STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

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

KEN SMITH and DEBBIE SMITH, husband and wife,

Plaintiffs,

vs.

THE LIGHTHOUSE GROUP, INC., AN IDAHO CORPORATION, D/B/A CRESCENT HOMES, ET AL,

Defendants.

Case No. **CV 2011 5105**

MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND BACKGROUND.

On August 15, 2003, plaintiffs Ken and Debbie Smith (Smiths) received a "certificate of occupancy" for their residence at 15170 S. Bull Run Road in Cataldo, Idaho. Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4. Smiths' residence was constructed pursuant to a contract entered into with defendant Crescent Homes, a.k.a Lighthouse Group, Inc.(Lighthouse). Complaint, p. 2, ¶ 2.2-3. Defendant Wallace Lucas, d.b.a. Lucas Design Group (Lucas) produced "plans" for this residence. Lucas Answer, p. 2, ¶ 4. Defendant Tate Engineering (Tate) provided engineering services for the residence and affixed an engineer seal on certain construction drawings. Tate Answer, p. 3, ¶ 11.

On June 24, 2011, Smiths filed this lawsuit asserting the following causes of action against the following parties:

	CLAIM	DEFENDANT
1.	Breach of Contract	Crescent Homes (Lighthouse Group)
2.	Negligent Construction	Crescent Homes (Lighthouse Group)
3.	Negligent Supervision	Crescent Homes (Lighthouse Group)
4.	Breach of Implied Warranty	Crescent Homes (Lighthouse Group)
5.	Breach of Express Warranty	Crescent Homes (Lighthouse Group)
6.	Professional Malpractice	Tate Engineering
7.	Negligent Engineering	Tate Engineering
8.	Negligent Design	Wallace Lucas d.b.a. Lucas Design Group

Complaint, pp. 4-9. Smith claims he discovered a variety of latent construction, design and engineering defects in the home in late winter or early spring of 2010. Affidavit of Ken Smith Filed in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 3. Smiths' engineer found engineering-related defects of: total window-wall ratio and related shear wall calculations, absence of foundation vents in the concrete stem wall, lack of fire breaks, the size of the mechanical room may be inadequate relative to the needs of the systems occupying the space, absence of footings for structural support posts for the deck and stairs, stairs and deck supports not constructed of treated material and on absence of footings under the stairs, and sistered beams supporting the composite deck were neither made from treated material nor flashed, resulting in water penetration and decay of the beams, and structural failure. Affidavit of Jeffrey D. Block, P.E. Filed in Support of Plaintiff's Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motions for Summary Judgment, p. 2, ¶ 6 (1)-(g).

All three defendants listed multiple affirmative defenses to the above claims in their respective Answers. One defense found in all three Answers is that Smiths may be barred from bringing the above claims pursuant to the applicable statute of limitations found in Idaho Code §§ 5-216- 219 and 5-241. *See* Lucas Answer, p. 2, ¶ 8; Tate Answer, p. 10; Lighthouse Answer, p. 8.

On December 2, 2011, Smiths proactively filed a motion for summary judgment on the question of the application of the statute of limitations. On January 17, 2012, Lighthouse filed its response to Smiths' motion and filed a cross motion for summary judgment as to both the economic loss rule and the statute of limitations. On January 20, 2012, Tate filed a response to Smiths' motion and filed a cross motion for summary judgment on two grounds: (1) the statute of limitations as it relates to the Notice and Opportunity to Repair Act (NORA) and (2) Smiths' inability "to establish an essential element of their malpractice and negligence claims" against Tate. Tate Engineering Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 2. On January 30, 2012, Smiths filed a separate reply and response to both Lighthouse's and Tate's cross motions for summary judgment. On February 7, 2012, Lighthouse filed a reply memorandum in support of its cross motion, and on February 8, 2012, Tate filed a reply memorandum in support of its cross motion.

On February 10, 2012, the parties filed a Stipulation for Dismissal of Defendant Wallace E. Lucas d.b.a. Lucas Design Group Without Prejudice.

On February 14, 2012, oral argument on the cross motions for summary judgment was held, following which the Court took the matters under advisement.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel*

v. Hepworth, Nungester & Lezamiz, Inc., 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982).

Evidentiary rulings, such as ones on the motion to strike before the Court, are reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.,* 134 Idaho 46, 50, 995 P.2d 816, 820 (2000). Reviewing Courts apply the abuse of discretion standard when evaluating whether testimony offered in connection with a motion for summary judgment is admissible. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 72, 177 (2007) (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). In Idaho, a party may wait until hearing on a summary judgment motion to object to an opposing party's affidavits. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992). In *Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003), the Idaho Supreme Court wrote:

> We have held that the question of admissibility of affidavits under Idaho Rule of Civil. Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment. *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 12227 (1994). The trial court must look at the affidavit or deposition testimony and determine whether it alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Regional Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Sulaney*, 137 Idaho at 163-64, 45 P.3d at 819-20.

139 Idaho 126, 128, 75 P.3d 180, 182. Rule 56(e) requires affidavits be made upon personal knowledge, "shall set forth such facts as would be admissible in evidence", and affirmatively show the affiant is competent to testify to the matters stated. I.R.C.P. 56(e).

III. ANALYSIS.

Smiths' claims can be broken up and considered in three categories as they relate to the statute of limitations. First, contract claims, including breach of an implied and/or express warranty will be considered in light of I.C. §§ 5-216 and 5-241. Next, tort claims will be considered in light of I.C. §§ 5-219 and 5-241. Finally, the claim against Tate for professional malpractice will be considered under I.C. § 6-2503.

However, before examining the applicability of the statute of limitations, this court must rule on two motions to strike.

A. Motions to Strike.

First, Tate moves to strike portions of the Affidavit of Jeffrey Block ¶¶ 6(a)-(g); 7-10, Exhibit A. Memorandum of Tate in Support of Motion to Strike, p. 2. Next, Smiths move to strike portions of the Affidavit of Jae Enos ¶¶ 3-4. Memorandum of Smiths in Support of Motion to Strike, pg. 3. Neither of these motions will affect the overall outcome of the statute of limitation analysis, as the matters testified to do not involve the timeliness of actions or filings.

Tate objects to the admissibility of Exhibit A of the Affidavit of Jeffery Block because of lack of foundation, failure to authenticate and hearsay. Memorandum of Tate in Support of Motion to Strike, p. 3. Block is the professional engineer hired by Smiths to give testimony in this lawsuit. Block gives an opinion as to the liability of Tate Engineering. Affidavit of Jeffrey Block p. 2, ¶ 5. He then immediately refers to Exhibit A, the plans Tate signed as professional engineer, as a specific example supporting his conclusion. *Id.*, p. 2, ¶ 6. This amounts to "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in

evidence to prove the truth of the matter asserted." I.R.E. 801(c). However, an expert "may testify thereto in the form of an opinion or otherwise." I.R.E. 702.

In regard to ¶¶ 6(a)-(g) and 7-10 of Block's Affidavit, Tate argues that there has not been adequate foundation laid to warrant the opinions of Jeffrey Block. Memorandum of Tate in Support of Motion to Strike, pg. 3. In his Affidavit, Block states he is a registered professional engineer who has gained personal knowledge through inspection of the residence, has reviewed the applicable plans and reviewed the notice of defect. Based on this foundation the testimony is admissible. *See Dulaney v. St. Alphonsus Regional Med. Ctr.,* 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). Tate's motion to strike must be denied.

Second, Smiths move to strike portions of the Affidavit of Jae Enos as conclusory, speculative, lacking in foundation and hearsay. Plaintiffs' Motion to Strike Portions of the Affidavit of J. Jae Enos Files in Opposition to Plaintiffs' Motion for Summary Judgment, and in Support of Defendant Crescent Home's Cross-Motion for Summary Judgment, pp. 2-4. Enos states, "at the time of the contract, Crescent Homes was not primarily known as a builder of 'custom homes' . . . in fact, there were at that time more than a few builders in the Coeur d'Alene area whose recognized specialty was large custom homes." Affidavit of Jae Enos, pg. 2, ¶ 3. Enos goes on to state an opinion of what a Kootenai County records search would reveal as to the number of homes constructed at that time in Kootenai County "…in that price range or higher." *Id.*, pg. 2, ¶ 4. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." I.R.E. 602. There is nothing to dispute that Enos had knowledge of other builders and building activity in the area. Affidavit of Jae Enos, pp. 1-2. Enos' affidavit shows that Enos is currently the president of The Lighthouse Group, Inc., and that back in 2003, Enos was an employee of Crescent Homes. Thus, Enos has the foundation to testify about what Crescent Homes did. However, nothing in Enos' affidavit establishes the basis of his knowledge about the building in Kootenai County in general

in 2003. Accordingly, the motion to strike filed by Smith as to Enos' statement that "at the time of the contract, Crescent Homes was not primarily known as a builder of 'custom homes'" is denied. The motion to strike filed by Smiths as to Enos' statement "…in fact, there were at that time more than a few builders in the Coeur d'Alene area whose recognized specialty was large custom homes", and "…I am certain that a search of county records would show that there were a substantial number of homes being constructed during that time period in that price range or higher", is granted, as lacking in foundation, speculative and conclusory.

B. Are the Smiths' Claims for Breach of Contract, Breach of Implied Warranty, and Breach of Express Warranty Timely?

Smiths' memorandum in support of their motion for summary judgment only addressed the statute of limitations as it related to five of the eight claims – Smiths did not address the statute of limitations pertaining to the breach of contract, breach of implied warranty, or breach of express warranty claims. *See* Memorandum in Support of Plaintiff's Motion for Summary Judgment, pp. 5-12. In its response brief, Lighthouse also addressed the statute of limitations for contract actions. *See* Memorandum in Response to Plaintiff's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment pp. 3-7. In Smiths' reply to Lighthouse's response, Smiths still failed to address the statute of limitations for these three contract claims.

"Contract actions shall accrue and the applicable limitation statute shall begin to run at the time of final completion of construction of such an improvement." I.C. § 5-241(b). Once construction is complete, Idaho Code § 5-216 requires an action based on contract to be brought within five (5) years. This has been upheld by the Idaho Supreme Court and distinguished from the tort causes of actions discussed *infra*. *See Twin Falls Clinic & Hospital Bldg v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982).

In the case at bar, the completion of the construction occurred no later than August 15, 2003. *See* Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4. No evidence in the record contradicts this date. The contract statute of limitations ran on August 15, 2008. Because there are no remaining issues of material fact on this issue and due to the fact that this action was not filed until June 24, 2011, the claims for Breach of Contract, Breach of Implied Warranty and Breach of Express Warranty are barred by the applicable statutes of limitations. Based on Smiths' memoranda and oral argument, Smiths appear to have conceded this issue.

C. Are the Smiths' Claims for Negligent Construction, Negligent Supervision, Negligent Engineering, and Negligent Design Timely, and, if Timely, are those Claims Barred by the Economic Loss Rule?

The Idaho legislature has distinguished the time period within which tort claims accrue from the time period within which breach of contract claims accrue. *See* I.C. § 5-241. This distinction allows for a "limited discovery exception in the area of 'tort' liability arising out of the design or construction of improvements to real property . . . It is to be noted that such exemption would only be applicable to *latent* defects since *patent* defects by definition would be those which should have been discovered." *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 103 Idaho 19, 23, 644 P.2d 341, 345 (1982), *emphasis added*.

> Tort actions, if not previously accrued, shall accrue and the applicable limitation statute shall *begin to run* six (6) years after the final completion of construction of such an improvement.

I.C. § 5-241(a), *emphasis added*. "This section provides a limited discovery rule for tort claims arising out of the design or construction of improvements to real property." *Hibbler v. Fisher*, 109 Idaho 1007,1012, 712 P.2d 708,713 (1985). Once the period of time provided by I.C. § 5-241 has expired, either because of notice of defect or the expiration of six (6) years, then "an action for relief [not explicitly provided for by statute] must be commenced within four (4) years after the cause of action shall have accrued." I.C. § 5-224. These statutes are considered

together when applied to latent defects. *Hibbler*, 109 Idaho 1007,1012, 712 P.2d 708,713. Therefore, the maximum amount of time for an action in tort relating to the design or construction of property is ten (10) years

The nature of the damage at issue in the present case presents questions of material fact: a) whether that damage is latent or patent, and b) when was the damage noticed. Construing the facts in the light most favorable to Smiths, the Court notes, "Plaintiffs discovered the latent construction defects [on] or about August of 2010." Complaint, p. 3, ¶ 2.17. Tate's argument that some or all of the defects are patent would bar a summary judgment motion. *See* Affidavit of Tate pg. 4-7, ¶¶ 20-44. As to patent defects, the statute of limitation expired well before Smiths filed this lawsuit.

As to latent defects, Idaho law provides Smiths with a six (6) year limitation provided by I.C. 5-241, with an additional possible timeframe of four (4) years provided by I.C. § 5-224. Thus, Smiths would have ten (10) years from the completion of construction to bring a claim in tort before statute of limitations expires on August 15, 2013. *See* Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 4. Smiths' negligence claims as they relate to latent defects are timely.

However, in Lighthouse's response to Smiths' motion for summary judgment, Lighthouse raises the issue of the economic loss rule as applied to negligence actions. *See* Memorandum of Lighthouse in Opposition to Plaintiff's Motion for Summary Judgment, p. 4-5. Idaho courts have held "that 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." *Blahd v. Smith*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005). "Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction." *Id*., 141 Idaho 296, 300, 108 P.3d 996, 1000. The Idaho Supreme Court has held:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. . . .

Tusch Enterprises v. Coffin, 113 Idaho 37, 41, 740 P.2d 1022, 1026 (1987), *citing Clark v. International Harvester Co.,* 99 Idaho 326, 335, 581 P.2d 784, 792 (1978) (plaintiffs sought recovery for damages arising out of purchase of a defective tractor). This economic loss rule is not limited to manufacturing. *Tusch Enterprises* involved a suit by a purchaser against a developer and seller of a defective residential duplex. *Tusch Enterp*., 113 Idaho 37, 40, 740 P.2d 1022, 1025. One month after purchase, the plaintiff noticed extensive damage which was determined to have resulted from the defendant's constructing the residential duplex on improper fill dirt. *Id.* "Economic loss includes the costs of repair and replacement of defective property which is the subject of the transaction. . . ." *Brian and Christie, Inc. v. Leishman Elec. Inc.*, 150 Idaho 22, 26, 244 P.2d 166, 170 (2010), *citing Salmon River Sportsman Camps, Inc.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975). The Idaho Supreme Court explained that "the economic loss rule limits the actor's duty so that there is no cause of action in negligence . . . The seller has no duty under the law of negligence to design, manufacture, or sell property that will conform to the buyer's economic expectations." *Brian and Christie, Inc*., 150 Idaho 22, 28, 244 P.2d 166, 172.

At oral argument, Smiths posited that the house is not the subject of the transaction, but rather the subject of the transaction is the services rendered to construct the house. Smiths rely on *Brian and Christie, Inc.,* to demonstrate that the subject of the transaction in question is service. *Brain and Christie, Inc.* involved a claim for damages resulting from upgrades and/or repairs made to an existing building by a subcontractor. 150 Idaho 22, 24, 244 P.2d 166, 168. In

that case, the Idaho Supreme Court examined numerous cases in which it had applied this general rule of economic loss and distinguished the facts of the case before it by pointing out that the electrician did not sell defective property. 150 Idaho 22, 26, 244 P.2d 166, 170. The Idaho Supreme Court then held:

> The restaurant was not defective property. It did not spontaneously combust. Rather, [Brian and Christie, Inc.'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.

Id.

The subject of the transaction in *Brian and Christie, Inc.* was the repair service to the existing building. This is distinguishable from the case at bar. The subject of a transaction can involve service. For instance, service is involved in making and selling an aircraft engine, yet the subject of the transaction is the engine itself not the construction of the engine. *See Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 544 P.2d 306 (1975) (economic loss rule bared recovery). Similarly, it may require service to make a tractor, yet the tractor itself is the subject of the transaction. *See Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Again, in *Tusch*, the "service" involved was both the leveling of the improper fill material upon which duplexes were later built, and the construction of the duplexes (113 Idaho 37, 40, 740 P.2d 1022, 1025); yet, in *Tusch*, the "subject of the transaction" was construction of the duplexes. 113 Idaho 37, 41, 740 P.2d 1002, 1026. This is consistent with the earlier case of *State v. Mitchell Const. Co.*, 108 Idaho 335, 699 P.2d 1349 (1984). In *Mitchell*, the State of Idaho contracted with Mitchell Construction for an office building to house the State of Idaho Department of Agriculture. 108 Idaho 335, 336 699 P.2d 1349, 1350. The constructed building had a defective roof so the State of Idaho sued Mitchell Construction. *Id.* The Idaho Supreme

Court held the claim was barred by economic loss rule because the building, not the construction service, was the subject of the transaction. *Id.*

In the case at bar, similar to *Tusch* and *Mitchell*, the subject of the transaction is the building. Unlike *Brian and Christie, Inc.*, in the present case Smiths did not hire the defendants to repair a small portion of an existing building. Rather, the contract was for the construction of the entire home. The construction of Smiths' residential building included services, similar to the construction of an engine, tractor, residence or roof of a state office building as shown in the examples above, but the end goal of the transaction was the construction of a residence. Once this distinction is made, it becomes clear that the subject of the transaction in question is the residence. Therefore, unless an exception applies, the economic loss rule will bar tort recovery.

The Court has set out only two exceptions to the economic loss rule: 1) the special relationship exception, and 2) the unique circumstances exception. *See Blahd v. Richard B. Smith, Inc*., 141 Idaho 296, 301-02, 108 P.3d 996, 1001-02 (2005).

> The term "special relationship," ... refers to those situations where the relationship between the parties is such that it would be equitable to impose such a duty. In other words, there is an extremely limited group of cases where the law of negligence extends its protections to a party's economic interest.

141 Idaho 296, 301, 108 P.3d 996, 1001, citing *Duffin v. Idaho Crop Improvement Assoc.,* 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995).

The Idaho Supreme Court noted in *Blahd* that there have only been two cases in which Idaho Courts have recognized a *special relationship* exception: 1) a case involving an insurance agent who knowingly led plaintiffs to inadequate coverage (*McAlvain v. General Ins. Co. of America,* 97 Idaho 777, 780, 554 P.2d 955, 958 (1976), where a professional relationship already existed prior to the time the insured expressly requested his insurance agent provide complete insurance coverage on all of the insured's inventory; the agent failed to do so, and a fire later destroyed the inventory) and 2) a case involving the Idaho Crop Improvement Association

(ICIA), which was the sole entity authorized to certify seed potatoes in Idaho. 141 Idaho 296, 301, 108 P.3d 996, 1001, citing *Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995). In *Blahd*, Mr. and Mrs. Blahd purchased a home which was constructed on improper fill material. 141 Idaho 296, 299, 108 P.3d 996, 999. The Idaho Supreme Court stated that even though the developers where experienced and may arguably be deemed "quasi-professionals" in the construction field, "there [was] no evidence showing the [developers] performed a personal service for the Blahds or held themselves out as having a special and unique expertise." 141 Idaho 296, 301, 108 P.3d 996, 1001. The complete analysis by the Idaho Supreme Court is as follows:

> As real estate developers of the lot in question, the Smith Entities may arguably be considered quasi-professional. Even if they are, there is no evidence showing the Smith Entities performed a personal service for the Blahds or held themselves out as having a special and unique expertise. Furthermore, even if the Smith Entities marketed the lot in question to the general public, there is no indication in the record that the Blahds relied on those representations. Accordingly, there is no special relationship between the Blahds and the Smith Entities.
>
> The Smith Entities hired Jones to supervise the lot preparation and provide geotechnical services. The Gyslings also hired Jones to inspect the soil on the lot and determine whether it was adequate for residential construction. There is no indication in the record that the Blahds relied upon or were even aware of Jones' services regarding the lot. Like the lack of evidence regarding inducement of reliance by the Federal–State Inspection Service in *Duffin*, there is no evidence in the record showing Jones actively sought to induce the Blahds to rely on its services. Therefore, the special relationship exception does not apply to Jones.

141 Idaho 296, 301-02, 108 P.3d 996, 1001-02. Similarly, in the present case, Smiths have not alleged a performance of a personal service outside of the design and construction of the residence that would indicate the existence of a special relationship exception to the economic loss rule.

Regarding the exception to economic loss for *unique circumstances*, the *Blahd* Court first made clear that the exception has never been applied in Idaho; then, the Idaho Supreme Court refused to apply it to the facts of that case. 141 Idaho 296, 302, 108 P.3d 996, 1002. "The

purchase of a residential house is an everyday occurrence and does not create the type of unique circumstances required to justify a different allocation of risk . . ." 141 Idaho 296, 302, 108 P.3d 996, 1002. The Smiths have asserted that "the construction of a million dollar three-story, 8,600 square foot custom river-front home, with an elevator, and in-ground swimming pool is hardly an everyday occurrence." Memorandum of Plaintiff in Reply to Defendant Crescent Homes Response to Plaintiff's Motion for Summary Judgment, p. 7. However, the individual characteristics of a given home do not make this a unique circumstance for purposes of an exception to the economic loss rule, particularly when Idaho Courts have never before applied this exception.

In the instant case, as to latent defects, the statute of limitations for Smiths' negligence claims has not run if discovery of the defects did not occur until 2010, as set forth by Smiths. Affidavit of Ken Smith in Support of Plaintiff's Motion for Summary Judgment, p. 2, ¶ 5. However, Smiths' claims do not allege personal injury. Instead, they "includ[e] costs of repair and replacement of defective property which is the subject of the transaction" (*Blahd v. Smith*., 141 Idaho 296, 300, 108 P.3d 996, 1000), which is prohibited under the economic loss rule. The present case is similar to *Blahd* and *Tusch* in that the subject of the transaction is the house. The Idaho Supreme Court has used the two exceptions to the economic loss rule very sparingly. The facts of the instant case do not amount to a special relationship or unique circumstance within the meaning of those exceptions as set forth in *Blahd.* Therefore, the claims of negligence, arising out of the construction of real property, are barred by the economic loss rule.

D. Is Smiths' Claim for Professional Malpractice Timely?

Similar to the actions sounding in tort discussed above, an action for professional malpractice must be made within six years of completion of construction. I.C. § 5-241(a). However, an action to recover damages resulting from professional malpractice has an additional two year statute of limitation. I.C. § 5-219(4). Therefore:

> [a] cause of action founded in professional malpractice arising out of the design or construction of improvements to real property must be brought within two years of discovery of the alleged malpractices and in no event later than eight years following the completion of the construction.

Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 24, 644 P.2d 341, 346 (1982).

In addition, Idaho has adopted the Notice and Opportunity to Repair Act (NORA), which in part establishes a process for providing notice to the construction professional and allowing that professional a chance to respond, correct or deny any claims. I.C. § 6-2503.

> If a written notice of claim is served under this section within the time prescribed for the filing of an action under this chapter, the statute of limitations for construction-related claims is tolled until sixty (60) days after the period of time during which the filing of an action is barred.

I.C. § 6-2503(1). Smiths had a six (6) year limitation, provided by I.C. § 5-241, with an additional two (2) years provided by I.C. § 5-219(4). Smiths would have eight (8) years from the completion of construction to bring a professional malpractice claim before the statute of limitations ran. Here, because a notice of defect was sent to Tate, the additional sixty (60) days provided by I.C. § 6-2503 would require filing of Smiths' action on or about prior to October 15, 2011**.** Smiths met that deadline as their Complaint was filed on June 24, 2011.

In its response, Tate argues the notice from Smith, on June 2, 2011, did not comply with NORA. *See* Memorandum of Tate in Response to Plaintiff's Motion for Summary Judgment, pp. 11-17. The Idaho Supreme Court addressed the issue of compliance with NORA by stating that the notice of defect must reasonably relate to the particulars of the deficiency. *Mendenhall v. Aldous*, 146 Idaho 434, 437 196 P.3d 352, 355 (2008). In *Mendenhall*, a dispute arose over unfinished work on a house as well as a leaky roof. 146 Idaho 434, 435 196 P.3d 352, 354. Written communication was initiated by the defendant builder (Aldous) addressing possible solutions to the unfinished work. *Id.* Mendenhall's response did not address the proposed solutions, but rather complained about the unfinished work and the leaky roof. *Id.* When Aldous sent another letter asking Mendenhall to address the proposed solutions, Mendenhall sent the

builder a demand letter for $29,496.74. *Id.* This demand letter ended communication between the parties. *Id.* One year after communication stopped, Mendenhall brought a civil action against the builder. *Id.*

The district court granted summary judgment to Aldous for failure by Mendenhall to meet NORA requirements. *Id.*146 Idaho 434, 436 196 P.3d 352, 354. In examining the district court's decision, the Idaho Supreme court explained that the purpose of NORA is to "give contractors the opportunity to fix construction defects before a lawsuit is filed." *Id.* The court went on to say:

> NORA's notice requirement does not require claimants to describe alleged defects with excessive particularity. Instead, the "reasonable detail" requirement is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect.

*Id.*146 Idaho 434, 437 196 P.3d 352, 355. The Idaho Supreme Court found that even though the letter only complained of unfinished work and a leaky roof, it "surely provided enough detail and pertinent information to permit the Aldouses to inspect the home and determine 'the general nature of the defect[s].'" *Id.* "If the construction professional disputes the claim or does not respond to the claimant's notice of claim within [21 days], the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice." I.C. § 6–2503(3)(a). The *Mendenhall* court held that because of Aldous' failure to respond to Mendenhall's demand letter, Mendenhall was free to pursue civil action. 146 Idaho 434, 438 196 P.3d 352, 356.

The facts of the present case are similar to those in *Mendenhall*. On June 2, 2011, Smith sent Tate a letter describing in reasonable detail the nature and type of deficiencies regarding the home. *See* Affidavit of Tate, Exhibit 1. This letter "surely provided enough detail and pertinent information to permit [Tate] to inspect the home and determine 'the general nature of the defect[s].'" *Mendenhall,*146 Idaho 434, 437 196 P.3d 352, 355. On June 22, 2011, Tate sent a

response which "notified the Smiths that Smiths' Notice of Claim did not describe any of Tate Engineering's engineering services, *therefore the Smiths claim was reasonably denied.*" Memorandum of Tate in Response to Plaintiff's Summary Judgment Motion, pg. 5, ¶ 14, *emphasis added*. Tate responded to Smiths' letter within 21 days by disputing responsibility for Smiths' claim. Because Tate disputed the claim, "the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice." I.C. § 6–2503(3)(a). Because of Tate's denial of Smiths' Notice of Claim, Smiths are not barred from bringing this claim under NORA, pursuant to Idaho Code § 6-2503(3)(a).

Tate alleges Smiths' Notice of Claim was served upon Tate via standard mail, not certified mail as is required by Idaho Code § 6-2502(8). Tate Engineering's Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment RE: Statute of Limitations and in Support of Tate Engineering's Motion for Summary Judgment, p. 15; Affidavit of Robert M. Tate, p. 3, ¶ 17. Tate admits his attorneys received Smiths' Notice of Construction /Engineering Defects in Smith Residence 15170 Bull Run Road, Cataldo, Idaho 83810. *Id.*, ¶ 16. Smith argues that while the notice was sent first class mail, but not certified, the Smiths have substantially complied with the notice requirement, the purposes of the notice requirement were satisfied, and that Tate cannot claim any prejudice because he in fact received notice. Plaintiffs' Reply to Defendant Tate Engineering's Response in Opposition to Plaintiffs' Motion for Summary, and Plaintiffs' Response in Opposition to Defendant Tate Engineering's Cross Motion for Summary Judgment, pp. 2-5. This Court agrees. As correctly noted by Smiths, "substantial compliance" has been recognized in other areas (contractor labor and material claims, *School Dist. 91, Bonneville Co. for Use and Benefit of Idaho Concrete Products, Inc. v. Taysom,* 94 Idaho 599, 603, 495 P.2d 5, 9 (1972); and the Idaho Tort Claims Act, *Sysco Intermountain Food Service v. City of Twin Falls,* 109 Idaho 88, 705 P.2d 548 (1985); *Huff v. Uhl,* 103 Idaho 274, 276, 647 P.2d 730, 732 (1982); and *Avila V. Wahlquist,* 126 Idaho 745, 748, 890 P.2d 331, 334

(1995)). *Id.* This Court finds it appropriate to apply "substantial compliance" to the NORA requirements. The Court also finds Smiths "substantially complied" with those requirements as Tate actually received timely notice and can demonstrate no prejudice.

Tate argues the scope of its work with Crescent Homes (Lighthouse) was very limited in general, and specifically, regarding the Smiths' home, was limited to beam sizing, shear wall calculations, fireplace footing detail, site plan analysis, providing an elevation certification and a site review for the deck encroachment on a setback. Tate Engineering's Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment RE: Statute of Limitations and in Support of Tate Engineering's Motion for Summary Judgment, p. 14. Tate also argues that none of the defects claimed in the Smiths' Notice of Claim were related to the services Tate provided. *Id.*, pp. 14-15. Smiths claim Tate, as the engineer of record in stamping the plans prepared by Lucas Group (who was not a licensed architect, and thus, the plans needed Tate's engineering stamp), approves the plans and Tate's claim that the scope of his work were limited are thus, of no consequence. Plaintiffs' Reply to Defendant Tate Engineering's Response in Opposition to Plaintiffs' Motion for Summary, and Plaintiffs' Response in Opposition to Defendant Tate Engineering's Cross Motion for Summary Judgment, p. 9. At the present time, this Court finds there is a material issue of fact in dispute as the scope of the work. This Court also finds a legal issue exists as to the significance of the engineer's stamp, whether liability extends to any deficiency in the plan or whether the scope of the work can limit such liability, and the significance, if any of Kootenai County Building Ordinances 221A and 221B.

IV. CONCLUSION AND ORDER.

The statute of limitation for the claims arising out of contract has expired since more than five (5) years has passed since construction was completed.

The economic loss rule applies to bar the negligence claims – even though action was commenced within the statute of limitations for tort actions. The narrow exceptions to the

economic loss rule have been narrowly construed and seldom used by the Idaho Supreme Court. Those cases do not indicate that either of those exceptions apply to the instant case.

The claim for professional malpractice against Tate is both timely and is in compliance with NORA. Of Smiths' claims in their Complaint set forth above, the only remaining claim is the professional malpractice claim against Tate. To summarize:

	CLAIM	OUTCOME
1	~~Breach of Contract (Lighthouse)~~	Dismiss, Statute of Limitations
2	~~Negligent Construction (Lighthouse)~~	Timely, but Dismiss, Economic Loss Rule
3	~~Negligent Supervision (Lighthouse)~~	Timely, but Dismiss, Economic Loss Rule
4	~~Breach of Implied Warranty (Lighthouse)~~	Dismiss, Statute of Limitations
5	~~Breach of Express Warranty~~	Dismiss, Statute of Limitations
6	Professional Malpractice	*** TIMELY ***
7	~~Negligent Engineering~~	Timely, but Dismiss, Economic Loss Rule
8	~~Negligent Design~~	Timely, but Dismiss, Economic Loss Rule

IT IS HEREBY ORDERED the Motion for Summary Judgment filed by plaintiffs Smiths is DENIED.

IT IS FURTHER ORDERED the Motion for Summary Judgment filed by Crescent Homes (Lighthouse Group, Inc.) is GRANTED.

IT IS FURTHER ORDERED the Motion for Summary Judgment filed by Tate Engineering is DENIED as pertains to Smiths' claims of professional malpractice, and GRANTED as pertains to Smiths' claims of negligence.

IT IS FURTHER ORDERED counsel for the respective parties are ordered to prepare a Judgment consistent with this Memorandum Decision and Order on Cross Motions for Summary Judgment.

Dated this 14th day of March, 2012.

_____

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of March, 2012 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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By _____
Jeanne Clausen, Secretary