticated land developer involved in a substantial project in Kootenai County. The project is essentially a second phase of a previous similar project within Kootenai County. A substantial amount of money has been expended in consultation with lawyers, engineers, architects, contractors and others in regards to land use planning. The extent, if any, and the circumstances surrounding the entitlement application process, are questions of fact yet to be fully resolved.

BRN seems to argue that a “special relationship” exception determination is similar to the satisfaction of certain elements to support a cause of action. This is too liberal of a reading of the economic loss rule. The case law clearly establishes that the exception only applies in a very limited number of cases. More, importantly it is an equitable application by this Court. Before this Court can apply equity, a full submission of the business dealings between the parties as they relate to securing the PUD final plat approval needs to be evaluated at trial. A determination of a special relationship exception is a question of fact and not a question of law that can be determined upon summary judgment in this case.

Based upon the foregoing the motion for summary judgment is hereby denied.

DATED this 7th day of December, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I certify that on this 7th day of December, 2011, I caused a true and correct copy of MEMORANDUM OPINION AND ORDER RE: BRN DEVELOPMENT, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT RE: TAYLRO ENGINEERINGS' ECONOMIC LOSS RULE DEFENSE to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

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**MEMORANDUM OPINION AND ORDER RE: BRN DEVELOPMENT, INC.'S PARTIAL
MOTION FOR SUMMARY JUDGMENT RE: TAYLOR ENGINEERING'S ECONOMIC LOSS
RULE DEFENSE**

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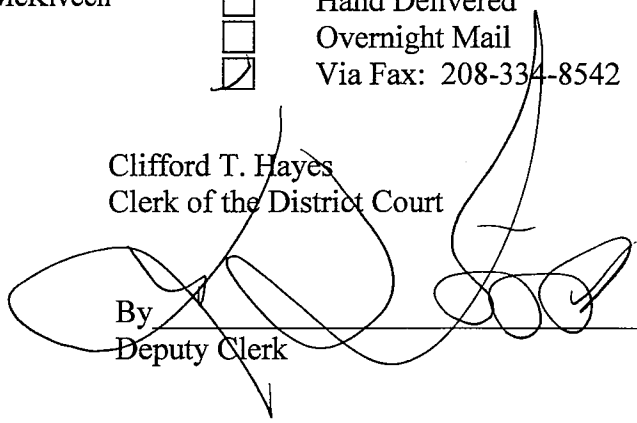
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Clifford T. Hayes
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By _____
Deputy Clerk



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