IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35629

DAVID GIBSON and PATRICIA GIBSON, husband and wife, **Plaintiffs-Appellants,** **and** **STEPHEN GIBSON,** **A Real Party In Interest-Appellant,** **v.** **LYDIA MERRILL and TIMOTHY MERRILL,** **Defendants-Respondents.**	**2010 Unpublished Opinion No. 347** **Filed: February 11, 2010** **Stephen W. Kenyon, Clerk** **THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order granting summary judgment in favor of defendants, affirmed; order awarding costs and attorney fees, affirmed.

David Gibson and Patricia Gibson, Boise, pro se appellants.

Stephen Gibson, Boise, pro se appellant.

Thomas G. Maile, IV, Eagle, for respondents.

MELANSON, Judge

David Gibson, Patricia Gibson, and Stephen Gibson[1] (the Gibsons) appeal from the district court's order granting summary judgment to Lydia Merrill and Timothy Merrill (the

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[1] Stephen Gibson was not a party to the litigation before the district court. While the present appeal was pending, David and Patricia Gibson filed a motion to add Stephen Gibson as a party because he paid them cash to satisfy an earlier judgment for attorney fees in exchange for a one-third interest in the personal property at issue. The Idaho Supreme Court granted their motion by order on July 29, 2009. For ease of reference, we refer to David, Patricia and Stephen

Merrills). Additionally, the Gibsons appeal from the district court's order awarding costs and attorney fees to the Merrills. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

The exhaustive facts of this case were summarized by this Court in *Merrill v. Gibson*, 142 Idaho 692, 693-94, 132 P.3d 449, 450-51 (Ct. App. 2005) (*Merrill II*).

> The course of litigation leading up to this appeal is long and somewhat tortuous. In February 2001, Orson and Lydia Merrill filed an action against David Gibson to quiet title to certain real property. Although the Merrills held legal title to the twenty-acre parcel, Gibson had occupied it since 1991 and, in the intervening years, had used the property for his composting business. By the time the Merrills filed their complaint, Gibson had accumulated a massive amount of compost material and a variety of related equipment and machinery on the property. On April 3, 2002, the district court decided in favor of the Merrills, and on June 6, 2002, ordered Gibson to vacate the premises by July 31, 2002.
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> Gibson appealed the April 3 judgment to the Idaho Supreme Court. Pending that appeal, the district court granted a stay of execution of the June 6 order, thereby allowing Gibson to remain on the premises. As a condition of the stay, the district court ordered Gibson to post a $10,000 bond to be used in the event Gibson lost on appeal and failed to remove his personal property within a reasonable time. On February 27, 2004, the Idaho Supreme Court affirmed the district court's judgment. *Merrill v. Gibson*, 139 Idaho 840, 87 P.3d 949 (2004) [*Merrill I*]. The Supreme Court also deemed Gibson's appeal frivolous and on that basis awarded attorney fees on appeal to the Merrills under Idaho Code § 12-121. *Id.* at 846, 87 P.3d at 955.
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> Following remand, on April 30, 2004, the district court lifted the aforementioned stay. On May 12, 2004, Gibson again moved the district court for a stay of execution-this time pending his petition to the United States Supreme Court for a writ of certiorari. Shortly thereafter, on May 27, 2004, the Merrills moved the district court for an order compelling Gibson to remove his property from their land. In a June 22, 2004 order, the district court impliedly denied Gibson's request for a stay by ordering him to "immediately remove" himself and his personal property from the premises. One week later, on June 29, Gibson filed a motion requesting the district court reconsider its June 22 order. Gibson asserted it would take sixty to ninety days to relocate his equipment and large quantities of compost, and that it was therefore impossible to comply with the district court's order for immediate removal. A hearing to address this matter was held on August 12 and, reasoning that Gibson had already had 104 days since the

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Gibson together as the Gibsons even though Stephen was not involved in the district court action below.

> stay was lifted to remove his personal property, the district court granted him only thirty more days to "completely remove himself and all personal effects and property or forever be barred from entry and/or possession." The written order was dated August 23, 2004.
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> Gibson's thirty days expired on September 12, and on September 16 the district court held another hearing to revisit the matter. As of the hearing, Gibson still had not removed all of his personal property. Consistent with its prior warning, the court thereupon prohibited Gibson from entering the Merrills' property, ordered the Merrills to begin relocating Gibson's remaining personal property to a location designated by Gibson, and directed that the Merrills would be reimbursed from the $10,000 bond. Finally, the court's order specified that either party could schedule another hearing in the event that any of Gibson's personal property remained on the Merrills' land after funds available from the bond had been exhausted by the Merrills' removal efforts. These terms were encompassed in a written order dated September 27, 2004.

In *Merrill II*, David Gibson argued that the district court abused its discretion by establishing a deadline that was too short and then prohibiting him from retrieving his remaining personal property. Gibson contended that the district court's orders, coupled with the Merrills' delay in relocation, amounted to conversion. Gibson also asserted that the district court abused its discretion by applying the bond to the property relocation efforts and that the district court's orders were in contravention of Idaho law. This Court affirmed the district court holding that it had not abused its discretion, Gibson's claims of conversion were absurd, and Gibson had raised certain issues for the first time on appeal. Additionally, this Court awarded costs and attorney fees to the Merrills pursuant to I.C. §§ 12-121 and 12-123, payable by Gibson and his attorney as a sanction under I.A.R. 11 for filing a frivolous appeal for an improper purpose.

After the Idaho Supreme Court denied review in *Merrill II* on June 21, 2006, the Gibsons sent the Merrills a notice and demand letter seeking a return of their personal property dated September 25, 2006. The Merrills never responded to the letter and the Gibsons filed a complaint on August 6, 2007, alleging that the Merrills had wrongfully converted their personally property by failing to remove it from the land in accordance with the district court's prior order. *Merrill I* and *Merrill II* were heard before Judge Williamson. The present case was heard before Judge Wilper, who granted the Merrills' motion for summary judgment. Judge Wilper reasoned that, based on the prior record between these two parties, the Merrills were not wrongfully in possession of the personal property. Additionally, Judge Wilper held that the Merrills' alleged failure to comply with the previous order to remove the personal property was a

matter to be brought before Judge Williamson, because that action was still pending, and any order entered by Judge Wilper could conflict with those orders entered by Judge Williamson. The Gibsons filed a motion for reconsideration, which was denied by the district court. The district court also found that the Gibsons's claim was frivolous, unreasonable, and without foundation, and awarded the Merrills costs and attorney fees pursuant to I.C. § 12-121. The Gibsons appeal.

II.

ANALYSIS

The Gibsons argue that the district court erred by granting the Merrills's motion for summary judgment, by dismissing their claim with prejudice, and by awarding the Merrills costs and attorney fees. The Merrills argue that the Gibsons's appeal should be dismissed for failure to cite to any legal authority. In response, the Gibsons argue that legal citations "only validate the truth, they don't create it." The Gibsons claim that citation to legal authority is often used to mislead courts. Furthermore, the Gibsons contend that they have legal authority, but the facts are so self-evident that "simple reason, logic, and common sense dictate the solution." 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 succeed on appeal, a party must not only present facts, but must provide legal authority supporting the position it advocates. That party must then apply those facts to the legal authority in order to justify a favorable ruling from the appellate court. This is not misleading and does not distort the judicial process. Rather, it promotes stability and furthers a court's capacity to decide cases based upon the law rather than misguided sympathy or prejudice. Accordingly, the Gibsons have waived their issues on appeal, and we do not address them further.

Even were we to address the Gibsons's claims on the merits, they would not be entitled to relief. Judge Wilper held that the matter was ongoing before Judge Williamson. By Judge Williamson's order entered September 24, 2004, the Merrills were instructed to begin removal of the personal property and to be reimbursed from the $10,000 bond posted by the Gibsons on appeal. By that same order, the parties were instructed to re-notice a hearing should any additional money be needed to complete removal. By order of March 16, 2005, Judge Williamson retained jurisdiction to decide in the future whether the Merrills were entitled to additional expenses or damages associated with moving the personal property or cleaning up the

real property. It was thereafter that the Gibsons filed a separate action before Judge Wilper which essentially sought a different outcome. It is within a court's discretion to dismiss a case when another action is pending between the same parties and involving the same subject matter. *See Klaue v. Hern*, 133 Idaho 437, 439-40, 988 P.2d 211, 213-14 (1999). Factors to be considered include judicial economy, minimizing costs and delay to the litigants, prompt and orderly disposition of claims or issues, and avoiding potentially inconsistent judgments. *Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct. App. 1984). Judge Wilper's holding that a ruling from his court could potentially conflict with any orders entered by Judge Williamson's court is supported by the additional proceedings held before Judge Williamson and yet another pending appeal arising as a result. *See Merrill v. Gibson*, Docket No. 36978.

The Merrills argue that they are entitled to attorney fees pursuant to I.C. §§ 12-121 and 12-123, I.R.C.P. 11, and I.A.R. 11.1[2], 40 and 41. An underlying requirement to an award of attorney fees pursuant to these sections is that an appeal be brought or defended frivolously, unreasonably, or without foundation. The Merrills claim that the present appeal was brought frivolously and for an improper purpose. We have concluded that the Gibsons have not shown entitlement to relief on appeal, but this does not make their claims frivolous or signify that they were raised for the sole purpose of harassing the Merrills. Therefore, under these circumstances, we decline to award the Merrills attorney fees on appeal. Costs, however, are granted as a matter of course to the Merrills as the prevailing party. I.A.R. 40.

III.

CONCLUSION

The Gibsons waived their issues on appeal for failure to cite to any legal authority. Accordingly, the district court's order granting summary judgment to the Merrills and the district court's order awarding costs and attorney fees to the Merrills are affirmed. Costs, but not attorney fees, are awarded to the Merrills on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**

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[2] This Court assumes the Merrills intended to request attorney fees pursuant to I.A.R. 11.2.