

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 53126

|                                   |   |                          |
|-----------------------------------|---|--------------------------|
| DALE JOHNSON and ROSE             | ) |                          |
| JOHNSON, Husband and Wife,        | ) | Filed: October 9, 2026   |
|                                   | ) |                          |
| Plaintiffs-Appellants,            | ) | Melanie Gagnepain, Clerk |
|                                   | ) |                          |
| v.                                | ) | THIS IS AN UNPUBLISHED   |
|                                   | ) | OPINION AND SHALL NOT    |
| STEWART TITLE GUARANTY CO.,       | ) | BE CITED AS AUTHORITY    |
|                                   | ) |                          |
| Defendant-Respondent,             | ) |                          |
|                                   | ) |                          |
| and                               | ) |                          |
|                                   | ) |                          |
| LENNAR MORTGAGE, LLC; LOW VA      | ) |                          |
| RATES, LLC; SANDPOINT TITLE       | ) |                          |
| INSURANCE, INC.; VILLAGE          | ) |                          |
| CAPITAL & INVESTMENT, LLC; and    | ) |                          |
| DAVID CASSEL, Engineer Agent; and | ) |                          |
| Unknown Does 1-50, inclusively,   | ) |                          |
|                                   | ) |                          |
| Defendants.                       | ) |                          |

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Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Susie D. Jensen, District Judge.

Judgment granting summary judgment, affirmed.

Dale Johnson and Rose Johnson, Athol, pro se appellants.

Brassey Crawford, PLLC; Tyler H. Neill, Boise, for respondent.

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FLEMING, Judge

Dale Johnson and Rose Johnson (collectively “the Johnsons”) appeal from the district court’s judgment granting summary judgment in favor of Stewart Title Guaranty Company (Stewart Title) on the Johnsons’ claims for breach of contract and request for declaratory judgment. For the reasons stated below, we affirm.

## **I.**

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, the Johnsons entered into a contract of sale with Federal Home Loan Mortgage Corporation (Freddie Mac) to purchase a 5.14-acre parcel of real property located in Athol, Idaho. Stewart Title was the underwriter for the title insurance policy on the property. Situated on the property was a manufactured home. At the time of purchase, the contract of sale contained an addendum for the manufactured home that was signed by the Johnsons and Stewart Lender Services, Inc. on behalf of Freddie Mac. The addendum contained several clauses, including, as relevant here:

1. Purchaser acknowledges that a manufactured home, identified as a Double-Wide, Serial Number(s) HUD IDA212218IDA212219Mfg S (the "Home"), is located on the Property.
2. Purchaser agrees and acknowledges that Seller has been unable to obtain title to the Home, and that evidence of title and title insurance, including an [American Land Title Association (ALTA)]-7 Endorsement, may not be available nor issued on the Home. Notwithstanding the foregoing, Purchaser is still desirous of purchasing the Property.
3. Notwithstanding any other provision of the Contract of Sale, including Addendum #1 or any other addenda thereto, Purchaser acknowledges that the sale is not contingent on an inspection of the Home by Purchaser. Purchaser acknowledges the Purchaser wants to purchase the Property without an inspection of the Home.
4. Purchaser agrees to indemnify, hold harmless and release Seller from any claims or demands of any person or persons arising out of any and all claims and causes of action arising out of the ownership and titling of the Home.
5. Purchaser, on Purchaser's behalf and on behalf of any and all subsequent heirs, successors or assigns, accepts the Home in "as is" condition and without evidence of title and hereby irrevocably and forever releases and discharges Seller and its trustees, officers, directors, employees, agents, representatives and attorneys from any and all claims, losses, causes of action and liabilities of any kind (including attorney's fees), including but not limited to tort claims, arising out of or relating in any way to any issues with the Home and ownership and titling of the Home. Purchaser agrees that Seller will no longer be responsible for, involved in, or liable in any way with any issues with ownership or title to the Home and is released from all liability in connection therewith.
6. Purchaser acknowledges and represents that Purchaser has carefully read this Addendum, understands it, signs it voluntarily, and has had the opportunity to seek the advice of an attorney prior to its execution.

In 2017, the Johnsons refinanced their mortgage on the property with Low VA Rates, LLC. Then, in 2020, the Johnsons applied for a home equity line of credit (HELOC). The HELOC was denied after the Johnsons were unable to provide photographic proof of United States Department of Housing and Urban Development certification labels (HUD labels) on the exterior of their manufactured home. The Johnsons contacted the manufacturer of the home and requested records regarding the home. The manufacturer's records revealed that the home had been wrecked during transport in 2004 and, as a result, the home was decertified and the HUD labels were removed. The Johnsons then discovered that when the prior owner of the manufactured home converted the home from personal property to real property, the prior owner used a legally invalid Manufacturer's Certificate of Origin (MCO) and the previously decertified HUD labels as part of the Statement of Intent to Declare Manufactured Home as Real Property (Statement of Intent) that was recorded with the county in 2006.

After the Johnsons discovered the problem, they filed a claim for coverage under the title insurance policy with Stewart Title. The Johnsons believed they were entitled to damages under the policy because the title to their manufactured home was fraudulent based on the legally invalid MCO and decertified HUD labels that were recorded with the 2006 Statement of Intent. The claim was denied by Stewart Title. In the denial letter, Stewart Title explained:

Coverage in the Policy is subject to the Exclusions from Coverage, the Exceptions from coverage contained in Schedule B, and the Conditions. In order for the claim to be covered it must trigger one of the Policy's Covered Risks. Title to the manufactured home does not fall under any of the cited, articulated Covered Risks. Please note, a manufactured home is initially titled with the [Department of Motor Vehicles (DMV)], as it is considered personal property until it is formally eliminated and converted to real property by way of a formal process required by the Idaho code. A Statement of Intent to Declare Manufactured Home as Real Property is recorded in the real property records of the County in which the property is located and taken to the DMV to have the title eliminated. Once that occurs, the manufactured home is considered real property. The specific manufactured home title is eliminated.

Stewart Title explained their understanding of the Johnsons' claim was that the manufactured home title was fraudulent. Stewart Title also explained that challenges to the manufactured home title while it was still titled with the DMV as personal property were not covered under the policy because the policy insured title "*to the real property*, not any personal property." Stewart Title further explained that the policy "did not insure the manufactured home title, or the accuracy or contents of such." The denial letter additionally pointed the Johnsons to

Schedule B of the policy which contains an exception from coverage for the Statement of Intent recorded in 2006. Stewart Title explained the exception excluded “any loss or damage” with respect to the Statement of Intent and “any of the accompanying information contained therein.”

In May 2023, the Johnsons filed a complaint against Stewart Title and several other defendants involved in the 2012 sale of the property and the 2017 refinance of the Johnsons’ mortgage. The complaint alleged five causes of action: (1) breach of contract; (2) fraud in the concealment; (3) request for declaratory relief; (4) breach of fiduciary duty; and (5) spoliation of evidence.

In June 2023, the Johnsons filed their first amended complaint alleging the same five causes of action listed in their initial complaint. Several defendants filed motions to dismiss. Following the hearings on those motions, all defendants other than Stewart Title, Sandpoint Title Insurance, Inc. (Sandpoint Title), and David Cassel were dismissed from the case. In October 2023, Stewart Title filed a motion to dismiss. Following a hearing on the motion to dismiss, the district court dismissed the Johnsons’ spoliation of evidence claim but took the remaining claims under advisement and indicated it would issue a written decision. In its written decision, the district court denied Stewart Title’s motion to dismiss, in part, as to the breach of contract and request for declaratory relief claims, but granted the motion, in part, as to the fraud in the concealment and breach of fiduciary duty claims and dismissed those claims without prejudice.

While the motion to dismiss was under advisement, the Johnsons then filed a motion for leave to file a second amended complaint; a copy of the proposed second amended complaint was attached to their motion. In the proposed second amended complaint, the Johnsons named Lennar Mortgage, LLC, Stewart Title, Low VA Rates, LLC, Village Capital & Investment, LLC, Sandpoint Title, and Cassel as defendants. The Johnsons alleged: (1) breach of contract against Stewart Title and Sandpoint Title; (2) fraud against Low VA Rates, LLC; (3) fraud against Village Capital & Investment, LLC; (4) fraud against Lennar Mortgage, LLC; (5) request for declaratory relief against Stewart Title and Sandpoint Title; and (6) breach of duty against all named defendants. Following a hearing on the motion to amend, the district court issued a written decision.

In its written decision, the district court denied the Johnsons’ motion to amend as to Village Capital & Investment, LLC, Lennar Mortgage, LLC, and Low VA Rates, LLC but granted the motion as to Stewart Title, Sandpoint Title, and Cassel. However, the district court ordered that

that the Johnsons' second amended complaint include only breach of contract against Stewart Title and Sandpoint Title; request for declaratory relief against Stewart Title and Sandpoint Title; and breach of duty against Cassel.<sup>1</sup>

The Johnsons filed an Idaho Rule of Civil Procedure 60(b) motion, requesting relief from the district court's decision and order denying the Johnsons' motion to amend their complaint. The district court denied the motion for relief following a hearing. The Johnsons then filed a motion to reconsider the order denying their I.R.C.P. 60(b) motion, but later withdrew the motion.

The Johnsons also filed a motion for entry of default against Stewart Title, Sandpoint Title, and Cassel for failure to respond to the second amended complaint. Stewart Title and Sandpoint Title filed memorandums in opposition to the Johnsons' motion for entry of default and noted that the Johnsons failed to actually file and serve their second amended complaint. The district court denied the motion for entry of default and the Johnsons thereafter filed their second amended complaint. Sandpoint Title and Cassel filed separate motions to dismiss the Johnsons' second amended complaint and, following hearings on those motions, the district court granted the motions and dismissed Sandpoint Title and Cassel from the case.

Stewart Title filed a motion for summary judgment and argued that the title insurance policy did not provide affirmative coverage for the manufactured home and that coverage for the manufactured home was further excluded by Schedule B of the policy. Following a hearing, the district court granted Stewart Title's motion for summary judgment with prejudice. The district court found that the Johnsons alleged, and Stewart Title did not contest, that the conversion of the manufactured home from personal property to real property was "illegal or invalid in 2006," and thus, "the manufactured home was 'personal property' at the time of the Johnsons' purchase, and remained as personal property." The district court further found that the Johnsons signed an addendum at the time of purchase acknowledging the seller was not able to obtain title to the manufactured home and that "evidence of title and title insurance, including an ALTA-7 Endorsement, may not be available nor issued on the Home," but that the Johnsons were still desirous of purchasing the property. The district court further found that the plain and unambiguous language of the policy insured title to the real property (the land), not to personal

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<sup>1</sup> As explained below, the Johnsons abandoned their fraud claim against Stewart Title in their motion for leave to file the second amended complaint.

property, and as such, “there is no coverage for [the Johnsons’] claims.” The district court also found that, even if the manufactured home was legally declared real property, the policy does not cover the Johnsons’ claims because the policy “explicitly and unambiguously excludes coverage for damages arising from the Statement of Intent.” As to the Johnsons’ claim for breach of contract, the district court found there was no genuine dispute as to any material fact and that, because there is no coverage under the policy for the Johnsons’ claims, Stewart Title did not breach its contract with the Johnsons by denying their claim for coverage.

The Johnsons filed a motion for reconsideration, which the district court denied. The Johnsons then filed a motion for declaratory decision requesting the district court to declare whether their manufactured home is real property or personal property. The district court denied the motion. The district court then entered a final judgment dismissing all remaining claims in the second amended complaint. The Johnsons appeal.

## II.

### STANDARD OF REVIEW

On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). 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 to a judgment as a matter of law. I.R.C.P. 56(c). The movant has the burden of showing that no genuine issues of material fact exist. *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788 (2010). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party’s own evidence or by a review of all the nonmoving party’s evidence and the contention that such proof of an element is lacking. *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(d). *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). Disputed facts

and reasonable inferences are construed in favor of the nonmoving party. *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010). This Court freely reviews issues of law. *Cole v. Kunzler*, 115 Idaho 552, 555, 768 P.2d 815, 818 (Ct. App. 1989).

### III.

#### ANALYSIS

On appeal, the Johnsons argue that the district court failed to properly apply the I.R.C.P. 56 summary judgment standard because material facts were in dispute. Stewart Title argues the record is clear that the district court properly identified and applied the correct summary judgment standard in determining that no question of material facts existed as to whether Stewart Title breached its contract with the Johnsons. We hold that the record, when reviewed as a whole, supports the district court's conclusion that Stewart Title demonstrated there was no genuine issue of material fact regarding the Johnsons' breach of contract claim and request for declaratory relief. The burden of proof then shifted to the Johnsons to present facts that would create a genuine issue of material fact on those remaining claims (rather than on previously dismissed claims). The Johnsons failed to do so.

"The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment." *Finholt v. Cresto*, 143 Idaho 894, 896-97, 155 P.3d 695, 697-98 (2007). "A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Id.* at 897, 155 P.3d at 698. "A statement is conclusory if it does not contain supporting evidence for its assertion." *Eldridge v. West*, 166 Idaho 303, 311, 458 P.3d 172, 180 (2020). A party may not rely on its pleadings nor merely assert that there are some facts which might or will support its legal theory, instead the party must establish the existence of specific facts by deposition, affidavit, or otherwise. *Berian v. Berberian*, 168 Idaho 394, 401, 483 P.3d 937, 944 (2020).

When an action will be tried by bench trial, the trial court is entitled to arrive at the most probable inferences based upon the undisputed evidence before it and grant summary judgment despite the possibility of conflicting inferences. *Wolford v. Montee*, 161 Idaho 432, 437, 387 P.3d 100, 105 (2016). On appeal, we exercise free review over the entire record that was before the trial court to determine whether either side was entitled to summary judgment, as well as review the inferences drawn by the trial court to determine whether the record can support those inferences. *Id.*

### A. Breach of Contract

Generally, to prevail on a breach of contract claim, a party must show: (1) a contract exists; (2) a breach of the contract; (3) the breach caused damages; and (4) the amount of damages. *Path to Health, LLP v. Long*, 161 Idaho 50, 57, 383 P.3d 1220, 1227 (2016). The Johnsons claim that Stewart Title breached its contractual duties by not paying the Johnsons “the full \$144,900 due [to] them under their contract of Policy and the intention of the law of contracts to the terms interconnecting Insurers ‘duty.’” Stewart Title argues that the policy insured title only to the real property (the land) and for the manufactured home to be considered real property, a valid Statement of Intent must be recorded. Because the prior owner of the property used a legally invalid Statement of Intent, Stewart Title argues the manufactured home remained personal property and, therefore, was not insured under the policy.

The district court found that the policy was not ambiguous. Because the policy was not ambiguous, the district court found two bases to conclude that the Johnsons failed to establish a genuine issue of material fact on their breach of contract claim. First, the district court found that, because the manufactured home was not converted from personal property to real property due to the invalid 2006 Statement of Intent, the manufactured home remained personal property and was not covered under the policy. Second, the district court found that even if the manufactured home was converted to real property, any claims related to the Statement of Intent and the manufactured home title were explicitly excluded from coverage under the policy.

“When interpreting insurance policies, this Court applies the general rules of contract law subject to certain special canons of construction.” *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 540, 66 P.3d 242, 244 (2003).

Beginning with the plain language of the insurance policy, the first step is to determine whether or not there is an ambiguity. Determining whether a contract is ambiguous is a question of law upon which this Court exercises free review. Where the policy language is clear and unambiguous, coverage must be determined, as a matter of law, according to the plain meaning of the words used. Where the policy is reasonably subject to differing interpretations, the language is ambiguous and its meaning is a question of fact. To determine the meaning of an ambiguous contract, the trier of fact must determine what a reasonable person would have understood the language to mean and the words used must be construed given their ordinary meaning.

*Id.* at 540-41, 66 P.3d at 244-45 (internal citations omitted).

The Johnsons argue that the policy is ambiguous because the “MOBX01 Exception language” was required and was intentionally omitted from the policy. From a review of the record, the “MOBX01 Exception” refers to alternative language from an underwriting manual. The Johnsons do not provide any authority for their assertion that the exemption is required to be included in a title insurance policy. 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).

The title insurance policy was issued to Dale Johnson and describes the “land” covered by the policy as: “Lot 1 of CHAMPION ACRES, according to the plat thereof, recorded in Book 7 of Plats, Page 267, records of Bonner County, Idaho.” The policy defines “land,” in pertinent part, as: “The land described in Schedule A, and affixed improvements that by law constitute real property.”

Idaho Code § 63-304 defines when a manufactured home constitutes real property:

(1) A manufactured home may constitute real property if the running gear is removed and:

(a) If the manufactured home becomes permanently affixed to a foundation:

(i) On land which is owned or being purchased by the owner or purchaser of said manufactured home; or

(ii) On land which is being leased by the owner or purchaser of the manufactured home if such home is being financed in accordance with the guidelines of the federal home loan mortgage corporation, the federal national mortgage association, the United States department of agriculture or any other entity or agency that requires, as part of its financing program, similar restrictions on ownership and actions affecting title and possession, provided that if a county takes a tax deed to the manufactured home the county shall not be liable for any delinquent or ongoing leases, rents or any other liabilities owed due to the placement of such property; and

(b) If the owner or purchaser of a manufactured home records with the county recorder in the county in which the manufactured home will be situated a statement of intent to declare the manufactured home as real property.

The district court found that the manufactured home was not converted from personal property to real property in 2006 because of the “legally invalid” Statement of Intent. As a result, the manufactured home was personal property at the time of the Johnsons’ purchase and remained personal property. The district court reasoned that the policy was for the land and because the manufactured home was never converted to real property, it did not become a part of the land’s legal description, and therefore the manufactured home was not covered by the policy.

The district court relied on *Wright v. Miller*, 629 S.W.3d 813 (Ky. Ct. App. 2021) for guidance and concluded that if the requirements to convert the manufactured home from personal property to real property were not followed, the manufactured home would remain personal property and would not be included in the title to the land. The district court also noted that, at the time of purchase, the Johnsons signed an addendum acknowledging that the seller could not obtain title to the manufactured home and that “evidence of title and title insurance . . . may not be available nor issued” on the manufactured home. The district court concluded that because the policy covered real property, and not personal property, there was no coverage for the Johnsons’ claims.

The Johnsons argue, however, that the policy affirmatively insures against fraud and forgery, pointing to the “Covered Risks” clause. That argument misapprehends what the policy insures. The Covered Risks insure the title to the “Land,” which the policy defines as the land described in Schedule A, “and affixed improvements that by law constitute real property.” The fraud-and-forgery Covered Risks protect against defects in the title to that land. The Johnsons do not identify any such defect in the title to the land itself. Rather, their claim concerns the manufactured home and the 2006 Statement of Intent by which the prior owner attempted to convert the home to real property. Because a manufactured home is personal property unless validly converted under I.C. § 63-304, and because the Johnsons themselves allege the conversion was invalid and that the home was never legally real property, their argument fails. Thus, there is no affirmative coverage for the loss the Johnsons’ claim.

Regardless of whether the manufactured home was or was not legally converted from personal property to real property, the claim is explicitly excluded from coverage under the policy. Schedule B of the policy contains exceptions from coverage and provides, in relevant part:

This policy does not insure against loss or damage and the Company will not pay costs, attorneys’ fees or expenses that arise by reason of:

. . . .

12. STATEMENT OF INTENT TO DECLARE MANUFACTURED HOME AS REAL PROPERTY, RECORDED SEPTEMBER 6, 2006, AS INSTRUMENT NO. 712445, RECORDS OF BONNER COUNTY, IDAHO.

Throughout their briefing, the Johnsons emphasize that they paid all premiums due under the policy. Unfortunately, the plain and unambiguous language of the policy, which the Johnsons signed and acknowledged they read and understood, provided an explicit exception from coverage under Schedule B “Exception 12.” Under the plain language of the exception, the policy does not

cover any loss or damages that arise from the Statement of Intent filed in 2006. Thus, whether that Statement of Intent included a legally invalid MCO and HUD label is irrelevant because any problems with the Statement of Intent, or its attachments or contents, is specifically excluded under the policy. The exception's "by reason of" language "is broad language that does not inherently limit the kinds of reasons that may trigger an exclusion." *Munden v. Stewart Title Guar. Co.*, 8 F.4th 1040, 1049 (9th Cir. 2021) (applying Idaho law). Thus, the language only requires a causal link between the excepted Statement of Intent and the claimed loss. The Johnsons' entire theory of loss traces to the 2006 Statement of Intent and the invalid documents recorded with it. Their claim therefore arises "by reason of" the very instrument that Exception 12 excepts. Accordingly, the district court did not err in finding there was no coverage under the policy, regardless of whether or not the home was converted from personal property to real property. As a result, there is no genuine issue of material fact regarding the Johnsons' breach of contract claim.

However, the Johnsons continue to argue that Stewart Title's "ambiguous interpretation to exclude the subject property from the contract of insurance, though accepting money for the coverage of the subject property, is a clear and deliberate insurance fraud violation, charging for insurance coverage that Defendant/Respondent never intended to provide." This argument is not correct as the language of the parties' contract is not ambiguous. The district court found that neither the policy nor the Schedule B exclusion were ambiguous, and this Court affirms that finding. The Schedule B exclusion explicitly states that the policy does not cover any expenses that arise out of the Statement of Intent to declare the manufactured home as real property, which is the basis for the Johnsons' breach of contract claim.

The Johnsons also argue that the 2017 ALTA endorsement should have provided coverage under the policy. However, the ALTA endorsement was an additional form of coverage that was not automatically issued with the original title, and instead, was an additional premium requiring additional underwriting. The endorsement was not requested by Dale Johnson in advance of closing when he purchased the property, and the endorsement was not issued to the Johnsons. As evidenced by the addendum, which Dale Johnson signed at closing, there was no ALTA-7

endorsement available or issued on the home. The Johnsons agreed and acknowledged that they understood this to be the case.<sup>2</sup>

We affirm the district court's conclusion that there is no genuine issue of material fact regarding whether Stewart Title breached their contract with the Johnsons. Therefore, the district court did not err in granting summary judgment in favor of Stewart Title as to the breach of contract claim.

## **B. Declaratory Relief**

Next, the Johnsons argue the district court erred by denying their motion for a declaratory decision as to whether their manufactured home is personal property or real property because the Johnsons were "entitled to declaratory relief decision, and have standing to seek such relief as they are the purchasers-current owners of the materially fraud subject property contaminated by unlawful Instrument record."

"As a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* "Courts are precluded from deciding cases which are purely hypothetical or advisory." *ABC Agra, LLC v. Critical Access Group, Inc.*, 156 Idaho 781, 783, 331 P.3d 523, 525 (2014) (internal quotation marks omitted).

In its order denying the Johnsons' motion for declaratory decision, the district court found that the "rights, status, and other legal relations of [the Johnsons] and the Defendants in this case have been resolved." The district court further found that because neither Bonner County nor any of its departments are a party to this case, a "'declaratory decision' regarding whether the manufactured home is real property or personal property, so as to affect the Bonner County Assessor's taxing of said home, does not touch 'the legal relations of parties having adverse legal interests.'" The district court concluded that any "declaratory decision or judgment on this issue would simply be an advisory opinion and would effectuate no relief for the [Johnsons]." We agree. Neither Bonner County, nor any of its departments, were parties to this case, and as such, there

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<sup>2</sup> As referenced above, the addendum explicitly stated: "Purchaser agrees and acknowledges that Seller has been unable to obtain title to the Home, and that evidence of title and title insurance, including an ALTA 7 Endorsement, may not be available nor issued on the Home. Notwithstanding the foregoing, Purchaser is still desirous of purchasing the Property."

were no adverse legal interests before the district court. As a result, any decisions would be “advisory” and inappropriate for the grant of declaratory relief. Therefore, we affirm the district court’s decision denying declaratory judgment.<sup>3</sup>

### **C. Dismissal of Fraud Claim**

Next, the Johnsons argue that the district court erred by dismissing their claim of fraud. The Johnsons assert that the district court previously dismissed, in part, their fraud claims based upon the district court’s “contention” that the statute of limitations had expired. This assertion is false and a direct misrepresentation of the record and the district court’s findings below. The district court specifically concluded:

There would be a question of fact for the jury as to whether the Johnsons exercised due diligence in discovering the facts constituting the alleged fraud. There has been sufficient evidence presented [by the Johnsons] in the First Amended Complaint to leave to the jury the question of when the fraud could have been discovered by due diligence--at the time of purchase in 2012, at the time of the HELOC application in March of 2020, or at some time between March 2020 and May 5, 2020.

While the court is dismissing [the fraud claim] on other grounds, it is appropriate to discuss the statute of limitations in the context of dismissing the claim with or without prejudice. At this time, the court declines to rule on the issue of whether the claim for fraud would be time-barred, rather ruling that if not dismissed, it would be an issue for the jury.

In its dismissal of the Johnsons’ fraud claim against Stewart Title, the district court found that the Johnsons failed to “allege with any degree of particularity facts, which would support the existence of each of the elements of a cause of action for fraud as to [Stewart Title].”

To state an actionable claim for fraud, a plaintiff must allege each of the nine elements of fraud with particularity: (1) a statement or representation of fact; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge about its falsity or ignorance of its truth; (5) the speaker’s intent that there be reliance; (6) the hearer’s ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

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<sup>3</sup> Furthermore, we reiterate that the legal status of the Johnsons’ manufactured home does not change the fact that their claim is not covered for purposes of the determination under the policy in this case because, as discussed above, the basis of their claim is explicitly excluded under Schedule B of the policy. As the district court correctly determined, there was no coverage for the Johnsons’ claim, and therefore Stewart Title did not breach its contract with the Johnsons. The Johnsons are likewise not entitled to declaratory relief against Stewart Title.

*Choice Feed, Inc. v. Montierth*, 168 Idaho 124, 138, 481 P.3d 78, 92 (2021) (internal citation omitted).

Upon reviewing the record, we agree with the district court's conclusion that the Johnsons failed to allege fraud with particularity. The Johnsons fail to identify any false statements or representations of fact made by Stewart Title. The Johnsons also fail to identify any falsity, materiality, Stewart Title's actual knowledge of falsity, or that Stewart Title intended the Johnsons to rely on any statements or representation of false facts by Stewart Title. On appeal, the Johnsons make unsupported, general conclusory fraud statements with no particularity, as they did below, that Stewart Title intentionally entered into a contract (the policy) that it had no intention of honoring.

Additionally, the majority of the Johnsons' argument as to this issue concerns the district court erroneously dismissing the fraud claims, in part, because of the statute of limitations, which the district court did not do. As stated above, the district court found that the Johnsons failed to plead each element of fraud with particularity. Idaho Rule of Civil Procedure 9(b) requires that, when alleging fraud, a party must state, with particularity, the circumstances constituting the fraud. On appeal, the Johnsons have failed to provide citations to the record or other authority demonstrating that the district court's determination was error. A party waives an issue on appeal if either argument or authority is lacking. *Powell*, 130 Idaho at 128, 937 P.2d at 440. As such, the district court did not err in dismissing the Johnsons' claim for fraud against Stewart Title because the Johnsons failed to plead each element of fraud with particularity as required by I.R.C.P. 9(b).

Alternatively, although the Johnsons' fraud claim was dismissed by the district court in its March 6, 2024, memorandum decision and order on Stewart Title's motion to dismiss, the record reflects that the Johnsons previously withdrew their fraud claim against Stewart Title in their motion and memorandum of law for leave of court to file a second amended complaint for damages and demand for jury trial, filed on December 21, 2023. The Johnsons filed their motion to amend prior to the district court's decision on Stewart Title's outstanding motion to dismiss, which had been argued on December 8, 2023.

In its decision granting, in part, the Johnsons' motion to amend, filed on February 22, 2024, the district court observed that the Johnsons' second amended complaint limited the claims asserted against both Stewart Title and Sandpoint Title to breach of contract and declaratory relief, but continued to allege fraud as to other defendants. Thus, in both the Johnsons' proposed second

amended complaint and their second amended complaint filed on March 20, 2024, they alleged only breach of contract and a request for declaratory relief against Stewart Title, while they pled fraud solely against other previously dismissed defendants. “Theories and defenses should be determined by the parties, not the tribunal” and “a party is bound by the theory upon which it tries its case.” *Green v. Green*, 160 Idaho 275, 282, 371 P.3d 329, 336 (2016), abrogated on other grounds by *Aguilar v. Indus. Special Indem. Fund*, 164 Idaho 893, 436 P.3d 1242 (2019).

The Johnsons abandoned any fraud claim against Stewart Title by omitting it from both the proposed and the filed second amended complaint.

#### **D. Recusal of District Court Judge**

A party may move to disqualify a judge from presiding on the grounds of bias. I.R.C.P. 40(b)(1)(D). An affidavit stating distinctly the grounds upon which disqualification is based, and the facts relied upon in support of disqualification, must accompany the motion. I.R.C.P. 40(b)(2). Whatever the source of the alleged bias or prejudice, it must be so extreme as to display clear inability to render fair judgment. *Bach v. Bagley*, 148 Idaho 784, 791-92, 229 P.3d 1146, 1153-54 (2010). Unless there is a demonstration of pervasive bias derived from either an extrajudicial source or facts and events occurring at trial, there is no basis for judicial recusal. *Id.* at 792, 229 P.3d at 1154. The standard for recusal of a judge, based simply on information that the judge has learned in the course of judicial proceedings, is extremely high. *Id.*

The Johnsons argue that the district court erred when it declined to recuse itself from the case. The Johnsons assert recusal was proper because of the judge’s “financial relationship” with one of the previously dismissed parties and that it was reversible error for the judge not to remove herself from the case. The Johnsons fail to support this claim with specific citations to the record or transcript. A party waives an issue on appeal if either argument or authority is lacking. *Powell*, 130 Idaho at 128, 937 P.2d at 440. Furthermore, the only mention of recusal below came in a motion from the Johnsons, after the district court granted summary judgment in Stewart Title’s favor and denied the Johnsons’ motion for reconsideration. The Johnsons never filed a motion to disqualify the district judge for cause. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). Therefore, the Johnsons’ recusal claim fails.

#### **E. Constructive Fraud**

On appeal, the Johnsons ask this Court to allow them to amend their complaint for a third time to include a claim for constructive fraud. In a motion for reconsideration following an order denying the Johnsons' request for relief pursuant to I.R.C.P. 60(b), the Johnsons first raised the issue of "constructive fraud," but only as to their claims against other defendants. In that motion for reconsideration, the Johnsons sought leave to include a claim for constructive fraud against Lennar Mortgage, LLC, Low VA Rates, LLC, and Village Capital & Investment, LLC. However, the Johnsons did not include Stewart Title in that request or otherwise request leave to assert this claim against Stewart Title. Furthermore, the Johnsons withdrew their motion for reconsideration of the order denying their I.R.C.P. 60(b) motion. Moreover, when the Johnsons moved for leave to file a second amended complaint, they likewise did not include a claim for fraud or constructive fraud against Stewart Title. Because the request was never made in the district court, we decline to consider it for the first time on appeal. *Sanchez*, 120 Idaho at 322, 815 P.2d at 1062. Thus, a claim of constructive fraud against Stewart Title is not preserved and will not be considered.<sup>4</sup>

#### **F. Attorney Fees and Costs on Appeal**

Stewart Title requests costs on appeal pursuant to Idaho Appellate Rule 40 and attorney fees on appeal pursuant to I.C. § 12-121. The Johnsons argue in reply that fees are unwarranted because their claims were not frivolous, pointing to the policy's coverage for fraud and forgery, and to a co-defendant's settlement of the case, which they argue are facts that lend credibility to their claims. Although the claims may not have been frivolous as to the co-defendant who settled, such an argument as to Stewart Title and this appeal do not address the Johnsons raising multiple issues that were not preserved below, that were unsupported by cogent argument or authority, or merely invited this Court to reweigh the evidence.

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 finds that the appeal has been brought or defended frivolously, unreasonably, or without foundation. If the appeal merely invites this Court to second-guess the findings of the trial court without providing any new argument or authority demonstrating how the trial court erred, I.C. § 12-121 allows the award of attorney fees.

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<sup>4</sup> Even if the constructive fraud claim was properly preserved against Stewart Title, a motion for reconsideration after the denial of an I.R.C.P. 60(b) motion is not the proper motion to request leave to amend a complaint.

*Kelly v. Kelly*, 171 Idaho 27, 49, 518 P.3d 326, 348 (2022). Costs may be awarded under I.A.R. 40 to the prevailing party. The standard for an award of attorney fees has been met in this case. On appeal, the Johnsons raised multiple issues that were not properly preserved below, were not supported by the record or authority, and/or were merely conclusory statements. Accordingly, Stewart Title is entitled to an award of attorney fees on appeal. Costs on appeal are awarded to Stewart Title as the prevailing party.

#### IV. CONCLUSION

We affirm the district court's judgment granting summary judgment in favor of Stewart Title, the denial of the Johnsons' I.R.C.P. 60(b) motion, and the denial of the Johnsons' motion to reconsider. Costs and attorney fees on appeal are awarded to Stewart Title.<sup>5</sup>

Chief Judge TRIBE and Judge LORELLO, **CONCUR.**

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<sup>5</sup> To the extent that the Johnsons challenge the dismissal of other defendants or the quashing of subpoenas directed at nonparties as raised in their briefing, those matters are not properly before this Court in this appeal.