7-17-2008

Gray v. Tri-Way Constr. Servs. Respondent's Brief Dckt. 34666

IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT GRAY,

Plaintiff/Appellant,

vs.

TRI-WAY CONSTRUCTION SERVICES, INC., a Washington Corporation; RAY ALLRAD [sic], an individual; KATHY PETERSON, an individual; GARY PETERSON, an individual,

Defendants/Respondents.

Supreme Court No. 34666

RESPONDENTS' BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada

Honorable Cheri C. Copsey, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This dispute arises out of an alleged employment agreement between plaintiff Robert Gray and defendants Tri-Way Construction Services, Inc. ("Tri-Way"), a Washington corporation, and Ray Allard, Kathy Peterson and Gary Peterson, individuals who collectively own the controlling shares of stock in Tri-Way. In early 2004, the parties held a number of discussions concerning various proposed business ventures, and eventually came together on May 21, 2004, to discuss a "Draft Employment Agreement" that had been prepared by Mr. Gray. This Draft Agreement set forth a number of proposed terms, including provisions for the term of Mr. Gray's proposed employment and the compensation he might receive. The parties were unable to reach a final agreement with respect to the Draft Employment Agreement at the May 21 meeting, at which time it was understood by all that Mr. Peterson would revise the Draft Employment Agreement for further review. Consequently, a number of drafts and other correspondence were exchanged between the parties as they attempted to reach a final agreement on the terms of Mr. Gray's employment. Ultimately, the parties were unable to agree on the material terms and, in October 2004, Mr. Gray broke off further negotiations and resigned from his employment with Tri-Way.

Following his resignation, Mr. Gray filed suit against Tri-Way, alleging breach of contract, a claim for statutory wages, promissory and equitable estoppel, and fraud. The complaint was subsequently amended to include Mr. Allard, as well as Mr. and Mrs. Peterson as individual defendants. Following discovery defendants moved for summary judgment, and after

the matter had been fully briefed and argued, the court granted summary judgment in favor of defendants on the basis that there had never been a meeting of the minds on the contract terms alleged by plaintiff, and that plaintiff had not reasonably relied upon any alleged misrepresentations concerning the terms of his employment. This appeal followed.

B. Course of Proceedings.

On December 2, 2004, plaintiff filed a Complaint and Demand for Jury Trial against Tri-Way, setting forth claims under theories of breach of contract, a claim for statutory wages, promissory and equitable estoppel, and fraud. (R. at 8-17.) Defendant Tri-Way filed its answer thereto on July 13, 2005. (R. at 18-23.) After conducting initial discovery, plaintiff filed his First Amended Complaint and Demand for Jury Trial on February 10, 2006. (R. at 24-38.) The Amended Complaint added Ray Allard, Kathy Peterson, and Gary Peterson as individual defendants and expanded the scope of the equitable relief sought to include additional claims for quasi-contract, constructive fraud and quasi-estoppel. Defendants filed their Answer to the Amended Complaint on March 13, 2006, and included a counterclaim asserting several legal and equitable claims against plaintiff. (R. at 39-51.)

Additional discovery was conducted in furtherance of the Amended Complaint, and on August 2, 2006, defendants filed their Motion for Summary Judgment seeking dismissal of all claims raised in the Amended Complaint. (R. at 52-54.) The following day, plaintiff filed his own Motion for Summary Judgment seeking dismissal of defendants' counterclaims, but not otherwise seeking judgment with respect to any of the claims raised in his Amended Complaint. (R. at 55-57.) Briefing and affidavits were submitted by both parties in support of their motions

(*see* R., Exs. 1-12) and a hearing was held on September 25, 2006. (R. at 65-67.) During the hearing, the court raised the issue of whether the statute of frauds would apply to the alleged oral contract at issue, and plaintiff's counsel requested an opportunity to brief that issue. (R. at 66.) Defense counsel stipulated to supplemental briefing, limited solely to the issue of whether the statute of frauds applied, and a stipulated briefing schedule was executed by counsel. (R. at 66, 68-68A.) A supplemental memorandum was submitted by defendants on October 13, 2006, and plaintiff's supplemental response was filed on November 13, 2006. (R. at Exs. 13, 14.) A reply memorandum was filed by defendants on November 27, 2006. (R. at 69-80.) Oral argument on the supplemental briefing was waived by the parties.

Following summary judgment proceedings, plaintiff made an oral motion that the parties be ordered into mediation, which was unopposed by defendants. When mediation failed, the parties notified the district court that the motions for summary judgment were ripe for final decision. Accordingly, the district court entered its Order Granting Motion for Summary Judgment to Tri-Way on June 5, 2007. (R. at 81-98.) On June 14, 2007, the court entered an Order Denying in Part and Granting in Part Gray's Motion for Summary Judgment. (R. at 99-101.) Because defendants had waived argument on three of their six counterclaims, plaintiff's motion was granted in part as to those counterclaims, and they were dismissed. However, the court denied plaintiff's motion to dismiss defendants' counterclaims for breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and conversion, finding that there existed genuine issues of material fact on those issues that precluded summary judgment. (R. at 100.)

The district court's Order Granting Motion for Summary Judgment to Tri-Way did not deny any portion of defendants' motion, which had sought dismissal of all claims brought under the Amended Complaint. (R. at 97.) However, because the order appeared to address only the breach of contract, statutory wage and statute of frauds issues (and was silent with respect to the claims for quasi-contract, promissory estoppel, equitable estoppel, fraud, constructive fraud and quasi-estoppel claims), plaintiff filed a Motion for Clarification of Granting Motion for Summary Judgment to Tri-Way on July 3, 2007. (R. at 102-104.) Following this motion, the district court entered an Order Clarifying June 5, 2007 Summary Judgment Order and Correcting the Order on August 7, 2007. (R. at 105-119.) The August 7 Order made it clear that summary judgment was granted on all of plaintiff's claims.

Judgment was entered in favor of defendants on September 11, 2007. (R. at 125-28.) In accordance with Rule 54, Idaho Rules of Civil Procedure, defendants timely filed their application for costs, including a Motion for Attorney's Fees. (R. at 129-141.) A Notice of Appeal of that judgment was filed by plaintiff on October 15, 2007. (R. at 142-144.) On December 21, 2007, the district court issued its Order Granting Costs and Attorney Fees, awarding defendants their costs pursuant to Rule 54(d)(1)(C), as well as a reasonable attorney fee award, and denying defendants their claimed discretionary costs under Rule 54(d)(1)(D). (R. at 167-174.) A Notice of Appeal was subsequently filed on January 18, 2008, appealing the award of costs and attorney fees. (R. at 175-178.)

C. Statement of Facts.

1. Robert Gray's search for employment outside Albertsons.

Prior to his efforts to join Tri-Way, plaintiff was working as a senior construction manager for Albertson's Inc. *See* Deposition Transcript of Robert Gray (hereinafter, "Gray Depo."), pp. 42-44, attached as Ex. A, Affidavit of Jason G. Murray in Support of Defendants' Motion for Summary Judgment ("Murray Aff.") (R. at Ex. 2.) Beginning in 2001, and continuing thereafter, Albertson's began to downsize its construction operation in plaintiff's northwest region. *See id.*, p. 45. By 2002, Albertson's had laid off at least half of its construction managers and/or supervisors in the northwest. *See id.*, p. 50. Accordingly, in November 2003, plaintiff held discussions with both Rite Aid, and with AC Electric, an electrical contractor in Washington state with whom plaintiff had worked in his capacity as construction manager for Albertson's and who was apparently interested in opening an office in Phoenix, Arizona. *See id.*, pp. 53-54. When nothing came of these discussions, Mr. Gray began similar discussions with Tri-Way. Although plaintiff claims that he did not make his decision to leave Albertson's until April of 2004 (*see id.*, p. 53), he has also testified that his first contact with Tri-Way regarding prospective employment occurred as early as January 2004. *See id.*, p. 61. Furthermore, plaintiff has testified to "several other discussions [with Tri-Way] in January and then into February," which culminated in a face-to-face meeting between plaintiff and defendants Gary Peterson and Ray Allard in the Tri-Cities in late February 2004. *See id.*, p. 68. During that meeting in the Tri-Cities, several options were discussed, although no resolution was achieved, yet the parties seemed intent on capturing construction work for Safeway and

Albertson's in the Phoenix area. *See id.*, p. 73. According to plaintiff, the Tri-Cities meeting ended with plaintiff "volunteering to contact an attorney and CPA in Boise to try and memorialize what had been discussed," including not only a potential employment relationship, but also an apparent proposal whereby plaintiff would buy out Gary Peterson's interest in Tri-Way at a future date. *See id.*, p. 75; *see also* Gray Depo. Ex. 2.

2. The terms set forth in plaintiff's Draft Employment Agreement were expressly rejected by defendants.

A few weeks later, plaintiff forwarded a proposal to Gary Peterson and Ray Allard dated March 16, 2004. *See* Gray Depo. Ex. 3; *see also* Gray Depo., pp. 155-158. Despite plaintiff's efforts to put forth a detailed proposal, he has testified that as of March 16, 2004, there was no agreement between the parties as to any material terms. *See* Gray Depo., p. 158. On or about April 29, 2004, plaintiff sent an e-mail to his accountant, Rob Grover, referencing partnership papers that he was having his attorney draft for a "corporation/partnership in Arizona." *See* Gray Depo. Ex. 5. Shortly thereafter, a "Draft Employment Agreement" prepared by plaintiff's attorney, at plaintiff's direction, was completed and circulated to Gary Peterson for his review. *See* Gray Depo., p. 177; Gray Depo. Ex. 6. While plaintiff is unclear as to what day he may have sent the Draft Employment Agreement to Mr. Peterson, he testified that the proposed contract was brought to a meeting with Mr. Peterson and Mr. Allard on May 21, 2004. *See* Gray Depo., p. 179. Gary Peterson acknowledged receiving the Draft Employment Agreement for the first time from plaintiff on May 19, 2004. *See* Deposition Transcript of Gary

Peterson ("Peterson Depo."), pp. 197-199, and Peterson Depo. Ex. 8, attached as Ex. B, Murray Aff. (R. at Ex. 2.)

Plaintiff's Draft Employment Agreement proposed that, beginning on June 1, 2004, Mr. Gray would be paid an initial base salary of $4,000 per month, which would be raised to $10,000 per month beginning in the calendar year 2005. *See* Gray Depo., p. 179; *see also* Gray Depo. Ex. 6. The Draft Employment Agreement also sought "an annual bonus of 50 percent (50%) of the net profit, before taxes, of the employer, such net profit to be calculated only for the Arizona division of the employer." *See id.* Mr. Peterson expressly noted his rejection of the Draft Employment Agreement on the face thereof, and communicated that rejection to Mr. Gray. *See* Peterson Depo., p. 199, LL. 5-15. Mr. Gray also testified that he understood changes were being made to his proposed terms. *See* Gray Depo., p. 216, LL. 15-21.

As negotiations over the Draft Employment Agreement progressed, one of the primary points of contention became the manner in which plaintiff would be compensated, particularly the proposed bonus provisions. *See* Gray Depo., pp. 216-217, 235, 240, 244; Peterson Depo., pp. 120-121, 132-135, 140-145, 147-148; Deposition Transcript of Ray Allard ("Allard Depo."), pp. 79, 130-131, 154-155, attached as Ex. C., Murray Aff. (R. at Ex. 2.)

On or about June 4, 2004, a revised "Draft Employment Agreement" was prepared by Tri-Way's attorney. *See* Peterson Depo., pp. 213-214. After reviewing this document Mr. Peterson again noted that the terms were rejected, and indicated on the face thereof the need for further changes. *See* Gray Depo. Ex. 8; *see also* Peterson Depo., p. 217.

Even though no final agreement had yet been reached and negotiations over the Draft Employment Agreement continued, Mr. Gray began working for Tri-Way on June 1, 2004.

3. The parties' continuing negotiations never resulted in an agreement with respect to material terms of the proposed employment agreement.

A revised "Draft Employment Agreement" bearing the date June 4, 2004, was prepared by Tri-Way's attorney and provided to defendants. Peterson Depo. Ex. 10. That revision contained several internal questions, set forth in italics, particularly with respect to the incentive or bonus pay provisions set forth at Section 4.3, Article 4, of the Draft Employment Agreement. *See id.*, p. 2. Given the methods of calculating such pay as set forth in Mr. Gray's May 21 "Draft," and the confusion generated thereby, Gary Peterson once again expressly indicated that those terms were rejected, and that the Draft Employment Agreement needed further changes. *See id.*, p. 1. Later revisions to the compensation provisions, including defendants' proposed means of calculating "Performance Based Salary" and "Incentive or Bonus Pay" were provided to Mr. Gray (*see* Gray Depo. Ex. 16), which he rejected. Gray Depo., p. 240.

Even though the parties were continually trying to negotiate mutually agreeable terms regarding the incentive or bonus pay, there was never any dispute that Mr. Gray was to receive an initial salary of $4,000 per month (*see* Gray Depo., p. 93), that Mr. Gray's salary would have doubled on December 1, 2004, to $8,000 per month (*see* Peterson Depo., p. 183), and that once the method of bonus calculations could be finally negotiated, Mr. Gray would receive a bonus as well (*see* Peterson Depo., p. 133). Unfortunately, the parties were never able

to fully and finally agree on the form of the bonus payment, or the means whereby that bonus would be calculated and distributed. *See* Peterson Depo., pp. 138, 140, 141, 144-145, and 148. Furthermore, the parties believed that a final agreement would be reached and reduced to a writing. *See* Appellant's Brief 16; Peterson Depo., pp. 151, 152, 266; Allard Depo., p. 152.

Following Mr. Gray's rejection of the proposed employment terms, he made one "last ditch" effort to buy out Gary Peterson and create a partnership with Ray Allard. *See* Gray Depo., pp. 253-254. Although Mr. Peterson was given a deadline of October 25, 2004, by which to respond to this final offer, at some point prior to October 20, plaintiff returned all of the corporate credit cards to Mr. Peterson at the Vancouver office and, on October 21, 2004, Mr. Gray tendered his resignation from Tri-Way. *See* Gray Depo., Exs. 22, 22A. Plaintiff also acknowledged that there was no agreed-upon formula for the computation of his bonus in a subsequent e-mail dated October 26, 2004, when he stated that it was up to Gary Peterson and Ray Allard "to figure out how much of the profits [he] brought to Tri-Way. . . . There is no 'negotiation' necessary." *See* Gray Depo. Ex. 23. In a good faith effort to compensate plaintiff for his time with Tri-Way, and despite the fact that there was never a mutually agreed upon formula for calculation and payment of a bonus, in addition to his final salary, plaintiff was offered a bonus of $60,000, which was an attempt to "make a fair assessment of the value . . . for the two projects he ran" while with Tri-Way. *See* Peterson Depo., pp. 237-238. Plaintiff rejected this tendered payment as well. In the words of Rob Gray on October 26, 2004, the parties tried "to put this 'deal' together over the [previous] few months," but "it just wasn't meant to be." Gray Depo. Ex. 23.

II. ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Defendants are entitled to an award of attorney fees on appeal.

III. ARGUMENT

A. Standard of Review.

Upon review of an order of the district court granting summary judgment, the standard of review is the same standard used by the district court in ruling on the motion. *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005). Summary judgment is appropriate when "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 the moving party is entitled to judgment as a matter of law." IDAHO R. CIV. P. 56(c). If there is no genuine issue of material fact, "only a question of law remains, over which this Court exercises free review." *Watson*, 141 Idaho at 504.

In addition, a "nonmoving party's failure to 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, requires the entry of summary judgment." *Jarman v. Hale*, 122 Idaho 952, 955-56, 842 P.2d 288, 291-92 (Ct. App. 1992). The nonmoving party is further required to set forth specific facts, by affidavit of otherwise (and not mere conclusions), from admissible record evidence, in order to show a genuine issue of material fact. *See Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).

B. The Undisputed Evidence of Record Establishes That the Parties Never Reached an Agreement with Respect to the Material Terms of the Alleged Contract.

Plaintiff has argued that at the May 21, 2004 meeting, the parties "had an agreement as to the terms of his compensation," specifically that he "was to receive 50% net profits before taxes." Appellant's Brief 15-16. Mr. Gray described this "agreement" as follows:

> Q. Okay. I want to focus for a minute on the second page, your handwritten notes. Those appear to be some figures that you wrote down. And I understand that those are probably going to correspond to a later e-mail that we'll come to in a few minutes, but I want to get your recollection at this point on what led to the generation of these notes that are contained on Exhibit 14.
>
> A. What led to the generation of these notes was a conversation with Gary Peterson, a meeting between he, myself, and Ray Allard.
>
> Q. And do you recall what was discussed?
>
> A. It was not so much a discussion as ***Gary's proposal to revise the agreement as I knew it from May 21st*** to something different.
>
> Q. You refer to May 21st there. Let me back up for just a minute to that date. Is May 21st the date upon which you believe the oral agreement had been reached establishing the terms of your employment agreement with Tri Way Construction?
>
> A. I believe a written agreement was in place at that time.
>
> Q. And when you say "a written agreement was in place," what do you mean by that? Had all of the parties – and by that I mean you, Gary, Ray, or anyone else from Tri-Way for that matter, signed a written agreement?
>
> A. The document had not been signed, but we were in agreement with respect to the terms of that agreement.

See Gray Depo., p. 216, L. 7 – p. 217, L. 11 (emphasis added).

The foregoing testimony clearly demonstrates Mr. Gray's acknowledged understanding that defendants intended to revise the terms of his proposed May 21 Draft Employment Agreement, which undermines his claimed belief that the very terms which were being revised somehow constituted "a written agreement."

In Idaho, the burden of proof is upon the plaintiff to prove not only a contract's existence, but also its enforceability. *Johnson v. Albert*, 67 Idaho 44, 170 P.2d 403 (1946). The general rules for the formation of a contract were established long ago by this Court in *Leavell & Co. v. Grafe & Associates, Inc.*, 90 Idaho 502, 414 P.2d 873 (1966), where the Court wrote:

> In order to constitute a contract, ***there must be a distinct understanding common to both parties***. The minds of the parties must meet ***as to all of its terms, and, if any portion of the proposed terms is unsettled and unprovided for, there is no contract***. An offer to enter into a contractual relation must be so complete that upon acceptance an agreement is formed which contains all of the terms necessary to determine whether the contract has been performed or not. ***An acceptance of an offer, to be effectual, must be identical with the offer and unconditional, and must not modify or introduce any new terms into the offer***. An acceptance which varies from the terms of the offer is a rejection of the offer and is a counter proposition, which must in turn be accepted by the offeror in order to constitute a binding contract.

Leavell, 90 Idaho at 512 (emphasis added). *See also Mitchell v. Siqueiros*, 99 Idaho 396, 582 P.2d 1074 (1978) (holding that there must be a distinct understanding common to both parties in order for a contract to arise).

To establish a meeting of the minds, admissible evidence must show that there was both a mutual understanding of the terms of the agreement, and that both parties "mutually assented to be bound by those terms." *Thomas v. Schmelzer*, 118 Idaho 353, 796 P.2d 1026 (Ct. App. 1990). This Court later provided a lengthy discussion of the mutuality requirement in

Intermountain Forest Management Inc. v. Louisiana-Pacific Corp., 136 Idaho 233, 31 P.3d 921 (2001). In that case, plaintiff IFM was represented by an employee named Briggs, who contacted defendant Louisiana-Pacific ("L-P") about a possible logging contract. An employee of L-P, named Stone, provided IFM's Briggs with a copy of a written form contract used by L-P in such transactions. Although the plaintiff signed the agreement and L-P's Stone allegedly told the plaintiff to begin work, the contract was never approved or executed by anyone with authority at L-P. The court thus held that there was no enforceable contract, explaining:

> The record is clear that the contract was never executed by L-P. . . . It is uncontroverted that no representative of L-P ever executed the contract; therefore, even drawing all inferences in favor of IFM, there are no genuine issues of material fact in dispute regarding lack of execution of a formal contract and the district judge did not err in granting L-P summary judgment on this issue.

Intermountain Forest, 136 Idaho at 236.

While plaintiff has argued in his opening brief that the *Intermountain Forest* decision is distinguishable because this case does not involve agency issues, the analysis of contract formation set forth therein is directly on point. Specifically, the *Intermountain Forest* court determined that the defendant's actions in giving IMF a copy of the written form contract was not an offer, but merely preliminary negotiations. In so concluding, the court held:

> The intent to have a written contract is shown by factors such as: (1) whether the contract is one usually put in writing, (2) whether there are few or many details, (3) whether the amount involved is large or small, (4) whether it requires a formal writing for a full expression of the covenants and promises, and (5) ***whether the negotiations indicate that a written draft is contemplated as the final conclusion of negotiations***. The burden of proof is on the party asserting that the contract was binding before the written draft was signed.

Id. at 237) (emphasis added). *See also Mitchell, supra*. The elements of formation as discussed by the *Intermountain Forest* court are not dependent on any agency analysis, and plaintiff's attempt to distinguish that case is unpersuasive.

Having established the elements necessary for formation of an enforceable contract, the *Intermountain Forest* court determined further that, when the intent for a written agreement has been expressed, mutual assent requires a fully executed written contract:

> It is undisputed that ***the parties' intent was to create a written contract to govern their agreement and both parties were to execute the agreement***. Briggs understood the document was unsigned when Stone presented it to him. Briggs also knew Stone did not have authority to bind L-P. Furthermore, Briggs was specifically told that the document had to be signed by Coates and would be returned to him by mail. ***The district judge was correct in inferring from the undisputed facts that the written contract was to be the consummation of the negotiations between the parties and that the signed contract would govern their relationship***. Because L-P did not sign the document, and the district judge could reasonably infer L-P did not intend to be bound until the document was signed, the district judge did not err in concluding that the parties lacked mutual assent to be bound.

Intermountain Forest, 136 Idaho at 237-38) (emphasis added).

The *Intermountain Forest* case is particularly helpful here because it presents facts that are substantially similar to those presented in this case; e.g., L-P provided the proposed contract to IFM, and IFM began work, even though the contract had not been fully executed. Furthermore, the parties' intent was to memorialize their agreement with a written document, which was to be fully executed. These facts were undisputed in the *Intermountain Forest* case, and similar facts are undisputed in this case. Yet the *Intermountain Forest* court still found (as

should this Court), that under Idaho law, no contract was formed because there was no mutual assent between the parties.

Here, plaintiff presented defendants with a "Draft Employment Agreement" that had been prepared by his attorney and his accountant. The proposed terms were discussed at a May 21, 2004, meeting in Vancouver, and though it is undisputed that plaintiff's draft was to be revised, he insists that an agreement had been reached, and he began work before the final agreement had been negotiated and reduced to a writing. *See* Gray Depo., pp. 216-217. There is no dispute that the parties intended to reduce their final agreement to a signed, "comprehensive" written agreement that would govern their working relationship. *See* Appellant's Brief 16. However, as in the *Intermountain Forest* case, the parties in this case never executed a completed agreement.

Given Mr. Gray's acknowledgment that Mr. Peterson intended to revise the Draft Employment Agreement, the only reasonable inference which may be drawn is that Mr. Gray knew his version of the Draft Employment Agreement had been rejected. The record evidence also contains a subsequent version of the Draft Employment Agreement, which reflected a number of changes, but this draft also bore an express, handwritten rejection by defendants, which further noted that the draft needed further changes. *See* Gray Depo., Exs. 6, 8. Finally, plaintiff was provided with defendants' proposed revisions to Article IV of the Draft Employment Agreement, which outlined the proposed terms for plaintiff's compensation, including bonus calculation and payment terms. *See* Peterson Depo. Ex. 9. As has been noted elsewhere herein, however, this revision was rejected by plaintiff.

Both the record evidence and plaintiff's own admissions at deposition lead to a single reasonable inference: that the parties were engaged in negotiation of employment terms that they intended to reduce to a final, comprehensive, written agreement. Despite plaintiff's claims to the contrary, the terms of that potential agreement were at all times being negotiated, and his claim that a final agreement on the material compensation terms had been reached on May 21 is unsupported by the record, and directly contrary to his own admission that the May 21 Draft was being revised. As such, the Court may "reasonably infer," as did the district court, that defendants (in the words of the *Intermountain Forest* court) "did not intend to be bound until the document was signed, [and the district court may not be found to have] err[ed] in concluding that the parties lacked mutual assent to be bound." *Intermountain Forest*, 136 Idaho at 238.

This Court has repeatedly recognized the "long existing contract principle" that:

> where it is clear that one party has agreed that an oral agreement must be reduced to writing before it shall be binding, there is no contract until a formal document is executed . . . therefore, the trial court was correct in holding that there was not a breach of contract when the parties did not intend to be bound until the execution of a formal contract.

Mitchell v. Siqueiros, 99 Idaho 396, 400, 582 P.2d 1074, 1078 (1978).

In this case, it is undisputed that the parties not only never signed or otherwise accepted any of the draft agreements, but moreover, that the parties had each expressly rejected the others' proposed terms. Accordingly, the district court correctly held that no valid contract was formed, and entry of summary judgment was proper.

1. All necessary inferences were drawn in plaintiff's favor.

In a further attempt to defray this Court's attention from the fact that no valid contract was formed, plaintiff has argued on appeal that the district court "failed to construe the evidence in a light most favorable to [him]." Appellant's Brief 17. While there is no discussion with respect to the inferences which he claims should have been drawn in his favor, he appears to suggest that the evidence of whether a contract existed was capable of "more than one inference," and therefore the issue of formation could only be decided by a jury. This argument ignores a longstanding premise, recognized by the Idaho courts, that "an inference adverse to the nonmoving party may be drawn if it is the only reasonable inference." *Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).

Here, as defendants have shown above, between plaintiff's admission that on May 21, 2004, he knew defendants intended to revise his proposed terms, and the subsequent exchange of drafts which clearly centered upon the compensation terms, there was but a single reasonable inference to be drawn: that the parties never reached a complete understanding concerning the terms of plaintiff's employment with Tri-Way, including the terms for calculation and payment of any bonus. As such, the district court did not "fail to construe the evidence in a light most favorable" to plaintiff, and the grant of summary judgment should be affirmed.

2. Plaintiff's conclusory allegations that defendants agreed to pay him a percentage of profits does not raise a genuine issue of material fact.

Plaintiff's next argument centers upon his naked assertion that the "[e]vidence indicates" that defendants "represented to Gray that he would receive 50% of the net profits from projects that he managed," and that defendants "acted in a manner that indicated that they agreed

that Gray was to receive 50% of the net profits." Appellant's Brief 17. The only "evidence" submitted in this regard, however, is his self-serving affidavit submitted in support of his own motion for summary judgment, and excerpted portions of his own deposition testimony. R. at Exs. 2, 4. Again, the proffered "evidence" is not only self-serving, but directly contrary to other admissions by plaintiff and the weight of the record evidence described above.

Plaintiff has also argued on appeal that it was not until "the terms of compensation [had been] set" that he "resigned from Albertsons in early May of 2004." Appellant's Brief 7. Assuming this representation to be true, and that Gray did not resign from his employment at Albertsons until *after* an agreement had allegedly been reached with respect to the terms of his compensation, the only inference which may reasonably be drawn is that this "agreement" had been reached by Rob Gray, and Rob Gray alone. It is undisputed that the first version of the Draft Employment Agreement was not submitted to defendants until May 19, 2004, in preparation for the May 21 meeting in Vancouver. *See* Gray Depo. Ex. 6. It is also undisputed, and the district court expressly noted, that Rob Gray resigned his employment with Albertson's, Inc. on May 1, 2004. *See* R., p. 83 L. 17; Gray Depo., p. 84.

Not only is the "evidence" on which plaintiff has relied on appeal contrary to his own testimony elsewhere in this case, but plaintiff's attempt to create an issue of fact by referencing his self-serving affidavit is insufficient under Idaho law. As the district court correctly noted, the "existence of disputed facts . . . will not defeat summary judgment when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to its case." R., p. 89, LL. 1-3, citing *Garzee v. Barclay*, 121 Idaho 771, 774, 828 P.2d

334, 337 (Ct. App. 1992). Furthermore, the district court found that "disputes of material facts are not created by mere conclusory statement." R., p. 89, L. 4 (emphasis in original), citing *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 786, 839 P.2d 1192, 1200 (1992). In fact, conclusory assertions, "in the face of the facts, are not sufficient to create a genuine issue of material fact." R., p. 89, LL. 10-11 (emphasis in original), citing *Farm Credit Bank of Spokane v. Stevenson,* 125 Idaho 270, 274, 869 P.2d 1365, 1369 (1994).

Here, the conclusory statements set forth by plaintiff in his affidavit (R. at Ex. 4), and his equally conclusory testimony as referenced at pp. 6-10 of his statement of facts, are indeed "in the face of the facts," including not only the record evidence, but his own admissions made under oath. Because the admissibility of evidence contained in the affidavits and depositions in support of or opposition to a motion for summary judgment is a threshold issue to be determined before applying the liberal construction or reasonable inferences rule (*Hecla Mining Co.*, 122 Idaho at 794), the district court did not err in finding that there was not a genuine issue of material fact as to whether or not a valid contract had been formed. This holds true whether or not plaintiff is seeking to enforce the entirety of the May 21 Draft Employment Agreement, or the selected compensation provisions upon which he now relies. In the words of the district court, "Gray's 'conclusions' that he had an agreement or that he had the impression he had an agreement alone do not create a material dispute of fact, especially in the face of the overwhelming evidence the parties simply did not have an agreement, including Gray's own evidence." R., p. 89, LL. 20-23.

C. The Statute of Frauds Was Correctly Applied by the District Court.

To the extent that plaintiff has inferred that the district court improperly considered the statute of frauds analysis (*see* Appellant's Brief 3), even when the statute of frauds is not pled as an affirmative defense it may nonetheless be tried with the express or implied consent of the plaintiff. *See Rowley v. Fuhrman*, 133 Idaho 105, 108, 982 P.2d 940, 943 (1999). Here, at the summary judgment hearing the district court inquired whether or not the doctrine applied, and plaintiff's counsel not only did not object, but himself requested leave to submit additional briefing on the issue. R. at 66. Given that request, the district court correctly noted that where the defense was raised before trial and the party was given time to present argument in opposition, the defense of statute of frauds can be raised for the first time in the summary judgment proceedings. R. at 93, n.6, citing *Bluestone v. Mathewson*, 103 Idaho 453, 649 P.2d 1209 (1982). Accordingly, the issue of whether the statute of frauds applied was properly considered by the district court.

1. There was never an agreement with respect to compensation, whether it was to be paid within one year, or five years.

Plaintiff's primary argument on appeal with respect to the statute of frauds is that it does not apply to the facts and circumstances of this case, because "he is not seeking compensation from Tri-Way for employment going forward . . . [but] is only seeking to recover under the agreed upon bonus structure for the time that he worked at Tri-Way." Appellant's Brief 21. This argument improperly and inaccurately assumes that an enforceable agreement had been reached with respect to the alleged bonus structure. Furthermore, this claim is contrary to the record and the pleadings on file. According to the First Amended Complaint, the operative

pleading on which summary judgment was granted, plaintiff is seeking, *inter alia*: "past and future loss of income," including income that he "would have received in merit and longevity wage increases" (R. at 35); "past and future suffering" (R. at 36); "past and future losses of income which Robert Gray would ordinarily have received" (R. at 36); "any future damages as may be proven" (R. at 36); as well as attorney fees based upon the contract claims he has continuously pursued (R. at 36.) Thus, the unenforceability of the entire Draft Employment Agreement is still squarely at issue in this case, and both the statute of frauds and controlling case law interpreting that statute preclude enforcement of *any* of the proposed terms.

Whether the "agreement" was written or oral, and whether or not it could be performed in one year, plaintiff has failed to present admissible evidence that an agreement was ever actually formed. As with his earlier arguments, Mr. Gray relies exclusively upon his own affidavit and selected portions of his deposition testimony, insisting that certain terms had been settled. However, other portions of his testimony clearly indicate a shared intent among the parties to reduce the terms of Mr. Gray's employment to a "comprehensive written agreement." Moreover, there is ample evidence in the record that the parties never reached a final agreement with respect to the material terms of the employment relationship, most notably the terms governing compensation. Because Mr. Gray is relying solely upon self-serving, conclusory assertions that an agreement had been reached, which testimony is not premised upon—and is indeed directly contrary to—the overwhelming weight of the record evidence, there is but one inference which may reasonably be drawn: that no agreement was ever reached with respect to

the proposed bonus structure. In the absence of an agreement, the issue of whether any such alleged agreement was subject to the statute of frauds is moot.

2. The doctrine of equitable estoppel does not operate as an exclusion to the statute of frauds in this case.

Mr. Gray further argues that, even if the statute of frauds were found to apply to his alleged agreement, because he was allowed to begin working for Tri-Way, there has been sufficient "part performance" to invoke an exception to the statute. Appellant's Brief 23. It should be noted that the ***only*** exception to the statute of frauds being argued by plaintiff on appeal is the doctrine of part performance. As such, any additional claimed exceptions have been waived. *See Rowley v. Fuhrman*, 133 Idaho 105, 108, 983 P.2d 940, 943 (1999) ("f]ailure to . . . address [an] issue in the opening brief eliminates consideration of it on appeal").

Regarding the part performance exception to the statute of frauds, the Court of Appeals of Idaho stated:

> We acknowledge that in some circumstances an oral agreement may be removed from the strictures of the statute of frauds by part or full performance. This exception to the statute of frauds is grounded in equity. The exception protects a party who demonstrates reliance upon an oral contract by acts that would not have been done but for the contract. . . .

Wolske Bros., Inc. v. Hudspeth Sawmill Co., 116 Idaho 714, 715-16, 779 P.2d 28, 29-30 (Ct. App. 1989).

Despite this recognized exception, it is not universally applied and, indeed, the exception based on part performance has no application here. Following *Wolske*, the Idaho Court of Appeals adopted the following premise:

> First, it has long been established in Idaho law that ***the doctrine of part performance is not applicable to a contract which comes within the statute of frauds because it cannot be performed within one year***. *Allen*, 84 Idaho at 23, 367 P.2d at 582. "The mere part performance of such a contract does not take it out of the operation of the statute or permit a recovery under the contract for any part of the contract remaining executory. . . . [T]o hold that part performance is performance ***would be a nullification of the statute***." *Id.*

Treasure Valley Gastroenterology Specialists, P.A. v. Woods, 135 Idaho 485, 489, 20 P.3d 21 (Ct. App. 2001) (emphasis added).

It is also well-settled under Idaho law that the doctrine of part performance "is best understood as a specific form of the more general principle of equitable estoppel." *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). Accordingly, the district court properly recognized that plaintiff's claimed part performance exception to the statute of frauds depends upon whether the part performance was such as to equitably estop defendants from relying upon the statute as a defense, and ultimately found that it did not. R., p. 94, L. 26 – p. 95, L. 2.

> The elements of equitable estoppel are:
>
> 1) there must be a false representation or concealment of a material fact made with actual or constructive knowledge of the truth;
>
> 2) the party asserting estoppel did not and could not have discovered the truth;
>
> 3) there was intent that the misrepresentation be relied upon; and
>
> 4) the party asserting estoppel relied upon the misrepresentation or concealment to his or her prejudice.

Sorensen v. Saint Al's, 141 Idaho 754, 759, 118 P.3d 86, 91 (2005).

Additional considerations also apply when part performance/equitable estoppel is raised within the context of the statute of frauds. For instance, the Idaho Court of Appeals has held on multiple occasions that "the reliance by the party claiming estoppel must be referable only to the contractual term that is in dispute." *Treasure Valley*, 135 Idaho at 491. In other words, "the performance must evidence the promise." *Frantz v. Parke*, 111 Idaho 1005, 1010, 729 P.2d 1069, 1073 (Ct. App. 1986).

Despite plaintiff's argument to the contrary, the facts of this case are substantially similar to those presented in the *Treasure Valley* case. First, Mr. Gray argues that he began his employment because, in his mind, he and Tri-Way had reached an agreement. Treasure Valley Gastroenterology had taken the same position in seeking to enforce terms which it felt had been agreed upon as well. Further, while Mr. Gray began work on June 1, he knew at that time that the final terms of his employment agreement were still under negotiation, and had not been finalized. The defendant in the *Treasure Valley* case had a similar understanding; namely, that she had been allowed to "begin work without agreement on all the terms of the employment in the expectation that the details of the contract would be worked out later." *Treasure Valley*, 135 Idaho at 491. There, the court held that "Treasure Valley's acts of reliance do not provide evidence of the contractual term asserted by Treasure Valley which, when combined with the other elements of equitable estoppel, could serve as a substitute for the writing that is otherwise required by the statute of frauds." *Id.* As a result, the court of appeals upheld the district court's grant of summary judgment.

The same result should apply here. Simply put, plaintiff's performance may have been referable to a portion of the terms contained in the Draft contracts, but the parties' continuing negotiations demonstrate that other material terms—including the disputed term upon which plaintiff relies in this case, i.e., compensation—were not final. Thus, while it may be said that an employment relationship existed between Mr. Gray and Tri-Way, the material terms of that relationship were never settled. This Court has clearly held that before an alleged oral agreement will be enforced by the doctrine of equitable estoppel, the alleged agreement "must be complete, definite and certain ***in all its material terms***, or contain provisions which are capable themselves of being reduced to certainty." *Lettunich*, 141 Idaho at 367 (emphasis added).

The undisputed evidence in this case shows that there were yet material terms under negotiation which were not "complete, definite and certain." As such, neither part performance nor equitable estoppel may be used as an exception to the statute of frauds and its requirement that the Draft Employment Agreement be reduced to a final, executed writing.

D. Absent Evidence of an Agreement Establishing the Method of Calculation and/or Means of Payment of the Alleged Bonus, There Is No Basis for the Statutory Wage Claim.

In his appellate brief, Mr. Gray argues that he introduced "evidence that the parties agreed to the terms of his bonus compensation." Appellant's Brief 24. The only argument presented in this respect, however, is a reference back to his earlier argument that the district court failed to construe certain facts in his favor; namely, the "facts" set forth in his affidavit (R. at Ex. 4), and selected deposition testimony. As shown above, the "facts" upon which plaintiff relied were conclusory, contrary to the record evidence and otherwise

inadmissible, and there was simply no competent evidence demonstrating that the parties had ever agreed to the terms of any bonus for plaintiff. Defendants, on the other hand, presented evidence in support of their motion for summary judgment establishing that even though the terms for calculation and payment of the bonus were never settled, plaintiff was nonetheless offered a substantial bonus amounting to three times the salary he had earned in the course of his employment with Tri-Way.

Idaho's wage and hour law defines a "wage claim" as an employee's claim against his or her employer for compensation owed to the employee for "personal services" and includes in that definition any "wages, penalties, or damages provided by law to employees with a claim for unpaid wages." IDAHO CODE § 45-601(6) (2006). The term "wages" is also defined to include "compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis." IDAHO CODE § 45-601(7). The definition of "wage" has been held to include any "ascertainable unpaid commissions and ***bargained-for*** compensation." *Moore v. Omnicare, Inc.*, 141 Idaho 809, 819, 118 P.3d 141 (2005) (emphasis added).

This Court has previously concluded that a "claim for an employee bonus, which was calculated by reference to the net profit of the defendant company and paid yearly, was part of the compensation bargained for in the agreement of employment." *Johnson v. Allied Stores Corp.*, 106 Idaho 363, 367, 679 P.2d 640 (1984). As set forth in extensive detail above, however, the primary point of contention in the parties' negotiation of an employment agreement in this case was the method of calculation and means of payment of such a bonus. Accordingly,

there was never a "bargained for" agreement on the bonus to be paid in this matter. Plaintiff instead resigned his employment with defendants before any agreement could be reached. *See* Gray Depo. Ex. 22A. Nevertheless, defendants still tendered a bonus to plaintiff in recognition of his contribution to the company, offering him $60,000 upon his resignation in November 2004. *See* Peterson Depo., pp. 237-238. Plaintiff simply rejected that payment.

Plaintiff argues that defendants violated the Wage Claim Act because he was not provided with a bonus ***according to the terms that he had been negotiating***. The *Johnson* case cited above, however, refers to compensation that was "bargained for" in the parties' employment agreement. Because no bargain was reached here, it is impossible to argue that plaintiff is entitled to a bonus to be paid in accordance with the disputed terms. The fact remains, and is undisputed, that plaintiff was offered a bonus payment. Furthermore, that bonus payment was significantly larger than any bonus previously offered by Tri-Way, either to its employees or its owners. For example, defendant Gary Peterson testified that when bonuses had been offered in the past, they were in an amount equal to two weeks' pay, "across the board." *See* Peterson Depo., pp. 52, 56. The bonus offered plaintiff, however, was in an amount three times greater than the salary he had earned in his five months of employment with Tri-Way. Yet plaintiff refused this amount, and instead continued to insist on not only fifty percent of Tri-Way's gross profits, but also an additional twenty-five percent of those profits in a retained earnings account which would go toward his planned buyout of Gary Peterson, despite the operative fact that no bonus had been fully and finally "bargained for." *See* Gray Depo., pp. 222-223, 235; Gray Depo., Exs. 14, 15.

Plaintiff has failed, both below and on appeal, to establish any evidence that an agreement had been reached concerning payment of any bonus. For the reasons described in the preceding sections, as well as those herein, the district court properly determined that there was no violation of the wage claim statute, and the grant of summary judgment should be affirmed.

E. Plaintiff Has Not Established the Elements Necessary To Support a Claim for Quantum Meruit.

In attempting to resuscitate his quantum meruit claim, plaintiff argues that "absent an agreement fixing compensation, any evidence tending to show the reasonable value of services is generally admissible." Appellant's Brief 26. He then argues that "evidence of the value of Gray's services can be found with reference to the benefit achieved by Tri-Way." *Id.*

The doctrine of quantum meruit is, as the district court found, a remedy for an implied in fact contract, and it permits a party to recover the reasonable value of services rendered or materials provided, on the basis of an implied promise to pay. *Cheung v. Pena*, 143 Idaho 30, 35, 137 P.3d 417, 422 (2006). An implied in fact contract is further defined as "one where the terms and existence of the contract are manifested by the conduct of the parties with the request of one party and the performance by the other often being inferred from the circumstances attending the performance." *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 708, 52 P.3d 848, 853 (2002). When seeking to establish a claim for quantum meruit, the burden is on the party claiming its applicability. *Erickson v. Flynn*, 138 Idaho 430, 435, 64 P.3d 959, 964 (Ct. App. 2002). In addition, the measure of damages must be proven by evidence demonstrating the nature of the work, and the customary rate of pay for such work in the

community at the time the work was performed. *See Baker v. Boren*, 129 Idaho 885, 894, 934 P.2d 951, 960 (Ct. App. 1997).

Here, the district court found it significant that "Gray does not dispute that he was compensated for his services at the agreed upon salary." R., p. 114, LL. 21-22. Indeed, plaintiff has not argued on appeal that the $4,000 salary which he proposed in his initial Draft Employment Agreement was unacceptable, nor has he argued that such salary was never paid. Instead, plaintiff argues solely that he was entitled to a bonus, which was to be calculated at the rate he set forth in his May 21 Draft Employment Agreement, despite the overwhelming evidence that this term was one of the key barriers to reaching a final agreement. The lack of an agreement notwithstanding, plaintiff has never offered any evidence establishing that a bonus is part of the "customary rate of pay" for the work he performed while with Tri-Way, nor is there any evidence demonstrating the prevailing rate for such a bonus "in the community at the time the work was performed," elements which this Court has deemed necessary in establishing a claim for quantum meruit. *See Baker*, 129 Idaho at 894. Given this failure to establish the necessary elements of his claim, upon which plaintiff bears the burden of proof, entry of summary judgment was not only appropriate, but mandatory.

Perhaps recognizing this fatal defect in his quantum meruit claim, plaintiff has attempted on appeal to create an issue of material fact by concluding that "Tri-Way testified that it always intended to share profits with Gary." Appellant's Brief 26. Even if all inferences raised by this claim were drawn in plaintiff's favor, the mere allegation itself does not establish the formula for calculation of such a bonus. Yet as evidence that defendants followed through

on the alleged intent to offer plaintiff a bonus, the undisputed facts establish that plaintiff was offered the sum of $60,000 following his resignation, a sum representing approximately 300% of the salary he had earned in his five months of employment with Tri-Way. Gary Peterson explained that the purpose of this payment was to "make a fair assessment of the value . . . for the two projects he ran" while with Tri-Way. *See* Peterson Depo., pp. 237-238. Accordingly, even though plaintiff has failed to establish the elements to support his quantum meruit claim, the record evidence shows that defendants endeavored to provide plaintiff with a reasonable value for his services, in addition to the salary he had agreed to accept. The fact that Mr. Gray unilaterally felt that $60,000 was insufficient is not evidence that a larger sum was "customary for such work in the community" in November 2004, and it certainly is not evidence that he was entitled to 50% of the company's profits. In short, based upon the lack of evidence submitted by plaintiff, the district court had no alternative but to dismiss the quantum meruit claim.

F. Plaintiff Never Presented Sufficient Evidence Establishing a Claim for Unjust Enrichment.

Having failed to establish the necessary elements for quantum meruit, plaintiff argues alternatively that defendants were unjustly enriched by his services while with Tri-Way. Appellant's Brief 27. In so doing, he insists that the district court erred when it determined that "Gray introduced no evidence of the amount Tri-Way was enriched by bringing in two projects." *Id.*, citing R. at 117. In so arguing, plaintiff misreads both the district court's order and the applicable case law.

Recovery under an unjust enrichment theory is limited to the amount by which the defendant was ***unjustly*** enriched. *See Erickson v. Flynn*, 138 Idaho at 434. It is not enough to simply show that the defendants were "enriched" as a result of plaintiff's services, since to do so would entitle ***every*** employee who performs his or her job with even a modicum of competence to pursue an unjust enrichment claim. The key, as noted by the district court and Idaho's appellate courts, is that the defendants must have "received a benefit from the plaintiff which it would be ***inequitable*** to retain without compensating plaintiff for the value of the benefit." R. at 115 (emphasis added), citing *Cont'l Forest Prods., Inc. v. Chandler*, 95 Idaho 739, 743, 518 P.2d 1201, 1205 (1974).

Contrary to the position urged by plaintiff on appeal, the measure of recovery for unjust enrichment is "not the actual amount of the enrichment, but the amount of enrichment which, ***as between the two parties it would be unjust for one party to retain***." R. at 116 (emphasis in original), citing *Hixon v. Allphin*, 76 Idaho 327, 281 P.2d 1042 (1955). Evidence of enrichment alone is not enough; there must be evidence that the amount of any alleged enrichment was "unjust." As with a claim for quantum meruit, the party seeking recovery under an unjust enrichment theory bears the burden to "present evidence not only of the value of the services it rendered, but also 'the amount of the benefit which, if retained by the defendant, would result in their unjust enrichment.'" R. at 116, citing *Blaser v. Cameron*, 121 Idaho 1012, 1017, 829 P.2d 1361, 1366 (Ct. App. 1991).

Here, the only "evidence" submitted by plaintiff concerning unjust enrichment, whether at the district court level or on appeal, is his claim that Gray brought two projects to Tri-

Way with ***gross revenues*** of approximately $1,175,000. Appellant's Brief 27. However, the record evidence also demonstrates that the ***net income*** on the projects plaintiff brought to Tri-Way were significantly less. Specifically, Kathy Peterson established at her deposition that the net income for the Phoenix division was $271,792.48. *See* Deposition Transcript of Kathy Peterson, Ex. 2, attached as Ex. F to the Affidavit of Scott E. Randolph in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment (R. at Ex. 8.) That same portion of Mrs. Peterson's deposition also established costs, expenses, and other overhead associated with the Phoenix division in the amount of $694,281.52. *See id.*

In spite of the disparity between the "revenues" described by plaintiff and the record evidence showing significantly lower numbers, it is the gross revenue to which plaintiff points when arguing that Tri-Way was "enriched" in an amount that "far outweighed the $4,000 per month salary he was paid." Appellant's Brief 27. Idaho law does not require evidence of enrichment alone, but instead requires the plaintiff to come forth with evidence establishing the amount of the alleged "enrichment" that it would be inequitable for defendants to retain. The only "evidence" proffered by Mr. Gray in this case has been a misplaced reliance upon gross revenues. The record evidence demonstrates, on the other hand, that defendants offered to pay plaintiff the sum of $60,000 in acknowledgment of "the value . . . for the two projects he ran" while with Tri-Way. *See* Peterson Depo., pp. 237-238. The $60,000 tendered by Tri-Way amounted to approximately 25% of the net income generated by the Phoenix division. Nevertheless, it is not incumbent upon defendants to establish that $60,000 was a reasonable tender. Instead, under Idaho law, it is plaintiff's burden to come forward with admissible

evidence that defendants were unjustly enriched by "only" offering him $60,000 in addition to his salary. Having failed to come forward with any evidence beyond his own conclusory statements that he should have been paid more, plaintiff has indeed failed to meet his burden of proof, and the district court properly granted summary judgment.

G. Gray Did Not Justifiably Rely Upon Any Alleged Statements Regarding Profit Sharing.

Although plaintiff argues that his fraud claims were based on "affirmative misstatements of facts as well as fraudulent concealment with the intent to induce Gray to begin his employment with Tri-Way," the district court correctly found that he had failed to establish each of the elements necessary to sustain a claim for fraud. The basis for this argument is plaintiff's insistence that he never acknowledged that the terms of his Draft Employment Agreement were never agreed upon by the parties. *See* Appellant's Brief 29. In fact, he maintains that "***he*** reached an agreement on the material terms of both the employment agreement and the option to purchase the Petersons' interest in Tri-Way ***at the May 21, 2004 meeting***." *Id.* (emphasis added).

Before turning to the substantive fraud analysis, it is worth noting that the position taken by plaintiff at page 29 of his brief is directly contrary to his deposition testimony, wherein he expressly acknowledged that while discussing the May 21 Draft Employment Agreement with Gary Peterson, Mr. Gray ***knew*** that the terms he had proposed were being revised by defendants. *See* Gray Depo., p. 216, LL. 19-21. Given this testimony, plaintiff's argument on appeal that "he [had] reached an agreement on the material terms" very plainly indicates that any such

"agreement" was unilaterally held by Mr. Gray. The conduct of Mr. Peterson, as acknowledged by plaintiff in the above-cited testimony, clearly manifested a disagreement over the terms contained in both agreements. Furthermore, Mr. Gray's recognition that the terms of the two alleged agreements were being revised bears directly upon his fraud claims, as such an acknowledgment undermines plaintiff's claim that false statements were made, his ignorance of the allegedly false statements, his reliance on the truth of defendants' alleged statements, and certainly his right to rely on the allegedly false statements.

1. Plaintiff has not proven each of the elements of fraud by clear and convincing evidence.

A *prima facie* case for fraud requires the plaintiff to prove 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) his intent that it should be acted on by the person and in the manner reasonably contemplated;
(6) the hearer's ignorance of its falsity;
(7) his reliance on the truth;
(8) his right to rely thereon; and
(9) his consequent and proximate injury.

Galaxy Outdoor Adver. v. Idaho Transp. Dep't, 109 Idaho 692, 696, 710 P.2d 602, 606 (1985). The party alleging the fraud has the burden of proving ***each*** element by ***clear and convincing evidence***. *Id.*

Speaking to a party's right to rely upon the truth of the alleged representation, this Court previously noted that a plaintiff must show that his or her alleged reliance upon the truth of the purported misrepresentation was justified. *See Stewart Title of Idaho, Inc. v. Nampa Land*

Title, Inc., 110 Idaho 330, 715 P.2d 1000 (1986). In the *Stewart* case, an escrow agent had sued for damages arising from an alleged misrepresentation by a title company's agent that title defects in a land transaction had been cured, and that the transaction could be closed. The court described the element of justifiable reliance as:

> An essential element of the torts of both fraud and negligent misrepresentation is that the recipient's reliance on the misrepresentation be justified. RESTATEMENT (SECOND) TORTS §§ 537, 552 (1977). In the instant case, the trial court concluded, as a matter of law, that Anderson's reliance on Astleford's alleged misrepresentations was not justified. The court determined that a reasonable and prudent closing officer in the Boise area would not have relied upon such representations, but would have investigated further and taken further action to ensure that the exceptions were, in fact, cleared prior to closing. Appellant argues that the trial court's conclusions are not supported by the evidence.

Stewart, 110 Idaho at 332.

A statement of mere opinion, or a statement as to a future event cannot provide a basis for establishing fraud, even if such a statement, had it related to a past or existing fact when made, would have provided such a claim. *See Mitchell v. Barendregt*, 120 Idaho 837, 843, 820 P.2d 707 (Ct. App. 1991). There, the plaintiff had sued for fraud, contending the defendant represented to him that if he committed to an Ore-Ida contract, all of his potatoes would be purchased and paid for under that contract. When those potatoes were not purchased as initially discussed, the court concluded the defendant's statement that he would need all of the plaintiff's potatoes to fulfill the Ore-Ida contact was not a statement of past or existing fact, but rather was an opinion only, upon which the plaintiff had no right to rely:

> [A] representation consisting of [sic] promise or a statement as to a future event will not serve as a basis for fraud, even though it was made under circumstances as to knowledge and belief which would give rise to an action for fraud had it

> related to an existing or past fact. The law requires the plaintiff to have formed his or her own conclusions as to such future events, and will not justify or remedy the plaintiff's reliance and change of position based on another's prediction or opinion.

Id. (internal citations omitted).

Here, the discussion between the parties concerning both the bonus structure and the proposed buyout were, at that time, merely "prediction or opinion." Because these terms were subject to lengthy, and at times contentious negotiations, the alleged statements that plaintiff would receive profits and that he would be allowed to purchase a share of the company at a set price cannot possibly have been statements of past or existing facts. Plaintiff knew that his Draft Employment Agreement was an initial proposal, that it was subject to ongoing discussions, and that no final agreement as to its contents had been reached, both before and after he began his employment with Tri-Way. There is no dispute that the parties were negotiating the payment of "certain profits" and his proposed purchase of "ownership in Tri-Way at a set price." The "misrepresentations" alleged by plaintiff in his First Amended Complaint are simply a reiteration of the terms he was trying to negotiate in his Draft Employment Agreement, and he also has acknowledged that those terms were never "agreed upon by the parties." *See* Gray Depo., pp. 86-87, 91, 106, 123, 158, 181, 195, 197, 200, 203, 206-207, 240, and 244. As such, they cannot be said to have constituted "past or existing facts."

Furthermore, while plaintiff claims that defendants never intended to reach an agreement (*see* R. at 29), defendants Gary Peterson and Ray Allard have ***both*** testified that they believed a bonus system would be negotiated, that it would include a percentage of company

profits, and that such was their intent from the beginning. *See* Peterson Depo., pp. 151, 152, and 266; Allard Depo., p. 152. Accordingly, the statements that plaintiff alleges were knowingly false at the time they were made were never false. As in the *Mitchell* case, if, at the time the alleged promise was made the defendants intended to pay plaintiff a bonus to be negotiated, and offer him a negotiated price for buying into the company, "the fact that [they] subsequently broke that promise does not create a cause of action for fraud." *Mitchell*, 120 Idaho at 843.

Finally, in light of the fact that plaintiff knew that the allegedly false statements were, in fact, the subject of ongoing negotiations, he was not justified in relying upon the alleged representations. The district court addressed this very issue, and based its decision upon the record evidence which established that "Gray clearly knew that the agreement terms were still being negotiated when he began working for Tri-Way." R. at 118. Thus, the court correctly determined that it was "not required to simply accept Gray's ***conclusory opinions*** that he had an agreement," particularly "when the facts so clearly indicate that ***when he began working for Tri-Way*** he himself continued to send and receive draft agreements with italicized words ***in the very sections addressing the bonus issue*** indicating the provisions needed revisions." *Id.* (emphasis added).

Plaintiff also argues that the district court erred in holding that there was not a sufficient showing of justifiable reliance because he "reasonably relied" on the alleged representation that he would receive "50% of net profits." Appellant's Brief 30. However, in support of this contention, he refers back to his earlier claim that he had "introduced facts that support a claim for equitable estoppel on the basis that the Tri-Way Parties falsely represented or

concealed material facts" from him. *Id.* The only "fact" to which he points with any specificity is "that the Tri-Way Parties never told Gray that they had rejected the terms of his employment agreement." *Id.* Given the testimony which has been presented earlier, wherein Mr. Gray admitted that Gary Peterson had told him he was going to be revising the agreement presented by plaintiff on May 21, 2004 (*see* Gray Depo., p. 216, LL. 19-21), this argument is wholly without merit. Plaintiff cannot reasonably claim that he was justified in relying upon any alleged "agreement" when, at the same time, he admits that on May 21 he knew that the terms of that same purported agreement were being revised by defendants. For similar reasons, plaintiff's alleged reliance on the "fact that the Tri-Way Parties allowed Gray to begin working and only later attempted to renegotiate the terms of Gray's agreement" is so contrary to knowledge he admittedly held on May 21, that it cannot serve as a basis for fraud.

2. Any reliance by plaintiff on the alleged representations from defendants was unreasonable, precluding application of promissory estoppel.

Should plaintiff argue later on appeal that he reasonably relied upon the alleged representations of defendants in a manner that caused him economic detriment and that the doctrine of promissory estoppel should be applied, as he indeed argued to the district court, this argument also fails as a matter of law.

The elements of promissory estoppel are as follows:

(1) reliance upon a specific promise;

(2) substantial economic loss to the promisee as a result of such reliance;

(3) the loss to the promisee was or should have been foreseeable by the promisor; and

(4) the promisee's reliance on the promise must have been reasonable.

Zollinger v. Carrol, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002).

This Court has repeatedly concluded that "[p]romissory estoppel is simply a substitute for consideration, not a substitute for an agreement between parties." *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). In *Lettunich*, the plaintiff had argued that promissory estoppel should be applied to prevent his lender from denying the enforceability of an oral promise. *See Lettunich*, 141 Idaho at 367. The court, on the other hand, found that "there was no complete promise . . . to be enforced." *Id.* Accordingly, the court held that the doctrine of promissory estoppel was "of no consequence in this case because there is evidence of adequate consideration. ***What is lacking is a sufficiently definite agreement.***" *Lettunich*, 141 Idaho at 368 (emphasis added).

The same result should apply here. This is not a matter of inadequate consideration to support an alleged oral promise. Instead, the central issue in this case is whether any binding promise was ever made in the first place. Because the alleged promise was in reality a term that had been proposed by plaintiff, but which was also subject to ongoing negotiations, no "sufficiently definite agreement" was made and promissory estoppel should not be applied.

As the foregoing analysis demonstrates, plaintiff has not offered any admissible evidence to support his claim for fraud. Instead, he has repeatedly referred to two self-serving and glaringly incorrect claims that either: 1) he had not been told that his proposed terms had

been rejected; or 2) that defendants allowed him to come to work and later attempted to renegotiate the "terms" of his employment. Mr. Gray's deposition testimony has shown that both of these assertions are false. According to his deposition testimony, he knew on May 21 that his proposed terms were being revised, and that those revisions were still pending when he began working for Tri-Way on June 1, 2004. These elements argued on appeal are the same as those argued to the district court. Because the record is replete with testimony from plaintiff which directly contradicts the claims he argued before the district court, and which he continues to argue on appeal, the district court cannot be said to have erred when it granted summary judgment on the fraud claim.

H. There Is No Evidence of Any Relationship of Trust or Confidence Which Would Support a Claim for Constructive Fraud.

While plaintiff has stated that the district court did not expressly address his claim for constructive fraud, he has argued that a relationship of trust and confidence existed in this case which rendered entry of summary judgment improper. However, as will be shown below, there was no such relationship, in that a friendship between Rob Gray and Ray Allard is in itself insufficient, and the "arrangement at issue [for] profit sharing," even if such was sufficient to create a fiduciary relationship, is premised upon an agreement that never formed, and which therefore cannot serve as the basis for a constructive fraud claim.

Constructive fraud "comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another." *Mitchell v. Barendregt*, 120 Idaho at 844. Furthermore, constructive fraud "usually arises from a

breach of duty where a relation of trust and confidence exists." *Id.* Though plaintiff has argued that a "relationship of trust and confidence" existed between the parties, he does not state any reasons for that conclusion.

The plaintiff in *Mitchell* had argued that such a relationship should be based upon the fact that the parties were also parties to a contract and were thus obliged to act in good faith, and that there the plaintiff had trusted the defendant. *See id.* at 844. The court clearly stated that "neither of these facts [was] sufficient to establish ***a relationship of trust and confidence*** from which the law will impose ***fiduciary obligations***." *Id.* (emphasis added). The court even went so far as to offer examples of relationships from which such a relationship would be imposed, none of which have been demonstrated in this case:

> Examples of relationships from which the law will impose fiduciary obligations on the parties include when the parties are: members of the same family, partners, attorney and client, executor and beneficiary of an estate, principal and agent, insurer and insured, or close friends. All the evidence presented in this case shows that Mitchell and Barendregt shared none of these relationships, but were parties who entered into an agreement at arms length.

Id.

Even though plaintiff claims that he was trying to become a partner with defendants, at the time the negotiations for his employment were taking place he was an employee, not a partner, and did not share the type of relationship that would impose a heightened duty. Furthermore, Mr. Gray provided lengthy testimony during his deposition describing the nature of his acquaintance with Ray Allard, which demonstrates nothing more than a casual business acquaintance. *See* Gray Depo., p. 62, L. 10 – p. 64, L. 13. There has been

no evidence establishing a relationship of trust and confidence between Mr. Gray and Mr. Peterson (or with Mrs. Peterson or Ray Allard, for that matter), as that term has been defined by this Court, and plaintiff's claim for constructive fraud was properly dismissed by Judge Copsey.

IV. PLAINTIFF WAIVED HIS APPEAL OF THE AWARD OF COSTS AND ATTORNEY FEES

This Court has very plainly stated that a party's "failure to include [an] issue in their statement of issues or address the issue in their opening brief eliminates consideration of it on appeal." *Rowley v. Fuhrman*, 133 Idaho 105, 108, 982 P.2d 940, 943 (1999). Argument in a subsequent reply brief is insufficient to cure this defect. *See State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993). Appellant's Brief sets forth seven (7) issues presented on appeal, ***none*** of which mention in any fashion the issue of costs and attorney fees awarded to defendants on December 21, 2007. Accordingly, plaintiff has waived his opportunity to pursue the appeal on costs and attorney fees, and the issue may not be considered further.

V. ATTORNEY FEES ON APPEAL

Respondents request attorney fees on appeal pursuant to Rules 35 and 41 Idaho Appellate Rules, and Idaho Code Section 12-121. Under Idaho law, attorney fees may be awarded on appeal pursuant to Idaho Code Section 12-121 if the "Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation." *See Rowley*, 135 Idaho at 110. Moreover, it has been held that attorney fees "are awardable if an appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence, or if the law is well settled and appellant has made no

substantial showing that the district court misapplied the law." *Johnson v. Edwards*, 113 Idaho 660, 662, 747 P.2d 69 (1987). In other words, when a "dispassionate view of the record discloses that there is no valid reason to anticipate reversal of the judgment below," attorney fees should be awarded. *Rueth v. State*, 103 Idaho 74, 81, 644 P.2d 1333 (1982).

In this case, plaintiff has simply asked this Court to reevaluate the evidence or second-guess the district court's well-reasoned decision granting defendants' motion for summary judgment. No substantial legal argument has been presented, and defendants should be awarded attorney fees on appeal.

VI. CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to affirm the district court's entry of summary judgment on all counts of the Amended Complaint, and award defendants their attorney fees on appeal.

DATED this 17th day of July, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
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Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2008, I caused a true and correct copy of the foregoing **RESPONDENTS' BRIEF** to be served by the method indicated below, and addressed to the following:

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