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IN THE SUPREME COURT OF THE STATE OF IDAHO

PHILIP P. McGIMPSEY

Plaintiff- Appellant,

vs.

D & L VENTURES, INC., a NEVADA
CORPORATION and DAVID B. ASHER,
individually,

Defendants- Respondents

D&L VENTURES, INC., a Nevada Corporation,

Counterclaimant- Respondent,

vs.

PHILIP P. McGIMPSEY,

Counter-Defendant- Appellant

D&L VENTURES, INC., a Nevada Corporation,

Third-Party Plaintiff- Respondent,

vs.

PHILIP P. McGIMPSEY, as Trustee of the JJM
Special Needs Trust, and JOLENE McGIMPSEY,

Third-Party Defendants- Appellants

Supreme Court Docket No.
46023-2018

Ada County District Court
No. CV01-17-20492

RESPONDENT'S BRIEF

Appeal from the Fourth Judicial District, Ada County, Idaho
Honorable Steven H. Hippler, Presiding

Philip P. McGimpsey
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Eagle, ID 83616
Philmcg2112@gmail.com

Pro Se- Appellant
Supreme Court Docket No. 46023

Jolene McGimpsey
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Eagle, ID 83616

Pro Se- Third-Party Defendant/Appellant
Supreme Court Docket No. 46024

Philip P. McGimpsey, as Trustee of the
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Pro Se- Third-Party Defendant/Appellant

Trust Appeal not proceeding by Order
Dated July 27, 2018 in
Supreme Court Docket No. 46112

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I. STATEMENT OF THE CASE

This case arrives on appeal from the district court's grant of summary judgment to defendant/counterclaimant/respondent D&L Ventures, Inc., ("D&L") in a suit brought by plaintiff/counter-defendant Philip P. McGimpsey ("McGimpsey"). McGimpsey filed suit against D&L and against David B. Asher claiming that D&L and Asher breached a buy-sell agreement to convey real property to McGimpsey.¹ *See generally*, R., p. 14-22. The Buy-Sell Agreement, dated June 26, 2017 ("Buy-Sell Agreement"), relates to real property owned by D&L, commonly known as 539 W. Oakhampton Dr., Eagle, Idaho (the "Residence"). R., p. 24-31. By Answer and Counterclaim filed December 21, 2017, D&L denied Plaintiff's claim and counterclaimed for (1) declaratory judgment that D&L did not breach the buy-sell agreement; (2) breach of contract against the purported buyers of the Residence, McGimpsey and McGimpsey as the Trustee of the JJM Special Needs Trust (the "Trust")²; (3) breach of the covenant of good faith and fair dealing as to the terms of the Buy-Sell Agreement; (4) action to quiet title and for declaratory judgment that McGimpsey, the Trust, and Jolene McGimpsey (Philip's wife) have no right, title, or interest in and to the Residence; (5) ejectment and restitution of property related to McGimpsey and Jolene McGimpsey's unlawful detainer of the Residence to D&L and for judgment equal to the fair rental value of the Residence from September 14, 2017, through the

¹ McGimpsey and the Trust are both parties to the Buy-Sell Agreement. The Trust, however, was not a party to Plaintiff's Complaint. *See generally*, R., p. 14-22. D&L named McGimpsey as Trustee of the Trust because the Trust was listed as a party to the Buy-Sell Agreement. Judgment was entered in favor of D&L upon its claim for Declaratory relief, *i.e.*, that D&L had the legal ability to convey the Residence and that it did not breach the Buy-Sell Agreement.

² The Trust did not appear in the action. Thus, the District Court entered its Order Entering Default Against Third-Party Defendant, Philip P. McGimpsey as Trustee of the JJM Special Needs Trust on February 21, 2018.

date of eviction in the amount of \$2,400 per month, plus fines and fees as provided by the Buy-Sell Agreement. R., p. 60-72.

On February 26, 2018, D&L filed its motion for summary judgment seeking entry of judgment as a matter of law decreeing that D&L was entitled to judgment as to all claims asserted. Following a hearing held on April 10, 2018, the district court correctly ruled that D&L's non-registration with the Idaho Secretary of State did not affect its ability to sell the Residence or the validity of the Buy-Sell Agreement, and thus granted summary judgment to D&L that D&L had the legal ability to convey the Residence to McGimpsey and the Trust. R., p. 340. Consequently, because D&L did not breach the Buy-Sell Agreement simply by failing to be registered with the Idaho Secretary of State at the time of the execution of the Buy-Sell Agreement. *Id.* The district court also correctly ruled that D&L established that McGimpsey breached the Buy-Sell Agreement by failing to close on the Residence and that McGimpsey failed to establish that his breach was excused by D&L's alleged inability to convey marketable title. Upon D&L's claim for breach of the covenant of good faith and fair dealing, the district court ruled that, in light of the relief awarded pursuant to the breach of contract claim, the implied covenant claim was moot. The district court also correctly perceived that no adverse claim was asserted by McGimpsey or the Trust in opposition to the motion for summary judgment upon the claim for quiet title and thus, the claim was moot. Finally, the district court correctly ruled that McGimpsey and Jolene McGimpsey continued to reside in the Residence, without paying rent, since the failed closing, and that D&L was entitled to possession of the

Residence, together with restitution for the fair rental value of the Residence in the amount of \$2,400.00 per month as set forth in the parties' Buy-Sell Agreement.

McGimpsey now appeals. Jolene McGimpsey has joined in McGimpsey's opening brief on appeal, particularly with respect to the restitution claim. McGimpsey as Trustee of the Trust filed a notice of appeal on June 19, 2018, but did not join in McGimpsey's opening brief on appeal. Accordingly, D&L requests that any appeal by McGimpsey as Trustee of the Trust be dismissed on its face.

II. STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

D&L is the owner of the Residence located at 539 W. Oakhampton Drive, Eagle, Idaho. D&L is a Nevada corporation. R., p. 134, ¶ 1. The sole shareholders of D&L are David Asher and Georgina Lori Asher. *Id.* D&L registered with the Idaho Secretary of State as a Nevada corporation on October 17, 2017, and filed all required tax returns and other obligations. R., p. 62, ¶ 8; *see also* D&L response to Request for Admission Nos. 29 and 32, attached as Exhibit 1 to Plaintiff's Summary Judgment Supporting Brief, R., p. 233.

Effective June 26, 2017, McGimpsey and McGimpsey as Trustee of the Trust entered into the Buy-Sell Agreement with D&L for the purchase of the Residence. R., p. 135, ¶6, 140-145. Under the Buy-Sell Agreement, the parties agreed to a purchase price of \$485,000.00 with \$5,000.00 to be paid as earnest money and the remainder to be paid at closing. R., p. 140-145. Pursuant to Paragraph 3 of the Buy-Sell Agreement, closing was to occur on or before September 13, 2017. *Id.* at p. 140, ¶3. For a period of approximately three years prior to the Closing, McGimpsey and his wife, Jolene McGimpsey, were tenants of the Residence. R., p. 135, ¶ 8.

Pursuant to Paragraph 6 of the Buy-Sell Agreement, McGimpsey and Jolene McGimpsey were to pay D&L rent on the Residence in the sum of \$2,400.00 per month, and, if payment was made after the 4th of the month, then a \$100.00 late fee plus \$10.00 per day for every day payment was late. R., p. 141, ¶ 6. The Buy-Sell Agreement further stated:

If Buyer fails to complete the purchase, or under any of the options or contingencies granted herein, terminates this agreement, then Buyer agrees to vacate the Property by 11:59 PM on the last day of the month in which the purchase deal fails to consummate, or is terminated.

R., p. 141, ¶ 6.

The Buy-Sell Agreement also provided that if McGimpsey failed to consummate the transaction for any reason other than those allowed by the Buy-Sell Agreement, D&L could declare the Buy-Sell Agreement void and could retain McGimpsey's earnest money. R., p. 143, ¶ 14.

The Buy-Sell Agreement was made contingent upon McGimpsey's receipt and approval of the preliminary title commitment. R., p. 142, ¶ 9. At closing, D&L agreed to convey the Residence by warranty deed. R., p. 142, ¶ 10.

D&L was ready, willing and able to close the transaction on the day of closing and was prepared to execute a warranty deed and all other closing documents. R., p. 135, ¶ 10. On September 13, 2017, the Closing date, Asher contacted the title company, TitleOne to see whether McGimpsey had signed the closing documents and delivered the funds. R., p. 136, ¶ 11. Asher was informed that none of this had occurred and that McGimpsey had not appeared, executed and delivered any documents, or communicated on such day that he was going to

appear. R., p. 136, ¶ 11. Despite failing to consummate the transaction, McGimpsey and Jolene McGimpsey remained in the Residence and only paid rent through September, 2017. No rent, late charges, or daily late fees were paid after September, 2017, through the date of eviction. R., p. 136, ¶ 13, 16.

On November 3, 2017, McGimpsey filed his Complaint for breach of the Buy-Sell Agreement. R., p. 14-51.³ On December 21, 2017, D&L filed its Verified Answer, Counterclaim and Third-Party Complaint against McGimpsey, McGimpsey as Trustee of the Trust, and Jolene McGimpsey.⁴ R., p. 60-79. D&L was granted an Order of Default against McGimpsey as the Trustee of the Trust on February 21, 2018. D&L subsequently brought a motion for summary judgment. R., p. 122-125. McGimpsey opposed D&L's motion for summary judgment, filed a motion to reschedule the hearing upon D&L's motion for summary judgment, and filed his own motion for summary judgment. R., p. 167-169 (motion to reschedule summary judgment hearing date and Amended Motion to Reschedule Summary Judgment Hearing Date at R., p. 185-187); R., p. 201-204 (Plaintiff's Motion for Summary Judgment); R., p. 204-206 (Plaintiff's Summary Judgment Opposition Brief/Response); R., p. 207-224 (Plaintiff's Summary Judgment Supporting Brief).

³ David Asher was not a party to the Buy-Sell Agreement and McGimpsey did not set forth a claim against him individually. Thus, as noted by the district court, it is unclear why he was named as a party. *See e.g.*, R., p. 359, FN. 1.

⁴ Jolene McGimpsey was not a party to the Buy-Sell Agreement but she initialed the provision regarding payment of rent and signed the Buy-Sell Agreement as "Lessee." *See e.g.*, R., p. 335, R., pp. 141, 144.

After briefing and oral argument upon D&L's Motion for Summary Judgment, held April 10, 2018, McGimpsey filed his Notice of Summary Judgment Hearing [R. p. 297] and Rule 56 Motion to Reconcile Record on Summary Judgment. R., p. 304-306.

On April 25, 2018, the district court issued a written Memorandum Decision and Order on Motion for Summary Judgment re: Counterclaims and 56(d) Motion. R., p. 333-348. In his decision, Judge Hippler determined that: (1) D&L's non-registration did not affect its ability to sell the Residence or the validity of the Buy-Sell Agreement; (2) D&L had the legal ability to convey the Residence to McGimpsey and the Trust and consequently D&L did not breach the Buy-Sell Agreement simply by failing to be registered with the Idaho Secretary of State at the time of the execution of the Buy-Sell Agreement; (3) McGimpsey breached the Buy-Sell Agreement by failing to close on the Residence and that McGimpsey failed to establish that his breach was excused by D&L's alleged inability to convey marketable title; (4) in light of the relief warranted pursuant to the breach of contract claim, D&L's implied covenant claim was moot; (5) that there was no claim to title adverse to D&L's claim for quiet title and thus the claim was moot; and finally (6) that McGimpsey and Jolene McGimpsey continued to reside in the Residence, without paying rent, since the failed closing, and that D&L was entitled to possession of the Residence, together with restitution for the fair rental value of the Residence in the amount of \$2,400.00 per month as set forth in the parties' Buy-Sell Agreement. R., p. 333-348. Upon McGimpsey's motion for additional time, the district court found that the information sought by McGimpsey's Rule 56(d) request would not aid in defeating the claims of D&L and consequently denied the motion. R., p. 333-348.

Following the district court's decision granting summary judgment to D&L, McGimpsey filed a document entitled Supplemental Summary Judgment Supporting Brief. R., p. 349-357. On May 7, 2018, the district court thus entered its Order re: Judgment and Vacating Summary Judgment Hearing. R., p. 358-362. Therein, Judge Hippler determined that "in responding to D&L's motion for summary judgment, McGimpsey simply referred the Court to the memorandum in support of his summary judgment motion. Thus, all the pending claims were effectively placed at issue for purposes of D&L's summary judgment motion." R., p. 359. The district court reiterated his summary judgment findings and decision before noting that the judgment proposed by D&L included a provision dismissing McGimpsey's claims with prejudice. R., p. 360. The district court then acknowledged that McGimpsey's Supplemental Summary Judgment Brief raised a defense based upon Rule 8(6)(6). Therein, McGimpsey claimed that D&L's failure to properly deny certain allegations in the Complaint resulted in admissions, thereby creating a question of fact as to whether D&L breached the Buy-Sell Agreement. The district court disagreed and held that McGimpsey's "reliance on procedural rules to avoid judgment in this matter is misplaced." R., p. 361. In support, the district court held that Rule 8(b)(3), I.R.C.P., allows a party to generally deny allegations of a pleading except those specifically admitted. R., p. 361. Paragraph 1 of D&L's Answer contained such a denial and thus, there was no claim set forth in the Complaint that was not addressed by the court's prior Decision and Order. Consequently, the district court reasoned that the practical effect of his prior decision was the dismissal of McGimpsey's Complaint and that Judgment in favor of D&L and Asher was warranted. R., p. 361. For these reasons, the district court vacated the

hearing upon Plaintiff's own motion for summary judgment. *Id.* The Court's Judgment followed on May 7, 2018.

D&L filed its Motion for Attorney's Fees and Costs on May 10, 2018. *R.*, p. 366-382. McGimpsey filed his Notice of Appeal from the Judgment on May 11, 2018. At the same time, Plaintiff filed his Rule 59(e) and Rule 60(b) Motions [*R.*, p. 400-403, supporting brief at *R.*, p. 404-418], together with Plaintiff's Rule 62(b) Motion and Brief [*R.*, p. 419-424]. McGimpsey filed his Rule 54(d)(5) Motion to Disallow Costs and Attorney Fees on May 21, 2018 [*R.*, p. 431-437], followed by Defendants' Objection and Response to Plaintiff's 59(e) and 60(b) Motions [*R.*, p. 438-440] and also Plaintiff's 62(b) Motion on May 24, 2018 [*R.* p., 441-444]. On the day the 14-day stay provided to McGimpsey by virtue of Idaho Appellate Rule 13(a) was set to expire, Third-Party Defendant Jolene McGimpsey filed her own Notice of Appeal from the district court's judgment on May 25, 2018. *R.*, p. 445-449. D&L's Reply Memorandum in Support of Motion for Attorney Fees and Costs followed on May 30, 2018. *R.*, p. 463-469. A hearing upon the above-referenced post-judgment motions was held on June 1, 2018. *See e.g.*, *R.*, p. 470-473. Following the hearing, Plaintiff submitted his Post-Hearing Rule 59(e), Rule 60(b)(6), and Rule 54(d)(5) Brief. *R.*, p. 474-482. As with expiration of the automatic 14-day stay provided to Jolene McGimpsey by virtue of Idaho Appellate Rule 13(a), Third-Party Defendant McGimpsey, as Trustee of the Trust, filed his [Third] Notice of Appeal from the district court's judgment on June 19, 2018. *R.*, p. 486-490.

On July 3, 2018, the district court entered his Order on Motion for Relief from Judgment and Stay. *R.*, p. 491-496. Therein, following six-pages of reasoned analysis of Plaintiff's claims,

the district court correctly held “McGimpsey’s allegations of error are entirely lacking in foundation. As such, his motion under IRCP 59(e) and IRCP 60(b)(6) is denied, thereby rendering his motion for a stay under IRCP 62(b) moot.” R., p. 485.

On July 24, 2018, the district court entered his Order on Attorney Fees and Costs, granting D&L an award of costs, but not attorney’s fees. R., p. 508-514. An Amended Judgment followed on July 24, 2018. R., p. 515-518. A Second Amended Judgment issued on September 7, 2018, [R., p. 579-581], following a Motion to Amend Amended Judgment filed by D&L on August 2, 2018. In primary part, the Motion to Amend Amended Judgment was filed to account for additional restitution occasioned by the McGimpseys’ three notices of appeal and the automatic stay instituted thereon. R., p. 523-532, Affidavit of Kimbell D. Gourley in Support, R., p. 533-542. McGimpsey’s Rule 59(e)-Rule 60(b) Opposition Brief followed on August 15, 2018. R., p. 554-559.

On September 7, 2018, the district court entered his Order on Motion to Amend Amended Judgment, granting D&L’s Motion. R, p. 573-578. Therein, the district court reasoned:

Following the entry of judgment, the McGimpseys refused to vacate the premises. Philip McGimpsey filed a notice of appeal on May 11, 2018, thereby obtaining a 14-day stay. The day the stay expired, Jolene McGimpsey filed a notice of appeal, thus extending the stay until June 8, 2018. After the expiration of the second stay, the McGimpseys still did not vacate. Instead, on June 19, 2019 [sic s/be 2018] the JJM Special Needs Trust filed a notice of appeal, despite having been defaulted and not represented by counsel. The McGimpseys finally vacated on June 29, 2018.

...

The judgment –which was issued on May 7, 2018- only ordered restitution for unpaid rent through April 30, 2018 as opposed to the date of eviction, which is what D&L requested in its pleadings. The correct course would have been to reserve the entry of judgment on the restitution amount until after eviction had been accomplished, thereby avoiding the very situation presented here. Rule 59(e) allows the Court to correct the error post-judgment. The evidence establishes that the McGimpseys did not vacate the premises until June 29, 2018. As such, D&L is entitled to additional restitution for the period of time between May 1, 2018 and June 29, 2018, which D&L has calculated to be \$4720.

R., p. 575-576. The Second Amended Judgment issued the same day, September 7, 2018. R., p. 579-581.

III. RESTATEMENT OF THE ISSUES

1. Whether the district court correctly granted summary judgment in favor of D&L.
2. Whether the district court correctly dismissed McGimpsey's Complaint.
3. Whether the district court correctly awarded restitution to D&L.
4. Whether D&L is entitled to an award of costs and attorney fees on appeal pursuant to Idaho Code § 12-121.⁵

IV. STANDARD OF REVIEW

⁵ McGimpsey's statement of issues on appeal is disjointed and does not logically follow the standard of review that guides this Court's resolution of the issues raised and decided by the district court. Distilled to their essence, McGimpsey's issues on appeal are:

1. Whether the district court erred in its *sua sponte* decision to vacate the hearing upon Plaintiff's motion for summary judgment;
2. Whether the district court deprived Plaintiff of his right to a jury trial upon the claim alleged in Plaintiff's Complaint;
3. Whether the Judgment is valid pursuant to Rule 54 and 58; and finally,
4. Whether the district court erred in awarding restitution damages to D&L.

McGimpsey's statement of issues on appeal does not address, nor does it specifically challenge, the factual or legal reasoning of the district court in granting summary judgment to D&L. Rather, McGimpsey repeatedly challenges the district court's post-judgment decisions, of which there were several, to deny McGimpsey the relief sought by McGimpsey's Rule 59(e) and Rule 60(b) Motions.

An Idaho appellate court reviewing a ruling on summary judgment employs the same standard as the district court below. *Erland v. Nationwide Ins. Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001). Under Idaho Rule of Civil Procedure 56(c), summary judgment is proper “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled a judgment as a matter of law.” Idaho R. Civ. P. 56(c). In order to demonstrate a genuine issue of material fact, the party opposing the motion must present more than a conclusory assertion that an issue of fact exists. *Allstate Ins. Co. v. Mocaby*, 133 Idaho 593, 596, 990 P.2d 1204, 1207 (1999). Instead, the party opposing summary judgment must respond to the motion with specific facts showing there is a general issue for trial. *Id.*; see also Idaho R. Civ. P. 56(e) (“[A]n adverse party may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986). Moreover, the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *E.g., Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992).

Where the evidence reveals no disputed issues of material fact, then only a question of law remains, the Supreme Court exercises free review. *JBM, LLC v. Cintorino*, 159 Idaho 772, 367 P.3d 167, 170 (2016) (citations omitted).

V. ARGUMENT

A. District Court Correctly Granted Summary Judgment in This Case Because There Was No Genuine Issue of Material Fact Precluding Entry of Judgment upon D&L's Counterclaims.

In a well-reasoned, logical, and legally sound decision, the district court correctly concluded that D&L had the legal ability to convey the property via warranty deed to McGimpsey and the Trust and that D&L did not breach the Buy-Sell Agreement simply by failing to be registered with the Idaho Secretary of State. As recognized by the district court, foreign entities are governed by the Idaho Uniform Business Code set forth in Chapter 21, Title 30 of the Idaho Code. Idaho Code § 30-21-502 states, in pertinent part,

(a) A foreign filing entity or foreign limited liability partnership may not do business in this state until it registers with the secretary of state under this chapter.

(b) A foreign filing entity or foreign limited liability partnership doing business in this state may not maintain an action or proceeding in this state unless it is registered to do business in this state.

(c) The failure of a foreign filing entity or foreign limited liability partnership to register to do business in this state does not impair the validity of a contract or act of the foreign filing entity or foreign limited liability partnership or preclude it from defending an action or proceeding in this state.

...

I.C. § 30-21-502. As reiterated by the Court in *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011):

The interpretation of a statute “must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.” *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (citations

omitted). “We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.” *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

Id., at 893, 265 P.3d at 506.

The district court properly analyzed the application of Idaho Code § 30-21-502(b) to conclude that D&L was entitled to the relief it sought in this case. R., p. 336-339. The district court’s reliance upon *JBM, LLC v. Cintorino*, 159 Idaho at ___, 367 P.3d at 172 to support this finding was well-placed. See R., p. 338. In *JBM*, a limited liability company brought suit to recover upon a business transaction involving the assignment of a promissory note by an unregistered foreign entity. *JBM*, 159 Idaho at ___ 367 P.3d at 172. The district court dismissed the complaint, finding that although the company obtained a certificate of authority prior to bringing suit, it had not obtained the certificate at the time of the transaction. *Id.*, 159 Idaho at ___ 367 P.3d at 171. On appeal, the Court reversed, holding that “while IABNA prohibits an entity in violation from filing suit in Idaho, it does not invalidate contracts entered into by that entity.” *Id.*, (citing *Nowels v. Ketchersid Music, Inc.*, 80 Idaho 486, 491, 333 P.2d 869, 871 (1958)). Thus, the *JBM* Court held:

JBM Company's alleged violations of IABNA and IULLCA have no effect on its ability to assign the promissory note to McAdams, LLC. Additionally, the alleged violations do not affect the validity or enforceability of the promissory note and personal guarantees. JBM Company's alleged violations of IABNA and IULLCA are not defenses to the validity or the enforceability of the rights assigned to McAdams, LLC. Rather, if JBM Company was in violation of Idaho Code section 30-6-808(1) or 53-509, it would lack capacity to file suit in the state until the violation was cured. *Nowels*, 80 Idaho at 491-92, 333 P.2d at 871.

Id., 159 Idaho at ___, 367 P.3d at 172 (emphasis added).

In his opening brief, McGimpsey asserts that Idaho Code § 30-21-502 applies to prohibit D&L from conveying marketable title to the Residence because D&L lacked access to Idaho Courts and thus could not have honored any warranties of a statutory warranty deed. Appellant's Opening Brief, p. 15-17. Thus, McGimpsey argues that D&L was legally incapable of performing the Buy-Sell Agreement. These arguments are misplaced and are not supported by a plain reading of Idaho Code § 30-21-502.

As correctly recognized by the district court, it is undisputed that D&L was an unregistered foreign entity at the time it purchased the Residence in 2013, leased the Residence to the McGimpseys from 2014-2017, and executed the Buy-Sell Agreement in June, 2017. R., p. 337. It was also undisputed, however, that D&L was registered with the Idaho Secretary of State when it filed its Counterclaim in December, 2017. R., p. 337. Thus, as correctly held by the district court, nothing in Idaho Code § 30-21-502 prevented D&L from maintaining its Counterclaims once it "cured" its alleged violation of Idaho Code § 30-21-502(a) when it registered with the Idaho Secretary of State in October, 2017. R., p. 338. Nothing in Idaho Code § 30-21-502 invalidated the Buy-Sell Agreement between McGimpsey, the Trust and D&L. D&L had the legal ability to convey the property to McGimpsey and the Trust and did not breach the Buy-Sell simply by failing to be registered with the Idaho Secretary of State at the time of the execution of the Buy-Sell Agreement. The district court correctly granted summary judgment on D&L's declaratory judgment claim.

McGimpsey next relies upon hypothetical examples to posit that he was excused from performance of the Buy-Sell Agreement because he, as a reasonably prudent buyer, was excused

from proceeding to closing due to the fact that D&L was unregistered as of September 13, 2017. Although unclear, this argument appears to relate to the district court's grant of summary judgment upon D&L's claim for breach of contract against McGimpsey and the Trust (Count Two). Upon this claim, the district court found that it was undisputed that McGimpsey and the Trust refused to complete the purchase. R., p. 341. The district court's finding is supported by the evidentiary record, namely, the uncontroverted Affidavit of David B. Asher in Support of Counterclaimant/Third-Party Plaintiff's Motion for Summary Judgment, ¶¶ 10 and 11.

McGimpsey's argument as to what a "reasonably prudent buyer" would do as a result of D&L's registration status is made without any citation to any facts or legal authority that would support such an argument. Appellant's Opening Brief, p. 17-18. A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct.App.1997). To be clear, McGimpsey did not submit a single affidavit, nor did he supply any admissible evidence to support his theories in this case. *See generally*, Record. Rather, the record before the district court and before this Court establishes that McGimpsey did not appear at the closing and did not complete his obligation to tender funds to close the transaction on September 13, 2017. D&L submitted evidence to establish that it was prepared to close on the transaction and to convey the Residence to McGimpsey pursuant to the Buy-Sell Agreement.

McGimpsey now complains that the district court's decision does not expressly decide whether his breach was "material" or "merely incidental" to the June 26, 2017 Buy-Sell Agreement or whether D&L's failure to attend the closing was a "like kind breach." These arguments were not raised and/or were not supported by cogent argument or authority before the district court and are

not briefed on this appeal. *See e.g.*, R., p. 412. A party waives an issue on appeal if either argument or authority is lacking. *Powell*, 130 Idaho at 128, 937 P.2d at 440 (Ct.App.1997).

The materiality argument was first raised in McGimpsey's Supplemental Summary Judgment Brief, R., p. 349-354 at 353, with no analysis or factual support. The materiality argument was next raised by Plaintiff's Rule 59(e) and Rule 60(b) Motions, R., p. 400-418, at 412, again with no analysis or factual support. The district court, in its discretion, refused these arguments, stating:

simply because the issues of breach and its materiality are questions of fact does not preclude summary judgment where – as here – the material facts are determined to be undisputed and only one reasonable inference can be drawn therefrom. ... In opposing summary judgment, McGimpsey failed to raise any genuine dispute as to the facts relevant to breach and materiality. Thus, the Court was justified in entering judgment as a matter of law.

Order on Motion for Relief from Judgment and Stay, R., p. 495. The district court was within its discretion to refuse to consider McGimpsey's argument that was unsupported by law or fact and McGimpsey has not urged, on appeal, any cognizable basis to find an abuse of discretion. Namely, no citation is made to any evidentiary record or legal authority that would support a finding that McGimpsey's failure to appear at the closing, tender funds, or sign closing documents would be "merely incidental" to the Buy-Sell Agreement. Moreover, the reliance upon a "like kind breach" by D&L for its failure to attend the closing was not raised below. The evidence presented to the district court established that D&L was ready, willing, and able to close the transaction. McGimpsey presented no contrary evidence.

McGimpsey's repeated reliance upon D&L's ability to convey the property pursuant to a

warranty deed do not raise any genuine issue of material fact where McGimpsey failed to establish, by way of admissible evidence and citations to legal authority, an affirmative defense to D&L's counterclaim for breach of the Buy-Sell Agreement.

B. The District Court Properly Dismissed McGimpsey's Complaint.

In a section commencing mid-way through the brief, entitled "Defendants' Procedural Breaches of Contract," McGimpsey argues that the district court erred in dismissing "Count Two" of Plaintiff's Complaint. Appellant's Opening Brief, p. 23. Plaintiff's Complaint contains a single cause of action for breach of contract labeled as Count One. Plaintiff's prayer for relief, however, requests declaratory relief that D&L acted in violation of Idaho Code § 30-21-502 (paragraphs 1 and 2), for a finding that D&L breached the Buy-Sell Agreement (paragraph 3); for specific performance of the Buy-Sell Agreement (paragraph 4), an alternative claim for money damages due to D&L's breach of the Buy-Sell Agreement (paragraph 5), and finally, for attorney fees and costs (paragraph 6). As properly held by the district court, McGimpsey's allegations/claims were resolved by the district court's determination that D&L was legally capable of transferring the property and maintaining its counterclaims and that D&L did not breach the Buy-Sell Agreement. McGimpsey has failed to produce cogent authority or analysis to support a finding that the district court erred in its grant of summary judgment to Respondent. Rather, McGimpsey advances a collateral attack upon the district court's decision by arguing that McGimpsey's claim/prayer for relief was not squarely addressed in the procedural manner McGimpsey envisioned would occur. McGimpsey previously raised constitutional and procedural challenges to the district court's judgment by way of post-judgment motion practice which motions were addressed and rejected. See

R., p. 358-362 (Order re Judgment and Vacating Summary Judgment Hearing); R., p. 491-496 (Order on Motion for Relief from Judgment and Stay); R., p. 573-578 (Order on Motion to Amend Amended Judgment).

Although McGimpsey's claims were fully briefed in support of McGimpsey's own motion for summary judgment, McGimpsey contends now, as he did before the district court in post-Judgment pleadings, that he was deprived of due process in the district court's incomplete consideration of McGimpsey's arguments. Following entry of summary judgment, McGimpsey filed his Rule 59(e) and Rule 60(b) Motions wherein McGimpsey asserted that the judgment wrongfully deprived McGimpsey of his constitutional right to a jury trial upon his breach of contract claim, that the judgment deprived McGimpsey of the fundamental opportunity to be heard, and that the judgment was not valid. R., p. 400-403. In summary, McGimpsey simply argued that he was deprived of an opportunity to be heard upon his motion for summary judgment. *See generally*, R., p. 404-418. McGimpsey further asserts that had he been permitted to be heard, he would have "explained why it was impossible for any foreign corporation doing business in Ada County in violation of I.C. Section 30-21-502(a) to legally convey real property by a statutory Warranty Deed." R., p. 415. The district court, in a reasoned and legally sound Order on Motion for Relief from Judgment and Stay addressed and rejected each of arguments advanced by McGimpsey in his Rule 59(e) and Rule 60(b) motions. As held by the district court:

McGimpsey's arguments are not persuasive. First, he conveniently ignores the fact- at least in this motion – that the affirmative defense he raised in attempting to defeat D&L's summary judgment motion was simply a restatement of his breach of contract claim – that D&L Breached the Buy-Sell first because it could not convey marketable title due to its unregistered

status. (FN2 – In his brief in opposition to D&L’s motion for fees and costs, McGimpsey acknowledged the parties’ claims were “mirror images” of each other and, therefore, if his pursuit of claims against D&L was frivolous, then so was D&L’s pursuit of claims against him. See Brief ISO Pl’s Rule 54(d)(5) Motion, p. 9. In this motion, by contrast, McGimpsey refuses to recognize this fact.) In their pleadings, the parties each advanced opposite sides of the same claims. In fact, in responding to D&L’s summary judgment motion, McGimpsey simply referred to the memorandum in support of his own summary judgment motion on his claims. (FN3– Given that it was McGimpsey who purposefully intertwined his summary judgment into D&L’s summary judgment motion – thus compelling the Court to consider both in rendering a decision – McGimpsey can hardly be heard to complain that the Court denied him of his constitutional rights by entering judgment prior to hearing his summary judgment.) In rejecting McGimpsey’s affirmative defense and concluding that, despite being unregistered, D&L had the legal ability to convey the property via warranty deed absent an outstanding assessment of income tax, the Court effectively barred McGimpsey’s claims as well. The Judgment Order highlighted this practical result, which was a result advanced by D&L at the summary judgment hearing. The Court did not err procedurally or substantively by entering the Judgment Order. Further, McGimpsey’s pending motion to compel merely sought the same information at issue in his IRCP 56(d) motion, which this Court specifically denied in its order on the summary judgment motion. Thus, even if this Court allowed the motion to compel to proceed, the information sought would have had no effect on the Court’s summary judgment rulings. (FN4 – omitted).

R., p. 491-496, at p. 493-494. The district court continued:

If McGimpsey believes the Court somehow erred by entering the Judgment Order and Judgment without allowing him to fully present his three pending motions, it was his burden to show the Court – by presentation of facts or law – that the motions were meritorious and how they would have affected the Court’s ultimate rulings in the case. He has not. He does not challenge the Court’s legal conclusion that an unregistered foreign company doing business in Idaho could convey marketable title despite being unregistered unless and until income tax has been assessed against the business by federal or state taxing authority, thereby subjecting the business’s real property to a potential tax lien. He does not challenge the Court’s observation that there was no evidence in the record that D&L had been assessed with income tax prior to the time of closing set forth in the Buy-Sell. He does not challenge

the denial of his IRCP 56(d) motion or otherwise argue his discovery requests would have unearthed evidence of such tax assessments. McGimpsey has presented this Court with nothing that would entitle him to relief from the Judgment.

Finally, simply because the issues of breach and its materiality are questions of fact does not preclude summary judgment where – as here – the material facts are determined to be undisputed and only one reasonable inference can be drawn therefrom. ... In opposing summary judgment, McGimpsey failed to raise any genuine dispute as to the facts relevant to breach and materiality. Thus, the Court was justified in entering judgment as a matter of law.

R., p. 494-495.

McGimpsey's present appeal brief is a restatement of his prior Rule 59(e) and Rule 60(b) motion which motion was considered and properly denied by the district court. McGimpsey does not expressly appeal the district court's Order on Motion for Relief from Judgment and Stay. Rather, McGimpsey acknowledges that a "Rule 59(e) motion is considered to be discretionary." Appellant's Opening Brief, p. 29. Instead, McGimpsey goes on to re-argue the constitutionality of the district court's Judgment. *Id.*, at p. 29-33. McGimpsey further argues that the district court "tainted the regular order of this case by bolting from the starting gate with an incomplete April 25, 2018 Memorandum Decision and Order ... viewed against the backdrop of a constitutional guaranty of due process and an opportunity to be heard, Plaintiff's three Rule 56 related and pending Motion(s) should have been entitled to their judicial due." *Id.*, at p. 32-33. To re-state the findings of the district court:

If McGimpsey believe the Court somehow erred by entering the Judgment Order and Judgment without allowing him to fully present his three pending motions, it was his burden to show the Court – by presentation of facts or law – that the motions were meritorious and how they would have affected the Court's ultimate rulings in the case. He has not.

R., p. 494-495. As with the proceedings before the district court, McGimpsey does not now adduce and evidence or fact that would support his present claim that the district court's grant of summary judgment and entry of Judgment "was an abuse of discretion, inappropriate, [or] clear error." Appellant's Opening Brief, p. 33. A party waives an issue on appeal if either argument or authority is lacking. *Powell*, 130 Idaho at 128, 937 P.2d at 440.

Next, and woven into McGimpsey's argument of judicial activism (below), McGimpsey suggests that the district court simply failed to "grasp the black letter principles of real estate law at issue" because the district court did not understand that the "truly litigable claim for the requested jury's determination was the Defendants' breach of contract caused by their failure or inability to deliver *marketable* title." Appellant's Opening Brief, p. 35. This argument is without merit. McGimpsey's claim that D&L could not legally convey real property by a statutory Warranty Deed was raised, but not supported by law or fact, and was therefore denied. *See* R., p. 491-496, at p. 493-494 (quoted above). McGimpsey gives this Court no additional authority or analysis that would support a finding that the district court erred as a matter of law or fact in its grant of summary judgment and dismissal of McGimpsey's Complaint.

C. McGimpsey's Claim that the District Court's Order re Judgment was in Clear Error is Unsupported.

McGimpsey's next argument, that the district court's May 7, 2018 Order re Judgment and Vacating Summary Judgment Hearing was clear error, it unsupported in law and in fact. McGimpsey opens this section of his brief by asserting that the district court was itself a party. McGimpsey appears to raise an issue of judicial bias or judicial advocacy but does not support any

such claim with cogent authority or facts. “To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal.” *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003) (citation omitted); *See also Johnson v. McPhee*, 147 Idaho 455, 469, 210 P.3d 563, 577 (Ct. App. 2009) (“Johnson makes a general argument that the district court was biased against him. However, because Johnson did not move to disqualify the district judge, he may not raise this issue on appeal. (citations omitted)). McGimpsey current criticism of judicial activism is both misguided and unsupported.

D. McGimpsey has Failed to Articulate a Legal or Factual Basis to Support a Claim that the Judgment is Invalid.

McGimpsey’s assertion that the May 7, 2018 Judgment is Invalid lacks evidentiary and legal support. *See* Appellant’s Opening Brief, p. 37. In raising this challenge, McGimpsey does not question the validity of the current, effective Second Amended Judgment, entered September 7, 2018. No appeal has been taken from the Second Amended Judgment. Consequently, McGimpsey’s claim of error with respect to the May 7, 2018 Judgment should be rejected.

E. The District Court Properly Awarded D&L Restitution.

McGimpsey’s final issue on appeal challenges the district court’s award of restitution to D&L. McGimpsey invokes principles of judicial estoppel to argue that D&L previously agreed that it was not seeking money “damages.” Appellant’s Opening Brief, p. 38. McGimpsey does

not accurately cite to the Transcript, nor does he state a cogent theory of relief.⁶ A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct.App.1997). Furthermore, the decision of whether to award restitution is discretionary with the trial court and McGimpsey has failed to demonstrate that the court abused that discretion. *See e.g., Krepik v. Tippett*, 109 Idaho 696, 701, 710 P.2d 606, 611 (Ct. App. 1985) (holding that the district court's determination of fair rental value was not clearly erroneous).

On August 15, 2018, McGimpsey filed his Rule 59(e) and Rule 60(b) Opposition Brief wherein McGimpsey argued that D&L was not entitled entry of an amended judgment to include additional restitution because D&L waived any such claim. R., p. 554-559. McGimpsey did not, however, previously challenge or raise the award of restitution made pursuant to May 7, 2018 Judgment or the Amended Judgment issued July 24, 2018.

In the Order on Motion to Amend Amended Judgment, the district court rejected McGimpsey's claim of judicial estoppel, finding:

In responding to D&L's motion under Rule 59(e), the McGimpseys take the opportunity to challenge D&L's entitlement to all damages. Namely, they argue that D&L is judicially estopped from seeking any damages in this case because D&L allegedly conceded at the summary judgment hearing that it did not incur damages. Not only is the McGimpseys' argument procedurally flawed (FN4 – The McGimpseys have no motion to reconsider pending before the Court), it is based on a remarkably selective and disingenuous reading of the hearing transcript. D&L conceded at the summary judgment that it did not incur damages as a result of the breach of contract, which was based on Philip McGimpsey and

⁶ McGimpsey's citation to the Transcript, p. 8, L. 23-25, p. 9, L. 1-13 relates to argument upon the application of Idaho Code § 30-21-505. More accurately cited, D&L's claim to restitution is addressed at Tr., p. 6, ll. 21-15; p. 8, ll. 16-20; p. 11, l. 3 – p. 12, l. 21.

the Trust's failure to execute the closing documents for the same of the home. D&L never conceded that it lacked damages for the restitution claim; in fact, D&L submitted an affidavit by David Asher attesting to the reasonableness of the monthly lease amount of \$2400. Unpaid rent through eviction was an item of damage sought by D&L from the beginning of the suit and was never waived. As such, the McGimpsey's judicial estoppel argument is unsupportable. Other than the judicial estoppel argument, the McGimpseys do not offer any reason why the judgment should not be amended to reflect the additional two months they remained at the residence without paying rent.

R., p. 576. Even assuming McGimpsey had followed the correct procedural process to challenge the underlying restitution award, the district court's reasoning and decision denying McGimpsey's challenge to additional restitution is legally and factually sound. As noted by the district court, D&L specifically prayed for restitution and ejectment and D&L did not waive any such claim during these proceedings. McGimpsey's claim of error in the award of restitution should thus be rejected in its entirety.

F. D&L is Entitled to An Award of Attorney Fees on Appeal Pursuant to I.C. § 12-121.

D&L was awarded its costs by the district court. No appeal has been taken from the Order on Fees and Costs or from that portion of the Second Amended Judgment awarding D&L its costs. D&L now seeks entry of an award of costs and attorney fees on appeal pursuant to Idaho Code § 12-121. "An award of attorney fees may be granted under I.C. § 12-121 and I.A.R. 41 to the prevailing party and such an award is appropriate when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Island Woods Homeowners Ass'n v. McGimpsey*, No. 35363, 2010 WL 9585678, at *9 (Idaho Ct. App. Mar. 24, 2010) (citing *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776

(Ct.App.1995)). See also *Island Woods Homeowners Ass'n, Inc. v. Mc Gimpsey*, No. 39698, 2012 WL 9495933, at *9 (Idaho Ct. App. Oct. 16, 2012).

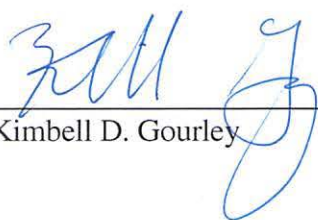
McGimpsey seeks to re-litigate the same claims he previously raised without success in the district court. As the district court previously found, repeatedly, McGimpsey's claims as to the validity of the Judgment were without merit. McGimpsey offers no new or cogent authority to the contrary upon this appeal. An award of costs and attorney fees pursuant to Idaho Code § 12-121 and I.A.R. 41 is thus warranted.

VI. CONCLUSION

For the above reasons, D&L respectfully requests that the Court uphold the decision of the district court granting summary judgment in D&L's favor and dismissing McGimpsey's Complaint. D&L further requests that the Court award D&L attorney fees on appeal pursuant to Idaho Code § 12-121.

DATED this 20th day of December, 2018.

Jones ♦ Gledhill ♦ Fuhrman ♦ Gourley, P.A.

By: 

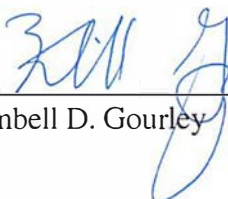
Kimbell D. Gourley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of December, 2018, a true and correct copy of the above and foregoing document was forwarded addressed as follows:

Philip P. McGimpsey
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Eagle, ID 83616

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