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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHELLE CAMPBELL,

Plaintiff/Counter-
Defendant/Respondent,

vs.

PARKWAY SURGERY CENTER, LLC,

Defendant/Counter-
Claimant/Appellant.

SUPREME COURT CASE NO. 42173

Seventh Dist. Case No. CV-2005-2477

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
for the County of Bingham

Honorable Darren B. Simpson, District Judge, Presiding

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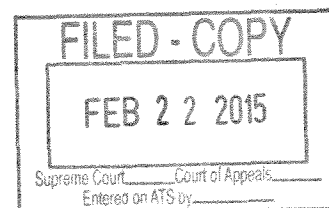


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ADDITIONAL ARGUMENT

1. Campbell did not, and does not, have standing to pursue this action

A. The undisputed facts demonstrate the lack of standing.

The facts surrounding Campbell's pursuit of this matter are unique. Campbell had an oral agreement with Parkway where any financial obligation with Bingham Memorial Hospital was to be taken care of by Parkway. Although the phrase "taken care of" is arguably ambiguous, there is no ambiguity or dispute that Campbell was not injured as a result of her dealings with Parkway. Campbell simply was not injured.

Despite this fact, Campbell brought an action, under a breach of contract theory, against Parkway. Again, despite the lack of any injury, Campbell claimed damages for breach of contract, and sought a monetary award for herself. At the trial in this matter, Campbell prosecuted the case under a theory of breach of contract and at all times sought personal monetary damages.

The Magistrate Court found a breach of contract and awarded Campbell contractual damages, according to her Complaint. The award of such damages, when Campbell had not suffered any cognizable injury, was contested in a Motion for Reconsideration before the Magistrate Court. In support of its arguments that Campbell could not be awarded damages under a contract theory when she had not been injured, Parkway asserted the case of *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941,

944 (Ct. App. 1988), where it was held “Although a plaintiff has been legally wronged, he may not recover damages unless he has been economically ‘injured.’” *Bergkamp*, at 653, 759 P.2d at 944. *See also Melaleuca, Inc. v. Foeller*, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014). The Magistrate Court, however, ruled that the award of contractual damages would stand without much analysis at all.

On appeal, Parkway again asserted again that Campbell could not recover contractual damages when there was no actual injury. The District Court apparently recognized the clear mandates of *Bergkamp* and did not uphold the Magistrate Court’s award of damages to Campbell when it was undisputed that Campbell had not been injured. The District Court, however, apparently relying on dicta¹ from *Bergkamp* raised, *sua sponte*, the issue of specific performance.

To be clear, at no time on the Motion for Reconsideration or on Appeal to the District Court did Campbell protest the award of personal contractual damages, but argued in favor of contractual damages. At no time during the trial or thereafter did Campbell prosecute the lawsuit as one of specific performance. It was the District Court that first asserted specific performance. The District Court reversed the Magistrate Court’s award of contractual damages to Campbell, and instead inserted its own theory

¹ In *Bergkamp*, the Court of Appeals stated in dicta, “If he wishes to protect some noneconomic interest in a contract, then he may pursue another remedy such as injunctive relief or specific performance. In this case, however, the tenants have sought only damages.” *Bergkamp*, at 653, 759 P.2d at 944. Similarly, Campbell has only sought personal monetary damages in this case.

of specific performance and awarded damages to a non-party, Bingham Memorial Hospital (“BMH”). Thus, it was only upon receiving the District Court’s opinion on appeal that Parkway was first presented the issue of specific performance. Further, it was only on appeal to this Court that Parkway was first able to argue the issue of specific performance, due to the fact that Campbell did not present evidence or try this issue, and never previously argued this issue.

B. Parkway’s standing argument is timely.

Idaho law provides that standing can be challenged at any time in the proceedings; therefore Parkway’s challenge to Campbell’s standing is timely. Multiple cases have affirmatively held that the issue of standing can be raised at any time. *Blankenship v. Washington Trust Bank*, 153 Idaho 292, 295, 281 P.3d 1070, 1073 (2012); *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 431, 283 P.3d 742, 748 (2012); *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982). Therefore, Parkway has the right to raise this issue before the Court at this time.

Parkway should also have the right to raise this issue at this stage in the proceedings given the fact that the issue of specific performance (as a remedy for BMH) was first raised by the District Court in its opinion on appeal in this case. Campbell never tried this case as one of specific performance for the benefit of BMH, and did not argue such either before the Magistrate Court on reconsideration, or before the District

Court on appeal. Thus, Parkway was not given the opportunity to argue standing because this assertion was never presented prior to the District Court's opinion.

Likewise, Campbell's assertions that Parkway cannot raise the issue of standing in the "second appeal", only in the "first appeal" fall short as an award to BHM was first raised in the District Court's opinion on appeal. Campbell's assertions that such a challenge had to be raised as an affirmative defense, under a I.R.C.P. 12(b)(6) motion, or that Parkway should be judicially estopped also fall short given the undisputed fact that Campbell was never injured, and never tried the case or argued on appeal a remedy on behalf of BMH. Accordingly, Parkway's assertions that Campbell lacked standing are timely.

C. The lack of a distinct and palpable injury demonstrates that Campbell lacked standing in this matter.

It is well-settled under Idaho law that to satisfy the case and controversy requirement of standing a party must demonstrate "an injury in fact" as well as a substantial likelihood that the relief requested will redress the claimed injury. *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989). The undisputed evidence in the record demonstrates beyond cavil that Campbell did not suffer any

legally recognizable injury and therefore lacks standing.²

In order to demonstrate an injury in fact, Campbell must show a distinct and palpable injury. *Martin v. Camas County*, 150 Idaho 292, 295, 281 P.3d 1070, 1073 (2012). More particular to this analysis, “[t]he alleged injury must be to the litigant whose standing is at issue.” *Abolafia v. Reeves*, 152 Idaho 898, 902, 277 P.3d 345, 349 (2012) (citing *Troutner v. Kempthorne*, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006)) (emphasis added).

Therefore, the threshold question the Court must examine is whether there was an injury to Campbell. A review of Campbell’s briefing in this matter makes it clear that there is not a “distinct and palpable injury”. *Martin*, at 295, 281 P.3d at 1073.

First, Campbell argues that she has standing in this action because she is a party to a contract. Whether a litigant is a party to a contract, however, is not the standard by which standing is determined. Campbell must at all times demonstrate a distinct and individualize injury. *Abolafia*, at 902, 277 P.3d at 349. Campbell asserts that her injury exists because she altered her position, which caused her to incur “a repayment obligation.” *Respondent’s Brief* at 11. Campbell further asserts she has proven she was injured because Parkway induced her to leave her employment with BMH. *Respondent’s Brief* at 11-12. In short, Campbell is asserting injury based upon the fact

² It is pure speculation whether BMH suffered any injury, as that fact was not tried and BMH is not a party to this action.

that she accepted employment at one location and left employment at another. That is not an injury. It can be conceded that a potential injury to Campbell may have arisen at the time. Without the requisite individualized injury, however, Campbell does not have standing. Without standing, it was reversible error for the Magistrate Court to award contractual damages and for the District Court to award damages to BMH.

D. Whether the BMH obligation was “taken care of” demonstrates that Campbell received her expectations under the agreement.

Campbell spends much of her brief arguing the meaning of the phrase “taken care of”. The legal principle involved, however, is whether Campbell received her expectation under the agreement. The record demonstrates that Campbell did receive the benefit of the bargain and is in the exact same position as she would have been had events transpired as she wished. Therefore, there is no basis under Campbell’s contractual theory to award any damages.

Idaho law provides that the purpose of an award of damages in a breach of contract context “is to fully compensate the non-breaching party for its losses sustained because of the breach, and not to punish the breaching party.” *Anderson v. Gailey*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980). A damage award in a breach of contract action is specifically to place the non-breaching party in the place they would have been had the contract not been breached.

“In an action for breach of contract, only such damages will be allowed as fairly compensate the injured party for his loss.” *Nelson v. Hazel*, 91 Idaho 850, 851, 433 P.2d 120, 121 (1967). For breach of contract the law of damages seeks to place the aggrieved party **in the same economic position he would have had if the contract had been performed.** CALAMARI AND PERILLO, *supra*, § 14–4.

Gilbert v. City of Caldwell, 112 Idaho 386, 395, 732 P.2d 355, 364 (1987) (emphasis added). As this Court held just last year:

A plaintiff who wishes to recover for a breach of contract bears the “burden of proving the existence of a contract and fact of its breach....” *Id.* at 747, 9 P.3d at 1213. Furthermore, even if the plaintiff establishes that he “has been legally wronged, he may not recover damages unless he has been economically ‘injured.’ ” *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1988). Thus, “the measure of damage—as well as the fact of damage—must be proven beyond speculation.” *Wing v. Hulet*, 106 Idaho 912, 919, 684 P.2d 314, 321 (Ct. App. 1984); *see also Gen. Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 859, 979 P.2d 1207, 1217 (1999) (“Damages must be proven with reasonable certainty.”).

Melaleuca, Inc. v. Foeller, 155 Idaho 920, 924, 318 P.3d 910, 914 (2014).

Therefore, the meaning of “taken care of” is actually a legal analysis of whether Campbell was put in the same position she would have been had the alleged breach not occurred. The answer to that question is yes.

Campbell is, and always has been, in the same position she would have been had Parkway made an actual payment to BMH. Campbell was hired by Parkway and received compensation for her work at Parkway. She owed nothing to BMH and never paid anything to BMH. Neither did BMH seek or establish any obligation to it.

Campbell ultimately left employment for Parkway for another job. For all intents and purposes, Campbell never had any losses. Therefore there is nothing to award to “fully compensate [Campbell] for [her] losses sustained.” *Anderson*, at 801, 606 P.2d at 95. Campbell’s apparent desire to punish Parkway is not legally justified. *Id.*

Whether Parkway “took care of” Campbell’s potential (though not actualized) obligation to BMH is another way of asking the legal question of what is a measure of damages in Campbell’s breach of contract action. As cited above, the measure of damages is well-settled in Idaho law that a non-breaching party should be fully compensated for losses sustained. There is no dispute that Campbell did not sustain any losses. Accordingly, an award of monetary damages in this matter is in error.

2. Campbell abandoned her specific performance remedy.

Campbell argues that she did not waive or abandon her specific performance remedy. *See Respondent’s Brief*, p. 19 – 30. Even assuming, for a moment, that Campbell properly pled the specific performance remedy (as opposed to a declaratory judgment – *see Appellant’s Brief*, p. 28-31), she abandoned this remedy by failing to present evidence at trial, and failing to request that remedy or argue it on appeal to the District Court.

Even if she properly pled this remedy, the burden always remained with Campbell to show her right to specific performance. *See, e.g., 81A C.J.S. Specific*

Performance §130 (Nov 2014); *see also Thorn Springs Ranch v. Smith*, 137 Idaho 480; 50 P.3d 975 (2002) (recognizing burden of proof is on party seeking specific performance remedy). As specific performance is an extraordinary equitable remedy, only available when other legal remedies are inadequate (*see, e.g., Fullerton v. Griswold*, 142 Idaho 820, 823, 136 P.3d 291, 294 (2005)), Campbell also had the burden of showing an award of monetary damages would be inadequate. *See, e.g., Perron v. Hale*, 108 Idaho 578, 582, 701 P.2d 198, 202 (1985); *see also Monus v. Colorado Baseball 1993, Inc., et al.*, 1996 U.S. App. LEXIS 32995 (10th Cir. 1996) (“[T]he burden is on the party seeking specific performance to show that damages are an inadequate remedy.”) (*citing Leach v. Fuller*, 65 Colo. 68, 173 P. 427 (Colo. 1918)). Campbell completely failed to present evidence at trial that monetary damages would be inadequate. Indeed, throughout the trial, Campbell specifically requested an award of monetary damages.

Campbell attempts to avoid this lack of evidence by pointing to certain trial testimony that reiterated the prayer for relief in her Second Amended Complaint – a simple request for payment to BMH. *See Respondent’s Brief*, p. 23-25. Nevertheless, Campbell fails to identify any evidence or testimony from trial on the issue of the inadequacy of monetary damages. This is, of course, because no such evidence was ever presented. By failing to present evidence of the inadequacy of monetary damages

(indeed, by focusing solely on an award of monetary damages), Campbell abandoned or waived the specific performance remedy.

Further, Campbell waived the specific performance remedy by failing to argue it on appeal to the District Court. When issues on appeal are not supported by propositions of law, authority, or argument, they should not be considered by the appellate court, and a party waives an issue on appeal if either authority or argument is lacking. *See, e.g., Van v. Portneuf Med. Ctr.*, 156 Idaho 696, 706, 330 P.3d 1054, 1064 (2014) (*citing Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 17, 278 P.3d 415, 419 (2012)). Here, there was no legal authority or argument presented to the District Court on appeal regarding the specific performance remedy. By failing to present any authority or any argument regarding the specific performance remedy on appeal to the District Court, Campbell again waived that remedy and it should not have been considered on appeal. Notwithstanding Campbell's lack of evidence supporting a specific performance remedy, and Campbell's abandonment and/or waiver of that issue by failing to argue it on appeal, the District Court *sua sponte* resurrected this remedy and unilaterally imposed it. Because Campbell had previously waived that remedy, the District Court erred in imposing that remedy for the first time on appeal.

3. Parkway's arguments regarding the Declaratory Judgment act were not waived.

This Supreme Court appeal is the first occasion for either party to brief or argue

the specific performance remedy imposed by the District Court. The District Court imposed that remedy notwithstanding Campbell's previously waiver – she chose instead to seek a monetary judgment. Campbell now attempts to argue that, because this is the first appeal to address the issue, Parkway has somehow waived any arguments that the claim itself was invalid. *See Respondent's Brief*, p. 28 – 30. Because Campbell abandoned her declaratory judgment remedy (i.e., what the District Court characterized as the specific performance remedy) and failed to present any evidence at trial on that issue, there was no need for Parkway to previously argue or brief the issue. In fact, Campbell's declaratory judgment action, had it actually been tried, was improper, as outlined in Parkway's initial brief on appeal. *See Appellant's Brief*, p. 28-31. This argument was not waived, and remains valid and applicable here.

4. Campbell is not entitled to a damage award.

The magistrate court initially awarded damages to Campbell on her breach of contract claim. *R.*, P. 89. The District Court reversed this order, ruling that Campbell had not suffered any damages, and therefore could not be the recipient of a damage award. *R.*, p. 237. Campbell never appealed this portion of the District Court's decision.³ Consequently, the unappealed law of this case is that Campbell did not suffer

³ Campbell now raises, for the first time in this Supreme Court appeal, an argument that she is entitled to nominal damages. This issue was never presented to either the trial court or the District Court on appeal. As a new issue and argument on appeal, this argument should be dismissed.

any damages as a result of any action or inaction by Parkway. *See, e.g., Swanson v. Swanson*, 134 Idaho 512, 5 P.3d 973 (2000) (discussing applicability of law of the case doctrine to intermediate appeals and unappealed issues).

Notwithstanding that Campbell did not suffer any damages, she continues to argue that she is entitled to a damage award and has previously established the amount of her damages. *See Respondent's Brief*, p. 31-35. This argument ignores the fact that Campbell did not appeal any portion of the District Court's ruling, including the decision that she suffered no damages at all (including, of course, nominal damages). Accordingly, this is not a proper issue on appeal. *See Idaho Appellate Rule 15; Miller v. Bd. of Trustees*, 132 Idaho 244, 970 P.2d 512 (1998). Simply put, Campbell did not suffer any damages, that issue was never appealed to this Court, and Campbell's arguments to the contrary should be dismissed.

5. The Statute of Frauds applies to the contract between Parkway and Campbell.

In this case, it is undisputed that there was no written agreement between Parkway and Campbell. *R. p.* 89. As "[a] special promise to answer for the debt, default or miscarriage of another ... ", Parkway's oral promise to "take care of" Campbell's BMH obligation was unenforceable under the statute of frauds unless an exception exists. *See, e.g., Idaho Code § 9-505(2)*.

There exist limited exceptions allowing for the enforceability of an oral agreement involving promises to answer for debt, including a promise being made “upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.” *Idaho Code* § 9-506(3). Such an agreement is deemed an “original obligation” of the promisor (i.e., Parkway). *Idaho Code* § 9-506. While this exception has the potential to be interpreted over-broadly, thus potentially undermining the applicability of *Idaho Code* § 9-505(2), little case law exists to explain or clarify these provisions in greater detail.

Assuming, *arguendo*, that § 9-506(3) applies (which would exempt the agreement from the §9-505 requirement that it be written), the agreement between Campbell and BMH would accordingly be considered to be an “original obligation” of Parkway, as it was made “upon consideration beneficial to [Parkway].” Because Parkway’s promise became an original obligation of Parkway, Campbell became a non-party to the debt (if any) owed to BMH.⁴ *See Jones v. Better Homes, Inc.*, 79 Idaho 294, 301-02, 316 P.2d 256, 260-61 (1957) (distinguishing between donee, creditor, and incidental beneficiaries to a contract, and associated rights).⁵ The District Court failed to address this argument - simply stating that it disagreed, and referring to the specific performance remedy. (*See R.*, p. 238-39.) Notwithstanding the District Court’s disagreement, by promising to take

⁴ Assuming that there was an obligation to BMH – an important fact that has not been established.

⁵ See also argument, *supra*, regarding Campbell’s standing to pursue the breach of contract claim.

care of Campbell's debt to BMH, the Idaho statute of frauds makes the obligation Parkway's own new original obligation. Campbell was not then the party with recourse against Parkway - BMH was.

Campbell attempts to avoid this result by pointing to an Ohio case discussing the statute of frauds. *See Respondent's Brief*, p. 39 (citing *Trans-Gear, Inc. v. Lichtenberger*, 128 Ohio App.3d 504 (Ohio Ct. App. 1998)). However, Campbell omits from her recitation of the case the crucial element of the Ohio opinion. Before discussing the second exception to the Statute of Frauds – characterized as the “leading object rule”, the Ohio Court of Appeals discussed the first exception:

[T]he first inquiry is whether the promisor became primarily liable on the debt owed by another to a third party, in the sense that the original debtor is discharged as to the original creditor. If the promisor agreed to become primarily liable on the debt and the original debtor has been discharged, then the promisor is, in essence, no longer answering for the debt of another, and the statute of frauds would have no application. This is often referred to as an “original promise,” and in effect, a new contract with new consideration has been formed.

Trans-Gear, Inc. v. Lichtenberger, 128 Ohio App.3d at 509-10.

It is this exact exception which applies here – Parkway had a new original obligation to take care of Campbell's debt, to which Campbell was a non-party. Because the new original obligation was created, there is no need to proceed to the second portion of the *Trans-Gear* test and determine the leading object of Parkway's promise.

The failure to reduce the Parkway/Campbell agreement to writing renders it unenforceable under Idaho's statute of frauds. If, however, the exception applies, it created an original obligation of Parkway, thus eliminating Campbell's cause of action for breach of contract against Parkway. In essence, the proper party for the breach of contract claim then became BMH, rather than Campbell. For these reasons, the Magistrate Court's decision regarding the statute of frauds issues (as later upheld by the District Court) should be reversed.

6. **Parkway is entitled to an award of attorney fees and costs and Campbell is not entitled to such an award.**

Parkway should be awarded Attorney's Fees pursuant to Idaho Code section 12-120(3) and Idaho Appellate Rule 41. "I.C. § 12-120(3) ... allows recovery for attorney fees by the prevailing party in any commercial transaction." *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 415, 179 P.3d 1064, 1071 (2008). A "commercial transaction" is defined as any transaction, except transactions for personal household purposes. I.C. § 12-120(3). *Cramer v. Slater*, 146 Idaho 868, 881, 204 P.3d 508, 521 (2009). The award of attorney fees is mandatory in commercial transactions of this nature. *See Clement v. Franklin Inv. Group, Ltd.*, 689 F. Supp 1575 (D. Idaho 1988) (*citing Evans v. Sawtooth Partners*, 111 Idaho 381, 723 P.2d 925 (Ct. App. 1986)).

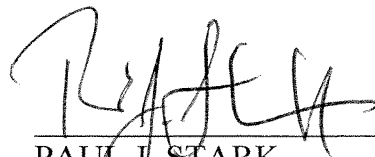
Campbell did not have standing to bring this action in the first instance because

Campbell had not suffered a distinct and palpable injury. Further, Parkway was the prevailing party on virtually all of the claims, both at the trial court level, and at the District Court.⁶ Consequently, Campbell was not the prevailing party below, and should not be the prevailing party on appeal. Campbell is not entitled to an award of any fees and costs, and the Magistrate and District Courts erred in awarding her fees and costs.

II. CONCLUSION

As outlined in the foregoing, and for the reasons outlined in the Appellant's Brief, the relevant decisions rendered below by the District Court and Magistrate Court must be reversed, and Parkway should be awarded fees and costs for all levels of this litigation.

DATED this 4th day of February, 2015.



PAUL J. STARK
Attorney for Parkway Surgery Center,
LLC

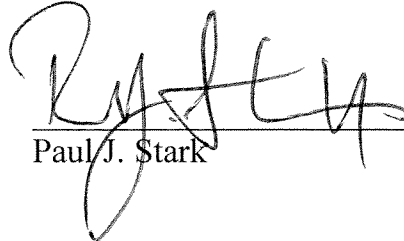
⁶ Indeed, the District Court ruled that Campbell had not proven her breach of contract claim, as she had not suffered any damages. The District Court then improperly awarded Campbell specific performance – a remedy she had not actually pled, or had specifically abandoned and waived. *See argument supra.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2015, I caused to be served two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF by the method indicated below, and addressed to those parties below:

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