

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36978

LYDIA MERRILL,	)	2011 Unpublished Opinion No. 468
	)	
Plaintiff-Respondent,	)	Filed: May 11, 2011
	)	
and	)	Stephen W. Kenyon, Clerk
	)	
ORSON MERRILL,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Plaintiff,	)	BE CITED AS AUTHORITY
	)	
v.	)	
	)	
DAVID GIBSON, an individual, and ALL	)	
KNOWN INDIVIDUALS who may claim any	)	
interest in the real property which is the	)	
subject of these proceedings, individually,	)	
jointly and severally,	)	
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
STEPHEN GIBSON,	)	
	)	
Real Party In Interest-Appellant.	)	
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order denying motion for contempt, affirmed.

David Gibson, Boise, pro se appellant.

Stephen Gibson, Boise, pro se appellant.

Thomas G. Maile IV, Eagle, for respondent.

LANSING, Judge

David and Stephen Gibson (the Gibsons) appeal from the district court's order denying their motion to hold Lydia Merrill in contempt for violation of a court order. For the reasons set forth below, we affirm and award attorney fees incurred on appeal to Merrill.

## I.

### FACTS AND PROCEDURE

This is the fourth time that the Gibsons<sup>1</sup> have appealed from orders and judgments regarding their ejection from Merrill's land and issues concerning the Gibsons' personal property that remains on the land. The facts and procedural history of the litigation were summarized 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<sup>2</sup> 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.

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.

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

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<sup>1</sup> David Gibson was the sole plaintiff to the litigation before the district court and on appeal in *Merrill I* and *Merrill II*. David and his wife Patricia Gibson were the named plaintiffs before the district court in *Merrill III*. While the appeal in *Merrill III* was pending, David and Patricia filed a motion to add David's brother Stephen Gibson as a party because he paid them cash they needed 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. For this same reason, Stephen became a party to the instant case at the district court level and in this appeal.

<sup>2</sup> Lydia's husband Orson died in 2001.

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 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.

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 for removal of his property 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 of his property; 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, finding that "Gibson presented no evidence of any sincere effort to comply with the court's deadline and the district court soundly reasoned that allowing Gibson more time would be fruitless." *Id.* at 695, 132 P.3d at 452. We specifically noted that Gibson's claims of conversion were "absurd." We explained, "Far from trying to retain Gibson's property, the record here shows that the Merrills have done nothing but try to get rid of it." *Id.* at 696, 132 P.3d at 453. 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. *Id.* The Idaho Supreme Court denied review in *Merrill II* on June 21, 2006.

On September 25, 2006, David Gibson and his wife Patricia sent the Merrills a demand letter seeking a return of their personal property. The Merrills never responded to the letter, and the Gibsons filed a complaint (*Merrill III*) on August 6, 2007, again alleging that Merrill and her son Tim had wrongfully converted the Gibsons' personal property. The Gibsons contended that the Merrills had failed to comply with the district court's September 2004 written order requiring them to remove all of the Gibsons' personal property from the land and deliver it to the Gibsons at a designated location, and that the Merrills therefore were liable for conversion. *Merrill I* and

*Merrill II* were heard before District Judge Williamson, but *Merrill III* was heard before District 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 liable for conversion because they were not wrongfully in possession of the personal property, and that the Gibsons' assertion otherwise was factually and legally frivolous. Additionally, Judge Wilper held that the Merrills' alleged failure to comply with the September 2004 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 district court also found that the Gibsons' lawsuit was frivolous, unreasonable, and without foundation, and awarded the Merrills costs and attorney fees pursuant to I.C. § 12-121. The Gibsons appealed, and this Court affirmed in an unpublished opinion. *Gibson v. Merrill*, Docket No. 35629 (Ct. App. Feb. 11, 2010.)

While the *Merrill III* appeal was pending, on September 28, 2008, the Gibsons filed, in this longstanding case before Judge Williamson, a "motion for order of contempt and for compensatory damages for conversion" asserting essentially the same two claims they had advanced before Judge Wilper in *Merrill III*. Before trial, Judge Williamson dismissed the Gibsons' conversion "claim" and further held that compensatory damages were not available on a contempt motion. In her written order entered following a contempt trial, Judge Williamson found that shortly after the entry of her September 2004 order, Lydia Merrill's son Tim:

hired heavy equipment and labor to help him in relocating Gibson's property onto the Smith's property about one fourth mile away. Gibson's attorney, V. K. Smith, Jr., had authorized the relocation of the property onto about 500 acres owned by Mr. Smith's mother. Tim spent eight days in the removal with expenses exhausting the \$10,000 cash bond posted. Ms. Merrill applied for reimbursement from the \$10,000 bond which the court granted on March 9, 2005. A substantial amount of the property was relocated. Remaining on the property are numerous rows of compost and miscellaneous items of property, which remains on the property to this day.

In the order, Judge Williamson ruled that Merrill could not be held in contempt because she had not willfully violated a court order. More specifically, the district court held that the written September 2004 order required only that Merrill "commence" moving the property, which she had done to the exhaustion of the bond proceeds, and that the order did not, as contended by the Gibsons, require Merrill to complete removal of all of the property.

The Gibsons appeal.

## II. ANALYSIS

Idaho courts have the constitutional, statutory, and inherent authority to compel obedience to their lawful orders. Idaho Code §§ 1-1603(4), 7-601(5); *In re Weick*, 142 Idaho 275, 278, 127 P.3d 178, 181 (2005); *Marks v. Vehlow*, 105 Idaho 560, 566, 671 P.2d 473, 479 (1983). A court has the authority to hold in contempt any person who willfully disobeys a specific and definite order of the court. *Weick*, 142 Idaho at 280, 127 P.3d at 183. A contempt proceeding is, however, an extraordinary proceeding that should be approached with caution. *Id.* at 281, 127 P.3d at 184. A court is not required to sanction a party found to have violated a court order, and the determination of whether a sanction or penalty should be imposed at all is within the discretion of the trial court. *Steiner v. Gilbert*, 144 Idaho 240, 243, 159 P.3d 877,

880 (2007); *Weick*, 142 Idaho at 278, 127 P.3d at 181; *Smith v. Smith*, 136 Idaho 120, 124, 29 P.3d 956, 960 (Ct. App. 2001). *See also* Idaho Rule of Civil Procedure 75(l). A trial court's exercise of that discretion is beyond the purview of a reviewing court unless it clearly has been abused. *State v. Stadley*, 127 Idaho 203, 208, 899 P.2d 416, 421 (1995).

In their motion to initiate contempt proceedings, the Gibsons contended, among other things, that Merrill willfully, wrongfully, and maliciously refused to deliver to them their personal property in violation of the district court's written September 2004 order. That order, drafted by Merrill's counsel, imposed only one affirmative duty on Merrill--that she "shall forthwith commence removing the Defendant's property to the location stipulated to by the Defendant." It further provided that Merrill was entitled to reimbursement from the \$10,000 bond for expenses incurred and that if this amount was insufficient to cover the cost of removal "either party may re-notice a hearing before the Court to address the issue." In the decision that is now appealed, the district court held that Merrill was not in contempt because she *had* commenced moving the property and that the September 2004 order did not, as contended by the Gibsons, require Merrill to finish moving all of the property, particularly at her own expense.

On appeal, the Gibsons change their tack. They contend that Merrill's counsel deceitfully drafted the September 2004 order, to Merrill's advantage, in a way that was not in accord with the district court's oral pronouncement at the hearing that preceded the written order. The Gibsons assert that the written order omitted the district court's intent, clearly stated at the hearing, that Merrill was to remove and deliver to them *all* of the personal property. Relying on case law from other jurisdictions, they contend that the oral pronouncement controls and, therefore, Merrill was clearly in contempt.

We need not decide whether the oral pronouncement or the written order controls, for even accepting the Gibsons' premise that the oral directive is determinative, their claim of error still fails. In their appellant's brief, the Gibsons quote Judge Williamson's oral statement from the September 2004 hearing as follows:

And, at this point, [David Gibson] is out of it, as far as going out and taking care of his own property to see that it's protected and to see that nothing happens to it and that it's properly removed. He's had plenty of time to do that; he has not done it. So now it's up to them [the Merrills]. They're going to remove it.

The Gibsons argue that "remove" clearly "meant to get everything off the Merrills' real property" and that this was the district court's intent.

The Gibsons have not provided a transcript of the September 2004 hearing in this appeal. The only record we have of Judge Williamson's remarks at that hearing is a quote of her comments that is contained in the district court's order holding that Merrill was not in contempt. The statement that the Gibsons quote is not all that the district court recounted. After quoting the above language from its September 2004 oral ruling, the court quoted its further statement at the same hearing: "Well, the order will only say that they [the Merrills] *have the right* at this point to relocate the property and apply to the court for reimbursement from the \$10,000. That's what the order will say." (Emphasis added.) In its order denying the contempt motion, the district court also said that "the language of the written order [that] required Lydia Merrill to 'commence' or to begin moving the property" was "in keeping with the oral statement of the court [at the September 2004 hearing] that the Merrills could 'start removing it.'"

Thus, Judge Williamson's oral statements at the September 2004 hearing show that she did *not* intend to impose any affirmative duty on Merrill but instead intended only to authorize

and grant her the “right to relocate the property.” Given the words actually used by the judge at that hearing, the ensuing written order, drafted by Merrill’s counsel, was erroneously phrased as possibly imposing a duty on Merrill by directing that she “shall forthwith commence removing the Defendant’s property to the location stipulated to by the Defendant.” In any event, Merrill did not disobey a provision of *either* the district court’s oral pronouncement or the subsequent written order because she did “commence” moving the personal property and continued until the bond proceeds were exhausted. The Gibsons’ contention that the trial court’s oral pronouncement directed Merrill to completely remove all of the property is specious and disingenuous as it is clearly disproved by the record. The district court’s order declining to hold Merrill in contempt is affirmed.

Merrill asks this Court to award attorney fees on appeal pursuant to I.C. §§ 12-121 and 12-123. An award of attorney fees to the prevailing party under I.C. § 12-121 is appropriate if the appellate court concludes that the appeal was brought frivolously, unreasonably, or without foundation in law or fact. *Vanvooren v. Astin*, 141 Idaho 440, 444, 111 P.3d 125, 129 (2005); *Durrant v. Christensen*, 117 Idaho 70, 74, 785 P.2d 634, 638 (1990); *Merrill II*, 142 Idaho at 696, 132 P.3d at 453. That standard is clearly satisfied here as the Gibsons appeal is frivolous and without foundation; their claim of error is based entirely upon a misrepresentation of the record. Therefore, attorney fees for this appeal are granted to Merrill.

### **III.**

#### **CONCLUSION**

The district court’s order is affirmed. Attorney fees are awarded to Merrill and against appellants David and Stephen Gibson, jointly and severally. Costs are granted as a matter of course to Merrill as the prevailing party. I.A.R. 40.

Chief Judge GRATTON and Judge MELANSON **CONCUR.**