



In the Missouri Court of Appeals
Eastern District
DIVISION THREE

SHIRLEY R. EBERT, ET AL.,	)	No. ED108195
	)	
Respondents/Cross-Appellants,	)	Appeal from the Circuit Court
	)	of Jefferson County
vs.	)	
	)	
MARK R. EBERT AND CINDY K. EBERT,	)	Honorable Troy A. Cardona
	)	
Appellants/Cross-Respondents.	)	FILED: June 8, 2021

Introduction

This appeal involves various real estate transactions and financial loans made between family members over a period of time. Mark R. (“Mark”) and Cindy K. Ebert (“Cindy”)¹ appeal from the trial court’s judgment following a bench trial arising out of an action by Shirley R. Ebert, individually and as Trustee of the Shirley R. Ebert Revocable Living Trust dated November 20, 2017 (collectively, “Shirley”), to resolve claims surrounding a real estate contract for the purchase of family property and repayment of personal loans. Mark and Cindy raise three points on appeal. Point One alleges the trial court erred in failing to apply a five-year statute of limitations to bar Shirley’s breach of contract claims to recover on two loans (the “Flight School Loan” and the “American Heritage Loan,” respectively). Point Two claims the trial court erred in holding Cindy liable on any loan-related claims because she was not a party to any loan

¹ In their briefs, the parties refer to one another by first names in order to distinguish between the family members. We intend no familiarity or disrespect in adopting the naming conventions contained within the briefs.

agreement. Point Three contends the trial court erred in finding the 2002 real estate contract (the “2002 Contract”) unenforceable on the grounds that its terms were neither certain nor capable of being made certain. In her sole point on cross-appeal, Shirley argues the trial court erred in not granting an easement by implication because the easement was pleaded and judicially admitted at trial.

Because the Flight School Loan ledger reflects a written promise of indebtedness, bringing it within the ten-year statute of limitations, the trial court did not err, and we deny Point One as to the Flight School Loan. However, the American Heritage Loan calendar entry does not reflect a written promise of indebtedness. For that reason, the trial court erred in not applying the five-year statute of limitations, and we grant Point One as to the American Heritage Loan. Because no legal reason justified holding Cindy liable on the Flight School Loan, we grant Point Two. Because the 2002 Contract did not set forth a certain or sufficiently determinable price term, the contract is unenforceable, and we deny Point Three. Because the record shows the weight of the evidence established an easement by implication, the trial court erred in not granting the easement in Count I, and we grant Shirley’s cross-appeal. Accordingly, we reverse the judgment in part and remand for the trial court to enter judgment consistent with this opinion.

Factual and Procedural History

Shirley is Mark’s mother. Cindy is Mark’s wife and Shirley’s daughter-in-law. Mark and Cindy sold Shirley a parcel of approximately thirty-five acres of land (the “Property”) located on their property for \$56,000.00. This sale was memorialized in a real estate contract (the “1997 Contract”).

The 1997 Contract provided for an easement of a roadway and bridge (the “Roadway”) for physical and utility access:

[Shirley] has full and unrestricted use of [the Roadway] for access and utility easement[.] [Mark and Cindy] will provide to [Shirley] a full and clear General Warranty Deed to said property . . . [a]long with, in writing, an access and utility easement on [the Roadway] for present and all future owners of said [thirty-five] acre parcel.”

Mark and Cindy executed a general warranty deed for the Property in 1998. The record suggests that no easement by title was filed. The parties split the costs of constructing the Roadway in order to provide access to Shirley’s house across Mark and Cindy’s property. Shirley obtained financing from a bank and paid Mark and Cindy the \$56,000.00 in full for the Property.

In 2002, Shirley entered into a contract with Mark and Cindy to sell the Property back to them (the “2002 Contract”). Cindy helped prepare the 2002 Contract. The 2002 Contract provided that Shirley would resell the Property to Mark and Cindy for \$56,000.00 with a caveat that if Shirley decided to move from the Property, the sale price would be adjusted and finalized if Shirley built improvements on the Property. Mark would pay for the **total** value of the Property, including the value of the improvements. Specifically, the 2002 Contract provides: “Price of said [P]roperty will be adjusted accordingly if a residence and/or any out buildings are constructed on said [P]roperty and [Shirley] wishes to move[.]” and “[Mark and Cindy] agree to pay in full any remaining balance due to [Shirley] if [Shirley] wishes to move from said residence.” Shirley gave Mark and Cindy a general warranty deed to hold, but not record. The 2002 Contract also arranged for Shirley to help Mark and Cindy finance the repurchase. Mark and Cindy executed a deed of trust to Shirley for \$56,000.00 and began making payments. Later in 2002, Shirley began to construct a residence on the Property. Over a fifteen-year period, Mark and Cindy paid Shirley \$56,000.00.

Shirley decided she wanted to move from the Property in 2017. Shirley informed Mark that the value of the Property with the improvements was assessed at \$200,000.00. Mark refused to pay the additional \$144,000.00, the difference between the assessed value with improvements and the \$56,000.00 value of the land. Shirley had not wanted Mark to file the general warranty deed for the Property, because the 2002 Contract stated that if she built a residence on the Property, the purchase price would be adjusted accordingly. Despite these terms, in 2017, Mark filed the general warranty deed conveying the Property from Shirley to himself and Cindy.

Separate from the real estate transactions, Shirley made two loans to Mark relevant to this appeal: the Flight School Loan, an \$80,500 loan to pay for Mark's flight school education, and the American Heritage Loan, a \$12,977.56 loan to invest in a foreclosure property. Neither loan was memorialized in a formal written loan agreement. The record contains writings regarding the loans in a handwritten organizer kept by Cindy for Mark. The Flight School Loan is denoted in a ledger specifying the dates and amounts borrowed totaling \$80,500.00, beginning April 5, 2010, with Mark and Shirley's initials, and the amount repaid. The American Heritage Loan is denoted in a handwritten calendar entry from the same organizer on January 31, 2009, which is marked: "\$12,977.56 American Heritage M.E. S.E."

Following a breakdown of the 2002 Contract regarding the repurchase price of the Property and issues relating to the repayment of the loans, Shirley demanded repayment of the loans and filed the present legal action in February 2018. The amended petition alleges seven counts, some against Mark individually and some against Mark and Cindy jointly. Count I sought an easement by implication for the Roadway described in the 1997 Contract. Count II sought to clarify contractual ambiguities in the 2002 Contract. Count III raised an action to quiet title as to the Property. Counts IV, V, and VI alleged claims against Mark for breach of the 2002

Contract and breaches of the loan agreements. In particular, Count V sought repayment of the American Heritage Loan, and Count VI sought repayment of the Flight School Loan. Finally, Count VII alleged undue influence and unjust enrichment against Mark and Cindy jointly.

The case proceeded to trial. Shirley testified about her continuous use of the Roadway since 1997 and its reasonable necessity to provide her ingress/egress access across Mark and Cindy's property to Hardin Road, which was otherwise blocked by a creek. Shirley submitted into evidence the 1997 Contract discussing the intention to grant an easement for the Roadway, the survey illustrating the Roadway on the Property, and handwritten ledgers showing payments for construction of the Roadway. Shirley read the relevant parts of the 1997 Contract that promised the granting of an easement into evidence. Mark testified that no easement by title was ever filed, that he was not opposed to Shirley using the road as an easement and did not object when the trial court indicated that Shirley had an easement and that the issue of the easement was resolved. The trial court followed Mark's testimony with the following exchange:

Trial Court:	Let me ask a couple questions to resolve something that's apparently resolved, then, unless his attorney is going to object. Do you have a problem with the easement being where the road is now located?
Mark:	No.
Trial court:	So we can resolve that issue.

Following trial, the trial court issued an Amended Judgment² primarily in Shirley's favor. The Amended Judgment found the 2002 Contract overly ambiguous and therefore void and unenforceable. The Amended Judgment did not refer to specific counts in the amended petition, but it awarded monetary judgments related to the Property and the two loans, which will be

² Shirley had initially moved to amend the trial court's judgment, but subsequently withdrew her motion after the Amended Judgment was issued. The Amended Judgment clarified that all other claims were denied for insufficient evidence.

detailed in the discussion below. The Amended Judgment found insufficient evidence with regard to all other claims for relief.

Mark and Cindy appealed, and Shirley cross-appealed. Shirley has moved to dismiss the appeal for lack of a final judgment, and the motion was taken with the case.

Points on Appeal

Mark and Cindy raise three points on appeal. Point One argues the trial court erred in granting money judgments on the two loans because the statute of limitations barred Shirley's breach of contract claims to recover money on the Flight School Loan in Count VI and the American Heritage Loan in Count V. Point Two maintains the trial court erred in granting judgment against Cindy because no substantial evidence supported the judgment. Point Three contends the trial court erred in declaring the 2002 Contract void and unenforceable because the terms of the contract were certain or capable of being made certain.

In her sole point on cross-appeal, Shirley asserts the trial court erred in failing to grant an easement by implication because she pleaded a claim for such easement in her amended petition and the easement was judicially admitted at trial.

Standard of Review

We review the judgment in a court-tried case for whether the judgment is unsupported by substantial evidence, is against the weight of evidence, or erroneously declares or misapplies the law. Koeller v. Malibu Shores Condo. Ass'n, Inc., 602 S.W.3d 283, 286 (Mo. App. S.D. 2020) (citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)); Dohogne v. Counts, 307 S.W.3d 660, 666 (Mo. App. E.D. 2010) (internal citation omitted) (noting we apply the same standard of

review of actions for declaratory judgment as any other court-tried cases); see also Rule 84.13(d).³

Under the Murphy v. Carron standard of review, “[w]e review the evidence and its reasonable inferences in the light most favorable to the judgment and disregard any evidence and inferences to the contrary.” Parkway Constr. Servs., Inc. v. Blackline LLC, 573 S.W.3d 652, 664 (Mo. App. E.D. 2019) (internal quotation omitted). However, we review de novo any questions of law that arise, such as whether a statute of limitations applies, without deference to the trial court. DiGregorio Food Prods., Inc. v. Racanelli, 609 S.W.3d 478, 480 (Mo. banc 2020) (internal citation omitted); see also Woodson v. Bank of Am., N.A., 602 S.W.3d 316, 323 (Mo. App. E.D. 2020) (internal citation omitted) (noting “[t]he interpretation of a contract is an issue of law, which we review de novo”).

Given that both parties improperly employ the Murphy v. Carron standard, and because Mark and Cindy suggest we should dismiss Shirley’s cross-appeal for failure to comply with Rule 84.04 on similar grounds on which they also fail to comply, we find it necessary to comment on the requirements of the Murphy v. Carron standard in finer detail. See Murphy, 536 S.W.2d at 32.

Both parties correctly acknowledge that Murphy v. Carron governs our review of a court-tried case, and we must affirm the trial court’s judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. See id. However, “each Murphy ground is proved differently from the others **and** is subject to different principles and procedures of appellate review.” Koeller, 602 S.W.3d at 287 (internal quotation omitted). In order to comply with the rules of appellate procedure in Rule 84.04, a

³ All Rule references are Mo. R. Civ. P. (2020), unless otherwise indicated.

point on appeal must proceed under **one** of the Murphy v. Carron grounds, each of which requires a distinct analytical framework. Koeller, 602 S.W.3d at 287 (internal citation omitted); see Rule 84.04(d)(1) (requiring a point relied on state concisely the legal reasons for the claim of reversible error), (e) (requiring the argument section set forth the applicable standard of review). If a point on appeal fails to identify which one of the Murphy v. Carron grounds applies, Rule 84.04 directs us to dismiss the point. Biggs by Next Friend Biggs v. Brinneman, 598 S.W.3d 697, 702 (Mo. App. S.D. 2020) (citing Murphy, 536 S.W.2d at 32).

A challenge that the trial court’s judgment is not supported by substantial evidence is distinct and should not be conflated with a challenge that the judgment is against the weight of the evidence. Koeller, 602 S.W.3d at 287 (internal citation omitted); Biggs, 598 S.W.3d at 702. Notably, we have repeatedly reminded appellants that weight-of-the-evidence challenges must adhere to the mandatory analytical framework as set forth in the caselaw. Biggs, 598 S.W.3d at 702 n.8 (citing Houston v. Crider, 317 S.W.3d 178, 187 (Mo. App. S.D. 2010)); see also O’Gorman & Sandroni, P.C. v. Dodson, 478 S.W.3d 539, 544 (Mo. App. E.D. 2015) (internal citation omitted).⁴ Further, “[e]ach of these, in turn, is different from a claim that the trial court erroneously declared or applied the law.” Koeller, 602 S.W.3d at 287 (internal citation omitted). Accordingly, just as failing to identify which one of the Murphy v. Carron grounds supports a claim of reversible error violates Rule 84.04(d)–(e) and warrants dismissal, a single point that alleges the trial court erred under **more than one** of the Murphy v. Carron standards raises a

⁴ The analytical framework for against-the-weight-of-the-evidence challenges is as follows: “(1) identify the trial court’s finding he [or she] seeks to challenge as against the weight of the evidence; (2) identify all favorable evidence submitted during trial that would support that finding; (3) identify evidence contrary to the trial court’s finding; and (4) explain why, in light of the whole record, the supporting evidence is so lacking in probative value that the trier of fact should have reached a different conclusion.” O’Gorman & Sandroni, P.C., 478 S.W.3d at 544 (internal citation omitted).

multifarious point that violates Rule 84.04(d)(1) and preserves nothing for review. See Koeller, 602 S.W.3d at 287 (internal citation omitted).

Discussion

Preliminarily, we address Shirley's motion to dismiss the appeal on the grounds that the Amended Judgment is not a final, appealable judgment. Mark and Cindy did not respond to Shirley's motion to dismiss. Shirley alleged the Amended Judgment fails to resolve all matters because it states: "The [trial] court finds that the \$56,000.00 paid by Mark [] and Cindy [] for the [thirty-six] acres shall be refunded and returned by Shirley [] to them ***or otherwise credited to the terms of this judgment below.***" (Shirley's emphasis altered). Shirley reasons that the emphasized language lacks specificity and leaves undetermined whether and how consideration should be otherwise credited. Immediately following the challenged language, the trial court continued:

The [trial] court finds and orders that \$14,000.00 shall [be] paid to Shirley [] by Mark and Cindy [] (along with the \$56,000.00 credit above), and further finds that these amounts totaling \$70,000.00, along with the additional \$10,000.00 the [trial] court finds Mark and Cindy [] have already repaid to Shirley [], shall pay-off any and all amounts due on the flight school loan of \$80,000.00, which the court finds the evidence suggests was a no interest personal loan. The [trial] court finds that \$12,977.00 shall be paid by Mark and Cindy [] to Shirley [] for the "foreclosure property venture." The [trial] court orders that each party shall be responsible for their own costs and attorney fees.

The Amended Judgment thus specifies the amounts owed between the parties. Rather than making Shirley pay Mark and Cindy \$56,000.00, the Amended Judgment simply permits Mark and Cindy to reduce the payments they owe to Shirley by that amount. We see no ambiguity in the amounts owed to Shirley. The Amended Judgment resolves all claims of the parties by denying the remaining claims for insufficient evidence. The trial court's judgment is a final,

appealable judgment under Rule 74.01(b). See Wilson v. City of St. Louis, 600 S.W.3d 763, 765 (Mo. banc 2020). We deny Shirley’s motion to dismiss the appeal.

I. Point One—Statute of Limitations

In Point One, Mark and Cindy challenge the trial court’s failure to apply a five-year statute of limitations to Shirley’s breach of contract claims in Counts V and VI. Shirley counters that because both loans involved a writing setting forth a promise to pay money, the trial court properly applied a ten-year statute of limitations.

Missouri has two statutes of limitations relating generally to contract actions: Section 516.110(1)⁵ and Section 516.120. Rolwing v. Nestle Holdings, Inc., 437 S.W.3d 180, 182 (Mo. banc 2014) (internal quotation omitted). Section 516.120(1) provides that “[a]ll actions upon contracts, obligations or liabilities, express or implied, except those mentioned in [S]ection 516.110(1) . . . must be brought within five years.” Id. (omission in original) (internal quotation omitted). Section 516.110(1) creates an exception to Section 516.120(1) and provides a ten-year statute of limitations for “[a]n action upon any writing, whether sealed or unsealed, for the payment of money or property[.]” See Rolwing, 437 S.W.3d at 182. “[T]he [ten]–year statute of limitations applies when a plaintiff files suit to enforce a written promise to pay money.” Id. at 183.

“A cause of action accrues, and the limitation period begins to run, when the right to sue arises.” White v. Emmanuel Baptist Church, 519 S.W.3d 917, 926 (Mo. App. W.D. 2017) (quoting Boland v. Saint Luke's Health Sys., Inc., 471 S.W.3d 703, 710 (Mo. banc 2015)). “When a payment obligation has a specific due date, the cause of action accrues ***on that date.***” Id. (citing Harms v. Harms, 496 S.W.3d 534, 537–39 (Mo. App. W.D. 2016)). In contrast,

⁵ All Section references are to RSMo (2016), unless otherwise indicated.

obligations that are payable on demand “are ***payable on the date of execution*** and no demand is necessary to start the statute of limitations running.” *Id.* (internal quotation omitted).

Shirley sent demand letters and filed her claims on the Flight School Loan and the American Heritage Loan in February 2018. Mark and Cindy maintain that the five-year statute-of-limitations defense applies to both loans running from the date they were executed. The Flight School Loan was executed in 2010, and the American Heritage Loan was executed in 2009. The record indicates Shirley first raised the issue of repayment on the American Heritage Loan in 2017 and made her first demand for repayment in February 2018, both dates of which would fall outside the five-year statute of limitations but within the ten-year exception if applicable. *See* Sections 516.110(1), 516.120; *White*, 519 S.W.3d at 926 (internal citation omitted). Regarding the Flight School Loan, Mark repaid \$10,000 in January 2014, and then Shirley mentioned repayment again in 2017 and demanded repayment in February 2018. If the five-year statute of limitations applies to the Flight School Loan measuring from its 2010 execution, Mark and Cindy contend repayment is barred. *See* Sections 516.110(1), 516.120; *White*, 519 S.W.3d at 926 (internal citation omitted). Shirley alternatively argues that even if the five-year statute of limitations applied to the Flight School Loan, Mark’s repayment of \$10,000 in January 2014 extended the statute of limitations, bringing it within a five-year period with respect to her February 2018 demand. *See, e.g., Anderson v. Stanley*, 753 S.W.2d 98, 100 (Mo. App. E.D. 1988) (internal citation omitted) (noting “[g]enerally, part payment on a debt tolls the statute of limitations . . . [in that it] acknowledges the existence of the indebtedness and raises an implied promise to pay the balance”).

Both loans involve a writing on different pages of the same calendar organizer. The issue presented on both loans is whether the separate writings reflect a written promise to pay money.

See Rowling, 437 S.W.3d at 183. If so, Section 516.110(1)'s ten-year statute of limitations applies, and Shirley's claims were timely filed. See id. If not, Section 516.120(1)'s general five-year statute of limitations applies, and Shirley's claims are barred. See DiGregorio Food Prods., Inc., 609 S.W.3d at 480–81.

A. Written Promise to Pay Money

The party seeking to recover money owed must show there is a writing “for the payment of money and that the writing contains a promise to pay money, [while] the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence.” Rowling, 437 S.W.3d at 183 (quoting Cnty. Title Co. v. Stewart Title Guar. Co., 977 S.W.2d 501, 502 (Mo. banc 1998)); see also DiGregorio Food Prods., Inc., 609 S.W.3d at 481 (citing Cnty. Title Co., 977 S.W.2d at 502) (“[T]he promise to pay money must arise from the writing’s explicit language; extrinsic evidence cannot supply the promise.”).

“[T]he essence of a promise to pay money is that it is an acknowledgment of an indebtedness, an admission of a debt due and unpaid.” DiGregorio Food Prods., Inc., 609 S.W.3d at 481 (quoting Martin v. Potashnick, 217 S.W.2d 379, 381 (Mo. 1949)). “[T]he language of the writing, by fair implication, must contain the promise to pay money[.]” Id. at 481 (citing Martin, 217 S.W.2d at 381). “Once, by fair implication, the obligation is found, the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence.” Martin, 217 S.W.2d at 381 (internal citation omitted).

The Supreme Court recently analyzed whether restaurant invoices contained the required acknowledgment of an indebtedness so as to come within the ten-year exception under Section 516.110(1). See DiGregorio Food Prods., Inc., 609 S.W.3d at 481–82 (finding shipment invoices prepared by a food-products company signed by a restaurant manager lacked explicit

language evincing the restaurant owner's acknowledgment of a debt owed and unpaid to the food-products company). In reaching its conclusion that the writings did not contain the necessary promise of indebtedness, DiGregorio noted that the invoices contained numerous specific terms, including the date, order, shipping method, total costs, and payment terms. However, DiGregorio further noted that:

[N]one of these terms can be said to be [the respondent's] acknowledgement of a debt or his admission a debt is due and unpaid. The only term on the invoice possibly attributable to [the respondent] is the restaurant manager's signature. The invoices are silent, however, as to the significance of the signature. The invoice does not contain any language suggesting or implying the signature is [the respondent's] acknowledgement of indebtedness or his admission of a debt due and unpaid.

Furthermore, a comparison of writings this Court has found to contain promises to pay money with the signed invoices shows the invoices lack the explicit language necessary to support such a promise. In Community Title Co., this Court found a promise to pay money in a title insurance underwriting agreement that stated in pertinent part, "[Stewart Title] shall . . . compensate [Community Title] as follows: Pay [Community Title] annually . . . twenty percent (20%) of the cash amount received by [Stewart Title] from such Agents." 977 S.W.2d at 502. In Hughes Development Co., this Court determined a promise to pay money was present in a written management service agreement that declared Omega Realty Company ("Omega") would pay Hughes Development Company a percentage of the management fees Omega collected from certain apartment owners. 951 S.W.2d at 616-17. Additionally, in Mo., Kan., & Tex. Railway Co. v. Am. Surety Co. of N.Y., this Court held the [ten]-year statute of limitations applied to a suit on an indemnity bond providing in pertinent part, "That we, J.T. Miller and L.G. Graham, . . . and American Surety Company of New York, as surety, are indebted to the Missouri, Kansas & Texas Railway Company . . . in the penal sum of \$10,000[.]" 236 S.W. 657, 658, 663-64 (Mo. banc 1921).

Id. at 481 (omissions in original).

B. The Ledger Entries

We first consider whether the ledger reflects a written promise for the payment of money as required for the application of the ten-year statute of limitations set forth in Section 516.110(1). The written ledger shows the dates and the dollar amounts of fourteen advances

totaling \$80,500.00, beginning April 5, 2010. Each entry is denoted “Borrowed,” and marked “F.S.” Each entry is initialed by Mark and Shirley. The fifteenth and final entry in the ledger reflects a “pay back” amount of \$10,000.00. We may not use extrinsic evidence to support finding a promise of indebtedness in the ledger, but rather must look only at the ledger. See id. At trial, extrinsic testimony indicated the ledger is handwritten primarily by Mark’s wife, Cindy, and that “F.S.” is for Flight School. Mark testified that the amounts were correct, that he wrote “borrowed” on the entries, and that Shirley delivered the money to him for flight school. Mark and Shirley each initialed the entries.

Based on the record before us, we are persuaded that the ledger constituted a written promise to pay money. The ledger clearly shows Mark acknowledging a debt due and unpaid to Shirley. See id. In particular, the ledger contains specific language denoting the exact amounts “borrowed,” and manifests a promise to repay to Shirley through both of their initials to the borrowed amounts. See id. The plain dictionary definition of “borrowed” is “to receive temporarily from another implying or expressing the intention either of returning the thing received or of giving its equivalent to the lender.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 256 (2002). “Borrowed” is further defined as “[t]o receive money with the understanding or agreement that it must be repaid, usu[ally] with interest.” BLACK’S LAW DICTIONARY (11th ed. 2019). The repeated use of the word “[b]orrowed,” plus the single use of “pay back,” fairly connotes a promise to repay the borrowed amounts, as opposed to monies being gifted without intent of repayment. See DiGregorio Food Prods., Inc., 609 S.W.3d at 481. While Mark and Cindy emphasize the absence of specific repayment terms, interest rates, or a date for repayment in the ledger, such terms are not required for a writing to show a promise to pay money; nor is it necessary for the

details of the debt to be fully understood from the writing, such as the meaning of “F.S.” as money for Flight School. See id.; Rolwing, 437 S.W.3d at 183; Martin, 217 S.W.2d at 381. The clear language used by the parties on the ledger expresses a promise for the payment of money. Accordingly, Section 516.110(1)’s ten-year statute of limitations applies, and Shirley’s claim was timely filed. See DiGregorio Food Prods., Inc., 609 S.W.3d at 480–81. We affirm the trial court’s judgment as to Count VI.⁶

C. The Calendar Entry

We next consider whether the singular calendar entry on January 31, 2009, reflects a written promise to pay money for the American Heritage Loan. The calendar entry is from the same physical document as the ledger and states: “\$12,977.56 American Heritage M.E. S.E.” Regarding extrinsic evidence, trial testimony indicates the entry is handwritten by Cindy. Mark testified that the initials were his, that he received that amount of \$12,977.56 from Shirley, and that he has not yet returned that \$12,977.56 to Shirley. Mark testified that the American Heritage Loan was for an investment property that foreclosed, and he and Shirley still have their investments in that property. Critically, however, we may not use extrinsic evidence to determine whether the calendar entry contains by fair implication an acknowledgment of a debt owed and unpaid. See id. at 481 (citing Cnty. Title Co., 977 S.W.2d at 502) (“[T]he promise to pay money *must arise from the writing’s explicit language*; extrinsic evidence cannot supply the promise.”) (emphasis added).

Unlike the ledger entries relating to the Flight School Loans, the calendar entry lacks the term “borrow,” “pay back,” or any other language suggesting a repayment obligation. When

⁶ Given that the record makes clear the Flight School Loan was for \$80,500.00, of which Mark had paid back \$10,000.00, we direct the trial court to amend its judgment consistent with this opinion to reflect the amount owed as \$70,500.00.

limiting our review to the written entry on the calendar, we cannot characterize the language in the calendar entry as reasonably manifesting “an acknowledgment of an indebtedness, an admission of a debt due and unpaid.” See id. (quoting Martin, 217 S.W.3d at 381). Therefore, because we hold the statutory exception to the five-year statute of limitations provided in Section 516.110(1) does not apply to the American Heritage Loan, the trial court erred in concluding that Shirley’s claim in Count V was not barred by Section 516.120(1) and in holding Mark liable on the American Heritage Loan for \$12,977.00. See id. at 480. Point One is granted as to Count V only.

II. Point Two—Claims against Cindy

The second point on appeal challenges the judgments entered against Cindy on Counts V and VI and contends that no substantial evidence supported an award against Cindy because Shirley pleaded facts alleging claims only against Mark.

Before we analyze the claim for whether the judgment was unsupported by substantial evidence as reflected in the point relied on, we note the section header in Point Two’s argument states the judgment is against the weight of the evidence, yet the text of the argument contends the Amended Judgment erroneously declares or applies the law **and** is also against the weight of the evidence. As explained in our standard-of-review section, a point relied on must assert one and only one of the Murphy v. Carron grounds to comply with Rule 84.04 See Koeller, 602 S.W.3d at 287; Biggs, 598 S.W.3d at 702. Here, Mark and Cindy improperly conflate the Murphy v. Carron grounds, rather than consistently arguing whether the trial court erred by erroneously declaring or applying law, by issuing judgment not supported by substantial evidence, or by issuing judgment that was against the weight of the evidence. See Koeller, 602 S.W.3d at 287; Biggs, 598 S.W.3d at 702. However, “[w]e have the discretion to review non-

compliant briefs ex gratia where the argument is readily understandable.” See Scott v. King, 510 S.W.3d 887, 891–92 (Mo. App. E.D. 2017) (internal citations omitted). In this case, we choose to exercise that discretion to review Point Two, because it adequately sets forth a claim of reversible error on the ground that the trial court misapplied the law. See id.

Because we granted Point One as to Count V and reversed the trial court’s judgment on that count, in this point on appeal, we review only the remaining claim as to Count VI involving the Flight School Loan. In Count VI of her amended petition, Shirley alleged Mark breached the contract as to the Flight School Loan. Specifically, the amended “Sixth Count against Mark” alleged that Shirley and Mark entered into a contract for the Flight School Loan, Mark failed to perform by repaying her after a demand was made, and Shirley was thereby damaged. In contrast, Shirley alleged other counts against Mark and Cindy jointly. In particular, Count VII sought “relief from undue influence and unjust enrichment . . . against Mark and Cindy” and raised allegations that Cindy breached fiduciary duties to her with respect to the 2002 Contract, the American Heritage Loan, and the Flight School Loan.

The trial court made no mention of undue influence or unjust enrichment in the Amended Judgment and specifically denied all otherwise unaddressed claims for lack of sufficient evidence. Given that fact, we infer the trial court denied Shirley’s claim of undue influence and unjust enrichment averred in Count VII. Thus, our review is limited to whether the trial court erred by holding Cindy jointly liable on Shirley’s claim for breach of contract against Mark in Count VI.

“In order for a party to be bound by a contract a court must find there was privity of contract.” Baisch & Skinner, Inc. v. Bair, 507 S.W.3d 627, 632 (Mo. App. E.D. 2016).

“Privity of contract is the relationship between the parties to a contract, which allows them to sue

one another but prevents a third party from doing so.” Id. (internal citation omitted). “The doctrine of privity means that a person cannot acquire rights or be subject to liabilities **arising under** a contract to which he [or she] is not a party.” Id. (internal citation omitted); see also Captiva Lake Invs., LLC v. Ameristrukture, Inc., 436 S.W.3d 619, 626 (Mo. App. E.D. 2014) (internal citation omitted) (“Generally, a defendant who has contracted with another owes no duty to a plaintiff who is not a party to that agreement[.]”). “This general rule of privity is designed to protect contractual parties from exposure to unlimited liability and to prevent burdening the parties with obligations they have not voluntarily assumed.” Id. “[O]bligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in privity with it.” Baisch & Skinner, Inc., 507 S.W.3d at 632 (internal quotation omitted).

The record is clear that Shirley raised breach of contract claims in Count VI solely against Mark. “The trial court’s authority is limited to such questions as are presented by the parties in their pleadings.” Swift v. Fed. Home Loan Mortg. Corp., 417 S.W.3d 342, 348 (Mo. App. S.D. 2013) (internal quotation omitted). In Point One, we determined that the ledger constituted a writing in which Mark acknowledged indebtedness to Shirley, permitting recovery for contract breach on the Flight School Loan. Although Shirley testified that the ledger was handwritten by Cindy, nothing in the ledger suggests Cindy was a party to the Flight School Loan agreement. See Baisch & Skinner, Inc., 507 S.W.3d at 632. Cindy’s name is not on the ledger entries nor did she sign or initial the ledger entries as did Mark and Shirley. While certain legal situations may allow a spouse to be held jointly liable for debts incurred by the other, the pleadings and evidence in this case, along with the Amended Judgment, establish no legal basis for holding Cindy liable for the breach of a contract to which she was not a party. See Swift, 417

S.W.3d at 348; Captiva Lake Invs., LLC, 436 S.W.3d at 626. Accordingly, the trial court misapplied the law and erred in awarding a monetary judgment on the Flight School Loan in Count VI against both Mark and Cindy. See Koeller, 602 S.W.3d at 286 (citing Murphy, 536 S.W.2d at 32). We therefore grant Point Two as to Count VI, reverse the judgment of the trial court as to Cindy, and direct the trial court on remand to enter judgment on the Flight School Loan in Count VI only against Mark.

III. Point Three—The 2002 Contract

Point Three disputes the trial court’s judgment declaring the 2002 Contract void and unenforceable. Mark and Cindy argue that the 2002 Contract was not overly ambiguous and that its terms were certain or capable of being made certain, thereby making the contract valid and enforceable.

Preliminarily, we note that Mark and Cindy improperly argue the judgment as to the 2002 Contract is against the weight of the evidence **and** erroneously declares or applies the law within the same point. See Koeller, 602 S.W.3d at 287; Biggs, 598 S.W.3d at 702. However, the record is clear that both Mark and Cindy agreed that the price term in the 2002 Contract was not specific as to what, if any, additional sum they were to pay in the event Shirley had a residence or other outbuildings constructed on the Property. Instead, Mark and Cindy argue that a contract is enforceable even in the absence of a specific price, and maintain that the trial court should have enforced the 2002 Contract and adjusted the price accordingly. Given this argument, it is clear that Point Three alleges the trial court misapplied the law of contracts to the facts of this case. For that reason, we choose to exercise our discretion and review Point Three. See Scott, 510 S.W.3d at 891–92 (internal citations omitted).

In the 2002 Contract reselling the Property from Shirley back to Mark and Cindy, the parties agreed that if and when Shirley wanted to move, Mark and Cindy would pay a price for the Property to be finalized if she built improvements. Specifically, the 2002 Contract provides: “Price of said [P]roperty will be adjusted accordingly if a residence and/or any out buildings are constructed on said [P]roperty and [Shirley] wishes to move[.]” and “[Mark and Cindy] agree to pay in full any remaining balance due to [Shirley] if [Shirley] wishes to move from said residence.” Mark and Cindy paid Shirley the \$56,000.00 for the value of the land. Shirley did not file a general warranty deed for the property because neither Mark nor Cindy paid her any money beyond the \$56,000.00 even though Shirley had a house built on the Property.

Real estate contracts require specific terms to be enforceable for the sale of real property. “The essential elements of an agreement to convey real property are: (1) the parties; (2) the subject matter; (3) the promises on both sides; (4) the **price**; and (5) the consideration.” Barkho v. Ready, 523 S.W.3d 37, 44 (Mo. App. W.D. 2017) (internal quotation omitted) (emphasis added). “Under Missouri law, to have a valid real estate sale contract, that contract must set forth ‘the stipulation of a price, or a method of determining it[.]’” Lipton-U.City, LLC v. Shurgard Storage Ctrs., Inc., 454 F.3d 934, 938 (8th Cir. 2006) (quoting Barling v. Horn, 296 S.W.2d 94, 97 (Mo. 1956)) (finding no support for the claim that a clause providing for arbitration of the sale price at some later date is an accepted method of determining price in a real estate contract). “It is fundamental that in order to be binding[,], an agreement [for the sale of land] must be definitive and certain as to its terms and requirements to enable a court to determine its meaning and to measure the extent of the parties’ liability.” Kemp Constr. Co. v. Landmark Bancshares Corp., 784 S.W.2d 306, 308 (Mo. App. E.D. 1990) (considering the certainty of terms in a real estate contract); see also In re Estate of Looney, 975 S.W.2d 508,

516–17 (Mo. App. S.D. 1998) (finding that stating the price per acreage made the exact price ascertainable simply by computation so as to satisfy the statute of frauds). Thus, where the price to be determined in the future is too indefinite and uncertain, the contract for the sale of land is unenforceable. Barling, 296 S.W.2d at 97; see also Looney, 975 S.W.2d at 517 (internal quotation omitted) (distinguishing the need for a specific price term from the **method** of payment, “view[ing] the method of payment, as opposed to the price, as one of the matters concerning the performance of the contract . . . which may be left open for future specification without destruction of the contract or depriving a party remedy for its enforcement”). In Barling, the Court recognized the agreement was not an enforceable contract for the sale of real estate where it clearly contemplated a “first opportunity to purchase” but did not provide a stated price on stated terms, or at a price and on the terms equal to another’s bona fide offer or fair-market value of the property. Id.; see Peet v. Randolph, 33 S.W.3d 614, 618 (Mo. App. E.D. 2000) (citing Kellner v. Bartman, 620 N.E.2d 607, 611–12 (Ill. App. 3d 1993)) (finding a missing price term **within a right-of-first-refusal clause** within a real estate contract in which purchasers agreed to buy land for a certain price does not necessarily render the **clause** unenforceable).

The 2002 Contract is for the sale of real property—not goods or services. Courts apply a reasonableness standard to enforce contracts lacking fixed prices for the sale of goods and services, guided by the statutorily adopted Uniform Commercial Code (“UCC”), particularly when establishing a price in advance would be difficult or impossible. See Allied Disposal, Inc. v. Bob’s Home Serv., Inc., 595 S.W.2d 417, 420 (Mo. App. E.D. 1980). Contrastingly, real estate contracts require price as an essential term. Barkho, 523 S.W.3d at 43-44; Three-O-Three Invs., Inc. v. Moffitt, 622 S.W.2d 736, 738 (Mo. App. W.D. 1981); see also Victory Hills Ltd.

P'ship I v. NationsBank, N.A. (Midwest), 28 S.W.3d 322, 329 (Mo. App. W.D. 2000) (“[B]y its own terms, the UCC does not apply to real estate transactions[.]”). Real estate contracts are subject to the extraordinary remedy of specific performance because they convey a unique interest in a particular tract of land, thus their essential terms “should be so precise and exact that neither party could reasonably misunderstand them.” Peet, 33 S.W.3d at 621 n.2 (Teitelman, J., dissenting) (internal quotation and citations omitted). While parties to a contract for goods or services have more flexibility in providing an indefinite or indeterminate price in a contract, the nature of the 2002 Contract subjects this contract to more demanding principles of law. See Barkho, 523 S.W.3d at 43-44; Peet, 33 S.W.3d at 618; Looney, 975 S.W.2d at 516–17; Allied, 595 S.W.2d at 420–21. Given the subject matter of the 2002 Contract, Mark and Cindy fail to meet their burden on appeal. Notably, Mark and Cindy offer no precedential authority in which a Missouri court enforced a contract for the sale of real property containing no stated price and without a clear method of determining the future price. See, e.g., Warren v. Trib. Broad. Co., LLC, 512 S.W.3d 860, 866 (Mo. App. W.D. 2017) (finding terms in an oral contract promising to an employee an annual revenue-based bonus determined by the formula used to calculate bonuses sufficiently certain to create an enforceable contract); Tom’s Agspray, LLC v. Cole, 308 S.W.3d 255, 260 (Mo. App. W.D. 2010) (finding terms allowing for reasonable charges for seeding-related goods and services sufficiently certain to create an enforceable contract); Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc., 817 S.W.2d 530, 533 (Mo. App. E.D. 1991) (finding terms of written agreement for underwriting services for land-secured bonds capable of being determined by mutual agreement sufficient to create an enforceable contract). “It is not . . . the duty of this [C]ourt to develop theories of error and search for reasons to reverse the judgment entered. The ruling as it comes to us is presumptively correct and the [appellants] have

the burden of demonstrating that the judgment is erroneous.” S. Mo. Dist. Council of Assemblies of God v. Hendricks, 807 S.W.2d 141, 146 (Mo. App. S.D. 1991) (finding a contract for the sale of land did not state various essential terms sufficient to support a decree of specific performance, including the parties’ names and signatures, the description of the land, and promises between the parties); see also Stadium W. Props., L.L.C. v. Johnson, 133 S.W.3d 128, 141 (Mo. App. W.D. 2004) (finding partial descriptions of the land for purposes of tax sale were “simply not specific enough to describe the real estate to be sold with reasonable certainty”).

The 2002 Contract provides that the price of the Property would be “adjusted accordingly if a residence and/or any out buildings are constructed on said [P]roperty and [Shirley] wishes to move.” We are not persuaded that this term provides an acceptable method for determining price in a real estate contract. See Lipton-U.City, 454 F.3d at 938 (citing Barling, 296 S.W.2d at 97). We find an inherent uncertainty in the phrase “adjusted accordingly” as used in the 2002 Contract as that term makes no reference to any particular method of determining the price on which a court may reasonably rely in finding clear and convincing evidence of a certain price term in a real estate contract. See Barkho, 523 S.W.3d at 43–44; see also Barling, 296 S.W.2d at 97. The 2002 Contract is silent as to how the price shall be “adjusted accordingly.” No terms indicate the price would be based on fair market value, assessed valuation by either real estate experts or a county assessor, projected or actual cost of building(s) construction, nor any other measure. Rather, the 2002 Contract terms lack **any method** for determining the “adjustment” required to fix a price for the real property. See Lipton-U.City, 454 F.3d at 938 (citing Barling, 296 S.W.2d at 97).

Therefore, we hold the trial court did not err by misapplying the law in declaring the 2002 Contract void and unenforceable. See Koeller, 602 S.W.3d at 286 (citing Murphy, 536 S.W.2d at 32); Woodson, 602 S.W.3d at 323. Point Three is denied.

IV. Cross-Appeal Point One—Easement by Implication

In her sole point on cross-appeal, Shirley charges the trial court with error in failing to grant her an easement by implication for the Roadway as pleaded in Count I of her amended petition. Preliminarily, Mark and Cindy seek dismissal of Shirley’s cross-appeal for failure to comply with Rule 84.04(d)(1) because the point on appeal fails to identify the legal reasons for the claim of reversible error or why those reasons support the claim of error.

The mandatory requirements concerning the points relied on in Rule 84.04(d)(1) are “not simply a judicial word game or a matter of hypertechnicality on the part of appellate courts.” Kieffer v. Gianino, 301 S.W.3d 119, 120 (Mo. App. E.D. 2010) (quoting Thummel v. King, 570 S.W.2d 679, 686 (Mo. banc 1978)). Rather, “[t]he purpose of Rule 84.04(d)(1) is to provide notice to the opposing party as to the precise matters that must be contended with and to inform the court of the issues presented for review.” Id. at 120–21 (internal quotation omitted). Failure to comply with Rule 84.04(d)(1) preserves nothing for appeal and warrants dismissal. Id.; see Biggs, 598 S.W.3d at 701.

We agree that Shirley’s point relied on is deficient under Rule 84.04(d)(1). The point relied on does not explain how her pleadings and the judicial admission support a claim of reversible error. Most damaging to Shirley’s point on appeal, as Mark and Cindy note, while correctly stating that Murphy v. Carron governs our review, the point on appeal is silent as to which of the authorized Murphy v. Carron grounds she is asserting. See Koeller, 602 S.W.3d at 287; Biggs, 598 S.W.3d at 702 (citing Murphy, 536 S.W.2d at 32) (noting dismissal of a point

relied on is appropriate under Rule 84.04 where an appellant fails to identify which of the Murphy v. Carron standards applies). Although failure to properly state the standard of review is deficient under Rule 84.04, we may review the point without improperly advocating for a party where the appropriate standard is clear from the argument. See Scott, 510 S.W.3d at 891–92 (internal citation omitted). In her standard of review, Shirley does not aver that the trial court’s judgment is unsupported by substantial evidence. Instead, Shirley refers to a “weight of the evidence” review. Moreover, Shirley’s cross-appeal does not allege any erroneous misstatement or misapplication of law by the trial court. See Koeller, 602 S.W.3d at 287 (internal citation omitted). While Shirley’s point relied on as drafted is deficient under Rule 84.04(d)(1), we choose to exercise our discretion to conduct appellate review because the argument portion of her brief is limited to and adequately alleges that the Amended Judgment is against the weight of the evidence. See id.⁷ We review the cross-appeal on this basis alone.

An against-the-weight-of-the-evidence challenge presents “an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact.” Ivie v. Smith, 439 S.W.3d 189, 206 (Mo. banc 2014); see also Koeller, 602 S.W.3d at 287 (internal citation omitted) (noting a substantial-evidence challenge and an against-the-weight challenge are distinct legal arguments). To show the trial court’s judgment was against the weight of the evidence, an appellant must adhere to the following analytical framework:

- (1) identify the trial court’s finding he [or she] seeks to challenge as against the weight of the evidence; (2) identify all favorable evidence submitted during trial that would support that finding; (3) identify evidence contrary to the trial court’s finding; and (4) explain why, in light of the whole record, the supporting evidence

⁷ We choose to treat Shirley’s briefing deficiencies in the same manner as we treated the briefing deficiencies of Mark and Cindy.

is so lacking in probative value that the trier of fact should have reached a different conclusion.

O’Gorman & Sandroni, P.C., 478 S.W.3d at 544 (internal citation omitted); see also Biggs, 598 S.W.3d at 702 n.8 (citing Houston, 317 S.W.3d at 187).

Where a party lacks an easement by title, a party may seek an easement by implication. Hillside Dev. Co., Inc. v. Fields, 928 S.W.2d 886, 889 (Mo. App. W.D. 1996) (“[I]t is only when the title to property does not contain the claimed easement that the question even arises whether an implied easement exists, for if the easement were in the title, then it would be an express easement, not an implied one.”).⁸ A party may acquire an easement by implication by demonstrating the following four elements:

(1) unity and subsequent separation of title; (2) obvious benefit to the dominant estate and burden to the servient portion of the premises existing at the time of conveyance; (3) use of the premises by the common owner in their altered condition long enough before the conveyance and under such circumstances as to show that the change was intended to be permanent; and (4) reasonable necessity for the easement.

Baetje v. Eisenbeis, 296 S.W.3d 463, 467 (Mo. App. E.D. 2009) (internal quotation omitted); see also Dohogne, 307 S.W.3d at 666. The proponent of the easement by implication must prove all four elements by clear and convincing evidence. Dohogne, 307 S.W.3d at 666; Baetje, 296 S.W.3d at 467.

Here, Shirley pleaded the elements of an easement by implication and presented evidence establishing the easement at trial. In her argument on appeal, Shirley presents all the evidence at trial related to the trial court’s judgment denying the easement by implication and argues why, in light of the whole record, the trial court should have reached a different conclusion. See Biggs,

⁸ Mark and Cindy suggest that merger following the delivery and acceptance of the 1997 Contract precludes Shirley from arguing an easement by implication exists. We agree that the terms of the 1997 Contract are relevant, given the unenforceability of the 2002 Contract, but because the record contains no easement by title, Shirley may petition the circuit court to recognize an easement by implication upon proof of the four elements.

598 S.W.3d at 702 n.8 (citing Houston, 317 S.W.3d at 187); O’Gorman & Sandroni, P.C., 478 S.W.3d at 544 (internal citation omitted). Shirley read portions of the 1997 Contract into the record and further submitted into evidence the 1997 Contract showing the Sellers’ intent to grant a permanent easement for the Roadway when she purchased the Property from Mark and Cindy. See Dohogne, 307 S.W.3d at 666; Baetje, 296 S.W.3d at 467. Shirley also submitted into evidence the survey illustrating the Roadway, as well as handwritten ledgers showing her payments towards the construction of the Roadway. Shirley testified about her continuous use of the Roadway since 1997 and its reasonable necessity to benefit her with ingress/egress access across Mark and Cindy’s property to Hardin Road, which is otherwise blocked by a creek. See Dohogne, 307 S.W.3d at 666; Baetje, 296 S.W.3d at 467. The evidence was also uncontradicted that the 1997 Contract resulted in separation of title from a previously unified estate with a corresponding benefit and burden to the dominant estate and servient portion. Concerning evidence supporting the judgment, Mark testified that he was not opposed to Shirley using the road as an easement, nor did he object to the trial court saying that Shirley possessed an easement for the Roadway. Mark testified that he did not have a problem with the easement being where the Roadway is now located. The trial court then stated that the issue related to the easement was resolved. Shirley marshalled evidence supporting the establishment of the easement by implication that had far greater probative value than any evidence against such easement. See Ivie, 439 S.W.3d at 205–06. While Shirley may not have followed the precise guidelines in mapping out her “against the weight of the evidence argument,” she has provided this Court with a sufficiently substantive record allowing us to review her point without becoming her advocate.

Given the overwhelming evidence at trial demonstrating that Shirley satisfied the required elements to be granted an easement by implication, we find the trial court's judgment not granting an easement by implication of the Roadway to be against the weight of the evidence. See Parkway Constr. Servs., Inc., 573 S.W.3d at 664; O'Gorman & Sandroni, P.C., 478 S.W.3d at 544; Dohogne, 307 S.W.3d at 666. Therefore, we grant Shirley's sole point relied on and remand this matter to the trial court with instructions.

Conclusion

We reverse the judgment holding Mark and Cindy liable on the American Heritage Loan in Count V. We reverse the judgment holding Cindy liable for the Flight School Loan in Count VI. We reverse the trial court's judgment denying the easement by implication sought in Count I. We affirm the trial court's judgment in all other respects. We remand this matter to the trial court with instructions to reverse the judgment in Count V, to remove Cindy from the judgment in Count VI and amend the amount owed by Mark on Count VI to \$70,500.00. Mark's obligations under Count VI are set-off by the \$56,000.00 Shirley owes Mark and Cindy from unraveling the 2002 Contract, leaving Shirley with a total judgment of \$14,500.00 against Mark. We further direct the trial court on remand to enter judgment in Count I granting Shirley an easement by implication in a manner consistent with this opinion.


KURT S. ODENWALD, Judge

Angela T. Quigless, P.J., concurs.
James M. Dowd, J., concurs.