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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHELLE CAMPBELL,

Plaintiff/Counter-
Defendant/Appellee,

vs.

PARKWAY SURGERY CENTER, LLC,

Defendant/Counter-
Claimant/Appellant.

SUPREME COURT CASE NO. 42173

Seventh Dist. Case No. CV-2005-2477

APPELLANT'S BRIEF ON APPEAL

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

Honorable Darren B. Sirapson, District Judge, Presiding

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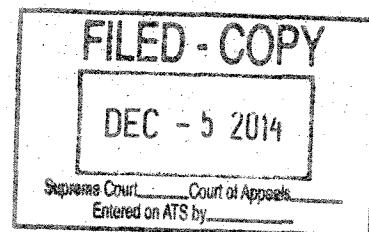


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I. STATEMENT OF THE CASE

1. Nature of the Case

This case stems from an employment offer made by Parkway Surgical Center, LLC (“Parkway”) to Michelle Campbell (“Campbell”). Parkway hired Campbell on approximately May 27, 2003. As part of the offer of employment, Parkway represented to Campbell that it would “take care of” a monetary obligation Campbell may have had with her previous employer, Bingham Memorial Hospital (“BMH”). Campbell then worked for Parkway for approximately 2 years. Campbell was never pursued by BMH for her obligation to BMH, and has neither paid nor lost anything as a result of that potential obligation to BMH. More importantly, it has never been adjudicated that an obligation by Campbell to BMH even exists.

Campbell sued Parkway for breach of contract, and prevailed at the Magistrate Court before Judge Robert C. Brower.¹ On appeal, the District Court (Judge Darren B. Simpson, presiding) reformed Judge Brower’s breach of contract decision, finding that Campbell had not suffered an economic injury – a prerequisite to a breach of contract claim. However, the District Court imposed a new remedy, specific performance, which Campbell had previously abandoned by failing to present evidence at trial or argument or authority on appeal to the District Court. The District Court upheld Judge Brower’s

¹ Since this case was appealed to the Supreme Court, Judge Brower passed away from a long-standing fight with cancer.

other findings dismissing Campbell's remaining claims. Parkway now appeals the portion of the District Court's decision which imposed the specific performance remedy, as well as certain other aspects of the District Court's decision.

2. Course of Proceedings Below

Campbell brought action against Parkway on October 14, 2005, alleging breach of contract and seeking an award of money damages. (R. p. 15-19.) The Complaint was amended twice with the Second Amended Complaint adding causes of action for declaratory judgment, breach of the implied covenant of good faith and fair dealing, constructive fraud, tortious interference with contract. (R. p. 54-62.)

A bench trial was conducted on July 25, 2012, in the Magistrates Division of the Seventh Judicial District Court, in Bingham County. (R. p. 86.) Throughout the trial, Campbell prosecuted the case as a breach of contract case and sought contractual damages for herself. At the conclusion of the trial, the trial judge held that Parkway was in breach of the oral contract, awarded contractual damages in the amount of \$6,800.00 to Campbell, and awarded Campbell attorney's fees and costs. (R. p. 89.) Campbell drafted the Judgment. (R. p. 91-96, 101-05.) Parkway subsequently appealed the decision to the District Court alleging that Campbell could not obtain contract damages where there was no injury. (R. p. 105-08; 127-44.) The District Court heard oral argument on the matter, but remanded the matter back to the Magistrate Division of the

District Court for additional findings as to Campbell's claims of breach of the implied covenant of good faith and fair dealing, constructive fraud, and tortious interference with contract. (R. p. 196-99.) Thereafter, the Magistrate Division of the District Court entered Supplemental Findings of Fact and Conclusions of Law. (R. p. 202-07.) The Magistrate Judge found in favor of Parkway on all the remaining causes of action. (*Id.*) Campbell subsequently Cross-Appealed the Supplemental Findings of Fact and Conclusions of Law. (R. p. 212-15.)

On April 16, 2014, the District Court issued its Decision and Order on Appeal. (R. p. 210-54.) The District Court's Decision and Order on Appeal concluded that Campbell could not obtain contract damages where there was no injury (as argued by Parkway), holding "Campbell is not entitled to a direct money judgment against Parkway" (R. p. 237.) Instead, the District Court held that Campbell's claim for declaratory judgment was a claim for specific performance (R. p. 236), despite the fact that Campbell had never actually pleaded a claim for specific performance. (R. p. 54-62.) This was the first time the issue of specific performance had been raised or asserted. There is no evidence in the record of Campbell pursuing a claim of specific performance. The District Court ultimately ruled against Campbell on her other causes of action. However, these alternative causes of action are not presently before the Court. (R. p. 281-85.) Parkway now appeals from the District Court's decision.

3. Statement of Facts

The facts from the trial in this matter are relatively undisputed as it applies to the issues on appeal. In 2002, Campbell was an employee of Bingham Memorial Hospital (hereafter referred to as “BMH”). (R. p. 84-85.) Campbell had entered into a Forgivable Loan Agreement with BMH wherein \$6,800.00 was paid to Campbell for tuition to her nursing program in exchange for certain employment commitments with BMH. (R. p. 85.) The \$6,800.00 was to be repaid in three (3) annual installments over three (3) years. (Exhibit A.) The first installment was to be paid, “on the first day of the month following the anniversary of Student Nurse's graduation from Nursing School, or in the case Student Nurse fails to graduate, the first day of the month following her/his discontinuation of the nursing program.” The agreement, however, also contained a provision that if Campbell was a full time employee of BMH “for at least twelve (12) months prior to the date of any of the three payments, the installment payment shall be forgiven.” (*Id.*) Further, the agreement provided that “In the event, [Campbell] is employed full time for a portion of the twelve month period, the installment payment shall be reduced pro rata.” (*Id.*) It is undisputed that Campbell began working for BMH in 2000 and quit working for them in May 2003.

On or about May 27, 2005, Campbell began working for Parkway. (R. p. 86.) Campbell was an at-will employee at Parkway. (R. p. 88.) As part of her employment,

Campbell was told that her obligation with BMH under the Forgivable Loan Agreement would be “taken care of.” (R. p. 86.) The trial court made the factual finding that Parkway “assured her, in general terms ‘that the obligation would be taken care of,’ with no mention of any further conditions or restrictions relating to the payment of that obligation.” (*Id.*) Campbell left employment with Parkway in March 25, 2005. (*Id.*) At the date of filing the Complaint in this matter, Campbell asserted that she had “incurred damages and will continue to incur damages.” (R. p. 18.) As of the date of trial, however, BMH had not pursued any action against Campbell, and neither Campbell nor Parkway had paid anything to BMH. (R. at 86; Trial Transcript, p. 60, l. 21 – p. 61, l. 2.)

4. Standard of Review

This Court is being asked to review the District Court’s decision after the District Court sat in its appellate capacity over the magistrate judge’s decision. Accordingly, the standard of review by this Court is 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, [the Supreme Court] affirms the district court's decision as a matter of procedure. Thus, [the Supreme Court] does not review the decision of the magistrate court. Rather, [the Supreme Court is] procedurally bound to affirm or reverse the decisions of the district court.

Pelayo v. Pelayo, 154 Idaho 855, 858-59, 303 P.3d 214, 217-218 (2013).

An issue cannot be raised for the first time on appeal, if it was not previously presented to the trial judge. *See, e.g., McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003). “Appellate court review is limited to the evidence, theories and arguments that were presented [in the lower court]. In order to preserve an issue for appeal, the issue must be raised in the [lower court] ... Appellate courts follow this rule because it would be unfair to overrule the [lower court] on issues not presented to it on which it did not have an opportunity to rule.” *Wattanbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 323-24, 246 P.3d 961, 967-77 (2010) (internal citations omitted).

II. ISSUES RAISED ON APPEAL

The Issues on Appeal are as follows:

- A. Whether the District Court erred in ruling that Campbell was entitled to judgment on her breach of contract claim;
- B. Whether the District Court erred in ruling that Campbell and/or BMH was entitled to an award of damages on Campbell’s breach of contract claim;
- C. Whether Campbell was entitled to relief (e.g., specific performance) based on evidence, arguments and/or authorities that Campbell had not presented or argued;

- D. Whether the District Court erred by ruling that the statute of frauds was inapplicable;
- E. Whether the Magistrate and District Courts erred in awarding Campbell attorney fees and costs.
- F. Whether the Magistrate and District Courts erred in failing to award Parkway attorney fees and costs.
- G. Whether Parkway is entitled to attorney fees and costs on appeal to the Supreme Court.

III. ARGUMENT

1. Campbell Lacks Standing

Applying the undisputed facts to well-settled Idaho law, the Court must conclude that Campbell does not have standing in this matter. Campbell has not demonstrated that she suffered any injury whatsoever, much less the requisite distinct and palpable injury. Further, her efforts to litigate a remedy for a third-party, Bingham Memorial Hospital (BMH), are also barred under the established standing analysis. Therefore the decisions of the Magistrate Judge, as well as the District Judge on Appeal, must be reversed.

Whether a litigant has standing is a jurisdictional issue that must be addressed even if it was not raised or address by the trial court. *Beach Lateral Water Users Assoc.*

v. Harrison, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006). Standing is an issue over which this court exercises free review. *Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254, 257, 220 P.3d 1073, 1076 (2009). The issue of whether a party has standing to assert a particular claim should be resolved before the merits of the claim are reached. *Id.* at 259, 220 P.3d at 1078. Standing is a matter of justiciability along with ripeness and mootness. *Blankenship v. Washington Trust Bank*, 153 Idaho 292, 295, 281 P.3d 1070, 1073 (2012). “Standing focuses on the party seeking relief and not the issues the party wishes to have adjudicated.” *Martin v. Camas County*, 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011) (quoting *Young v. City of Ketchum*, 137 Idaho 102, 104-05, 44 P.3d 1157, 1159-60 (2002)).

In order to satisfy the case and controversy requirement of standing, the litigant “must allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury.” *Id.* The requirement that the litigant show an “injury in fact” mandates that the litigant demonstrate two separate facts: (1) a distinct and palpable injury, and (2) a fairly traceable causal connection between the claimed injury and the challenged conduct. *Id.* The term “palpable” in this context has been defined by this Court as “[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest.” *Id.* at footnote 3 (quoting *Black’s Law Dictionary*, 1110 (6th ed. 1990)).

Applying these well-settled principles to the undisputed facts in the record, Campbell does not have standing in this matter. First, it is undisputed that Campbell has not suffered any injury. This issue of whether Campbell suffered injury was argued both before the Magistrate Division of the District Court (R. p. 96-100.), as well as before the District Court, under established principles of contract law that a party cannot bring suit for breach of contract when the party has not been injured. (R. p. 105-08, 127-44.) *Bergkamp v. Martin*, 114 Idaho 650, 653, 759 P.2d 941, 944 (Ct. App. 1998). The District Court agreed with this legal mandate, and found that Campbell had not been injured. The District Court held, “Campbell is not entitled to recover the amount of the debt personally ...” and that “Campbell is not entitled to a direct money judgment against Parkway” (R. p. 237.) Instead, the District Court determined, *sua sponte*, that Campbell was actually seeking specific performance to recover damages for a third-party, and the District Court’s focus proceeded to Campbell’s ability to recover under that theory. (R. p. 236.)

As discussed above, however, the standing analysis does not focus on the underlying legal claims, or even the remedy sought. Instead, the standing analysis focuses on the party, in this case Campbell, and whether she herself suffered an injury in fact, by demonstrating a distinct and palpable injury and a causal connection between the injury and conduct. Applying the legal framework of *Blankenship v. Washington*

Trust Bank, and *Martin v. Camas County*, *supra*, Campbell does not have a injury in fact, much less a distinct and palpable injury, and therefore does not have standing.

When this action was first brought, Campbell alleged in her Complaint that she had been damaged “in the amount of \$6,800.00 in addition to interest and attorney fees” and that Campbell “will continue to incur damages.” (R. p. 18.) It was upon these assertions that Campbell pursued this litigation. The record, however, reveals that Campbell never was, nor ever has been, actually damaged by Parkway. The evidence in the record of this undisputed fact comes from Campbell’s own sworn testimony. At the trial, Campbell admitted that she had never received any demand letter from BMH and had, in fact, paid nothing on the agreement with BMH.

Q. (BY MR. SORENSEN) You've never received a demand letter from any attorney for the hospital or the foundation to repay this obligation; is that correct?

A. That is correct.

Q. And so at this point, **you have paid nothing on this obligation?**

A. **That is correct.**

(Trial Transcript at p. 60, L. 21 - P. 61, L. 1) (emphasis added).

The admission by Campbell that she has not suffered any injury is fatal to her standing to bring this action. Campbell has not suffered a distinct and palpable injury and thus cannot demonstrate an “injury in fact” as required by Idaho law. Accordingly, her claims must be dismissed.

There are, admittedly under Idaho law, situations where a party can litigate a

claim for a third-party. One such example is in the case of *State v. Doe*, 148 Idaho 919, 231 P.3d 1016 (2010). In *Doe*, this Court addressed the situation where the plaintiff argued that the curfew statute was unconstitutional because it infringed on parents' liberty interest in directing the upbringing of their children. *Id.* at 936, 231 P.3d at 1033. This Court, however, dismissed the action because then plaintiff lacked standing. *Id.* This Court laid out the rationale for this ruling as follows:

Courts must hesitate before resolving the rights of those not parties to litigation. Even though a potentially illegal action may affect the litigant as well as a third party, the litigant may not rest his claims on the rights or legal interests of the third party. A party challenging the constitutionality of a statute must not only demonstrate some injury from the unconstitutional aspect of the statute, but also that he is in the class of persons protected by that constitutional interest. This requirement is based on the presumption that the third parties themselves are the best proponents of their own rights.

Id. (citations omitted). Accordingly, the Idaho Supreme Court adopted the three-party analysis enunciated in the United States Supreme Court case of *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 1370–71, 113 L.Ed.2d 411, 425–26 (1991), as follows:

[T]he U.S. Supreme Court requires a litigant who seeks to assert the rights of another party to demonstrate three interrelated criteria: (1) he must have suffered injury in fact, providing a significantly concrete interest in the outcome of the matter in dispute; (2) he must have a sufficiently close relationship to the party whose rights he is asserting; and (3) there must be a demonstrated bar to the third parties' ability to protect their interests.

Ultimately, this Court held that Doe “failed to demonstrate any bar to his father’s ability to challenge the constitutionality of the Ordinance.” *Id.* at 937, 231 P.3d at 1034.

Likewise, in this case there is insufficient evidence that Campbell can meet prong one and three of the *Powers* test, and therefore she does not have standing to enforce the rights of BMH. As to the first prong, discussed extensively above, Campbell has not suffered an injury in fact herself. As to the third prong, there is no “demonstrated bar” to BMH ability to protect its own interests. There is no evidence in the record showing that BMH lacked knowledge of their rights or were in some respect prevented from protecting their interests. Accordingly, Campbell does not have standing to bring litigation on behalf of BMH.

The recent case of *Arambarri v. Armstrong*, 152 Idaho 734, 274 P.3d 1249 (2012) is instructive. In *Arambarri*, the plaintiff sought reinstatement of his employment, as well as three other fellow employees. The defendant contested the plaintiff’s standing on various grounds. *Id.* at 738, 274 P.3d at 1253. This Court applied the legal framework of *Martin v. Camas County*, 150 Idaho 508, 248 P.3d 1243 (2011) concluding that the plaintiff himself had standing because he had alleged “sufficient injury in fact, traceability and redressibility with regard to his request for damages for his lost wages and benefits.” *Id.* As such, the claims were “personal to Arambarri and have adversely impacted him.” *Id.* The Court went on, however, to hold that the plaintiff did not have standing to challenge the defendant’s actions in relation to the other three employees. *Id.* at 738-39, 274 P.3d at 1253-54.

Similarly, in this case Campbell does not have standing to pursue claims and redress for third-party, especially in light of the fact that she herself did not suffer any injury in fact. Although there may be speculation as to what, if any, injury BMH may have suffered, such conjecture is not established in the record and in no event confers standing upon Campbell. *See State v. Doe, supra.* To hold otherwise would open the door to judicial vigilantism where individuals that have not been damaged pursue claims for third-parties, even when such third-parties are entirely capable of doing so themselves and have chosen not to do so. There has been no adjudication that there was any obligation to BMH, only a “Forgivable Loan Agreement” that might at some point give rise to an obligation. There is simply no evidence that BMH was damaged or could not protect their rights. Accordingly, Campbell does not have standing to litigate for and on behalf of BMH.

2. Campbell Received All Of The Benefit Of The Bargain With Parkway, Which Did Not Include Mandating The Manner In Which Parkway Took Care Of Any Obligation, Should It Have Arisen.

The record is clear that Campbell obtained all the benefit that she bargained for under the purported agreement with Parkway. As discussed above, there is very little detail of such agreement (hence the need for a Statute of Frauds). The agreement was simply that the obligation with BMH would be “taken care of.”

It is undisputed that the representations to Campbell at the time she was hired by

Parkway was only that the obligation “would be taken care of.” Campbell testified, “I started work at Parkway May 27th, 2003, and they said the loan would be taken care of.” (Trial Transcript at P. 88, ll. 18-19).

Nanette Hirschi, who was with Art McCracken when the offer was made, testified similarly. Ms. Hirschi was the Director of Nursing at Parkway. (Trial Transcript at P. 111, ll. 4-5). Ms. Hirschi testified that the terms of employment for Campbell were very limited:

Q. Okay. And so what were the terms of that offer, just to be clear, that you could offer to Michelle?

A. That there was a dollar amount for her hourly wage, that she was a full-time employee, and that her scholarship would be taken care of.

(Trial Transcript at P. 124, ll. 17-22). She also testified that one of the methods contemplated to “take care of” Campbell’s obligation was to wait and see if BMH actually attempted to enforce the agreement with Campbell. Ms. Hirschi testified of the internal conversation of Parkway as follows:

I remember one of them -- I don't remember which one -- saying "Well, we need to do whatever -- whatever we need to do to get Michelle. And if we need to pay back her scholarship, we'll pay back her scholarship."

And I remember somebody making the comment "Bingham probably won't come after her."

And I can remember saying "But if they do, we'll be responsible. It will need to be taken care of."

(Trial Transcript at P. 123, ll. 11-20). Ms. Hirschi testified a second time that Parkway contemplated waiting to see if BMH took action to enforce the agreement with Campbell

as follows:

Q. At the board meeting when there was some discussion about an obligation to Bingham on Michelle Campbell's behalf, was there also some discussion about maybe not -- that that obligation may not be due or ever have to be paid?

A. I remember somebody made a comment "Bingham probably won't ever go after her."

(Trial Transcript at P. 141, ll. 13-19).

In fact, how and when such obligation "would be taken care of" was never discussed. (Trial Transcript at P. 137, L. 23- P. 138, ll. 3). When Ms. Hirschi was asked about her authorization to hire Campbell, she testified:

Can you tell me the circumstances behind the authorization where you felt you were authorized to do that?

A. Discussion with the board members about Michelle, about her scholarship obligation. **They agreed to take care of it however they decided to take care of it.** And they authorized us to hire Michelle. So we went forward at their direction.

(Trial Transcript at P. 144, ll. 14-21) (emphasis added).

Mr. McCracken, who was the CFO and an administrator for Parkway (Trial Transcript at P. 160, ll. 10-18) testified the offer to take care of Campbell's obligation was not a signing bonus and the details were not specified as to how or when:

I wouldn't consider it a signing bonus. But at that time, **none of the details had been spelled out as to how that obligation would be handled.**

Q. Do you recall whether there were discussions about when the obligation would be paid?

A. No.

(Trial Transcript at P. 172, ll. 11-16) (emphasis added). Mr. McCracken went on to testify:

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 to work for us"?

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.

Q. If there wasn't an obligation, it wouldn't be paid by Parkway?

A. Why would they pay for an obligation if there was no obligation? We're talking about a very financially distressed organization that -- the intent was to save money, not extend new debt.

(Trial Transcript at P. 181, L. 25 - P. 182, L. 15). Mr. McCracken further testified:

Q. So it was your understanding from the board meeting and whatever was discussed by members of the board -- if there was nothing owed by Michelle Campbell, what was the responsibility of the Parkway Surgery Center with regard to that forgivable loan?

A. **There were no specific terms discussed. It was "We will take care of the obligation."**

My assumption is that if there was no obligation -- and this is my own thought process -- is that the surgery center wouldn't write a check if there was no obligation. If there was an obligation, they had indicated their intent to take care of that.

(Trial Transcript at P. 186, L. 21 - P. 187, L. 7) (emphasis added). Thus, if there never arose the obligation (i.e., BMH never enforced its agreement with Campbell) then Parkway would not pay the \$6,800.

Lastly, Mr. McCracken testified regarding a letter he wrote to Campbell's counsel

stressing that Parkway would pay, but only if a “penalty” arose from Campbell’s agreement with BMH:

Q. In your letter, which is -- I think that's Exhibit F -- in the third paragraph -- actually, the fourth paragraph down, it says "Dr. Robert Lee, in efforts to attract and capture Michelle's commitment to the organization **had offered repayment of any penalty caused by breach of Michelle's contract with the hospital**, would be met and satisfied in full by Parkway Surgery Center, the employer."
Do you remember writing that?
A. Yes I do.

(Trial Transcript at P. 206, L. 18 - P. 207, L. 2.) (emphasis added).

Under Idaho law, “[The] purpose of awarding damages for breach of contract is to fully recompense the non-breaching party for its losses sustained because of the breach, not to punish the breaching party.” *Anderson v. Gailey*, 100 Idaho 796, 801, 606 P.2d 90, 95 (1980). Campbell is, and has been for the duration of this litigation, in the same position that she was before her contractual relationship with Parkway; namely, she has not paid anything to BMH nor has she been obligated on any debt, thus no injury. Further, Campbell has realized her expectation under the agreement. Her obligation to BMH was, in fact, taken care of.

Whether there may have been a breach of a contractual agreement between BMH and Campbell, and a resulting obligation, has not been established in the record or otherwise adjudicated. Thus any such conclusion is purely speculative. The existence of the Forgivable Loan Agreement does not equate an obligation owed to BMH. Such

agreement only indicated a potential claim. Any breach of Campbell's agreement with BMH has not been established, and the limitations period for BMH to assert that claim has long since passed. Moreover, whether the agreement between Campbell and BMH was breached, and whether there was injury to BMH, is squarely outside of this scope of this litigation.

What is within the scope of this litigation is the agreement between Campbell and Parkway. The record is clear that Campbell obtained all her expectations under the agreement - she has not been required to pay anything to BMH based on her previous agreement with BMH. Accordingly, Campbell has received the benefit of her bargain with Parkway, and there was no breach of any contractual terms between Campbell and Parkway.

Campbell's contention, it would appear, is not that she was injured or that she failed to receive the benefit of the bargain, but that she objects to the method upon which Parkway took care of the obligations to BMH. Campbell, however, had no contractual right to control or determine how, or when, the obligation would be taken care of. Indeed, the record demonstrates that the obligation was, in fact, taken care of. The trial court's findings support this conclusion when it found, that Parkway "assured her, in general terms 'that the obligation would be taken care of,' with no mention of any further conditions or restrictions relating to the payment of that obligation." (R. p. 86.)

Absent a contractual provision to the contrary, Parkway could have taken care of the obligation in a variety of ways such as 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 waited to see if BMH elected to pursue an action under its contract. Certainly there could be defenses raised had BMH pursued such action, and it is conjecture to assume BMH would be able to establish a breach. In short, absent some express provision limiting Parkway, Campbell could only look to her own expectation that she would not bear liability on the obligation, which expectation and benefit she received.

3. The District Court Erred In Awarding The Specific Performance Remedy.

A. The District Court erred in holding that Campbell's cause of action for declaratory judgment was a claim for specific performance.

The District Court erred in treating Campbell's claim for declaratory judgment as a claim for specific performance because the Declaratory Judgment Act, Idaho Code section 10-1201, *et seq.* only allows for the declaration of rights, status, and other legal relations. It does not provide for fact intensive remedies such as specific performance. Accordingly, the District Court's *sua sponte* conversion of the claim for declaratory judgment into a claim of specific performance was in error.

This issue was squarely dealt with by this Court in the case of *Farmers Ins. Exchange v. Tucker*, 142 Idaho 191, 125 P.3d 1067 (2005). In *Farmers Ins. Exchange*, the Court examined whether a trial court abused its discretion when it allowed the plaintiff to file an amended complaint asserting a declaratory claim to determine whether a party must pay damages and to whom, but it refused the amendment to determine the amount of the damages. *Id.* at 194, 125 P.3d at 1070. In rendering its decision, this Court examined the nature of the Declaratory Judgment Act as follows:

The Declaratory Judgment Act authorizes courts to declare rights, status, and other legal relations. I.C. § 10–1201.

...

The district court began its analysis by examining the literal words of the statute. It correctly noted that the literal words of the statute should be given their plain, obvious and rational meaning and that the court does not need to engage in statutory construction if the language is clear and unambiguous. The district court determined that the provisions of the Act are clear and unambiguous and that the court had the ability to “declare a party's rights, status, and other legal relations under [the FIE] insurance contract.”

Id. at 193-94, 125 P.3d at 1069-70.

In making its determination, the District Court relied on the case of *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951):

A statute worded the same as [I.C. § 10–1201] has been enacted by many of the states, also the United States Congress. No authority from any decision of the states, or the United States, has been called to our attention where the statute had been interpreted to include an adjudication of rights and liability which necessitated the determination of whether or not a tort

or wrong had been committed, or to determine a liability due to breach of contract.

Id. at 184, 238 P.2d at 437. The District Court further relied upon *Country Ins. Co. v. Agricultural Development, Inc.*, 107 Idaho 961, 972, 695 P.2d 346, 357 (1984), where this Court held that “the Declaratory Judgment Act is not a freeway open for the litigation of factual disputes.”

In this matter, Campbell asserted in her Second Amended Complaint “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.) There is no mention in any of Campbell’s pleadings or briefing to specific performance because it simply was not pleaded. Instead, there is an explicit claim for declaratory judgment, which by express provisions is limited in scope to the declaration of “of rights, status, and other legal relations.” *Idaho Code section 10-1201.*

After the trial in this matter, Campbell was awarded contractual damages. (R. p. 91-95, 101-04.) At no time did Campbell object to such an award arguing specific performance, either on the Motion for Reconsideration before the Magistrate Division of the District Court, or on appeal before the District Court. It was the District Court that first raised this issue on appeal and changed a claim for declaratory judgment to a claim

of specific performance. This was not an issue that was tried by consent.

This Court very recently addressed the issue of a claim not being pled in the case of *Mahnami v. Mahnami*, 156 Idaho 338, 325 P.3d 679 (2014), holding:

In *Nguyen v. Bui*, 146 Idaho 187, 191, 191 P.3d 1107, 1111 (Ct. App. 2008), this Court set forth the standard by which we determine if an issue was tried by consent:

The purpose of Rule 15(b) is to allow cases to be decided on the merits, rather than upon technical pleading requirements. Nevertheless, *due process requires that parties have sufficient notice of the issues to be tried and an opportunity to address those issues with evidence and argument.* As the Idaho Supreme Court has said, “When issues are not raised by the pleadings, the evidence raising the legal issue must be clear enough so that both parties know of the issue and consent to the issue being tried.” Trial of a claim or defense by consent is not established merely because evidence relevant to that issue was introduced; rather, *it must appear both parties understood that the evidence was aimed at the unpleaded issue.*

Id. at ____, 325 P.3d at 682 (internal citations omitted) (emphasis added).

In this matter, specific performance was not pled. Declaratory judgment was pled, but not tried. Accordingly, the District Court erred in *sua sponte* raising a specific performance argument that had not been properly or actually raised by Campbell.

B. Campbell waived any specific performance remedy by failing to present sufficient evidence at trial.

The usual rules as to presumptions and burden of proof in civil actions are applicable to actions to enforce specific performance of contracts. Here, Campbell failed to request specific performance as a remedy. (R., p. 19.) Assuming, *arguendo*, that Campbell amended her Complaint to request a specific performance remedy (notwithstanding the arguments above that the second amended complaint does not actually request this remedy) (R. p. 61.), the burden is on 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)).

Here, Campbell’s evidence at trial, and arguments at trial, consisted of evidence

related to her alleged monetary damages. Consistent with her early pleas for relief, Campbell focused her trial evidence on a monetary damage award, and ignored any evidence of the inadequacy of monetary damages. By failing to present any evidence that a monetary damage award would be inadequate (and, indeed, by presenting and arguing the exact opposite - that a monetary damage award was proper), Campbell abandoned and/or waived any request she previously had made for specific performance. The District Court erred when it imposed the specific performance remedy that Campbell had previously abandoned or waived by failing to present evidence at trial.

C. Campbell waived any specific performance remedy by failing to argue it on appeal.

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.*, ___ Idaho ___, 330 P.3d 1054, 1064 (2014) (citing *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 17, 278 P.3d 415, 419 (2012)). Here, not only did Campbell not present evidence at trial to support a specific performance remedy, but Campbell did not pursue the specific performance remedy on appeal to the District Court. There was no legal authority or argument presented to the District Court on appeal regarding the specific performance remedy. In fact, Campbell's counsel specifically requested the damage award in the context of the post-trial motion for reconsideration. At the

argument on the motion for reconsideration, Campbell's counsel focused her argument on the proper measure of damages, stating the following:

[A]t this point, I mean, clearly, the remedy for Ms. Campbell, according to Idaho law, is that the measure of damages is to put Ms. Campbell in the position she would have been in had the contract been fully performed.

Exhibits, p. 240 (Transcript of hearing on Motion for Reconsideration, p. 10, Ll. 10 - 14). Additionally, in her brief on appeal to the District Court, Campbell focused solely on an award of damages:

“Campbell proved the amount of damage with reasonable certainty.” (R., p. 157).

“Just like *Mead*, Campbell is entitled to damages for the debt Parkway agreed to pay and did not.” (R., p. 160).

“The amount of the debt is exactly the damages the Court awarded to Campbell in this matter. Consequently, the Court should affirm the award of contract damages to Campbell.” (R., p. 160).

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. Accordingly, the District Court erred in imposing a remedy on appeal for which Campbell had failed to argue or present authority.

D. Even If Not Previously Waived By Campbell, Specific Performance Is Not A Proper Remedy In This Matter.

Specific performance is an equitable remedy. “Equity will not intervene where the aggrieved party has a plain, speedy, adequate, and complete remedy at law. Specific performance is an extraordinary remedy that can provide relief when legal remedies are inadequate.” *Hull v. Giesler*, ___ Idaho ___, 331 P.3d 507, 521 (2014) (internal citations omitted). “The object of specific performance is to best effectuate the purpose for which the contract is made.” *Fazzio v. Mason*, 150 Idaho 591, 597-98, 249 P.3d 390, 396-97 (2011). Most importantly, specific performance is an alternative remedy for a breach of contract claim – it is not a claim by itself. In this case, the District Court imposed the specific performance remedy without any analysis of these required elements. Nowhere in its opinion does the District Court explain why the damage award made by the Magistrate Court was not a plain, speedy, adequate and complete remedy, or otherwise analyze why Campbell’s other legal remedies were inadequate.

The District Court correctly reformed the Magistrate Court’s ruling and found that Campbell had not suffered any economic damages by Parkway’s actions. Parkway’s agreement with Campbell was to “take care of” her obligation to BMH. There was no meeting of the minds on what “take care of” actually meant. At this point BMH is legally prohibited from pursuing Campbell for recovery of the obligation – accordingly there is nothing for Parkway to “take care of.” In other words, not only has

Campbell not suffered any damage by Parkway's alleged failure to pay BMH – Campbell will *never* suffer any damage.² Specific performance of the agreement to “take care of” Campbell's obligations would not actually require Parkway to take any action at all – the obligations are already “taken care of” by operation of Idaho's statutes of limitation.³ For these additional reasons, even if Campbell did not abandon and waive any specific performance remedy, it is not a proper remedy in this case, and the District Court erred by unilaterally imposing that remedy on Parkway.

4. The Statute Of Frauds Applies To The Contract Between Parkway And Campbell.

Idaho law provides that in certain cases, agreements are deemed legally invalid and unenforceable unless evidenced in writing. *Idaho Code § 9-505*. Among such agreements requiring a written contract is “[a] special promise to answer for the debt, default or miscarriage of another... .” *Idaho Code § 9-505(2)*. Even with sufficient facts to prove the existence of the oral agreement, “it is unenforceable if there is not a sufficient writing to comply with the statute of frauds.” *Mickelsen Const., Inc. v. Horrocks*, 154 Idaho 396, 401, 299 P.3d 203, 208 (2013). A sufficient writing includes the parties to the agreement, the subject matter, the price or consideration, a description

² It should also be remembered that the District Court correctly found that Campbell had not shown any reputation or other damages. This portion of the District Court's decision has not been appealed.

³ See argument, *supra*, regarding Parkway's “taking care of” Campbell's debt.

of property covered or affected, and all essential terms and conditions of the agreement. The writing evidencing the agreement must contain all such terms, or else it cannot be enforced. *See Hoffman v. SV Co.*, 102 Idaho 187, 190-91, 628 P.2d 218, 221-22 (1981).

In this case, it is undisputed that there was no written agreement between the parties. Thus, the statute of frauds generally applies. Even if Campbell's agreement with Parkway were reduced to writing as enforceable under the statute of frauds, the sufficiency of the writing would be brought into serious question, negating the enforceability of the written agreement. In this case, the witnesses vaguely addressed that Campbell's obligation to BMH would be "taken care of," without setting forth any specifics with regard to the amount of the debt in question to be covered, consideration received, or general parameters of the agreement.⁴ The trial court made the factual finding that Parkway "assured her, in general terms 'that the obligation would be taken care of,' with no mention of any further conditions or restrictions relating to the payment of that obligation." (R. p. 86.) As discussed above, such a writing would fail to meet the minimum required elements to invoke statute of frauds enforceability. 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)*.

⁴ The testimony and evidence surrounding Campbell's obligation being "taken care of" is discussed in detail above.

Admittedly, 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].” As the original obligation would thus require Parkway to compensate BMH for Campbell’s obligation, Campbell effectively became a non-party (or an incidental beneficiary) to Parkway’s new original obligation, possessing no legal rights or recourse against Parkway or from BMH.⁵ *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

⁵ Assuming that there was an obligation to BMH – an important fact which has not been established.

associated rights).⁶ 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 (based, apparently, on the previously-waived specific performance remedy), the legal authority remains if this exception is to apply. By promising to take 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.

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.

5. 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*

⁶ See also argument, *supra*, regarding Campbell's standing to pursue the breach of contract claim.

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.⁷ Parkway should be considered the prevailing party at all levels of this litigation as this is a commercial transaction. Consequently, as Campbell was not actually the prevailing party, and should not be the prevailing party on appeal, she is not entitled to an award of any fees and costs, and the Magistrate and District Courts erred in awarding her fees and costs.

IV. CONCLUSION

Based upon, and as outlined in, the foregoing, the relevant decisions rendered below by the District Court and Magistrate Court must be reversed.

⁷ 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*.

DATED this 5th day of December, 2014.

A handwritten signature in black ink, appearing to read "P. Stark", written over a horizontal line.

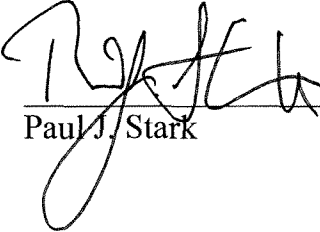
PAUL J. STARK
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LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of December, 2014, I caused to be served two true and correct copies of the foregoing APPELLANT'S BRIEF ON APPEAL by the method indicated below, and addressed to those parties below:

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