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Gallagher v. Best Western Cottontree Inn Appellant's Brief Dckt. 43695

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALYN GALLAGHER,)
)
Plaintiff- Appellant) Supreme Court Docket No.: 43695
)
v.) Bonneville Court Case No.: CV-2014-3826
)
BEST WESTERN COTTONTREE INN,)
SNAKE RIVER PETERSEN PROPERTIES,)
LLC, a Wyoming Close Limited Liability,)
and DOES 1 through 10 inclusively,)
)
Defendants-Respondents.)
_____)

APPELLANT'S BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

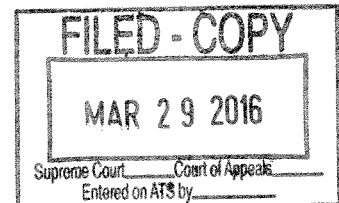
Honorable Alan C. Stephens, District Judge presiding.

FOR THE PLAINTIFF-APPELLANT:

Allen H. Browning
Browning Law
482 Constitution Way, Ste. 111
Idaho Falls, Idaho 83402

FOR THE DEFENDANTS-RESPONDENTS:

Steven R. Kraft
Moore & Elia, LLP
P.O. Box 6756
Boise, Idaho 83707



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I.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a personal injury case. The defendant slipped and fell at a hotel in Idaho Falls; there was no warning sign indicating the hotel floor had just been washed and was wet at the time Gallagher stepped on it and fell.

The Plaintiff sued the party named as owning the property at which the Plaintiff fell, as that information appeared on the Idaho Secretary of State's website for assumed names, within the statute of limitations. Service upon the owner of the property, as that owner was listed with the Secretary of State, was also timely accomplished. When serving the listed owner, Plaintiff-Appellant Gallagher was informed the property had changed hands. Gallagher thereafter moved to amend the complaint to reflect the new owner, was granted permission and served the new owner. Defendant-Respondent Snake River Petersen Properties, LLC, alleges the amendment should not relate back to the original filing date, and the limitation period of six months should not be tolled, despite Gallagher's reliance upon the official record on file with the Idaho Secretary of State's office for assumed business names.

B. COURSE OF THE PROCEEDINGS

The Plaintiff-Appellant GERALYN GALLAGHER filed a Verified Complaint for Damages and Demand for Jury Trial on July 9, 2014. During the six month period for serving the Defendants, while attempting to serve the Defendant Best Western Cottontree Inn and L & L Legacy Limited Partnership upon Scott Eskelson, the Plaintiff-Appellant was informed that the business had been sold. Plaintiff-Appellant filed a Motion to Extend Time for Service of Plaintiff's Complaint and

Summons and Affidavit of Allen H. Browning on January 8, 2015. The Court entered an Order to Extend Time for Service for ninety days on January 14, 2015. An Amended Complaint and Summons was filed by Plaintiff-Appellant on April 9, 2015 and was served upon the Defendants-Respondents Best Western Cottontree Inn and Snake River Petersen Properties, LLC, a Wyoming Close Limited Liability on April 13, 2015. Defendants-Respondents filed a Notice of Appearance on April 27, 2015. The parties filed a Stipulation for Dismissal of L & L Legacy Limited Partnership, LLC with Prejudice on May 19, 2015. On May 21, 2015 the Defendants-Respondents filed a Motion to Dismiss, Memorandum in Support of the Motion to Dismiss in which they argued that the case should be dismissed as based on untimely service and that Plaintiff-Appellant's Amended Complaint should date back to the original filing on July 9, 2014 when filed under I.R.C.P. 15(c). The Court entered an Order for Dismissal of L & L Legacy Limited Partnership, LLC with Prejudice on June 4, 2015. Plaintiff-Appellant filed an Objection to Defendant's Motion to Dismiss on June 5, 2015, in which Defendant-Respondent filed a Reply Brief in Support of Defendant's Motion to Dismiss on June 19, 2015. A hearing on Defendant-Appellant's Motion to Dismiss was held on June 23, 2015 in which the Court took the matter under advisement. Following that hearing the Court entered its Decision and Order re: Motion to Dismiss and Judgment on June 30, 2015 in which it dismissed Defendant-Respondent with prejudice. A Motion to reconsider was filed by the Plaintiff-Appellant on July 10, 2015 and Defendant-Respondent filed is Opposition to Plaintiff's Motion for Reconsideration on August 31, 2015. The Hearing on Plaintiff-Appellant's Motion to Reconsider was held on September 8, 2015 in which the Court asked both the parties for additional brief before issuing a ruling. The Defendant's Supplemental Brief in Opposition to Plaintiff's Motion for Reconsideration was filed September 15, 2015, Plaintiff's Response to Defendant's Supplemental Brief was filed

September 21, 2015 and the Defendant's Reply to Plaintiff's Opposition to Defendant's Supplemental Brief was filed on September 24, 2015. The Court entered its Decision and Order re: Motion to Reconsider on September 28, 2015 in which it denied the Plaintiff-Appellant's Motion to Reconsider. A Notice of Appeal was filed with the Court by the Plaintiff-Appellant on October 21, 2015.

STATEMENT OF FACTS

On July 10, 2012, Plaintiff-Appellant Geralyn Gallagher was severely injured at a hotel in Idaho Falls, Idaho, located at 900 Lindsay Boulevard, named the Best Western Plus Driftwood Inn, aka the Best Western Cottontree Inn. The floor had been washed and was still wet, with no signs warning of a hazard (R., Vol. I, p. 7, L. 6-10).

She hired Allen Browning to pursue her injury claim.

A search was done with the Idaho Secretary of State to determine the legal owner of the Best Western Plus Driftwood Inn, the correct business name for the purposes of filing a lawsuit, and the registered agent for service of process (R., Vol. I, p. 13-18). The name of the business as registered with the Idaho Secretary of State was the Best Western Cottontree Inn; the owner was listed as L&L Legacy Limited Partnership.

At the time of the accident, and unknown to the Plaintiff-Appellant Gallagher or her attorney, Best Western Cottontree Inn had been purchased by Snake River Petersen Properties, LLC, a Wyoming Close Limited Liability (hereinafter "Snake River") (R., Vol. I, p. 50 L. 13-23 and p. 51, L 1-8). The hotel was owned and operated by Snake River at the time of the accident (R., Vol. I, p. 23-32), but there was no filing of this information with the Idaho Secretary of State.

The Best Western Cottontree Inn was required under I.C. § 53-504 to file a certificate of

assumed business name. There was on file with the Secretary of State's office a certificate of assumed business name for that name at that address and for that business, and that filing was listed as "current" when Plaintiff-Appellant filed its complaint against Best Western Cottontree Inn and L&L Legacy Limited Partnership on July 9, 2014 (R., Vol. I, p. 15-18). Plaintiff-Appellant had checked those records listed as "current" at the time of filing, and "L&L Legacy Limited Partnership" was listed as the only entity owning and operating this business at the time of the accident and subsequent thereto (R., Vol I., p 15-18).

Because Plaintiff-Appellant's investigation revealed that the Best Western Cottontree Inn was owned and operated by L & L Legacy Limited Partnership at the time Mrs. Gallagher was injured, Plaintiff-Appellant filed her lawsuit against Best Western Cottontree Inn and L & L Legacy Limited Partnership on July 9, 2014, prior to the running of the statute of limitations. (R., Vol I., p. 6-10).

A timely summons was issued for Best Western Cottontree Inn and L & L Legacy Limited Partnership, this is undisputed. During the six month period for serving the Defendants-Respondents, a process server attempted to serve the Summons and Complaint upon Scott Eskelson, the registered agent for L & L Legacy Limited. Eskelson informed the process server the business had been sold, L&L Legacy was not the owner, and James Spatig was the current registered agent (R., Vol I., p 13-18 and p. 50, L. 13-23, p. 51, L. 1-8).

On January 8, 2015, the Plaintiff-Appellant asked the court for additional time to determine who the new owner was, and his registered agent (R., Vol I., p. 11-18).

The Plaintiff-Appellant was granted a 90 day extension of time to find and serve the new owner (R., Vol. I., p. 19-20). During that time, Plaintiff-Appellant amended the complaint to include Snake River and served a copy of the Complaint upon Snake River (R., Vol. I., p 21-35).

When, for the first time, it was demonstrated that Snake River had purchased the hotel from L&L Legacy prior to the accident, the Plaintiff-Appellant stipulated to allow L&L removed from the suit. (R., Vol. I., p. 38-39).

II.

ISSUES

1. Does the Plaintiff-Appellant Gallagher's amendment of her complaint relate back to the time of filing the original complaint?
2. Did Defendant-Respondent Snake River's failure to file with the Idaho Secretary of State's Office prejudice Gallagher and therefore allow this complaint to relate back to the date of Filing under *Winn v. Campbell*, and toll the limitations period for serving the proper defendant?
3. Because Plaintiff Gallagher actually found the name and address of the business which owned and operated the hotel at which Gallagher was injured, is this circumstance distinguishable from *Ketterling v. Burger King*?

III.

STANDARD AND SCOPE OF REVIEW

In this case, the District Court granted summary judgment in favor Defendant-Respondent Snake River, finding that under *Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012), the service of the amended complaint naming a different plaintiff did not relate back to the original filing date and the time for serving the Defendant-Respondent was not tolled.

When reviewing an order for summary judgment, the standard of review for an appellate court is the same standard used by the district court in ruling on the motion. Summary judgment is proper when 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 judgment as a matter of law. Idaho R. Civ. P. 56(c). If there is no genuine issue of material fact, only a question of law remains, over which an appellate court exercises free review.

Winn v. Campbell, 145 Idaho 727, 728, 184 P.3d 852, 853, (Idaho 2008).

IV.

ARGUMENT

A. PLAINTIFF-APPELLANT'S AMENDMENT OF COMPLAINT RELATES BACK TO THE TIME OF FILING THE ORIGINAL COMPLAINT

Plaintiff-Appellant originally sued the Best Western Cottontree Inn as well as its former owner, L & L Legacy Limited Partnership. The Complaint was amended to keep the name of the business (which has not changed), and to name the current owner, Snake River Petersen Properties, LLC, because Defendant-Respondent Snake River hid its ownership from the world by failing to file a certificate of assumed name, as required by I.C. Sections 53-504 and 53-509. The Rule of Civil Procedure concerning amendments to complaints is I.R.C.P. 15, which states:

(a) Amended and Supplemental Pleadings--Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty (20) days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires, and the court may make such order for the payment of costs as it deems proper. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these

issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The relation back of an amendment joining or substituting a real party in interest shall be as provided in Rule 17(a). The delivery or mailing of process to the Idaho attorney general or designee of the attorney general, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the state of Idaho or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

It is clear the complaint may be amended at any time, and motions to amend are to be freely granted when doing so is in the interests of justice.

The original complaint was filed within the statute of limitations, was served within the 6 month period for service. Therefore, under Rule 15(c), the amended complaint relates back to the date of service of the original complaint.

The controversy in this case concerns the effect of the Defendant-Respondent Best Western Cottontree Inn having an official state filing with the prior owner and showing that listing as “current” as of the dates of filing and serving the complaint. Further, Gallagher’s attorney investigated and found the proper business name and address as reflected in the Secretary of State’s official listing of assumed names and relied upon the accuracy of those records when filing and serving its complaint.

B. DEFENDANT-RESPONDENT SNAKE RIVER’S FAILURE TO FILE WITH THE IDAHO SECRETARY OF STATE’S OFFICE ACTUALLY PREJUDICED GALLAGHER AND THEREFORE THIS COMPLAINT SHOULD RELATE BACK TO THE DATE OF FILING AND THE REQUIREMENT OF SERVICE WITHIN SIX MONTHS SHOULD BE TOLLED UNDER WINN V. CAMPBELL.

Defendant Snake River failed to file a certificate of assumed name with the Secretary of State’s office when it began operating the Best Western Cottontree Inn. This violated I.C. Section 53-504, which requires this be done:

53-504. Filing of certificate required. (1) Any person who proposes to or intends to transact business in Idaho under an assumed business name shall, before beginning to transact business, file with the secretary of state a certificate of assumed business name in a form prescribed by the secretary of state. The form may be in any medium permitted by the secretary of state. The certificate shall be executed for the person by an individual who has actual authority to bind the person to legal obligations.

Under *Wait v. Leavell Cattle*, the Court stated the purpose of that statute was to “[p]rotect the public against fraud and to give public information to persons who deal with those who conduct business under a fictitious name.” 136 Idaho at 797, 41 P.3d at 225; *Winn v. Campbell*, 145 Idaho 727, 731, 184 P.3d 852, 856 (Idaho 2008).

Winn v. Campbell, supra, involved a person who had been injured in a hotel. The Plaintiff sued the wrong party and listed a defendant which did business at a different address

than that at which the plaintiff had been injured. Plaintiff's counsel had been mistaken concerning the physical location where the Plaintiff was injured, and named the wrong hotel in which the Plaintiff was injured. Under those facts, the court dismissed the amended claim as not relating back and not tolling the limitations period for serving the correct defendant, finding the Plaintiff should have made a more reasonable search to determine the place of injury and the owner of the hotel. *Winn v. Campbell*, 145 Idaho 727, 184 P.3d 852 (2008).

In *Winn*, the Idaho Supreme Court found the statute of limitations was not tolled because Plaintiff in that case did not conduct a proper inquiry as to the owner of the business, and that the failure to file with the Secretary of State's office did not mislead the Plaintiff. However, it further stated that the tolling of the statute of limitations could have been possible, had Plaintiff sued the hotel in which she actually had fallen:

This Court, however, has given some indication that tolling of the statute is possible. In *Wait v. Leavell Cattle*, the Court discussed Idaho's former assumed name statute and concluded that its purpose was to “[p]rotect the public against fraud and to give public information to persons who deal with those who conduct business under a fictitious name.” 136 Idaho at 797, 41 P.3d at 225. It concluded that the defendant's conduct in that case did not mislead the plaintiff in any way. *Id.* Therefore, the Court stated that the case did not provide a basis for holding that the statute of limitations should be tolled. This language, however, indicates that **this Court may someday find a situation where tolling would be appropriate.**

Today, however, is not that day. This case, like *Wait*, does not provide a situation that might support a tolling of the statute of limitations. Winn failed to find out where her fall took place, and she sued the wrong hotel entirely. The purpose of the Assumed Business Names Act is to ensure disclosure of the true names of persons who transact business in Idaho. I.C. § 53–502. The consequences for noncompliance are found in I.C. § 53–509(1), which prohibits noncompliant parties from maintaining any legal action until they comply with the statute. I.C. § 53–509(2) allows any person who suffers a loss because of another's noncompliance to recover damages and attorney fees. **If Winn had filed her suit against Tumbling Waters Motel, where she actually fell, her argument may have had merit because it appears as though Campbell, Inc., has yet to comply with the filing requirement for that hotel. Thus, had Winn attempted to sue the Tumbling Waters Motel, she may not have been able to find the correct party to serve.** However, that is not the situation at hand. To toll the statute of limitations in this case would reward Winn for failing to take the simple step of finding out where she fell so that she could attempt to sue the correct party.

Winn v. Campbell, 145 Idaho 727, 731, 184 P.3d 852, 856 (2008).

In the instant case, Plaintiff-Appellant Gallagher did identify the precise location at which she was injured, and she named the hotel listed with the Idaho Secretary of State. Plaintiff-Appellant Gallagher was actively misled by Snake River's failure to file its certificate of assumed name with the Idaho Secretary of State. Therefore, under the express reasoning of *Winn* and consistent with *Wait v. Leavell Cattle*, Gallagher's complaint should be allowed to relate back to the date of filing and the time for serving Snake River should have been tolled. This is the case anticipated by *Winn*, when it stated "this Court may someday find a situation where tolling would be appropriate." *Winn v. Campbell*, 145 Idaho 727, 731, 184 P.3d 852, 856 (Idaho 2008).

C. BECAUSE PLAINTIFF GALLAGHER ACTUALLY FOUND THE NAME AND ADDRESS OF THE BUSINESS WHICH OWNED AND OPERATED THE HOTEL AT WHICH GALLAGHER WAS INJURED, THIS CIRCUMSTANCE DISTINGUISHES THIS CASE FROM KETTERLING V. BURGER KING

At the District Court, Defendant-Respondent Snake River urged that Gallagher's situation was more analogous to *Ketterling v. Burger King*, 152 Idaho 555, 272 P.3d 57 (2012).

In *Ketterling*, the court considered whether the Plaintiff, injured at a Burger King restaurant, had been prejudiced by the failure of Defendant to file a certificate of assumed name with the Idaho Secretary of State's office. In *Ketterling*, the Defendant had not filed, there was no assumed name filing of record which would have confused the Plaintiff, and the Plaintiff did not inquire further:

In this case, **HB Boys' failure to file an assumed business name may or may not have disadvantaged Ketterling**. HB Boys had failed to file with the Idaho Secretary of State as a foreign limited liability company¹ and therefore was not a "formally organized or registered entity" under I.C. § 53-503(2). Thus, it was required under I.C. § 53-504 to

file a certificate of assumed business name. With no information to the contrary on record with the State, a customer of the Burley Burger King might, therefore, assume that it was being operated by Burger King. **Indeed, Ketterling contends she was unable to ascertain the name of any entity, besides Burger King Corporation, registered with the Secretary of State to conduct business under the name "Burger King."** HB Boys does not dispute this assertion. Ketterling therefore argues that HB Boys should have filed a certificate of assumed business name of "Burger King."

The district court was unmoved by Ketterling's argument because it determined HB Boys identity was readily available:

The identity and contact information for HB Boys was reasonably available and ascertainable prior to the filing of the original complaint by virtue of the undisputed fact that such information was publically posted inside the Burger King restaurant in question, **regardless of whether HB Boys was registered with the Idaho Secretary of State.**

The district court's reasoning implies that **HB Boys failure to comply with I.C. § 53-504 did not disadvantage Ketterling since the identity of the restaurant operator was readily available for anyone who made inquiry.**

Ketterling v. Burger King Corp., 152 Idaho 555, 559, 272 P.3d 527, 531 (2012).

Because the Plaintiff did not find the name and address of the Defendant filed with the Idaho Secretary of State, the Supreme Court affirmed a dismissal of the amended complaint naming the franchisee, finding the Plaintiff should have continued to investigate the identity of the owner of the Burger King restaurant, and should not have merely assumed that a lack of any filing with the Secretary of State meant the restaurant was owned by the larger corporation and not a franchisee. *Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012).

The *Ketterling* case is quite different from Gallagher's situation. Gallagher had the proper address for the place of injury, and found that address listed in the official record on file with the Idaho Secretary of State, that it had been on file with that name and address for many years prior to the accident, and that it was "current" as of the time of filing the complaint. Gallagher relied upon the accuracy of the official record of the State of Idaho concerning filing of assumed names, and filed and served the Complaint and Summons based upon that information.

If this Court were to find that Ketterling controls, it would be holding Plaintiffs should

never rely upon the accuracy of the official record of the State of Idaho concerning the filing businesses with assumed names. It would be holding when a Plaintiff properly identifies the name of a business and the location of the accident at the location of that business and finds the ownership information needed at the official state repository of that information, the Plaintiff must assume that information is worthless and he should seek his information elsewhere.

Idaho law does not support that result.

Idaho Supreme Court precedent does not support that result—*Winn* supports the ability to rely upon the Secretary of State’s information made available to the public. *Ketterling* did not overrule *Winn*, it expressly affirmed what should happen if failing to file an assumed name with the Idaho Secretary of State misled a Plaintiff into serving the wrong party:

in *Winn* we wrote that the discussion in *Wait* about assumed business names implied that noncompliance with the Act might preclude a business from asserting a statute of limitations defense, if the noncompliance misled the plaintiff. *See Winn*, 145 Idaho at 731, 184 P.3d at 856.

Ketterling v. Burger King Corp., 152 Idaho 555, 558-559, 272 P.3d 527, 530-531 (Idaho 2012)

Logic does not support granting summary judgment against Gallagher, as no one should expect the official state information is wrong. Further, Snake River urges that Gallagher had a duty to keep looking for the owner of the Best Western Cottontree Inn after that information was found and confirmed on the Secretary of State’s website as being current; that is absolutely illogical.

Equity does not support granting summary judgment against Gallagher, as the confusion in this case was caused by Snake River, not Gallagher. Snake River desires to capitalize upon its own error. Gallagher caused no confusion and merely desires to proceed and to allow Snake River to have its day in court. The harm in allowing the case to go forward is non-existent, as

Gallagher will have to establish the elements of her negligence action. The harm in granting Snake River's motion to dismiss is that Gallagher, through no fault of her own, would not get her day in court, while Snake River would receive a windfall dismissal caused by its own refusal to obey the law. Snake River, in failing to file a certificate of business name, AND in allowing L&L Legacy Limited Partnership to remain listed as the current owner of the business, actively misled Gallagher regarding who owned the business.


V.

CONCLUSION

If Gallagher's amended complaint is not allowed to relate back to the original filing date, and if the time for serving the Defendant-Respondent is not tolled, the pronouncements of this Court concerning a Plaintiff who suffers prejudice by relying upon the official record of the Idaho Secretary of State when determining which party to sue and which person to serve would be rendered meaningless. All of the language in *Wait*, *Winn* and *Ketterling* concerning there being a distinct difference in result when a plaintiff relies upon the record with the Idaho Secretary of State concerning the filing of an assumed name will be declared meaningless, and a plaintiff who followed the law and properly checked to make sure the proper party was sued and served within the proper time limits will be unjustly denied her day in court.

DATED this 23 day of March, 2016.

BROWNING LAW



Allen Browning

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document was served upon the following person(s) this 23 day of March, 2016, by the following method:

Steven R. Kraft
P.O. Box 6756
Boise, Idaho 83707
Facsimile: 336-7031

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Allen H. Browning

