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**In the Supreme Court of the State of Idaho**

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NOAH G. HILLEN, in his capacity as Personal  
Representative of the Estate of Victoria H. Smith,

Plaintiff-Respondent,

vs.

DAVID R. GIBSON, an individual, d/b/a BLACK  
DIAMOND COMPOST PRODUCTS,

Defendant-Appellant.

Supreme Court Docket No. 47687-2020

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**RESPONDENT'S BRIEF**

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**Appeal from the District Court of the Fourth Judicial District of  
The State of Idaho, in and for the County of Ada,  
Honorable Steven J. Hippler, Presiding**

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**RESPONDENT'S BRIEF**

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

This is the response brief of Plaintiff-Respondent Noah G. Hillen, in his capacity as the personal representative of the Estate of Victoria H. Smith (“Hillen”). The facts of this appeal are undisputed and established in the pleadings. For example, it is not disputed that Defendant-Appellant David R. Gibson, d/b/a Black Diamond Compost Products (“Gibson”) occupies a portion of Estate-owned property referred to herein as the “Gibson Property”. Nor is it disputed that Gibson does not have Hillen’s permission to possess the same. Consequently, Hillen, on behalf of the Estate, previously demanded that Gibson remove himself and his belongings from the Gibson Property. Gibson refused.

As a result, Hillen filed a complaint, seeking ejectment and other relief. After briefing and oral argument, Judge Hippler correctly concluded that Hillen proved the elements of ejectment. The Court then issued a Judgment (and corresponding Writ of Assistance), ejecting Gibson from the Gibson Property. Judge Hippler also certified the Judgment as final, pursuant to I.R.C.P 54(b). Gibson, through his counsel, Vernon K. Smith, Jr. (“Vernon”), moved the District Court to reconsider/amend the Judgment. The District Court denied the motion and Gibson appealed.

Gibson—but mostly his attorney Vernon—claims the Estate, acting through its personal representative, Hillen, lacks the authority to eject an unwanted party from Estate-owned property. Cutting through Gibson/Vernon’s irrelevant and incorrect facts and points, the disposition of this appeal amounts to a single issue: does Hillen have the authority, as a personal

representative, to eject an unwanted party from Estate property. Hillen does and he asks that this Court AFFIRM.

**B. Course of Proceedings.**

**1. The Estate Case.**

While not strictly relevant to this matter—or necessary to decide it—Hillen offers a brief background regarding how we got where we are currently. Victoria H. Smith (“Victoria”), Vernon’s mother, died in 2013. *Matter of Estate of Smith*, 164 Idaho 457, 463, 432 P.3d 6, 12 (2018). After Victoria’s death, Judge Copsy, who is presiding over Victoria’s estate case (the “Estate Case”): (1) invalidated Victoria’s will—drafted by Vernon—as the product of undue influence; and (2) set aside a series of transactions by which Vernon transferred all of Victoria’s property to himself or entities controlled by him. *Id.* at 465-66, 432 P.3d at 14-15. After issuing these rulings, Judge Copsy appointed Hillen as personal representative of the Estate, and entered a judgment, pursuant to Idaho Rule of Civil Procedure 70(b), which, for present purposes, vested title to the Gibson Property in Hillen. (R. 131<sup>1</sup>). That Judgment is referred to here as the “Rule 70 Judgment”.

Vernon appealed the invalidation of the will, the decision to set aside the property transfers, and the Rule 70 Judgment. *Matter of Estate of Smith, supra*. As part of that appeal, this Court considered “any matters occurring up to and including the post-trial judgment under Rule 70(b).” *Id.* at 466, 432 P.3d at 15 (2018). After such consideration, this Court concluded that “the decisions of the magistrate court are affirmed.” *Id.* at 482, 432 P.3d at 31.

## **2. This Ejectment Action.**

As a part of the administration of the Estate, Hillen sought to remove Gibson from the Gibson Property. In so doing, Hillen initiated this action by filing a complaint and asserting claims for ejectment (Count One), declaratory judgment / quiet title (Count Two), trespass (Count Three), and unjust enrichment (Count Four). Each claim stems from the fact that Gibson refuses to vacate the Gibson Property and has not paid any remuneration for his occupancy (R. 10-13). Gibson filed his Answer on July 5, 2019. (R. 28-52).

## **3. Hillen's Motion for Judgment on the Pleadings.**

Hillen moved for: (1) partial judgment on the pleadings as to Count One for ejectment; (2) entry of a Writ of Assistance to effectuate the Judgment; and (3) certification of the Judgment, if entered, as final under I.R.C.P. 54(b) (Hillen's "Motion"). (R. 53-55). Hillen filed the Motion and corresponding memorandum in support on August 5, 2019. (R. 53-65). In addition, Hillen filed a Declaration in Support of Motion for Partial Judgment on the Pleadings and Motion to Certify Judgment Under I.R.C.P. 54(b) (Hillen's "Declaration") that same day. (R. 66-85). Hillen's Declaration was not filed because there was any dispute from the pleadings as to any material fact, but only to support the need for a Writ of Assistance and/or final certification if Hillen's Motion was granted. (R. 64, n.4).

Gibson opposed the Motion. In his September 12, 2019, response, Gibson raised arguments largely coextensive with the claims raised in his Appellant's Opening Brief to this Court. (R. 86-109); *compare* (R. 86-109) *with* Appellant's Opening Brief. Although not relevant,

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<sup>1</sup> For ease of reading, references to the Clerk's Record on Appeal in this Brief are

Gibson asserts, without support, that Gibson was a boon to the Gibson Property, rather than a burden. (R. 89). Gibson also argues that: (1) this Court had not upheld the Rule 70 Judgment (R. 95-99); (2) Vernon was, and is, the owner of the Gibson Property via his status as an heir (*e.g.* R. 13); and (3) Hillen, as the personal representative of the Estate, lacks the power to eject a tenant from Estate property unless necessary to satisfy an Estate creditor (R. 99-103).

**4. Judge Hippler’s Ruling and Judgment of Ejectment Against Gibson.**

On October 2, 2019, having heard oral argument from the parties, Judge Hippler: (1) granted Hillen’s Motion; (2) issued a Memorandum Decision and Order; and (3) entered a Judgment ejecting Gibson from the Gibson Property (the “Judgment”). (R. 117-127). Judge Hippler also granted Hillen’s request to certify the Judgment as final and issued a Writ of Assistance. (R. 123-124). The next day, Judge Hippler entered an Amended Memorandum Decision and Order Granting Plaintiff’s Motion for Partial Judgment on the Pleadings that was identical to the original decision and order, but included an attachment that had been inadvertently omitted from the original (the “Memorandum Decision”). (R. 129-146, 207).

**5. The Memorandum Decision Invalidated Most of Gibson’s Claims on Appeal.**

Judge Hippler’s Memorandum Decision concludes that the elements of ejectment had been met: (1) Hillen, as the personal representative of the Estate, had sufficient ownership interest to eject Gibson from Estate property; (2) Gibson was in possession of the Gibson Property; and (3) Gibson was refusing to surrender possession of the Gibson Property. (R. 132).

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designated by “R.” followed by the page numbers cited with preceding zeros eliminated.



Judge Hippler also directly addressed many of the claims presented by Gibson on this appeal. For example, Judge Hippler pointed out that, while Estate property does generally devolve to the heirs upon the decedent's death, that rule is subject to limitations, including the personal representative's "right [and obligation] to . . . take possession or control of . . . the decedent's property." (R. 133 (quoting I.C. § 15-3-709)). Judge Hippler also noted that the personal representative of an estate has the same power over estate property as that of an absolute owner. (R. 133 (quoting I.C. § 15-3-711)). Finally, Judge Hippler recognized that Gibson's pleadings were a thinly veiled collateral attack on the Rule 70 Judgment and that Gibson was "essentially request[ing] that the [District] Court act as an appellate court and overrule the [Rule 70] Judgment in the other case, something it cannot do." (R. 135).

**6. Gibson Unsuccessfully Challenges the Judgment a Second Time.**

**a. Gibson's Post-Judgment Motion.**

Following entry of the Judgment and Memorandum Decision, Gibson moved to alter or amend the Judgment on October 14, 2019. (R. 147-150). Gibson then filed a Memorandum in Support of Motion to Reconsider Court Decision and Motion to Amend Judgment Under Rule 59(e), I.R.C.P. on November 29, 2019. This was more than one month after Gibson's original motion. (R. 188-206).

Gibson's primary contention was that it was not clear whether the Judgment and Memorandum Decision established that Hillen had a valid claim of "absolute and sole ownership of the estate property[,]" (*e.g.* R. 195) and that the practical effect of the Judgment and Memorandum Decision was that Vernon and the other heir would be divested of their interests in

the Estate. (*e.g.* R. 192, 196-197). Vernon was concerned that the Judgment for ejectment of a party unrelated to the Estate case would somehow preclude Vernon, as an heir, from challenging Hillen's actions as the personal representative or from pursuing a claim for breach of fiduciary duty against Hillen. (R. 196-197).

**b. Judge Hippler Denies Gibson's Motion to Reconsider and/or to Alter or Amend the Judgment.**

Before the time came for Hillen to respond to Gibson's motion, Judge Hippler denied the same, and *sua sponte* cancelled the hearing, pursuant to I.R.C.P. 7(b)(3)(F). (R. 207). In his Memorandum Decision and Order on Defendant's Motion to Alter or Amend the Judgment and Motion to Disallow Costs and Attorney Fees, Judge Hippler correctly recognized the "procedural oddity" with the way Gibson brought his motion to Alter or Amend the Judgment, noting that it appeared Gibson was trying to back door a motion to reconsider into his brief. (R. 207, n. 2). Despite the oddity, Judge Hippler considered Gibson's motion under all rules that could apply (R. 207, n. 2) and denied the same. To avoid confusion, Judge Hippler's Memorandum Decision and Order on Defendant's Motion to Alter or Amend the Judgment and Motion to Disallow Costs and Attorney Fees will be referred to in this brief as the "Reconsideration Denial".

Judge Hippler concluded that Gibson's motion presented a "false-bifurcation" and noted that Hillen's statutory power over title to Estate property—the same an absolute owner would have—created at least an ownership interest in the Gibson Property sufficient to eject Gibson therefrom. (R. 208-209). This power, Judge Hippler continued, did not extinguish

Vernon's interest in the Estate<sup>2</sup> or prevent Vernon from bringing a claim for breach of fiduciary duty against Hillen in the Estate Case. (R. 208-209). "Those issues were not presented to the [District] Court, nor could they have been decided, as Vernon and the other heirs would have been necessary parties and had not been joined." (R. 209). The same is true now, when Vernon, under the guise of representing Gibson, reiterates those same claims.

Judge Hippler concluded by noting that, "[b]eyond asking for clarification, Gibson presents no real argument as to why the Court's order was incorrect." (R. 209). Instead, Gibson was merely "once again collaterally attack[ing] the Judgment," and his motion to alter or amend or reconsider was denied for the same reasons laid out in the Memorandum Decision. (R. 209). Gibson's arguments "had no merit[.]" (R. 210).

Gibson filed his Notice of Appeal on December 31, 2019 (R. 212-252), and submitted his Appellant's Opening Brief on June 1, 2020 ("Gibson's Opening Brief"). Gibson's Opening Brief raises no arguments that were not directly and correctly considered and dismissed by Judge Hippler below. Gibson's arguments still have no merit.

### **C. Statement of Facts.**

The facts necessary for this Court to uphold Judge Hippler's Judgment and Memorandum Decision are simple and undisputed. Prior to Victoria's death, she owned real property, including the Gibson Property. (R. 130). Following Victoria's death, Judge Copsey, in the Estate Case, appointed Hillen as the personal representative to the Estate and issued the Rule

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<sup>2</sup> Even if it had, Vernon was not a party to this case and Gibson did not have standing to bring this claim.

70 Judgment, which, in part, conveyed the Gibson Property to Hillen in his status as the personal representative. (R. 131). Gibson currently occupies the Gibson Property. (R. 130). Despite demand from Hillen to vacate, Gibson refuses to surrender possession of the Gibson Property. (R. 131).

That's it. Those are the only facts relevant to Judge Hippler's Judgment and are all that need be considered by this Court. Despite this, Gibson goes on for page after page, asserting "facts" that are irrelevant or untrue or both. Hillen asks that this Court ignore the Statement of Facts in Gibson's Opening Brief, which comprises little more than *ad-hominem* gripes with Hillen. Gibson's Opening Brief at 8-13. The facts described in Gibson's Statement of Facts are not supported by the record and the entire section is devoid of even a single record citation. Gibson's Opening Brief at 8-13.

## **II. SUMMARY OF ARGUMENT**

The only true issue to be considered by this Court is whether Hillen, as the personal representative of the Estate, has sufficient power over Estate property to eject Gibson therefrom. Hillen does have that power as correctly concluded by Judge Hippler. Gibson's arguments to the contrary reflect an incorrect understanding of Idaho's Uniform Probate Code. Judge Hippler's Memorandum Decision, Judgment, and Reconsideration Denial were correct and Gibson has not shown otherwise.

### III. STANDARDS OF REVIEW

#### A. Motions for Judgment on the Pleadings.

The standard of review applicable to lower courts' rulings on motions for judgment on the pleadings is the same as that for motions for summary judgment. *Trimble v. Engelking*, 130 Idaho 300, 302, 939 P.2d 1379, 1381 (1997) (“Thus, the standard of review applicable to lower courts' rulings on motions for summary judgment also applies to motions for judgment on the pleadings.”). “[W]here the record reveals no issues of disputed fact, the question is one of law . . . over which this Court exercises free review.” *Id.*

#### B. Motions to Reconsider.

“[W]hen reviewing a trial court's decision to grant or deny a motion for reconsideration, this Court utilizes the same standard of review used by the lower court in deciding the motion for reconsideration.” *Westover v. Idaho Ctys. Risk Mgmt. Program*, 164 Idaho 385, 391, 430 P.3d 1284, 1290 (2018) (quoting *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012)).

#### C. Motions to Alter or Amend Under Rule 59(e) of the Idaho Rules of Civil Procedure.

A motion to alter or amend brought under Rule 59(e) rests within the sound discretion of the trial court. And, while an order denying a motion made under Rule 59(e) is appealable, the appeal is available “only on the question of whether there has been a manifest abuse of discretion.” *Pandrea v. Barrett*, 160 Idaho 165, 171, 369 P.3d 943, 949 (2016).

#### IV. ARGUMENT

##### A. The District Court Correctly Determined that Hillen Proved The Three Elements of Ejectment.

“An action for ‘[e]jectment requires proof of (1) ownership, (2) possession by the defendants, and (3) refusal of the defendants to surrender possession.’” *PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 637, 200 P.3d 1180, 1186 (2009) (quoting *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008)). The second and third elements of ejectment are conceded by Gibson, so only the first element, ownership, is at issue here. Memorandum Decision at 4 (R. 132); (R. 2, 11, 14, 18-20 (Gibson’s answer conceding that he possesses the Gibson Property and that he refuses to surrender possession)). As correctly decided by Judge Hippler, Hillen owns the Gibson Property sufficiently to prove the ownership element of ejectment for several different reasons, which are addressed in turn below.

##### B. Hillen, as the Personal Representative of the Estate, is the Owner of the Gibson Property and/or Enjoys the Same Power as That of An Owner.

The Rule 70 Judgment unambiguously establishes that Hillen is the owner of the Gibson Property. The Rule 70 Judgment is valid and effective, and has been upheld by this Court. But—and this is significant—even if the Rule 70 Judgment was somehow ineffective, this is immaterial since Hillen has the power over the Gibson Property as that of an absolute owner, which necessarily includes the ability to eject an unwanted person from the property. Each argument is discussed in turn.

As found by Judge Hippler, “[t]he [Rule 70] Judgment clearly gives Hillen ownership of the [[Gibson]] Property, as it vest[s] in [Hillen] . . . any and all real property of any kind of [sic] nature, including [the [[Gibson]] Property].” Memorandum Decision at 4 (R. 132) (quoting Rule 70 Judgment). The Rule 70 Judgment is unambiguous. It vests all right, title, and interest in the Gibson Property to Hillen. The Rule 70 Judgment is a valid judgment, lawfully issued by a court of competent jurisdiction. It has not been overturned or otherwise successfully challenged. It is the law.

Beyond that—and what makes Gibson’s repetitive arguments frivolous—is the fact that this Court directly considered and upheld the Rule 70 Judgment. *Matter of Estate of Smith*, 164 Idaho 457, 463, 432 P.3d 6, 12 (2018). The opening paragraph of this Court’s recent decision in *Smith* states that Vernon appealed from decisions of the magistrate court “and a corresponding judgment entered pursuant to Idaho Rule of Civil Procedure 70(b) [the Rule 70 Judgment]. We affirm the decisions of the magistrate court.” 164 Idaho at 463, 432 P.3d at 12. Given the ruling in *Smith*, Hillen undisputedly owns the Gibson Property and can assert all powers associated with such ownership.<sup>3</sup>

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<sup>3</sup> Gibson falsely claims “[t]he only issues presented to the Supreme Court for determination on that portion of the bifurcated appeal was invalidation of the holographic will and ‘power of attorney transfers’ of Decedent’s property by the July 12, 2012 transfer, which transfer was nullified by the magistrate.” Gibson’s Opening Brief at 25 (it is unknown what Gibson was quoting in this passage as he failed to attribute the quote to any citation). He claims the Rule 70 Judgment was never put at issue. *Id.*

Even if the Rule 70 Judgment did not exist, Hillen would still have sufficient power over the Gibson Property to eject Gibson therefrom. Whatever other conclusions have been reached in the Estate Case, Gibson and Vernon agree that ownership of the Gibson Property reverted to the Estate when Judge Copsey invalidated Vernon's transfer of the same to himself. Gibson's Opening Brief at 25 (acknowledging that "Decedent's property . . . was to be returned to the prior ownership").

Idaho's Uniform Probate Code provides personal representatives, like Hillen, with "the same power over the title to property of the estate *that an absolute owner would have*, in trust however, for the benefit of the creditors and others interested in the estate." I.C. § 15-3-711 (emphasis added). An absolute owner would unquestionably have the power to eject an unwanted party from the owner's property. Therefore, by the plain and unambiguous language of Idaho Code Section 15-3-711, Hillen has the power to eject Gibson from Estate property.

Along those same lines, Idaho Code Section 15-3-709 expressly provides that personal representatives, like Hillen, "may maintain an action to recover possession of [estate] property or to determine the title thereto." I.C. § 15-3-709. This ejectment action is an action to

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If Gibson's counsel were uninvolved with the *Smith* case, the misstatement may be attributable to a simple mistake, but of course Vernon himself brought the appeal resulting in the *Smith* decision, in which Vernon expressly invited this Court to address the issue he now claims was not presented. "Vernon respectfully requests this Court reverse the court's Order Granting Partial Summary Judgment upon the 2012 Transfers, *together with the June 2, 2017 Judgment on Motion Under Rule 70(b)* of the Idaho Rules of Civil Procedure." Appellant's Opening Brief (filed February 12, 2018), *Matter of Estate of Smith*, 2018 WL 2103594 (Idaho) at 2-3 (emphasis added). Additional instances of Vernon's express requests for this Court to consider and reverse the Rule 70 Judgment can be found at pages 20 and 44 of his Appellant's Opening Brief, as well as page 35 of his Reply Brief (2018 WL 2462977).



recover possession of Estate property, and Hillen is statutorily enabled to maintain this action. To find otherwise would require this Court to invalidate multiple sections of the Idaho Code. It should not do so. Upholding Judge Hippler's decisions is the only legally sound conclusion. Because the three elements of ejectment are met here for multiple distinct reasons, the Judgment, Memorandum Decision, and Reconsideration Denial are proper and must be upheld.

**C. Gibson Presents No Reason for Reversing the Judgment, Memorandum Decision or Reconsideration Denial.**

The Court need look no further than the above analysis to uphold Judge Hippler's various decisions below: (1) the elements of ejectment having been met; and (2) the Judgment, Memorandum Decision, and Reconsideration Denial were properly entered (and the latter certainly does not emanate from any abuse of discretion). However, if the Court considers the voluminous and irrelevant argument presented by Gibson, nothing therein presents a valid reason to revisit any of Judge Hippler's decisions.

**1. Hillen Has Never Asserted He Personally Owns Estate Property.**

Gibson's incorrect analysis can all be traced to one misunderstanding maintained by Vernon: he incorrectly believes Hillen is asserting that Hillen owns the Estate property personally, rather than in his capacity as personal representative of the Estate. Once this incorrect premise is assumed, it is a little easier to understand Vernon's concern that he will be divested of his interest in Estate property, and little easier to understand why Vernon thinks the Judgment contains an inherent inconsistency. Judge Hippler came to the same realization about Vernon's misunderstanding. Reconsideration Denial at 3 (R. 209).

Of course, Hillen is not now asserting, and has never asserted, that he owns the Gibson Property—or any Estate property—in his personal capacity. He brought this action in his capacity as the personal representative for the Estate so he could administer the Estate to the benefit of all the heirs, including Vernon. That clarification nullifies all of Vernon’s concerns. Vernon’s interest as an heir of the Estate does not affect Hillen’s ejectment claim, and Vernon’s interest as an heir is unaffected by the outcome of this case.

**2. Vernon’s Interest as an Heir of the Estate Does Not Defeat Hillen’s Ejectment Claim.**

Gibson (through Vernon) claims Vernon’s partial interest in the Gibson Property became “vested” pursuant to Idaho Code Section 15-3-101 upon Victoria’s death, and that that somehow supersedes the Rule 70 Judgment. Gibson’s Opening Brief at 23, 28, 43. Not so. First, Section 15-3-101 does not mention permanently vesting interests nor pre-emption of future orders or judgments. Instead, that section opens by expressly noting that the rights of heirs like Vernon “are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates.” I.C. § 15-3-101. To further emphasize this point, the section concludes by noting that estate property “is subject . . . to administration.” *Id.*

So, contrary to Vernon’s assertions, title to Estate property is not automatically vested with him, but is instead subject to the restrictions and limitations contained in the Uniform Probate Code and is otherwise subject to administration. The restrictions and limitations contemplated by the Uniform Probate Code include the personal representative’s “power over the title to property of the estate that an absolute owner would have,” (I.C. § 15-3-711) as well as

the personal representative's "right to . . . possession or control of, the decedent's property" and statutory authority to "maintain an action to recover possession of property or to determine the title thereto." I.C. § 15-3-709.

The comments to Section 15-3-711 make it clear that the power conferred on Hillen is "the broadest possible 'power over title'" and state that the power is "conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of possession." (emphasis added). Those powers, statutorily granted to Hillen as the personal representative, are precisely what empowers Hillen to bring and maintain this ejectment action, and are precisely why Judge Hippler was correct to issue the Judgment, Memorandum Decision, and Reconsideration Denial.

Judge Hippler considered and rejected the applicability of the case law Vernon cites. Hillen's analysis on the subject would add nothing, so he rests on Judge Hippler's considered reasoning:

The cases cited by Gibson do not compel a different result. They stand for the general rule that a decedent's property immediately descends to an heir upon the decedent's death, but neither one addressed the language in I.C. § 15-3-101 that an heir's right to a decedent's property "are subject to restrictions and limitations." See generally, *Ellmaker* [*v. Tabor*], 160 Idaho 576, 377 P.3d 390 [(2015)]; *Fairchild* [*v. Fairchild*], 106 Idaho 147, 676 P.2d 722 [(1984)]. In those cases, there was no need to consider a personal representative's temporary power over the property, and its effect on an heir's right to immediate vesting of title. In *Ellmaker* "there was no probate of [the decedent's] estate." 160 Idaho at 580, 377 P.3d at 394, so there would not have been a personal representative. And although in *Fairchild* the estate had been probated, the issue in that case was whether one heir had adversely possessed the property or instead was a cotenant with the other

heirs by common inheritance. 106 Idaho at 150,676 P.2d at 725. It had nothing to do with the personal representative's temporary power to control the property. *See id.* Because neither *Ellmaker* or *Fairchild* addressed any sort of "restriction" mentioned in I.C. § 15-3-101, their holdings are no more than reiterations of the general rule. They do not help in deciding the scope of a personal representative's temporary statutory power over a decedent's property.

Memorandum Decision at 5-6 (R. 133-134).

Gibson adds no new analysis to his case citations on appeal. The same reasoning employed by Judge Hippler still defeats his position.

**3. Vernon's Interest in the Estate is Unaffected by and Irrelevant to This Case.**

Vernon asserts multiple times that Hillen is in breach of his fiduciary duties to the Estate's heirs. *See, e.g.*, Gibson's Opening Brief at 30, 40, 42. Hillen is not, but that is irrelevant and Gibson has no standing to bring such an action. It is undisputed that Gibson is not an heir to the Estate, and is owed no fiduciary duty by Hillen.

If Vernon feels that Hillen is in breach of his fiduciary duties, he is free to raise those concerns in the appropriate forum, which is not this case. This case is (or should have been) a simple action for ejectment comprising only three elements. That Hillen is not administering the Estate properly is not a defense to any of the elements of ejectment, and Vernon is not precluded from raising those issues in the court-administered Estate Case.

Therefore, as concluded by Judge Hippler, Hillen's fiduciary duties to the heirs are perfectly compatible with his power to eject Gibson from Estate property. Memorandum Decision at 6 (R. 134). In other words, as the comment notes, an heir may be able to sue "for

breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.'" Memorandum Decision at 6 (R. 134) (quoting comment to Idaho Code 15-3-709).

No possible outcome of this case could divest Vernon of his interest as an heir. And, the Judgment that issued in this case did not affect that status. Rather, it merely required Gibson—who has no interest in the Estate—to vacate the Gibson Property. Vernon's interests as an heir are unaffected, and Hillen cannot use the Judgment as a sword to claim personal ownership of the Gibson Property because the Judgment says nothing of the sort.

#### **V. REQUEST FOR ATTORNEYS' FEES AND COSTS<sup>4</sup>**

Hillen is entitled to an award of attorneys' fees and costs against Gibson on this appeal. Hillen makes this request pursuant to I.A.R. 40 and Idaho Code § 12-121 (permitting an award of fees "when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation."). At the risk of providing too fine a point on the matter, Gibson and his counsel have not presented any legitimate points of law or fact as to why this Court should reverse any of the trial court's decisions. Gibson simply repeats the same arguments to this Court that failed below. This Court should, therefore, assess fees (and costs) against Gibson and in favor of Hillen.

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<sup>4</sup> Gibson does not claim an entitlement to attorney fees in this appeal and should not receive them. Gibson appears to insinuate that, if he prevails, the District Court should award him his appellate attorney fees after a trial. *See* Gibson's Opening Brief at 49. But there is no basis for such an award and Gibson's failure to cite authority for appellate fees is fatal to any such fees being awarded. *A & J Const. Co. v. Wood*, 141 Idaho 682, 688, 116 P.3d 12, 18 (2005). Under no circumstances should Gibson be awarded his appellate fees in this case.

## VI. CONCLUSION

For the reasons set forth above, Hillen respectfully requests that this Court:

- (1) uphold Judge Hippler's Judgment, Memorandum Decision, and Reconsideration Denial; and
- (2) award Hillen his attorneys' fees and costs on appeal and in the proceedings below.

Respectfully submitted on June 29, 2020.

GIVENS PURSLEY LLP

By /s/ Alexander P. McLaughlin  
Randall A. Peterman – Of the Firm  
Alexander P. McLaughlin – Of the Firm  
Jack W. Relf – Of the Firm  
Attorneys for Plaintiff-Respondent

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of June, 2020, I caused a true and correct copy of the foregoing **RESPONDENT'S BRIEF** to be served electronically through the iCourt system, which caused the following parties or counsel to be served by electronic means, as more fully reflected below:

Vernon K. Smith  
vvs1900@gmail.com  
*Attorneys for Defendant/Appellant David Gibson*

*/s/ Alexander P. McLaughlin*  
Alexander P. McLaughlin