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Campbell v. Parkway Surgery Center, LLC Respondent's Brief Dckt. 42173

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHELLE CAMPBELL, Plaintiff/Counter-Defendant/Respondent, v. PARKWAY SURGERY CENTER, LLC, Defendant/Counter-Claimant/Appellant.	Supreme Court Docket No. 42173-2014 Bingham County No. 2005-2477

RESPONDENT'S BRIEF

Appeal from the Magistrate Division of the District Court of the Seventh Judicial District, State of Idaho, Bingham County

Honorable Darren B. Simpson, District Judge, presiding

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I. STATEMENT OF THE CASE

This case is a breach of oral contract over the initial sum of $6,800. Plaintiff Michelle Campbell ("Campbell") is an excellent nurse and Defendant Parkway Surgery Center, LLC ("Parkway") wanted her to join its team when it opened its doors for business. Parkway's prior Administrator/Chief Financial Officer ("CFO"), Arthur McCracken ("McCracken") and Director of Nursing, Nanette Hirschi ("Hirschi"), both of whom helped recruit Campbell on behalf of Parkway, testified Parkway agreed to pay Campbell's Forgivable Loan Agreement (the "Loan") with Bingham Memorial Hospital ("BMH") Foundation ("BMH Foundation"), which would become due if Campbell left her employment with BMH.

In spite of the agreement confirmed by its own employees, Parkway has repeatedly refused to pay Campbell's Loan to the BMH Foundation. After lengthy discovery, numerous motions, a bench trial, a ruling that Parkway breached its oral agreement with Campbell, a motion for reconsideration affirming that Parkway breached its oral agreement, and an appeal to the District Court again affirming Parkway's breach, Parkway continues to raise any argument it can to avoid its obligation. The District Court's careful consideration of the evidence and its thorough analysis of the legal authority should be affirmed.

II. FACTUAL BACKGROUND

In June 2002, Campbell entered into a Loan with the BMH Foundation, which required Campbell to work for BMH for a set period of time in consideration for payment of $6,800.00 toward Campbell's tuition for her nursing program. (Tr., p. 20, L. 20-p. 25, L. 5; Pl. Ex. A). The Loan, dated June 25, 2002, provided that the Loan would be incrementally forgiven if Campbell

worked for BMH for the period of time specified after obtaining her registered nurse ("RN") degree. (Pl. Ex. A). In the Loan, Campbell agreed that if she did not work for BMH as agreed, she would reimburse the BMH Foundation for the $6,800.00 tuition payment, plus interest. (Pl. Ex. A).

In approximately April of 2003, while Campbell was employed by BMH, Hirschi, Director of Nursing for Parkway, approached Campbell to recruit her for a nursing position with Parkway. (Tr., p. 25, L. 6 - p. 26, L. 8; p. 120, L.7-L. 11). Campbell indicated that she was interested but that in order for her to leave BMH to work for Parkway, the Loan would have to be paid. (Tr., p. 25, L. 6 - p. 26, L. 8; p. 120, L.7 - p. 121, L. 10). At the time, Parkway had just been organized, and the board was working to set up facilities and hire nurses and other staff members. (Tr., p. 117, L. 14 - p. 119, L. 3). Hirschi had previously been Campbell's supervisor at BMH prior to becoming Director of Nursing for Parkway, and, therefore, knew of Campbell's capabilities as a nurse and believed Campbell would be a valuable asset for Parkway to have on staff. (Tr., p. 113, L. 16-25). Campbell also had worked with Parkway's owners, Dr. Robert Lee ("Lee"), Dr. Bret Rogers ("Rogers"), and Dr. Christopher Riley ("Riley"), while she was at BMH. (Tr., p. 122, L. 11-16). Based upon their prior experiences with Campbell, Lee, Rogers and Riley all knew Campbell was an excellent nurse and wanted her on Parkway's staff. (Tr., p. 122, L. 11-16).

Prior to recruiting Campbell, Parkway was aware of Campbell's obligation under the Loan because Hirschi had assisted Campbell in obtaining the Loan with the BMH Foundation while she was still employed at BMH as Campbell's supervisor. (Tr., p. 114, L. 12 - p. 115, L. 17). Consequently, when Parkway's board began discussing recruiting Campbell, Hirschi explained Campbell's Loan and informed Parkway's board that if they wanted to have Campbell work for

Parkway, they would need to pay the amounts due under the Loan for Campbell, because working for Parkway would necessitate leaving BMH prior to Campbell being able to fulfill the requirements for the Loan to be forgiven. (Tr., p. 122, L. 8 - p. 123, L. 8). Hirschi was aware of the amount of the Loan and provided that information to the board. (Tr., p. 123, L. 5-8).

A board member commented at the board meeting that, if they recruited Campbell, they may not have to pay off the Loan because he thought BMH may not attempt to collect from Campbell if the Loan was not paid. (Tr., p. 123, L. 11-20; p. 141, L. 13-19). Hirschi responded that if Parkway were to recruit Campbell by promising to pay off her Loan to BMH, then they would need to actually pay off the Loan as promised. (Tr., p. 123, L. 11-20; p. 141, L. 13-19). The board discussed the issue further and they agreed that paying Campbell's Loan was necessary to recruit Campbell to work as a nurse for Parkway. (Tr., p. 124, L. 5-11; p. 144, L. 2-21). McCracken, Parkway's Administrator/CFO at the time, was also present at the board meeting when the terms of recruitment of Campbell were discussed and the direction was given to recruit Campbell and pay off her Loan. (Tr., p. 121, L. 20-24; p. 164, L. 14-21; p. 181, L. 25 - p. 182, L. 9).

As a result of the board's decision to recruit Campbell, in early May 2003, McCracken and Hirschi held a joint interview with Campbell and Robin Chadburn, another potential employee of Parkway. (Tr., p. 125, L. 7-16). During the interview, McCracken and Hirschi brought up the issue of Campbell's Loan. (Tr., p. 27, L. 3-23; p. 126, L. 1-4; p. 131, L. 3-7; p. 167, L. 22 - p. 168, L. 6). Campbell explained that the loan was for $6,800. (Tr., p. 28, L. 3-15). McCracken stated that Parkway would take care of the Loan for Campbell if she would come work for Parkway, and asked Campbell to bring in the promissory note so Parkway could pay the debt. (Tr., p. 27, L. 3 - p. 28,

L. 15; p. 167, L. 22 - p. 168, L. 10). Both Hirschi and McCracken testified that "taking care of" the Loan meant Parkway would pay it. (Tr., p. 137, L. 10-22; p. 182, L. 3-9). Aside from Campbell quitting her job at BMH and coming to work for Parkway, no other conditions were attached to Parkway paying off the Loan for Campbell. (Tr., p. 27, L. 13-23; p. 89, L. 5-10; p. 166, L. 2-8; Pl. Ex. D). Subsequent to accepting Parkway's offer of employment, and based upon Parkway's promise to pay off her Loan to the BMH Foundation, Campbell resigned from BMH and began working for Parkway. Campbell gave a copy of the promissory note and Loan to Parkway. (Tr., p. 27, L. 16-19; p. 168, L. 7-12). After starting employment at Parkway on May 27, 2003, Campbell wrote a thank you note to Parkway's board, thanking Parkway for taking care of her Loan with the BMH Foundation and for the opportunity to work at Parkway. (Tr., p. 30, L. 7-14; p. 168, L. 22 - p. 169, L. 9). Both the thank you note and promissory note were given to Dave Collette ("Collette"), who was Parkway's manager at the time. (Tr., p. 30, L.7-14; p. 169, L. 2-4). After giving the thank you note and promissory note to Parkway, no one from Parkway ever approached Campbell to ask her why she would be thanking them for paying off her Loan or to tell her that she was mistaken that Parkway had agreed to pay off her debt to the BMH Foundation. (Tr., p. 30, L. 15-21). Campbell understood that subsequent to her beginning work at Parkway that Parkway paid off the Loan as agreed. (Tr., p. 30, L. 22-25). McCracken and Hirschi also understood that Parkway had paid the Loan as promised. (Tr. p. 127, L. 2-8; p. 172, L. 17 - p. 173, L. 5).

Unbeknownst to Campbell, Parkway did not pay off the Loan with the BMH Foundation as promised. Campbell did not learn that Parkway failed to pay off the Loan until February of 2005, when she received a telephone call from BMH asking her to repay the Loan because she was in

default. (Tr., p. 36, L. 21-23). Campbell was surprised by this call, as she understood that Parkway had previously paid off her Loan. (Tr., p. 36, L. 21-25; p. 47, L. 2-4). Campbell approached Hirschi about the non-payment of the Loan. (Tr., p. 37, L. 17-20). Hirschi was shocked that the Loan had not been paid, as she had also understood it had been paid. (Tr., p. 127, L. 9-16). Campbell and Hirschi spoke to McCracken about the Loan payment, who also understood it had been paid, and with Dr. Steve Klippert ("Klippert"), who was Parkway's Administrator at the time. (Tr., p. 37, L. 20-24; p. 173, L. 9-24). Klippert said he would look into the matter. Klippert later informed Campbell that Parkway had never paid off the Loan to the BMH Foundation. (Tr., p. 38, L. 3-5).

In March 2005, shortly after Campbell received the telephone call from the BMH Foundation informing her that she was in default and that she needed to pay the Loan back, Parkway was looking to reduce expenses and had informed its staff that it would be cutting hours and benefits. (Tr., p. 35, L. 16 - p. 36, L. 20). Hirschi resigned as Director of Nursing. (Tr., p. 38, L. 20). Campbell also informed Parkway that she intended to resign. (Tr., p. 36, L. 13 - p. 42, L. 12). Campbell received a telephone call from Rogers after Hirschi resigned, at which time he offered Campbell the position of interim Director of Nursing, with the promise that she could apply for the Director of Nursing position. (Tr., p. 38, L. 19-22). Campbell expressed reservations about taking the position because, at the time, she had only had her RN license for one week. (Tr., p. 38, L. 23 - p. 39, L. 1). Then Campbell asked Rogers, "What about my loan?" Rogers responded that "maybe" Parkway would pay off Campbell's Loan "this time" if she would accept the position she was being offered. (Tr., p. 39, L. 2-4; p. 42, L. 6-9). Ultimately, Campbell opted not to accept the interim Director of Nursing position and resigned from Parkway in early March 2005. (Tr., p. 42, L. 10-12). Campbell

sent a demand letter to Parkway from counsel, requesting that Parkway fulfill its promise. (Aug. R., Aff. of DeAnne Casperson, Ex. B). Parkway never paid off her Loan to the BMH Foundation and Campbell was forced to bring suit against Parkway in 2005. (R., p. 15-21).

The matter was tried before the honorable Robert C. Brower, Magistrate. The Magistrate Court found in favor of Campbell on her breach of contract claim, against Parkway on its counterclaim and cross-claim, and determined that Campbell was entitled to attorney's fees and costs as the prevailing party. (R., p. 87-88).

The Magistrate Court ordered the following relating to the breach of contract:

> 3. That the Defendant, Parkway Surgical Center, LLC, is hereby ordered to pay the amount of $6,800.00 plus any accumulated interest due by Ms. Campbell on the Forgivable Loan Agreement with "Foundation." This payment shall be made directly to Ms. Campbell, it being assumed that Ms. Campbell will tender that amount to "Foundation" to extinguish her obligation with them and to thus rehabilitate her reputation in the local medical community.

(R., p. 89). Parkway appealed to the District Court. The District Court affirmed the breach of contract claim but remanded to reform the judgment, finding that Campbell was entitled to specific performance as was pled in the Second Amended Complaint. (R., p. 237). The District Court also granted Campbell's attorney's fees and costs on appeal. (R., p. 249). On May 28, 2014, Parkway appealed the decision of the District Court. (R., p. 281). After two 35-day extensions of time, Parkway filed its Appellant's Brief untimely.[1]

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[1] Parkway was ordered by this Court to file its brief "on or before 12-4-2014." Parkway filed its brief on December 5, 2014. Failure to timely file a brief "may be grounds only for such action or sanction as the Supreme Court deems appropriate, which may include dismissal of the appeal." I.A.R. 21. As a result, it is within the discretion of this Court whether Parkway should be sanctioned in some manner for its untimely filing.

III. STANDARD OF REVIEW

This Court's review of the District Court's decision in its capacity as an appellate court has been clearly set forth as follows:

> The Supreme Court reviews the trial court (magistrate) record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure.

Bailey v. Bailey, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012) (citing *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008)). This Court does not review the Magistrate Court's decisions. *Id.* This Court is "procedurally bound to affirm or reverse the decisions of the district court." *Id.* (quoting *State v. Korn*, 148 Idaho 413 n.1, 224 P.3d 480, 482 n.1 (2009)).

IV. ADDITIONAL ISSUES PRESENTED ON APPEAL

Respondent includes the following additional issues on appeal:

1. As an alternative basis for affirming the District Court, is Campbell entitled to a damage award as a result of her economic interest in Parkway's promise to pay off her Forgivable Loan Agreement?
2. Is Campbell entitled to attorney's fees and costs on appeal?

V. REQUEST FOR ATTORNEY'S FEES AND COSTS

Campbell is entitled to attorney's fees and costs, pursuant to Rule 41 of the Idaho Appellate Rules, Idaho Code §§ 12-120(1), and 12-120(3) in defending Campbell in this appeal. The Magistrate Court has already determined that Campbell is the prevailing party as against Parkway

in its Judgment issued on August 14, 2012, (R., p. 92) and granted Campbell her attorney's fees and costs in its Amended Judgment on November 14, 2012. (R., p. 297). The District Court affirmed the decision by the Magistrate Court and granted attorney's fees and costs on appeal. (R., p. 297). Campbell has set forth further argument in support of her claims for fees and costs in Section VI, E.

VI. ARGUMENT

A. CAMPBELL HAS STANDING

1. Parkway Was Required to Present its Standing Argument to the District Court.

For the first time, Parkway claims in its opening brief that Campbell lacks standing to bring her breach of contract claim. Generally, a challenge to subject-matter jurisdiction can be raised for the first time on appeal. *See Blankenship v. Wash. Trust Bank,* 153 Idaho 292, 295, 281 P.3d 1070, 1073 (2012). However, this is not Parkway's first appeal, but its second. Under the standard of review, this Court sits as a reviewing Court over the District Court's appellate decision. *See Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012). As a result, this Court is "procedurally bound to affirm or reverse the decisions of the district court." *Id.* (quoting *State v. Korn*, 148 Idaho 413, 415 n.1, 224 P.3d 480, 482 n.1 (2009)). As a result of the procedural restrictions as a second-level appellate reviewing Court, Parkway was required to raise its standing argument to the District Court to preserve it. As a result, the claim should be dismissed.

2. Parkway Should Be Estopped from Contesting Campbell's Standing When it Sought the Jurisdiction of the Court on its Counterclaim and Cross-Claim.

Parkway's actions prevent it from asserting that Campbell lacked standing. First, a motion under Idaho Rule of Civil Procedure 12(b) is the avenue for contesting the lack of subject matter

jurisdiction. *See* Idaho R. Civ. P. 12(b). Parkway never brought a motion to dismiss contesting Campbell's standing. Second, in its Answer to the Second Amended Complaint, Parkway failed to include as an affirmative defense that Campbell lacked standing. (R., p. 68) A failure to assert an affirmative defense before trial is generally a bar to raising the issue at a later time. *See Guzman v. Piercy,* 155 Idaho 928, 935, 318 P.3d 918, 925 (2013). Third, Parkway asserted a counterclaim against Campbell, admitting that it did have an agreement with Campbell for the repayment of the Loan, but under different terms than those asserted by Campbell. (R., p. 69-72). In addition, Parkway asserted a cross-claim against McCracken, claiming he did not have authority to offer Campbell payment of the Loan. (R., p. 34-35). After losing on its counterclaim and its cross-claim (R., p. 88-89), Parkway now seeks to contest the jurisdiction of the Court.

Parkway cannot contest the jurisdiction of the Court when it is the defendant, and seek the jurisdiction of the Court when it is the plaintiff — all on the basis of a contractual agreement associated with the repayment of Campbell's Loan. Understandably, Campbell cannot find a single case where a defendant has both contested standing of the plaintiff in a breach of contract action, and asserted a counterclaim, admitting that an agreement existed but that the terms were different. Parkway seeks to take inconsistent positions to suit its purposes in the litigation. It certainly understood the Magistrate Court had subject matter jurisdiction when it counterclaimed against Campbell and cross-claimed against McCracken. The doctrine of judicial estoppel prevents Parkway from contesting the jurisdiction of the Magistrate Court. "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."

Sword v. Sweet, 140 Idaho 242, 252, 92 P.3d 492, 502 (2004) (quoting *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir.1996)). As quoted from *Rissetto* in *Sword* by this Court, "[t]he policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings.... Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.... Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion." *Id.* Parkway's argument that Campbell did not have standing when it admitted it had a contractual agreement with her and filed a counterclaim and cross-claim, should be disregarded by this Court.

3. As a Party to the Agreement, Campbell Has Standing.

Campbell, as a party to the contract with Parkway, has standing to bring this action to contest Parkway's breach of contract by its failure to pay Campbell's debt to the BMH Foundation. In its efforts to contest a straightforward breach of contract claim, Parkway asserts Campbell has no standing, claiming that Campbell suffered no injury from Parkway's refusal to pay a debt she incurred only as a result of leaving her employment with BMH to work for Parkway. Most disturbing is Parkway's claim that the District Court on appeal ruled that Campbell was not injured. (Appellant's Brief, p. 13 ("The District Court agreed with this legal mandate and found that Campbell had not been injured.")). The District Court's first conclusion of law was as follows: "1. Campbell sustained an injury recoverable under contract law." (R., p. 251). The District Court specifically found that Parkway was liable for the breach of contract and the remedy was specific performance: "Regardless of whether the applicable statute of limitations now bars the Foundation

from suing Campbell on the Forgivable Loan Agreement, Parkway's promise to 'take care of' Campbell's debt created an enforceable duty which may be remedied by specific performance." (R., p. 236). Parkway essentially argues that unless Campbell actually paid off the Loan and incurred out-of-pocket money damages, she has no standing. Parkway simply ignores the evidence that Campbell altered her position as a result of Parkway's promise by leaving BMH, which caused her to incur a repayment obligation of the Loan.

Parkway disregards its contractual relationship with Campbell in its standing analysis, and instead, claims Campbell has no injury, confusing the injury necessary for standing with the obligation of proving damages as an element of a claim of breach of contract. "When an issue of standing is raised, the focus is not on the merits of the issues raised, but upon the party who is seeking relief. Indeed, a party can have standing to bring an action, but then lose on the merits." *Bagley v. Thomason*, 149 Idaho 806, 808, 241 P.3d 979, 981 (2010). Further, Campbell's demonstration of a breach of contract would entitle her to nominal damages, even if she could not recover the amount of the Loan or was not entitled to specific performance. *See Davis v. Gage*, 106 Idaho 735, 739, 682 P.2d 1282, 1286 (1984); RESTATEMENT (SECOND) OF CONTRACTS, § 305, cmt. a.

"To satisfy the requirement of standing, a litigant must allege an injury in fact, a fairly traceable causal connection between the claimed injury and the challenged conduct, and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). Campbell has both pled and proven that she has been injured by Parkway's breach of contract. Campbell has consistently alleged that

Parkway injured her by inducing her to leave her employment with BMH with its promise that Parkway would pay her debt to the Foundation — a debt that would not have arisen if Campbell had stayed employed with BMH. Both the Magistrate Court and District Court agreed that Parkway breached the agreement and Campbell was injured thereby. In her Second Amended Complaint, Campbell set forth the terms of her agreement with Parkway, Parkway's breach by its failure and refusal upon demand to pay the debt incurred, and the injury caused to her in incurring a debt. (R., p. 54-64). In her prayer for relief, Campbell asked for "a declaratory judgment ordering Defendant to pay to Bingham Memorial the principal amount of $6,800.00 plus interest to be determined upon judgment, or in the alternative, for a money judgment in the principal amount of $6,800.00 plus an award of interest in an amount to be determined upon judgment." (R., p. 61). Based on the pleadings, Campbell has clearly demonstrated privity of contract with Parkway and has alleged an injury as a result of the breach necessary to establish standing.

Parkway can only make its argument that a person in privity of contract with the opposing party has no standing to assert a breach of contract claim by ignoring Idaho Supreme Court authority on standing in the context of a party to a contract. Parkway has not cited to a single case wherein a party to a contract at issue in the lawsuit did not have standing. Idaho Supreme Court authority has made it very clear who has standing to enforce the terms of a contract:

> It is axiomatic in the law of contract that a person not in privity cannot sue on a contract. "Privity" refers to "those who exchange the [contractual] promissory words or those to whom the promissory words are directed. Calemari and Perillo, Contracts § 17–1 (2d ed. 1977); see generally 4 Corbin on Contracts § 778 (1951). Here, plaintiffs-appellants are not parties to the prior lease between Montierth and San Tan, and hence they have no privity and cannot sue to enforce the terms of that prior contract. **A party must look to that person with whom he is in a direct**

> **contractual relationship for relief, in the event that his expectations under the contract are not met.** *Pierson v. Sewell*, 97 Idaho 38, 45, 539 P.2d 590, 597 (1975); *Minidoka County v. Krieger*, 88 Idaho 395, 399 P.2d 962 (1965); *Coburn v. Fireman's Fund Ins. Co.*, 86 Idaho 415, 387 P.2d 598 (1963).

Wing v. Martin, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) (emphasis added). Campbell brought this action against Parkway, the very party that promised to pay her Loan with the BMH Foundation in exchange for her agreement to end her employment with BMH and work for Parkway. In spite of Campbell's privity of contract with Parkway, it argues that the cause of action actually belongs to the BMH Foundation and not to Campbell. Although the BMH Foundation may have been able to enforce the agreement as a third-party beneficiary, Campbell still has standing to enforce the agreement made for her benefit. The RESTATEMENT (SECOND) OF CONTRACTS § 305 makes it clear Campbell, as the promisee, has a right to enforce the agreement: "(1) A promise in contract creates a duty in the promisor to the promisee to perform the promise even though he also has a similar duty to an intended beneficiary." Further, § 307 directly indicates that "either the promisee or the beneficiary may maintain a suit for specific performance of a duty owed to an intended beneficiary." RESTATEMENT (SECOND) OF CONTRACTS, § 307.

Instead of citing the straightforward cases that make it clear a party to a contract can sue to enforce its own agreement, Parkway cites to *State v. Doe*, a case in which a minor sought standing to contest the constitutionality of a statute on the grounds that it infringed upon his parents' rights. 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010). *State v. Doe* has no applicability to Campbell's situation. Parkway also cites to *Arambarri v. Armstrong*, 152 Idaho 734, 738-39, 274 P.3d 1249, 1254 (2012), in which a former employee sought reinstatement for himself, and for three other

employees who were not parties to the action. *See id.* This Court rejected that standing existed for the three employees not a party to the action. *See id.* Parkway compares this case to Campbell, attempting to claim that she is in the same position as one of the three other employees. Again, Parkway ignores that Campbell is a party to the contract, making these other cases completely inapplicable. Parkway's promise to pay Campbell's Loan in order to obtain her as its employee was a promise made to and for the benefit of Campbell. Campbell's lawsuit to force Parkway to do exactly as it promised is not "judicial vigilantism" as asserted by Parkway (Appellant's Brief, p. 17), but Campbell's longstanding effort to force Parkway to honor its promise. As a party to the agreement, Campbell has standing to compel Parkway to perform its obligation under the agreement.

B. PARKWAY'S ARGUMENT THAT IT TOOK CARE OF THE LOAN BY DOING NOTHING WAS REJECTED BY THE DISTRICT COURT, AND THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED

In this appeal, Parkway again argues that there was never any agreement that Parkway would actually pay off Campbell's debt to the BMH Foundation, but that it could deal with the debt however it wanted, including "paying the amount immediately, paying the obligation in installment payments, negotiating a compromise settlement of the obligation, off-setting the amount against another debt, or simply waiting to see if BMH elected to pursue an action under its contract." (Appellant's Brief, p. 23). Not only did Parkway present no evidence that this was the case, Parkway's assertion is yet another example of Parkway's shifting attempts to avoid its obligation to Campbell. Parkway's first position is this case was that the agreement with Campbell was that Parkway stepped into the shoes of BMH, meaning that Campbell had to work for Parkway for a specific amount of time in order for Parkway to repay Campbell's debt to the BMH Foundation. (R.,

p. 30). When Parkway realized it had no evidence to support that position, Parkway then switched its stance. Having been unsuccessful with that argument, on appeal to the District Court, Parkway argued, as it does now, that it could "take care of" the debt however it wanted. (R., p. 142 and Appellant's Brief, p. 23). Parkway's shifting position with regard to the terms of the agreement further bolster the Magistrate Court's finding of fact, supported by substantial, competent evidence in the record, that, consistent with Campbell's position throughout this case, the agreement between Campbell and Parkway was that if Campbell came to work for Parkway, Parkway would pay off the debt incurred by Campbell by leaving BMH. Moreover, Parkway's argument ignores the applicable standard of review, asking this Court to overturn the Magistrate Court's determination, based upon the evidence presented at trial, that Parkway agreed to repay Campbell's loan to the BMH Foundation in exchange for Campbell coming to work for Parkway. (R., p. 87-88). This Court does not review the decision of the Magistrate Court, but the decision by the District Court. *See Bailey v. Bailey*, 153 Idaho 526, 529, 284 P.3d 970, 973 (2012).

Parkway completely sidesteps this standard, and instead invites this Court to second guess the Magistrate Court's findings of fact and conclusions of law, raising evidence it claims is contrary to the Magistrate Court's determination. Of course, in doing so, Parkway, ignores the substantial, competent evidence presented by Campbell at trial, which contradicts Parkway's theory of the case. Campbell presented testimony upon which the Magistrate Court based its decision, indicating that Parkway understood and agreed that "taking care of" the loan meant paying the loan off for Campbell. Hirschi, who was Director of Nursing, an officer position, at the time Parkway entered into the agreement with Campbell, testified:

(Ms. Ulrich)	Q.	So was the decision made at that meeting to hire Ms. Campbell?
(Hirschi)	A.	Yes, it was.
	Q.	And to pay off her loan for her?
	A.	(Nonverbal answer.)
	Q.	Can you verbalize that?
	A.	Yes.
		***
(Mr. Manwaring)	Q.	And how was it stated in her interview?
(Hirschi)	A.	That Parkway would take care of her obligation.
	Q.	Okay. When you say "take care of it," does that mean - -
	A.	Parkway would pay.

(Tr., p. 124, L. 5-11; p. 138, L. 17-22). Likewise, McCracken, Administrator/CFO for Parkway at the time, testified:

(Mr. Sorensen)	Q.	Okay. And as far as you knew, the board hadn't authorized you to say "We're going to give you $6,800 if you come work for us?"
(McCracken)	A.	No. That wasn't the authorization at all. It was authorization to extend employment under the agreement that they would take care of her obligation.
	Q.	Okay. By taking care of the obligation, do you mean that if the obligation – if there did exist an obligation, it would be paid by Parkway?
	A.	Yes.

(Tr., p. 181, L. 25 - p. 182, L. 9). The letters that Hirschi and McCracken wrote on behalf of Campbell when Parkway refused to pay off Campbell's debt after BMH contacted Campbell about the nonpayment of the debt also demonstrates that Parkway agreed to actually pay off Campbell's debt. (Tr., p. 138, L. 19, Ex. D; p. 171, L. 11, Ex. F). Campbell's testimony likewise indicates that the agreement was that Parkway actually pay Campbell's debt which was incurred as a result of her leaving BMH to work for Parkway. (Tr., p. 27, L. 3 - p. 28, L. 19). The testimony from Parkway's

own agents constitutes more than substantial and competent evidence in the record to support the Magistrate Court's decision and the District Court's decision affirming the Magistrate Court.

Unbelievably, Parkway cites to testimony from its board meetings, demonstrating Parkway was already considering how it could avoid making the payment it authorized and agreed to pay on Campbell's behalf, and additionally cites incomplete portions of McCracken and Hirschi's testimony regarding Parkway's agreement to pay off Campbell's Loan. Parkway argues it could have done whatever it wanted regarding Campbell's debt, including paying in installment payments, negotiating a settlement, off-setting the amount against another debt or waiting for Campbell to be sued, among other things. (Appellant's Brief, p. 23). The testimony and argument propounded by Parkway certainly supports a possible fraudulent intent on the part of Parkway, but has no relevance to the breach of contract claim. As the District Court noted, Parkway presented no testimony as to *any* actions it actually took to "take care of" the debt as promised. (R., p. 242).

Parkway's unsupported assertions that it "took care of" the debt do not comport with Parkway's actions leading up to and during this litigation. Parkway failed to pay the Loan when Campbell delivered the promissory note and wrote a thank you note thanking Parkway for paying off the loan. (Tr., p. 38). After receiving the thank you note from Campbell thanking Parkway for paying off the Loan, Parkway did not approach Campbell to ask why she thought they were actually paying off the debt or to tell her she was somehow mistaken. (Tr., p. 30, L. 7-21). After the BMH Foundation had contacted her regarding her unpaid debt, Campbell and Hirschi approached Dr. Steven Klippert ("Klippert") to inquire as to whether Parkway had actually paid the debt. Klippert said he would look into the matter. (Tr., p. 37, L. 17-24). He did not question why Campbell would

think the debt had or should have been paid previously. (Tr., p. 38, L. 3-9). When Parkway sought to entice Campbell to stay at Parkway to become the Director of Nursing, Dr. Bret Rogers stated that "maybe we'll pay [your Loan] this time if you accept employment." (Tr., p. 38, L. 17 - p. 39, L. 4; p. 41, L. 16 - p. 43, L. 7). Rogers' comment acknowledges the fact that Parkway should have previously paid off the debt, as agreed, but did not. Further, Parkway refused to pay the debt as agreed when Campbell's attorney wrote a demand letter, requesting that the debt be paid after the BMH Foundation made demand upon Campbell for payment. (Aug. R., Aff. of DeAnne Casperson, Ex. B). In response to the letter from Campbell's counsel, Parkway did not assert it could have paid off or taken care of the debt in any number of ways, as now suggested by Parkway. Rather, Parkway claimed at the time that it did have an agreement with Campbell, but that the agreement required Campbell to work for Parkway for three years, (Tr., p. 265, L. 15 - p. 266, L. 9, Ex. H), a position which Parkway ultimately abandoned, and regarding which Parkway presented no supporting evidence. Dr. Robert Lee ("Lee"), who authored the response to Campbell's demand, however, did provide a significant amount of testimony which contradicted the contents of the letter as well as Parkway's discovery responses which he personally verified. (Tr., p. 266, L. 10 - p. 274, L. 17). Neither after Campbell provided Parkway with the promissory note and thank you letter, nor after Campbell informed Parkway that BMH was seeking repayment of the debt from her, did Parkway assert that it was not obligated to pay off the debt but could take care of the obligation "in a variety of ways." (Appellant's Brief, p. 23). Parkway's argument that it somehow complied with the terms of the agreement by not paying Campbell's debt is unsupported by the evidence, and should be disregarded. Moreover, Parkway's argument would require that this Court second-guess the

Magistrate Court's findings of fact and conclusions of law, something it cannot do when the District Court has affirmed the Magistrate Court's decision and the Magistrate Court's decision is supported by substantial and competent evidence. The Magistrate Court's findings of fact and conclusions of law holding that Parkway was required to pay off Campbell's debt to BMH as part of the agreement between Campbell and Parkway, affirmed by the District Court, should be upheld.

C. THE DISTRICT COURT CORRECTLY AFFIRMED THE MAGISTRATE COURT'S DECISION ON CAMPBELL'S BREACH OF CONTRACT CLAIM REQUIRING PARKWAY TO PAY THE LOAN AS IT PROMISED

Parkway claims the District Court erred by affirming the Magistrate Court's decision on the breach of contract claim and remanding the case to reform the judgment to require Parkway to pay the Loan directly to the BMH Foundation. The Magistrate Court required that the money to pay off the Loan to be paid to Campbell so that she could "tender the amount to 'Foundation' to extinguish her obligation with them and to thus rehabilitate her reputation in the local medical community." (R., p. 89). Based on this language used by the Magistrate Court, and Campbell's request for specific performance, the District Court affirmed the decision on the breach of contract as follows:

> Thus Campbell sued for a decree directing Parkway to pay Campbell's debt to the Foundation. In other words, Campbell sued Parkway for specific performance of its oral agreement to take care of Campbell's debt to the Foundation. Judge Brower awarded Campbell monetary damages in the amount of Campbell's debt, together with any accrued interest, with the assumption that Campbell would tender that amount to the Foundation.
>
> ***
>
> Accordingly, Campbell is not entitled to a direct money judgment against Parkway, but she is entitled to a decree of specific performance of her agreement with Parkway. Judge Brower erred in awarding the amount of the debt to Campbell. On remand, the *Amended Judgment* shall be reformed to decree that Campbell is entitled to specific

> performance of Parkway's promise to pay the Foundation for the amount of Campbell's debt, together with interest.

(R., p. 237). As explained by this Court, "'[t]he remedy of specific performance may be invoked where necessary to complete justice between the parties. The object of specific performance is to best effectuate the purpose for which the contract is made, and specific performance should be granted upon such terms and conditions as justice requires.' 81A C.J.S. Specific Performance § 2 (2011). In considering whether to award specific performance, a court must balance the equities between the parties." *Fazzio v. Mason*, 150 Idaho 591, 597-98, 249 P.3d 390, 396-97 (2011) (citing *Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.3d 291, 294 (2006)).

Campbell pled in her breach of contract claim a request for damages, or in the alternative, a request for Parkway to actual pay the Loan to the BMH Foundation. (R., p. 57-58, 61). Whether the funds are paid to Campbell so that she can pay the BMH Foundation or Parkway pays them directly to the BMH Foundation makes little difference to Campbell. Throughout the litigation, and at trial, Campbell has made it clear that she wanted Parkway to fulfill its promise. (Campbell Depo. Tr., p. 43, L. 6-21; p. 12, L. 18 - p. 13, L. 7; p. 48, L. 25 - p. 49, L.19; p. 63, L. 14 - p. 64, L. 7). Parkway induced Campbell to leave her employment with BMH, creating the debt to the Foundation, with Parkway's promise to pay the debt and she is entitled to have it paid. The Magistrate Court clearly intended by its ruling that Parkway be required to pay off Campbell's debt, albeit through Campbell, with the BMH Foundation. (R., p. 102). Instead of funneling the debt payment through Campbell to the BMH Foundation, the District Court found that Campbell's requested remedy, asking that Parkway be ordered to pay off the Loan, i.e., specific performance, was the appropriate

remedy under the circumstances and what appeared to be intended by the Magistrate Court. As set forth below, Parkway has failed to demonstrate that the District Court's decision was in error.

1. Campbell Requested the Remedy of Specific Performance of Parkway's Promise to Pay Campbell's Loan.

Parkway's argument that the remedy of specific performance was a surprise and raised for the first time by the District Court (Appellant's Brief, p. 7) is contradicted repeatedly by the record. On numerous occasions, Campbell put Parkway on notice that she was requesting an order from the Court that Parkway pay the debt as promised – the promise Parkway made to induce Campbell to leave her employment with BMH. In fact, in the demand letter Campbell initially sent to Parkway, she requested exactly what she has always wanted — that Parkway pay the Foundation as it agreed it would do if Campbell ended her employment with BMH and came to work for Parkway. (Aug. R., Aff. of DeAnne Casperson, Ex. B). Campbell performed her end of the agreement, while Parkway, initially unbeknownst to Campbell, failed to pay the Loan. It was not until Campbell received a telephone call in 2005 and an invoice from the BMH Foundation, requesting payment, that she learned Parkway failed to perform its end of the agreement. (Tr., p. 36, L. 21-25; p. 46, L. 6 - p. 47, L. 4). After Parkway refused to pay the Foundation as agreed, Campbell initiated legal action against Parkway.

Although Campbell did not use the words "specific performance" in the Second Amended Complaint, she put Parkway on notice that she was requesting specific performance. "The Idaho Rules of Civil Procedure set forth a system of notice pleading intended to free litigants from what were once rigid pleading requirements." *Carillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 752, 274

P.3d 1256, 1266 (2012). As set forth in *Carillo*, this Court has explained the purpose of notice pleading:

> The general policy behind the current rules of civil procedure is to provide every litigant with his or her day in court. The rules are to be construed to secure a just, speedy and inexpensive determination of every action or proceeding. The purpose of a complaint is to inform the defendant of the material facts upon which the plaintiff bases his action. A complaint need only contain a concise statement of the facts constituting the case of action and a demand for relief.

Id. (quoting *Clark v. Olsen*, 110 Idaho 323, 325, 715 P.2d 993, 995 (1986)). "A party's pleadings should be liberally construed to secure a just, speedy and inexpensive resolution of the case." *Mickelsen Const. Inc. v. Horrocks*, 154 Idaho 396, 406, 299 P.3d 203, 213 (2013) (quoting *Youngblood v. Higbee*, 145 Idaho 665, 668, 182 P.3d 1199, 1202 (2008)). "Under notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings. . . . The general policy behind the current rules of civil procedure is to provide every litigant his or her day in court." *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010).

In her Second Amended Complaint, Campbell asserted a breach of contract/declaratory judgment claim, and requested remedies as follows:

- Plaintiff has incurred damages and will continue to incur damages, and/or is entitled to a declaratory judgment directing Defendant to repay her Forgivable Loan Agreement with Bingham Memorial." (R., p. 58).
- For a declaratory judgment ordering Defendant to pay to Bingham Memorial the principal amount of $6,800.00 plus interest to be determined upon judgment, or, in the alternative, for a money judgment in the principal amount of $6,800.00 plus an award of interest in an amount to be determined upon judgment. (R., p. 61).
- For such other and further relief as the Court deems just and equitable in the premises. (R., p. 61).

The Second Amended Complaint actually provides more detail, specifically requesting the actual performance requested based on the promise given. The fact that Campbell described the actual performance she was requesting based on the agreement instead of using the words "specific performance" provides Parkway more notice, not less. Further, under the liberal pleading rules, Campbell is not required to use any magic words to assert a claim or request a remedy. However, Campbell provided more detail than the pleading standard, actually setting forth the actual act of specific performance requested.

Further, Parkway's argument that Campbell failed to make her request for specific performance an issue during the litigation and at trial is belied by the record. During the course of the litigation, Parkway deposed Campbell. Parkway's counsel specifically inquired about Campbell's claim for relief from the Second Amended Complaint:

BY MR. SORENSEN:

Q. I am looking at your second amended complaint. It's on file with the court.

And it says you want the defendant, which is Parkway, to pay Bingham Memorial $6,800 plus interest to be determined on the judgement; or in the alternative for a money judgement and principal amount of $6,800 plus an award of interest in the amount to be determined upon judgement.

So are you saying that if you don't have to pay Parkway – or pay Bingham Memorial Hospital any money back, do you still want my clients to pay you $6,800?

A. I want them to pay Bingham $6,800.

Q. So, you're not asking for money for yourself, only for Bingham?

A. Correct.

(Campbell Depo. Tr., p. 43, L. 6-21). At the onset of trial, Campbell's counsel in her opening statement, again made the request for actual performance of the agreement as follows:

> (Ms. Ulrich) And, Your Honor, that is why we have brought this case for Ms. Campbell, is that **she just wants to have that loan paid off.** She loved working at Bingham Memorial. It was a good place. They were good people there. She has local ties. And she doesn't want her reputation ruined because Parkway didn't fulfill its part of a promise.
> She's an honest person. She wants to keep that reputation. **And she wants Bingham Memorial to have that loan paid back to them too because it's the right thing to do and that is what Parkway agreed to.**
> And so that's why today **we are just asking you to enforce this agreement and require Parkway to do what it promised to do in return for Ms. Campbell coming to work for them.**

(Tr., p. 12, L. 18 - p. 13, L. 7) (bold emphasis added). In response, Parkway's counsel made no objection. In its opening statement, Parkway primarily argued that there was no "meeting of the minds" and therefore, no contract. (Tr., p. 13, L. 11 - p. 14, L. 17). Campbell confirmed at trial that the BMH Foundation contacted her to obtain payment and sent her an invoice, showing what she owed. (Tr., p. 36, L. 21-25; p. 46, L. 6 - p. 47, L.4, Pl. Ex. B)[2]. In addition, Campbell fully admitted that she had not paid the debt, and expected Parkway to directly pay it as promised. (Tr., p. 36, L. 21-25; p. 48, L. 14 - p. 49, L. 19; p. 60, L. 25 - p. 61, L. 2). Parkway's counsel demonstrated his clear

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[2] Parkway repeatedly asserts, for the first time on this second appeal, that Campbell never presented evidence of an obligation between herself and the BMH Foundation. First, Parkway has waived this argument, and it should not be considered by this Court. *See Garner v. Bartschi*, 139 Idaho 430, 436, 80 P.3d 1031, 1037 (2003) (citing *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003)). However, assuming *arguendo*, that this issue is properly before the Court, Campbell presented evidence of both the agreement and her continuing obligation to BMH at trial via the Bingham Memorial Hospital Foundation Forgivable Loan Promissory Note and the Bingham Memorial Hospital Forgivable Loan Agreement (Tr., p. 20, L. 20 - p. 21, L. 16; Pl. Ex. A), the balance statement from BMH sent to Campbell when BMH sought to collect the loan debt in 2005 (Tr., p. 45, L. 1 - p. 46, L. 5; Pl. Ex. B) and Campbell's own testimony. (Tr., p. 46, L. 6-24). The Magistrate Court found that Campbell owed a debt to BMH. (R., p. 85, ¶ 4; p. 86, ¶ 7; p. 86, ¶ 9). The District Court acknowledged the Magistrate Court's finding that Campbell owed a debt to the BMH Foundation. (R., p. 221, p. 222). There is no question that Campbell presented substantial and competent evidence of her obligation to the BMH Foundation.

understanding as to what Campbell was seeking as a remedy from the breach of contract claim in his cross examination at trial:

(Mr. Sorensen)	Q.	What you really wanted this to be was a signing bonus, didn't you?
(Campbell)	A.	No, sir.
	Q.	You wanted to be repaid $6,800 even if you walked out of the door and resigned from Parkway -- or resigned from the hospital and worked one minute for the Parkway Surgery Center, you thought that obligated them to pay the money to you; is that right?
	A.	I don't want them to pay the money to me.
	Q.	Okay.
	A.	The money needs –
	Q.	So you never wanted the money. But to the hospital, is that right?
	A.	That's correct.
	Q.	Did you think that -- my understanding is that you thought that, as part of the deal to leave Bingham Memorial Hospital, that, in your mind, Parkway was going to repay this obligation?
	A.	Correct.

(Tr., p. 63, L. 14 - p. 64, L. 7). Parkway demonstrated a full understanding that Campbell was requesting that Parkway pay the Loan directly to the BMH Foundation. Parkway's argument that Campbell failed to plead or present evidence of her request for specific performance is without merit and should be disregarded.

2. The District Court Correctly Found Evidence to Support Specific Performance as the Appropriate Remedy Presented at Trial and on Appeal.

In order to avoid any damages as a result of its breach of contract, Parkway argues that Campbell cannot receive monetary damages without having paid the Loan first, and that Campbell is not entitled to specific performance, giving Parkway a windfall of never having to perform its

promise in spite of its breach. Parkway ignores the well-established law that an appellate court may affirm the trial court's decision if an alternative legal basis supports it. *See Hanf v. Syringa Realty, Inc.*, 120 Idaho 364, 370, 816 P.2d 320, 326 (1991). "It is well established that this Court will use the correct legal theory to affirm the correct decision of a district court even when it is based on an erroneous legal theory." *J.R. Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991). Citing to *In re Estate of Boyd*, 134 Idaho 669, 675 P.3d 664, 670 (Ct. App. 2000), the District Court recognized and applied its authority to affirm the decision but to remand to reform the judgment according to the correct legal authority. (R., p. 237). In fact, the District Court recognized that the Magistrate Court intended the BMH Foundation to receive the money from Parkway: "In her Second Amended Complaint, Campbell requested specific performance of Parkway's promise and Judge Brower indicated his intent that the award to Campbell would be paid to the Foundation. Accordingly, Judge Brower's *Amended Judgment* shall be remanded for reformation as instructed above." (R., p. 239).

The District Court also correctly identified Campbell's right to pursue a claim for the breach as the promisee as set forth in the RESTATEMENT (SECOND) OF CONTRACTS § 305, comment a:

> *a. The promisee's right.* The promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee, whether the promise is binding because part of a bargain, because of his reliance, or because of its formal characteristics. If the promisee has no economic interest in the performance, as in many cases involving gift promises, the ordinary remedy of damages for breach of contract is an inadequate remedy, since only nominal damages can be recovered. In such cases specific performance is commonly appropriate. See § 307. In the ordinary case of a promise to pay the promisee's debt, on the other hand, the promisee may suffer substantial damages as a result of breach by the promisor. So long as there is no conflict with rights of the beneficiary or the promisor, he is entitled to recover such damages. See § 310.

RESTATEMENT (SECOND) OF CONTRACTS § 305, cmt. a. Because Campbell has an economic interest in the payment of her own debt, she could seek either specific performance or contract damages. Although Campbell asserts the remedy could have been fashioned under direct damages to her or as specific performance, the District Court's decision to remand the case to reform the judgment so the money damages are directly paid to the BMH Foundation is exactly what Campbell has consistently sought. Further, Campbell has no objection to the money damages being paid directly to the BMH Foundation because it resolves any potential claim by the Foundation as a beneficiary, which resolves any future claims.

Parkway fails to explain how specific performance is inappropriate under the circumstances. This Court has set forth the basic requirements of specific performance as follows:

> The general rules of the common law are that: (1) a party is entitled to the equitable remedy of specific performance when damages, the legal remedy, are inadequate; (2) because of the perceived uniqueness of land, it is presumed that damages are inadequate in an action for breach of a land sale contract, and the non-breaching party need not make a separate showing of the inadequacy of damages; (3) the remedy is equally available to both vendors and purchasers; and (4) additionally, the appropriateness of specific performance as relief in a particular case lies within the discretion of the trial court.

Perron v. Hale, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985). Although the District Court did not cite this general statement regarding specific performance, it clearly recognized the authority from the RESTATEMENT (SECOND) OF CONTRACTS, § 307, "Remedy of Specific Performance" when there has been a promise to pay a debt to a third party. (R., p. 236). The District Court's analysis of the need for specific performance takes into account the position of both parties based on the findings of fact from the Magistrate Court. The Magistrate Court found that Parkway breached its agreement

with Campbell by its failure to pay the Loan. (R., p. 87-88). The Magistrate Court also found that Campbell's debt to the BMH Foundation "remains unpaid and unsatisfied," and that "Parkway has refused to pay this debt on behalf of Ms. Campbell." (R., p. 86). Further, the Magistrate Court intended that Campbell tender the damages to the BMH Foundation. (R., p. 89). Based on the substantial and competent evidence, the District Court correctly found that specific performance was the more appropriate legal remedy under the circumstances, and the remedy that appeared to be intended by the Magistrate Court. In addition, there is no dispute that if Campbell is not entitled to money damages, the legal remedy of nominal damages is inadequate. The remedy of specific performance also protects Parkway's interests by resolving claims from Campbell and the BMH Foundation as against Parkway. Further, specific performance in this case, particularly where it is merely a money judgment paid to a third party instead of the promisee, "best effectuates the purpose for which the contract was made." *See Fazzio v. Mason*, 150 Idaho 591, 597-98, 249 P.3d 390, 396-97 (2011). Further, Parkway presents no argument that specific performance would be "unjust, oppressive, or unconscionable." *Id.* Consequently, the District Court's decision should be affirmed.

3. Parkway Waived Any Argument Related to the Declaratory Judgment Act and the Request for Specific Performance Because it Raised No Objection.

On February 24, 2009, Campbell filed a motion to amend, attaching the proposed Second Amended Complaint to the motion. (Aug. R., Motion to Amend Complaint, Ex. A). In the Second Amended Complaint, Campbell amended her previously stated breach of contract claim to assert a cause of action for "BREACH OF CONTRACT/DECLARATORY JUDGMENT." (R., p. 57-58). In paragraph 20 of that cause of action, Campbell asserted the following: "As a result of Defendant's

breach, Plaintiff has incurred damages and will continue to incur damages, and/or is entitled to a declaratory judgment directing Defendant to repay her Forgivable Loan Agreement with Bingham Memorial." (R., p. 58). In addition, Campbell modified her prayer for relief to specifically ask for "a declaratory judgment ordering Defendant to pay to Bingham Memorial the principal amount of $6,800.00 plus interest to be determined upon judgment..." and for "such other and further relief as the Court deems just and equitable in the premises." (R., p. 61). Campbell did not cite the provisions of the Declaratory Judgment Act anywhere in the Second Amended Complaint. (R., p. 54-64).

In response to the motion, Parkway submitted an objection, but never raised any objection to this cause of action. (Aug. R., Response to Mot. to Amend Complaint). In fact, the first time Parkway has ever raised any objection to Campbell's breach of contract/declaratory judgment cause of action is in this appeal. Parkway never asserted that Campbell's claim for breach of contract/declaratory judgment action was not allowable before the Magistrate Court or the District Court. Parkway can hardly claim error based on Campbell's breach of contract/declaratory judgment cause of action, asking for Parkway to be required to actually perform its agreement, when it never objected, sought a motion to dismiss, or took any other action. Further, Parkway filed a counterclaim, cross-claim, and requested a jury trial – all of which demonstrate it did not view the action as solely a declaratory judgment proceeding. (R., p. 65-72). Parkway also tried the case, knowing the remedy Campbell wanted was for Parkway to pay the debt to the BMH Foundation (Tr., p. 63, L. 14 - p. 64, L. 2). From the Second Amended Complaint, it is obvious Campbell's use of the term "declaratory judgment" was intended to illustrate the unique nature of Campbell's status in bringing a breach of contract claim to force Parkway to pay Campbell's debt to another party or for

her to obtain contract damages so she could pay the debt off herself. Although it would have been more accurate for Campbell to title the claim "breach of contract/decree of specific performance," the intent from the alternate remedies requested was sufficient to put Parkway on notice of the remedy Campbell was requesting.

Further, Parkway's argument that a claim for damages or specific performance could not be included with a declaratory judgment action is incorrect. As the District Court for the Fourth Judicial District noted, "[t]he issue in *Farmers Insurance Exchange v. Tucker*, 142 Idaho 191, 125 P.3d 1067 (2005) was the ability of a party to amend a complaint for declaratory relief to add a claim for damages when there was already a pending claim in another court on the same subject, it is not authority for the proposition that an action for damages may never be combined with a declaratory judgment action." *Curtis-Klure, PLLC v. Ada County Highway Dist.*, Dkt. No. CV OC 0716381, 2008 WL 8832970, n.1 (Idaho Dist. Feb. 22, 2008). In fact, Idaho Code § 10-1209 specifically allows determinations of issues of fact as necessary.

Because Parkway raised no objection to Campbell's cause of action for "breach of contract/declaratory judgment," and was on notice of the request for specific performance based on the Second Amended Complaint, which was demonstrated by its own conduct at trial, Parkway's argument should be dismissed.

D. EVEN IF THE DISTRICT COURT HAD NOT RELIED ON SPECIFIC PERFORMANCE, A DAMAGE AWARD DIRECTLY TO CAMPBELL WAS ALLOWABLE AND COULD SERVE AS AN ALTERNATE BASIS OF AFFIRMING THE DISTRICT COURT'S DECISION

Even if specific performance is not available to Campbell, the remedy of damages directly to Campbell is allowable for Campbell to pay off her debt to the BMH Foundation and compensates her for Parkway's breach.[3] "This Court may uphold decisions on alternate grounds from those stated in the findings of fact and conclusions of law on appeal." *Martel v. Balotti*, 138 Idaho 451, 453, 65 P.3d 192, 194 (2003). Parkway asserts Campbell should have appealed the Magistrate Court's decision, but ignores that Campbell sought alternative remedies – either requiring Parkway to pay the BMH Foundation directly, or providing her the funds so that she could pay the debt. The Magistrate Court's decision and the District Court's decision accomplished that request. As an alternative to specific performance, however, Campbell asserts that damages to her for the purpose of paying off her debt is an alternative legal theory to affirm the decision of the District Court.

Campbell is entitled to protect her economic interests in Parkway's promise to pay her debt. The law in Idaho is quite clear on the issue of contract damages:

> A plaintiff is entitled to recover damages sustained as a breach of the contract. The damages for a breach of contract are compensatory damages or damages that will fully compensate the non-breaching party for the loss suffered as a result of the breach of contract. **The compensatory damages are measured by the amount that would be necessary to put the plaintiff in as good a position as would full performance of the contract.** *Sullivan v. Bullock,* 124 Idaho 738, 864 P.2d 184 (Ct.App.1993); *O'Dell v. Basabe,* 119 Idaho 796, 810 P.2d 1082 (1991).

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[3] Pursuant to Idaho Appellate Rule 15, a respondent may raise an additional issue on appeal that does not seek affirmative relief. Campbell asserts this issue is an alternate method of affirming the District Court's decision.

Jenicek v. State Farm Fire & Cas. Co., CV-01-05652, 2003 WL 23914536 (Idaho Dist. Aug. 11, 2003) (emphasis added); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). There is no doubt that if Parkway had actually performed its part of the contract as promised, it would have paid the debt owed by Campbell to the BMH Foundation, and the debt would subsequently cease to exist. Campbell produced as evidence the invoice she received from the BMH Foundation and testimony regarding telephone calls from the BMH Foundation regarding payment of the debt and the amount. (Tr., p. 36, L. 21-25; p. 44, L. 23 - p. 46, L. 24; Pl. Ex. B). On December 29, 2005, the BMH Foundation's invoice to Campbell indicated she owed $8,005.96 with interest continuing to accrue. (Pl. Ex. B). Incurring debt as a result of a breach of contract is damage and entitles Campbell to receive damages because she has an economic interest in the performance promised by Parkway. *See* RESTATEMENT (SECOND) OF CONTRACTS, §§ 305, 307. Section 305 provides the following example:

> **Illustrations:** 4. A owes C $100. For consideration B promises A to pay the debt to C. On B's breach A may obtain a judgment for $100 against B. But the court may protect B against double payment by permitting joinder of C, by an order that money collected by A is to be applied to reduce A's debt to C, by giving B credit on the judgment for payments to C which reduce A's obligation, or by enjoining enforcement of the judgment to the extent of such payment.

RESTATEMENT (SECOND) OF CONTRACTS, § 305, cmt. b, Ills. 4. The Magistrate Court primarily followed this example by giving a money judgment to Campbell to be paid to the BMH Foundation: "The above-stated money judgment shall be paid directly to Ms. Campbell so that she may tender such amount to Bingham Memorial Hospital Foundation to extinguish her obligation. . . ." (R., p. 102.) Further, the substantial case law addressing the unique circumstance of an agreement to pay

the debt of another illustrates Campbell can recover damage in the amount of the debt. Although this narrow issue could not be found in any Idaho case, the well established holding in other states is that where a party has agreed to pay the debt of another to obtain economic benefit, the debt does not have to be paid by the non-breaching party in order to establish damages and the amount of damages are measured by the amount of the debt that was to be paid. Much of the case law regarding this issue is approximately 100 years old. Many of the cases acknowledge the consensus that the debt does not have to be repaid to pursue the breach. In a more recent case addressing this topic of law, the Supreme Court of Texas ruled on an agreement to pay the debt of another. *See Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex. 1981). In *Mead*, the parties agreed in association with the sale of the business that Johnson Group would pay certain debts of the business. *Id* at 686. When Johnson Group failed to pay the debts, Mead filed suit for the breach, claiming damages for the unpaid debts. A jury awarded Mead damages for the unpaid debts. The trial court reversed, holding Mead could not recover on the unpaid debt without paying the debt first. In reversing the trial court, the Texas Supreme Court held as follows:

> In a suit similar to the instant case involving the sale of business and assumption of existing debts, it was held the contract created a direct obligation from the promisor to the promisee and did not require that the promisee first pay the debts in order to recover. *Cohen v. Simpson*, 32 S.W. 59, 61 (Tex.Civ.App. 1895, writ dism'd). See also *Smith v. Smith*, 595 S.W.2d 631, 632 (Tex.Civ.App. Fort Worth 1980, no writ). There are other cases in which Texas courts have permitted recovery for expenses incurred without first requiring payment by the plaintiff. See, e. g., *Triton Oil & Gas Corp. v. E. W. Moran Drilling Co.*, 509 S.W.2d 678, 686 (Tex.Civ.App. Fort Worth 1974, writ ref'd n. r. e.) (materials and services in drilling contract); *Taylor v. Mark*, 376 S.W.2d 927, 928 (*Tex.Civ.App. Waco 1964*, writ ref'd n. r. e.) (materials in a construction contract); *San Antonio & A. P. Ry. Co. v. Moore*, 31 Tex.Civ.App. 371, 72 S.W. 226, 228 (1903, writ ref'd) (medical expenses). This court noted in *Smith v. Nesbitt*, supra, 230 S.W. at 978, that proper orders directing the promisee to apply the

> recovery to payment of the debt would prevent double recovery. Here, the trial court so ordered. **Johnson received valuable assets from Mead from which he has profited. He breached the contract, yet is relieved of the obligation to perform that which he agreed to do pay the SBA loan and business debts. To permit this result is inequitable and allows Johnson to be unjustly enriched. We hold that Mead is not required first to pay the loan and debts assumed under the contract.**

Id. at 689 (emphasis added). The holding in *Mead* is reflected in numerous other cases from many other jurisdictions all addressing the failure to pay another's debt pursuant to contract. *See Fairfield v. Day*, 71 N.H. 63, 51 A. 263 (1901) (measure of damages is full amount of accrued liability); *Furnas v. Durgin*, 119 Mass. 500, 507 (1876) (repayment is not required in order to pursue breach of contract claim); *Heins v. Byers*, 174 Minn. 350, 352 (1928) (measure of damages is amount of debt); *Lathrop v. Atwood*, 21 Conn. 117, 123-24 (1851) (no obligation to repay debt when breaching party obtained direct benefit); *Locke v. Homer*, 131 Mass. 93, 102 (1881) (same); *Merriam v. Pine City Lumber Co.,* 23 Minn. 314 (1877) (same); *Meyer v. Parsons*, 129 Cal. 653, 655-56, 62 P. 216 (1900) (same); *Stokes v. Robertson*, 143 Ga. 721, 85 S.E. 895 (1915) (same); *Stout v. Folger*, 34 Iowa 71, 75-76, 1872 WL 182 (1871) (same); *Turner v. Howze*, 28 Cal. App. 167, 170-71, 151 P. 751 (1915) (same); and *Wright v. Chapin*, 87 Hun. 144, 33 N.Y.S. 1068, 1070-71(N.Y. Gen. Term, 1895) (same). For the Court's convenience, the relevant holdings from these cases are set forth in Addendum A. Just like *Mead*, Campbell is entitled to either specific performance or damages for the debt Parkway agreed to pay and did not so she can extinguish her debt.

In addition, Idaho court's have allowed the recovery of damages without requiring payment by the plaintiff first. In *Warm Springs Development Assoc. Limited Partnership v. Burrows*, 120 Idaho 280, 285, 815 P.2d 478, 483 (Ct. App. 1991), a landlord brought a breach of contract claim

for physical damages done to the premises. The tenant argued that the landlord could not recover for damages to the leased property because the landlord had not actually performed any of the repairs, but only provided testimony and estimates of the amounts necessary to make the repairs as a result of the damage allegedly done by the tenant. *See id.* The Court of Appeals rejected this argument, holding that the evidence proved the damages with reasonable certainty as follows:

> When a tenant covenants to keep the premises in good repair, the landlord is not obligated to repair the property at the expiration of the lease, and nothing in this lease prevents Warm Springs from making an agreement with the next lessee to repair the property or accept the premises in the condition they are in. To recover damages under count two of the complaint, Warm Springs had only to show that the damages were proved with reasonable certainty. This requirement was met through the testimony of King.

See id. Just like *Warm Springs*, Campbell established the amount of the damage to her as a result of the existing debt and interest that had accrued by her testimony and the invoice from the BMH Foundation. (Tr., p. 36, L. 21-25; p. 44, L. 23 - p. 46, L. 24, Pl. Ex. B). Parkway did not present any evidence that the calculations of the debt were incorrect, or that the debt did not exist. Campbell proved the amount of damage with reasonable certainty.

Campbell's expectation in entering into the contract with Parkway, and performing her part by leaving her employment with BMH, thereby incurring a debt, was that Parkway would pay her debt to the BMH Foundation as promised. Whether this is accomplished by damages to Campbell so she can pay off the debt or by way of specific performance, Campbell is entitled to the benefit of her bargain. Pursuant to Idaho case law regarding contract damages, and the law in other jurisdictions pertaining to contracts in which a party agrees to pay the debt of another and then breaches, the damages suffered by the non-breaching party are measured by the amount of the debt

which the breaching party did not pay. Because the contract is not one of indemnity, there is no obligation for the non-breaching party to pay the debt first. Consequently, even if specific performance is inapplicable, the decision of the District Court should be affirmed.

E. CAMPBELL'S AGREEMENT WITH PARKWAY IS NOT BARRED BY THE STATUTE OF FRAUDS

Parkway argues yet again on appeal that Campbell's agreement with Parkway was barred by the statute of frauds. However, the agreement between Campbell and Parkway falls within an exception to the statute of frauds and is therefore not barred. With regard to Parkway's statute of frauds argument, Parkway acknowledges the exception to the statute of frauds found in Idaho Code § 9-506(3) which provides that oral agreements to answer for the debt of another are enforceable where the promising party gains some direct benefit for itself by making such promise. *See* I.C. § 9-506(3). However, Parkway argues that Idaho Code § 9-506(3) does not apply.

Idaho Code § 9-506 provides as follows:

> A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:
>
> [. . .]
>
> 3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.

I.C. § 9-506(3). The language of § 9-506(3) in particular which is pertinent to the situation at hand is "[w]here the promise, being for an antecedent obligation of another, is made . . . upon a

consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." I.C. § 9-506(3). Although Parkway attempts to skirt case law on this issue to create its own interpretation of the meaning of Idaho Code § 9-506(3), there is ample Idaho case law, as well as case law from other jurisdictions, explaining the meaning of this particular exception to the statute of frauds. The Idaho Supreme Court noted in *Johnson Cattle Co., Inc. v. Idaho First Nat. Bank*, 110 Idaho 604, 719 P.2d 1376 (1986), that Idaho Code § 9-506(3) "allows for enforcement of an oral promise to answer for the debt of another if the promisor obtains a direct benefit." *Id.*, 110 Idaho at 607, 719 P.2d at 1379. This rule is generally known as the "leading-object rule" or the "main-purpose rule," and is defined in BLACK'S LAW DICTIONARY as "[t]he doctrine that if a promise to guarantee another's debt is made primarily for the promisor's own benefit, then the statute of frauds does not apply and the promise need not be in writing to be enforceable." BLACK'S LAW DICTIONARY (9th ed. 2009). Other jurisdictions have recognized this rule taking oral promises out of the statute of frauds as well. *See, i.e., Trans-Gear v. Lichtenberger*, 715 N.E.2d 608 (Ohio Ct. App. 1998); *Morrison-Knudsen Co., Inc. v. Hite Crane & Rigging, Inc.*, 678 P.2d 346 (Wash. Ct. App. 1984); and *Haas Drilling Co. v. First Nat. Bank Dallas*, 456 S.W.2d 886 (Tex. 1970). This is exactly the situation Campbell found herself in with Parkway. Parkway, through McCracken, its Administrator/CFO at the time, made an oral promise to Campbell that if would she would come to work for Parkway, Parkway would pay off her Loan to the BMH Foundation. (R., p. 86). McCracken made this promise at the direction of Parkway's board. (R., p. 85-86). Parkway obtained a direct benefit from this promise to Campbell, i.e., Campbell quitting her job at BMH and coming to work for Parkway. Parkway's main purpose in agreeing to pay off

Campbell's loan with BMH was to obtain for itself the benefit of having Campbell come to work for Parkway. Parkway's promise to answer for Campbell's debt was primarily for Parkway's benefit, and therefore, Parkway's oral agreement with Campbell to pay off her debt with the BMH Foundation falls outside the statute of frauds and is enforceable.

Parkway also argues that Campbell's agreement with Parkway is not enforceable because, when Campbell negotiated with Parkway for Parkway to pay Campbell's debt to the BMH Foundation directly, Campbell became a non-party to the Loan between herself and BMH, and, therefore, has no right to enforce her agreement with Parkway.[4] (*See* Appellant's Brief, p. 33-34). In support of this argument, Parkway cites to the dissenting opinion in *Jones v. Better Homes, Inc.*, 79 Idaho 294, 300, 316 P.2d 256 (1957), which does not address the particular statute of frauds exception at issue here. Moreover, Parkway's argument that Campbell has no ability to enforce the agreement she made with Parkway would belie the existence of Idaho Code § 9-506(3) in the first place, rendering it superfluous and meaningless. Parkway's argument appears to imply that the only party with enforceable rights under the "leading object" rule exception to the statute of frauds is the original creditor. However, such a position is not legally tenable, given that no direct contractual relationship need exist with the original creditor in order for the subsequent agreement to answer for the original debt to be enforceable against the promising party. Parkway has cited to no case law indicating that, under the § 9-506(3) statute of frauds exception, Campbell has no right to enforce her agreement with Parkway.

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[4] As set forth in Section VI.A.3, both the beneficiary and the promisee have a right of enforcement. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 305, cmt. a.

Although there is no Idaho case law directly on point, the Ohio Court of Appeals has addressed this very issue:

> If, however, the trial court determines that the promisor did *not* become primarily liable, and the original debtor remains liable, then the promise is nothing more than a collateral or secondary promise to answer for the debt of another, and the Statute of Frauds is applicable. Then, at that juncture, the court may inquire "whether the promisor's leading object was to subserve his own business or pecuniary interest." *Id.* at 459, 8.O.O.3d at 449, 377 N.E.2d at 518. This is commonly referred to as the leading-object rule and exception. See *Mentor Lumber & Supply Co. v. Victor* (Dec. 31, 1990), Lake App. No. 89-L-14-103, unreported, 1990 WL 237185. When the leading object of the promisor is not to answer for another's debt but to subserve some pecuniary or business purpose of his own involving a benefit to himself, his secondary or collateral promise is not within the Statute of Frauds. *Wilson Floors.*
>
> In the instant case, the record strongly supports the trial court's determination that Lichtenberger was a secondary and not a primary obligor. Clearly, Booher still remained obligated to Trans-Gear, despite any guaranty of Lichtenberger. Thus, the second phase of the *Wilson Floors* test needed to be employed:
>
> > "Under the second test, it is of no consequence that when such promise is made, the original obligor remains primarily liable or that the third party continues to look to the original obligor for payment. So long as the promisor undertakes to pay the subcontractor whatever his services are worth irrespective of what he may owe the general contractor, and so long as the main purpose of the promisor is to further his own business or pecuniary interest, the promise is enforceable. Thus, under this test it is not required to show as a condition precedent for enforceability of the oral contract that the original debt is extinguished." *Id.* at 459-460, 8 O.O.3d at 449, 377 N.E.2d at 519.

Trans-Gear, Inc. v. Lichtenberger, 128 Ohio App.3d 504, 510, 715 N.E.2d 608, 611 (Ohio Ct. App. 1998). Pursuant to Idaho Code § 9-506(3), Campbell is entitled to enforce an oral agreement between herself and Parkway through which Parkway was obligated to pay off Campbell's debt to the BMH Foundation directly. Parkway's argument that Campbell has no contractual rights to

enforce a contract which terms she personally negotiated and from which she has an economic interest has no basis in law. Because Parkway obtained a direct benefit from the verbal agreement with Campbell to pay the Loan, the statute of frauds is inapplicable. Consequently, the District Court's decision on the statute of frauds should be affirmed.

F. AS THE PREVAILING PARTY, CAMPBELL IS ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL, NOT PARKWAY

1. Parkway Is Not Entitled to Attorney's Fees and Costs on Appeal.

Parkway argues it is entitled to attorney's fees and costs on appeal based upon Idaho Code § 12-120(3) and Idaho Appellate Rule 41. However, because this Court should affirm the District Court's decision in favor of Campbell, Parkway cannot be the prevailing party on appeal and is therefore not entitled to attorney's fees or costs on appeal.

2. Campbell Is Entitled to Attorney's Fees and Costs on Appeal.

As the prevailing party, Campbell is entitled to the costs associated with this action pursuant to Idaho Appellate Rule 41 and Idaho Code § 12-120(1) because the amount Campbell pled was $25,000.00[5] or less, and Campbell sent demand to Parkway for payment of the amount in controversy more than ten days prior to the filing of the action (Aug. R., Aff. of DeAnne Casperson, Ex. B). Idaho Code § 12-120(1) also allows for the recovery of attorney's fees on appeal. *See Chavez v. Barras*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008).

Additionally, Campbell is entitled to attorney's fees pursuant to Idaho Code §12-120(3) because Campbell is the prevailing party and the contract at issue is in this matter between Campbell

[5] The amount under Idaho Code § 12-120(1) has since been amended to $35,000.

and Parkway constituted a commercial transaction. Actions brought for breach of a contract related to employment are considered commercial transactions and are subject to the attorney's fee provision of Idaho Code § 12-120(3). *See Northwest Bec-Corp. v. Home Living Serv.*, 136 Idaho 835, 842, 41 P.3d 263, 270 (2002); *Teton Gastroenterology Specialists, P.A. v. Woods*, 135 Idaho 485, 492, 20 P.3d 21, 28 (Ct. App. 2001).

Campbell has prevailed in this matter on both her breach of contract claim and successfully defended Parkway's counterclaim. Even, assuming arguendo, that specific performance is not allowed and Campbell cannot personally be awarded damages, Campbell is entitled to nominal damages for the breach. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 305, cmt. a. As a result, Campbell is entitled to attorney's fees and costs as the prevailing party in this action.

VII. CONCLUSION

Based on the foregoing, Campbell respectfully requests that the District Court's decision be affirmed.

RESPECTFULLY SUBMITTED this 31st day December, 2014.

DeAnne Casperson
Holden, Kidwell, Hahn & Crapo, P.L.L.C.
Plaintiff/Counter-Defendant/Respondent

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 31st day of December, 2014.

DOCUMENT SERVED: **RESPONDENT'S BRIEF**

ATTORNEYS SERVED:

Paul J. Stark
Stark Law, P.C.
5088 N. Aberdeen Place
Meridian, Idaho 83646

(✓) *First Class Mail*
( ) *Hand Delivery*
( ) *Facsimile*
( ) *Via Overnight Mail*

DeAnne Casperson

ADDENDUM A

1. *Fairfield v. Day*, 71 N.H. 63, 51 A. 263 (1901) (emphasis added):

> The contention of the defendant is that his contract in respect to the payment of the outstanding bills was one of indemnity merely, while the contention of the plaintiff is that it was one for the unconditional payment of liabilities. There being a well-settled distinction between an agreement to indemnify and an agreement to pay, it is necessary in the first instance to determine the nature of the contract upon which this action is founded. The contract speaks for itself. By it, and for a valuable consideration, the defendant, among other things, "was to pay all outstanding bills due on account of the business," among which were the claims which are now sought to be recovered. This language is plain and unequivocal. It admits of but one construction. In common understanding and in legal effect the defendant undertook and agreed "to pay all outstanding bills due on account of the business" as his own proper debts, and not merely to indemnify the plaintiff against them. **In such a case a recovery may be had as soon as there is a breach of the contract, and the measure of the damages is the full amount of the accrued liability;** whereas in contracts of indemnity the obligee cannot recover until he has been actually damnified, and then only to the extent of the injury sustained by him up to the time of the institution of his suit.

2. *Furnas v. Durgin*, 119 Mass. 500, 507 (1876) (emphasis added):

> **That a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained and damages recovered to the amount of such debt, is held by many authorities.** *Holmes v. Rhodes,* 1 B. & P. 638. *Cutler v. Southern,* 1 Saund. 116, Wms.' note. *Toussaint v. Martinnant,* 2 T. R. 100. *Martin v. Court,* 2. T. R. 640. *Hodgson v. Bell,* 7 T. R. 97. *Thomas v. Allen,* 1 Hill, 145. *Loosemore v. Radford,* 9 M. & W. 657. *Penny v. Foy,* 8 B. & C. 11. In *Lethbridge v. Mytton,* 2 B. & Ad. 772, the defendant, by a settlement made upon his marriage, conveyed an estate upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estate to the amount of £19,000, within a year, and it was held, upon his failure to do so, that the trustees were entitled to recover the whole £19,000 in an action of covenant, although no payment had been made by them, and no special damage was laid or proved. Whether the contracts in some of these cases were anything more than contracts of indemnity, and therefore whether there could under our decisions have been any recovery, might perhaps be questioned. *Cushing v. Gore,* 15 Mass. 69. *Little v. Little, ubi supra.* That, however, need not now be considered, as we treat the agreement before us as one not for indemnity merely, but for payment.

3. *Heins v. Byers*, 174 Minn. 350, 288 (1928) (emphasis added)

> The contract is not one of indemnity. It is a contract to pay and discharge a debt of the plaintiff made upon consideration moving from the plaintiff to the defendants. **In cases of such sort, authorities are fairly in accord, or at least it is the prevailing doctrine, that one in the position of the plaintiff may recover, and that the amount of the debt is the measure of his damages.** *Merriam v. Pine City Lbr. Co.*, 23 Minn. 314; *Stout v. Folger*, 34 Iowa 71, 11 Am. Rep. 138; *Lathrop v. Atwood*, 21 Conn. 117; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199; *Shattuck v. Adams*, 136 Mass. 34; *Lee v. Burrell*, 51 Mich. 132, 16 N.W. 309; *Turner v. Howze*, 28 Cal. App. 167, 151 P. 751; *Meyer v. Parsons*, 129 Cal. 653, 62 P.216; *Gage v. Lewis,* 68 Ill. 604; *Fairfield v. Day*, 71 N.H. 63; 51 A. 263; *Stokes v. Robertson*, 143 Ga. 721, 85 S.E. 895; 3 Sutherland, Damages (4th Ed.) § 765, p. 2892, 2893; 2 Sedgwick, Damages (9th Ed.) § 789, p. 1641; 8 R.C.L. p. 463, § 30; 1 Williston, Contracts, p. 374, § 392, et seq.; 3 Williston Contracts, p. 2500, § 1408. And this is the apparent future of the doctrine. See Am. L. Inst. Restatement Contracts (Tent.) § 133(b).

4. *Lathrop v. Atwood*, 21 Conn. 117, 123-24 (1851) (emphasis added):

> These debts were all then due to the respective creditors of Atwood & Lathrop, and the defendants proceeded to pay the same; but on the 24th day of October, when this suit was brought, there remained due and unpaid the sum of 635 dollars. This was four months after the defendants had assumed the payment; but the plaintiff had not been compelled to pay, nor had he paid, any of these claims, nor had he been subjected to any cost on account of them, at that time. And the questions now put to us, are, whether the defendants are liable, in this action, for the non-payment of the balance of the debts unpaid? The cases in which this question is discussed, are not free from some confusion; and yet the principles deducible from them, or explicitly decided by them, are clear enough. The confusion seems to have arisen from the want of a clear discrimination between mere contracts of indemnity, and contracts for the performance of some act in which the plaintiff has an interest, from which indemnity, either expressly or by implication, is to result.
>
> **We think an examination of the cases will show these reasonable doctrines; that, if a condition, covenant or promise be only to indemnify and save harmless a party from some consequence, no action can be sustained for the liability or exposure to loss, nor until actual damage, capable of appreciation and estimate, has been sustained, by the plaintiff. But if the covenant or promise be, to perform some act for the plaintiff's benefit, as well as to indemnify and save him**

harmless from the consequences of non-performance, the neglect to perform the act, being a breach of contract, will give an immediate right of action.

5. *Locke v. Homer*, 131 Mass. 93, 102 (1881) (emphasis added):

In the case at bar, the court is therefore unanimously of the opinion that if the defendant, by deed or other writing signed by himself, had promised the plaintiffs to pay the amount of the mortgage to Aitken, **the authorities are conclusive that the plaintiffs might have sued him on his agreement, and recovered the whole amount of the mortgage debt, without proving they had paid it.**

6. *Merriam v. Pine City Lumber Co.*, 23 Minn. 314 (1877) (internal citations omitted)(emphasis added)

The defendant's undertaking was not one of indemnity. It was an affirmative, unconditional promise to the plaintiff, upon valid consideration, to pay, within a specified time, a definite sum of money to a third party - the state - for his benefit. Though, within the doctrine of New York cases upon this subject, as well as our own, the state might have maintained an action against defendant upon a breach of its agreement, it is well settled, both upon principle and authority, that the defendant also remained liable to plaintiff, upon its promise, by privity of contract; and a cause of action accrued in favor of the latter, which became complete immediately upon its breach by the failure of the defendant to make the payment at the stipulated time. **It is not necessary for the promisee in this case to discharge the debt before asserting his right of action against the promisor, growing out of the breach of his own agreement. The measure of damages in a case of this kind is the amount of the debt agreed to be paid.**

7. *Meyer v. Parsons*, 129 Cal. 653, 655-56, 62 P. 216 (1900) (emphasis added):

Appellant contends that if all that is claimed by plaintiff is true, yet he is not entitled to recover the $814.60, because he has not paid the same himself, and because the agreement was not that appellant should pay the plaintiff that amount, but that he should pay it to the creditors.

In answer to this it is sufficient to say that the promise to pay the creditors was made to plaintiff, and that on a failure to keep that promise plaintiff is entitled to recover whatever damages he has sustained by reason of such failure. He is not compelled to rescind nor to treat the contract as rescinded, but may rely upon the contract and recover damages for its breach, and this is, as we understand it, just what he is endeavoring to do in this suit. **His damages in that regard are the same whether he has already paid the creditors or must yet inevitably pay them. There is no**

question but that he is yet liable to the creditors, and the extent of his right of recovery is not affected by the possibility that the creditors may not exact all that they are entitled to in discharge of their claims. The extent of appellant's liability is the amount that he agreed to pay for the property; and plaintiff can recover this full amount even though he has not paid it himself. (2 Sedgwick on Damages, sec. 789, and cases there cited; *Banfield v. Marks*, 56 Cal. 185.).

8. *Stokes v. Robertson*, 143 Ga. 721, 85 S.E. 895 (1915) (emphasis added):

The contract on which suit was brought was not merely one of indemnity, but contained a direct agreement on the part of the decedent to pay off and discharge the notes given by Robertson as fast as they should mature. A failure to pay one of the notes at maturity constituted a breach of the contract, and the plaintiff could bring suit thereon. He was not obliged to pay the note before bringing suit. If he was thus entitled to sue, for what amount could he bring his suit? In Thomas v. Richards, 124 Ga. 942, 53 S. E. 400, where one person entered into a contract with another, by which he assumed the payment of certain notes made by the latter, maturing at different dates, the failure to pay any single note was held to be a breach of the contract, and the other party to it was held to be entitled to recover. In Gage v. Lewis, 68 Ill. 604, it was said:

"Where a bond is given, intended as a bond of indemnity, but containing a covenant that the obligor will pay certain debts for which the obligee is liable, and the obligor fails to perform, an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damnified, unless from the whole instrument it manifestly appears that its sole object was a covenant of indemnity."

9. *Stout v. Folger*, 34 Iowa 711, 75, 76 (1871) (emphasis added):

It is claimed by defendant that his contract is merely to save plaintiff from harm by reason of his indebtedness, and that, until plaintiff has paid the debt, he is not damnified, and cannot recover. We have examined the numerous authorities cited in defendant's brief, and while they are not altogether free from confusion, yet we think underlying them will be found the following doctrines: That is a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff. **But if the covenant or promise be to perform some act for the plaintiff's benefit, as well as to indemnify and save him harmless from the consequences of non-performance, the neglect to perform the act is a breach of contract, and will give him an immediate right of action.** *See Lathrop v. Atwood*, 21 Conn. 116.

The authorities argee that upon an undertaking *to pay* a debt due a third person, the plaintiff may maintain an action without showing that he has paid the debt. *Lathrop v. Atwood, supra*; *In re Negus*, 7 Wend. 499; *Port v. Jackson*, 17 Johns. 239; *Thomas v. Allen*, 1 Hill. 145; *Churchill v. Hunt*, 3 Denio. 321; *Wilson v. Stilwell*, 9 Ohio 467; *Redfield v. Haight*, 27 Conn. 31.

10. *Turner v. Howze*, 28 Cal. App. 167, 170-71, 151 P. 751 (1915) (emphasis added):

Such breach having occurred, the party not in default was entitled to recover damages therefor. **The measure of her damages is the amount of the indebtedness, and she may recover those damages without first paying the mortgage debt.** We base this ruling upon the decision of the supreme court in Meyer v. Parsons, 129 Cal. 653, [62 Pac. 216]. It was there held that where, upon sufficient consideration, the defendant agreed with the plaintiff to pay certain indebtedness of the plaintiff to creditors, that on a failure to keep that promise the plaintiff is entitled to recover whatever damages he has sustained by reason of such failure, and that **the damages are the same whether he has already paid the creditors or must yet inevitably pay them.** In the present case the debt which Howze agreed to pay was not an indebtedness of Mrs. Turner, but was in substance a debt of Howze for which the property of Mrs. Turner was given as security. There is no difference between this case and *Meyer v. Parsons* which can reasonably prevent that decision from being applicable in favor of the plaintiff here.

11. *Wright v. Chapin*, 87 Hun. 144, 33 N.Y.S. 1068, 1070-71(N.Y. Gen. Term, 1895) (emphasis added)

It thus appears that defendant purchased lands from plaintiff, and as consideration for such purchase agreed to pay Goodwin the debt that plaintiff owed Goodwin, and agreed to relieve plaintiff of and from all liability to said Goodwin. The defendant, therefore, has the plaintiff's property, and as the consideration of the conveyance of the property he agreed to pay a debt of plaintiff's to Goodwin, and to relieve plaintiff from the liability which he was under to Goodwin; and that covenant the defendant has failed to perform by failing to pay $22,429.38 of the said indebtedness of plaintiff to Goodwin. **This covenant is not strictly a covenant for indemnity against loss, but an express covenant to do a particular act, namely, to pay Goodwin the money due him, and to relieve plaintiff from a liability to Goodwin; and the damage sustained by plaintiff by a breach of that covenant is the amount of the liability from plaintiff to Goodwin. . .**