

STATE OF IDAHO }  
COUNTY OF KOOTENAI } SS  
FILED: 9/3/09 }  
AT 9:30 O'CLOCK AM }  
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

TAYLOR ENGINEERING, INC., a

CASE NO. CV-09-2619

**DECISION ON COURT TRIAL**  
**Re: BRN CROSS CLAIM VS. TAYLOR**  
**ENGINEERING**

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.

Bench Trial on BRN Development, Inc. cross claim against Taylor Engineering, Inc. seeking an award of money damages on cause of action for professional negligence.

Bradley Crockett and Brian Balch, Layman Law Firm, PLLP, for BRN Development, Inc.

M. Gregory Embrey and Mark Ellingson, Witherspoon Kelley, for Taylor Engineering, Inc.

## I. STATEMENT OF THE CASE

A court trial was conducted in this case over the course of several days. Numerous exhibits were submitted to the court by stipulation of the parties and evidence was admitted by the court along with consideration of the testimony of several witnesses. The Parties provided written closing arguments and final briefing, and the matter was taken under advisement on September 17, 2012. The following Decision on Court Trial shall constitute Findings of Fact and Conclusions of Law pursuant to **Idaho Rule of Civil Procedure 52(a)**.

The issues presented for trial arise in connection with a failed real estate development known as Black Rock North. The primary action was commenced by American Bank seeking foreclosure on a secured loan. A number of parties along with various claims have been included within the litigation in connection with financing, services, materials, and labor provided in connection with the project. A number of the claims between certain parties have been bifurcated by the court in order to more efficiently address those issues.

This dispute is between BRN, the developer of the project, and Taylor, the engineering firm that provided services on the project. It is undisputed that Taylor provided engineering services in connection with the project. Taylor was not fully paid and brought suit against BRN. Pursuant to a Partial Summary Judgment entered by the court on July 27, 2011, the court awarded \$155,448.77 to Taylor against BRN for breach of contract. BRN seeks to offset the

amount owed based upon a remaining claim for professional negligence, which has been set forth by BRN against Taylor 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.

Pre-trial motions and subsequent rulings by the Court have narrowed the issues to be resolved at trial. There is no claim against Taylor regarding negligence in the engineering work provided by Taylor on the project. BRN, however, asserts that in assuming engineering responsibilities on the project, Taylor also took on the lead role of providing planning services. In providing those services, BRN argues that Taylor was negligent, which led to damages in excess of seven million dollars. The court has previously ruled that any damages suffered by BRN are purely economic losses and therefore covered by the "economic loss rule", which bars recovery unless covered by a recognized exception to the rule. The exception at issue is whether a "special relationship" exists between BRN and Taylor to allow recovery for professional negligence against Taylor for land-use planning advice.

BRN contends that when the project ran into financial difficulties, it was misled by Taylor in terms of the work necessary to vest the PUD with Kootenai County. Consequently BRN claims that it incurred significant unnecessary expense in attempting to protect its entitlement as a result of the negligent advice. Taylor disputes that it agreed to provide planning services and contends that it only provided civil engineering, utility design, boundary surveying, topographical surveying, construction staking, and limited construction observation

on the project. Taylor further disputes any legal duty owed or resulting proximate losses as well as any special relationship exception to any planning services that may have been provided.

BRN was formed by Marshall Chesrown as CEO and Robert Samuel as a primary investor to develop a high-end 325-unit residential and golf course subdivision on the west side of Lake Coeur d' Alene. In addition to the residential units and golf course, the conceptual design included amenities such as a clubhouse, equestrian facility, and the Kootenai Cabin Kids Camp. Chesrown had been involved in a number of other developments in Kootenai County as well as in Spokane, Washington. Part of the motivation in pursuing the Black Rock North project was the earlier success of Chesrown's original Club at Black Rock, which was a similar residential and golf course subdivision.

Chesrown had experience in land development and had been successful in working with Kootenai County in developing subdivisions and PUD projects. In order to pursue the project at Black Rock North, it was necessary for BRN to obtain from Kootenai County a zone change and approval of applications for the subdivision and for the PUD. The project was fairly complex, and BRN assembled a team in early 2005 to pursue the development. Included in this "team approach" was Design Workshop, hired to provide a conceptual master plan, a detailed lot layout, and road design. Taylor was retained for the technical aspects of providing civil engineering services, grading and draining expertise, and preliminary and final plat expertise. Kyle Capps was hired as the project manager, and the Layman Law Firm was utilized for legal services.

BRN also utilized the consulting services of Roger Nelson. Nelson was an experienced realtor and accountant, and had been engaged in the real estate industry for a number of years.

He worked on the original Club at Black Rock and was president of Black Rock Development, which was the controlling entity of the original project and an affiliate of the Black Rock North project. His primary focus on the project was marketing and sales. Nelson did not have any formal background in land-use planning; however, he had worked in the building industry and had been involved in various aspects of land-use planning involving the entitlement process with large master-planned communities.

Chesrown had hired the engineering firm of Inland Northwest Consultants to provide the engineering and planning work on the Club at Black Rock. While Taylor Engineering had not worked on that project, Chesrown was familiar with Taylor's services and had worked with Ron Pace on a variety of other developments. Chesrown thought Taylor would be a good fit for Black Rock North. Taylor Engineering was situated primarily in Spokane, Washington, but had recently opened an office in Coeur d' Alene. Ron Pace is an engineer and part owner of Taylor Engineering. He does not hold himself out as a land-use planner; however, the firm does provide planning services and advertised these services on its web site. The invoices used on the Black Rock North project include the letterhead designation "Civil Design and Land Use Planning." Frank Ide is a senior associate with Taylor who specializes in landscape architecture and is the company's expert on land-use planning.

There was never any written agreement generated between the parties, nor was there offered into evidence any specific oral terms that clearly defined Taylor's roles and responsibilities on the project. As the project progressed, Ron Pace assumed the role of preparing the applications to be submitted to the county that sought approval of the subdivision. He would attend the meetings with the county representatives and prepare

minutes. Pace was also the primary contact person on behalf of BRN in dealing with the county; but, this role was somewhat shared with Kyle Capps.

John Layman was an attorney with the Layman Law Firm, and his firm provided a variety of services during the project. The office would prepare PowerPoint™ presentations for the county meetings and Layman, on behalf of BRN, would personally present at the meetings and answer questions. Ron Pace would also attend and address the technical inquires. Layman would assist on specific tasks for BRN such as contract review and due process claims. He also assisted in agency disputes with the Idaho Department of Water Resources and the Worley Highway District. The law firm performed work for BRN through a number of associates including Art Bistline, Patti Foster, Amie Anderson, and Kathryn Mckinley. Mr. Bistline and Ms. McKinley had experience in land-use planning matters, but provided only limited roles on the project. The Layman Law Firm billed BRN \$50,000 to \$100,000 for services provided.

Land-use planning appears to be a nebulous profession. The evidence establishes that land-use planning is a specialized function in connection with real estate developments- especially large PUD projects such as Black Rock North. The parties agree that a certain expertise is required to assist a developer through the entitlement process. However, an individual can engage in the business of being a land-use planner without any formal education or training requirements. There is no licensing required by the State of Idaho, nor is there any regulatory board that governs professional standards. Anyone can hold themselves out to be a land-use planner.

This court derives a description of the services provided by a land-use planner from the testimony of those engaged in the industry. According to Roger Nelson, one does a

conceptual land plan where one designs the actual lot layouts and configurations to comply with the overall land-use zoning requirements of the jurisdiction where the property is located. Rand Wickman bases his consulting business on helping developers complete the entitlement process where land entitlement experience and the county ordinances are the instruction book. Sandra Young described task performed by a land-use planner to include researching ordinances that pertain to zoning, platting, planned unit developments, and subdivisions. Responsibilities further include attending meetings with government agencies, working closely with the project engineer, and generally guiding the client through the process. Frank Ide describes the work as simply planning the use of property and gaining entitlements. The evidence shows that some planning work does not require engineering services while some planning can incorporate engineering principles. Engineers are often used by developers to provide the dual role of providing engineering as well as planning services on a project; however, it appears that employees in the county planning department are not always impressed with engineers as planners.

It appears to the Court that land-use planning can include a broad range of services that are provided to a developer, from general design and layout to obtaining approval of a project. Duties that fall under the umbrella of land-use planning services include the following: researching ordinances, consulting with engineers and surveyors, filling out applications, attending meetings and presenting the client's proposal, and communicating with county planning employees in terms of answering questions about the project and perhaps more importantly asking the right questions about what needs to be done. Given the general scope

of planning work, it is interesting to note that nobody in this case wants to accept any responsibility for performing planning work in connection with Black Rock North.

In light of this broad definition, the reality in this case is that a number of individuals and entities have done planning work on the BRN project. Design Workshop was hired to prepare the raw land for the development's master plan, to prepare the overall design aspects of the project, and to provide landscape architecture services. The company needed to examine relevant county code provisions in preparing the master plan, prepared a narrative for the PUD submittal, and prepared documents to be used in the entitlement process. Taylor, through Ron Pace, prepared applications, attended hearings, prepared minutes, and served as a primary contact person for the project. Both Ron Pace and Kyle Capps regularly communicated with the county and related agencies in advancing progress on the project. Layman Law Firm provided advice and services on planning-related issues. Clearly, the evidence establishes a multiplicity of efforts in providing planning for BRN.

What is not so clear, however, is who, if anyone, was engaged to take the lead in providing land-use planning on the project. A great deal of effort at trial focused on placing that role with one individual or another. The court finds that the role of lead land-use planner was never clearly defined by the parties. The course of conduct indicates that land planning was a team effort advanced on behalf of BRN. The testimony, correspondence, and other evidence presented show that over the duration of the project, Kyle Capps and Ron Pace worked very closely on issues related to engineering needs and project approval requirements. Each was perceived at times by various individuals involved to be "in charge" in matters relating to the

planning process. Kyle Capps's role was perceived as more general and conceptual; Ron Pace's involvement was more technical.

The important question is not so much who was the lead planner, but rather who was responsible to provide guidance on the entitlement process. The question can be refined further to who provided consultation advice on how best to minimize expense and vest the PUD. It is obvious to this court that the failure of this project is wholly unrelated to poor planning services. The project failed because of the dire economic circumstance related to the recession commencing in 2007. BRN's prospects of selling units were bleak, and financing was no longer available. If the economy had remained vibrant, the BRN project likely would have enjoyed similar success to the original Club at Black Rock because the PUD was vested, and construction and marketing could proceed as contemplated by the developers.

During 2007 Mr. Cheshrown became concerned about the market, and the bank became nervous. He had some discussions with his partner, Mr. Samuel, about other options. In early January of 2008 BRN called a meeting to discuss cash flow problems and what was needed to be done. Of particular concern to Chesrown was to vest the PUD in hopes that if the market improved the entitlement would be secure and the project could continue at some future time. At the conclusion of the meeting, BRN had a clear impression that it was necessary to record a final plat. At this time the bank was no longer providing financing, and Chesrown raised an additional \$15 million through private equity offerings and other resources. Ultimately, this money was used to service the American Bank loan and to continue work on the BRN project.

By the spring of 2008 the market was in full decline and BRN continued working on the Panhandle Plat, which consisted of 56 lots. BRN found it necessary to do this work in order to

record the plat and secure vesting of the PUD. This understanding was erroneous because the PUD was vested based upon preliminary approval, and BRN was engaged in substantial construction. BRN's claim for damages is based upon the fact that, had they known the status of their entitlement, they would have "mothballed" the project rather than incur additional construction cost.

During the January 2008 meeting, Taylor left BRN with the impression that the additional work was needed to vest the PUD. Taylor disputes that any such representation was made. The evidence is clear that both BRN and Taylor felt compelled to continue work to record a final plat. This work continued through 2008 until BRN was confronted with serious financial distress and could no longer pay the bills from Taylor. Ron Pace and Kyle Capps continued to work together on the project into 2009 despite Taylor's increasing concern about not receiving payments. Finally, Taylor filed a claim of lien and sought payment from BRN in the amount of \$177,274.08. Taylor's attorney, William Hyslop, sent a demand letter to BRN on May 18, 2009. That letter included the following representations:

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.

..... Taylor Engineering, Inc. has been very involved with the survey, design, and preliminary plat approval process for this property since 2005. It has obviously invested a great deal of work product and holds a great deal of knowledge and expertise regarding this property. Once paid the amounts set forth below, Taylor Engineering, Inc. is prepared to complete the necessary documents, request the signatures from Kootenai County, the Worley Highway District, and the Panhandle Health District, and deliver the documents to whoever pays the amount owed.

On May 22, 2009, Chesrown's attorney, Barry Davidson, sent a return correspondence indicating that, after consulting with real estate and legal advisors, they did not share Hyslop's

conclusion that the PUD would fail to vest. Davidson referenced Kootenai County Ordinance No. 394 and advised as follows:

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.

BRN consulted with Kathryn McKinley, who reviewed the letter from Davidson, examined the ordinance, contacted the county, and reached the same conclusion regarding the security of the entitlement. Sandra Young, a planner with the county, was contacted earlier by Mr. Samuel on the issue, and responded in an April 19, 2009 memo that the PUD was not in jeopardy.

The foregoing reflects that the blame is shared among the players for BRN's misguided understanding in regards to the status of their entitlement when they made critical financial business decisions to continue to work on the project. The simple question that Chesrown needed answered in January 2008 was the status of the PUD. It is evident that attorneys Davidson and McKinley, as well as Sandra Young, were able to answer this question in short order. Chesrown had competent attorneys who he could ask to review the ordinances and consult the county planners. Kyle Capps was clearly capable, energetic, and fully versed on the project, and easily could have verified the information in the same manner as Mr. Samuels. Similarly, Mr. Pace, on behalf of Taylor, cannot escape a measure of fault. Nonetheless BRN blundered along without this critical information.

In order for BRN to recover damages, they must first establish that Taylor was negligent in providing land-use planning services. There are four elements of a negligence action: (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the

resulting injuries; and (4) actual loss or damage. *McKim v. Horner*, 143 Idaho 568, 149 P.3d 843 (2006).

Any claim of negligence by Taylor must arise from a duty owed BRN. In addressing the requirement of such a duty, the Idaho Court of Appeals set forth the following in *Gibson v. Hardy*, 109 Idaho 247, 706 P.2d 1358 (Ct. App 1985):

It has been established that “one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it would be reasonably anticipated or foreseen that failure to use such care might result in such injury.” In addition, “every person has a general duty to use due or ordinary care not to injure others, ... and to do his work, render services or use his property as to avoid such injury.” In determining whether such duty has been breached by the allegedly negligent party, his conduct is measured against that of an ordinary prudent person acting under all the circumstances and conditions then existing.

This general duty of care is the standard to be applied in this case. BRN seeks to advance a professional engineer malpractice claim by arguing that the applicable standard of care is an engineering standard of care. BRN asserts that even if the specific land-use planning task involved were not engineering, it is within the personal services that engineers customarily provide and upon which their clients rely. Additionally, BRN cites to the definition of “professional engineering” set forth in Idaho Code § 54-1202 (10) that includes planning under the scope of work. The court is not persuaded. The statutory reference to the services provided by engineers is prefaced upon those services requiring the application of engineering principles. Providing BRN with the proper advice on the status of the entitlement does not require the use of engineering skills.

The evidence does not establish that Taylor entered into an oral agreement with BRN to perform land-use planning services on the project. This is demonstrated by a lack of a clear

understanding between the parties regarding this responsibility. BRN may have been under the impression that land-use planning was part of Taylor's role, however, such an impression does not give rise to an obligation under the contract. Taylor's billings do not reflect the extent of services commensurate with land-use planning on a project as complex as Black Rock North. Additionally Frank Ide, Taylor's land-use planner, was utilized for only a limited purpose. Taylor, however, did provide planning services on the project as reflected in the limited billings as well as the conduct of Ron Pace and his involvement in those areas that inherently create a connection with engineering and land-use planning.

Negligence arises out of some duty imposed by law, irrespective of any contract. A breach of contract is ordinarily not a tort, although contract may create circumstances for commission of a tort. *Gibson*, supra. Taylor owed a duty of reasonable care in providing non engineering services in its work with BRN regardless of whether those services were provided under the contract or they were services assumed by Taylor. While it is clear that Taylor took on certain planning-related duties' it has not been established from the evidence that Taylor specifically advised BRN that a final plat had to be recorded to vest the PUD entitlement. Kyle Capps and Ron Pace had regularly consulted the county and each organized and pursued their respective work task on the final plat with that understanding in mind. On Taylor's part, its understanding was reflected in the Hyslop letter. Taylor's understanding or the parties' impression does not give rise to a duty imposed upon Taylor.

Any duty upon Taylor is further dependent upon establishing the existence of a special relationship. This court has ruled that the damages sought by BRN in the form of money damages are purely economic losses. 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 of a 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 exists where a special relationship exists 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, a special relationship exists 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*.

BRN contends that the exception applies because the land-use planning services provided by Taylor on the project were professional services. The law would certainly recognize an exception for engineering services, however, this claim is for the planning services provided by Taylor while employed as an engineer. BRN argues that Taylor was engaged to perform professional services and point to the billing statements from Taylor. The charges for the work that could be considered land-use planning reflect “for professional services.”

The economic loss rule exceptions contemplate a limited number of cases. The law does not extend as broad a definition of professional services as argued by BRN. A common definition of “professional” extends to virtually anyone who engages in an occupation as a means of livelihood or for gain. This would apply equally to the brain surgeon and the hot dog vendor. Under the law, the term “professional” is more refined. Black’s Law Dictionary defines “professional” as a person who belongs to a learned profession or whose occupation requires a high level of training and proficiency. *Blacks*, 7<sup>th</sup> Edition.

In *Sumpter v. Holland*, 140 Idaho 349, 93 P.3d 680 (2004), the Idaho Supreme Court considered the application of the statute of limitations for professional malpractice in a case involving a real estate agent. In determining the definition of “professional services” for the purpose of applying the statute of limitations the Court examined the statutory provisions of Idaho Code § 30-1303(1) - governing professional service corporations, and Idaho Code § 53-615(8)(a) – governing limited liability companies. The Court noted that, on two separate occasions, the legislature has compiled a list of services designated as being “professional” thereby giving an indication of legislative intent with regard to the term “professional services.”

The Court concluded that the legislature contemplated there to be some type of specialized higher education degree in occupations that render “professional services.”

Land-use planning was not included in either of the statutes. Land-use planning does not require any educational degree or specific training. The occupation is not subject to any licensing requirement and is not regulated by the state. Anyone can provide land-use planning services. Taylor’s work as a land-use planner in this case does not fall under the exception to the economic loss rule as providing professional or quasi-professional personal services.

The second exception applies 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. Taylor is an engineering firm that does provide land-use planning services. It has a planning expert, Frank Ide, on its staff and it advertises planning services to the public on their web site. Taylor’s billings and letterhead references planning services. Notwithstanding that land-use planners are not considered professionals under the law, they do appear to provide a specialized function. The evidence establishes that an experienced land-use planner can be critical in guiding a developer through the complexities of land development, especially as it relates to working with government agencies and securing entitlements.

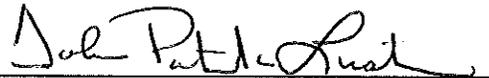
The planning services provided by Taylor do not fall within this second exception. The facts vary considerably from the circumstances presented where the exception has been applied. In *Duffin*, the Idaho Supreme Court noted that the seed certification entity was the only such entity in the state. Furthermore, the farmer was obligated to utilize the entity. Many if not most engineers provide planning services. A developer has a choice to hire an engineer to

provide those services, retain the services from a specialty firm such as Design Workshop, use an individual consultant with planning experience, rely on a lawyer, or simply go it alone and work with the county planner.

Applying the special relationship requires an equitable consideration. It has been used by the court where it would be equitable to impose a duty to prevent economic loss to another. This court does not find that imposing such a duty would be appropriate in this case. Mr. Chesrown was an experienced developer who embarked on a large complex development that involved a significant financial commitment. His company, BRN, engaged professional services without a written contract or clearly defined job responsibilities. Kyle Capps, as BRN's project manager, was involved regularly with the county and other agencies in the planning process. BRN had competent attorneys available to review ordinances and determine the status of entitlements. Ultimately, the economic loss incurred by BRN was the result of a poor market caused by an economic recession, and the facts of this case do not invoke equity to shift the burden of that loss to Taylor.

Based upon the foregoing, it is the decision of the court that BRN has failed to meet its burden of proving the claims against Taylor. Counsel for Taylor shall prepare an appropriate judgment.

Dated this 4<sup>th</sup> day of November, 2012.



John Patrick Luster, District Judge