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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALYN GALLAGHER,

Plaintiff/Appellant,

vs.

BEST WESTERN COTTONTREE INN,
SNAKE RIVER PETERSEN
PROPERTIES, LLC, A WYOMING
CLOSE LIMITED LIABILITY, and
DOES 1 through 10 inclusively,

Defendants/Respondents.

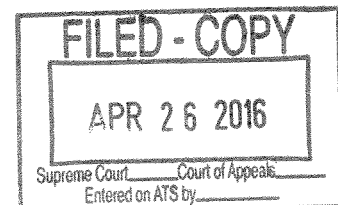
Supreme Court
Docket No. 43695

Bonneville County
Court Case No. CV-2014-3826

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RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville
Honorable Judge Alan C. Stephens, Presiding



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I. STATEMENT OF THE CASE.

A. Nature of the Case and Background.

This case concerns a slip and fall accident that occurred at the Best Western Cottontree Inn, located at 900 Lindsay Boulevard in Idaho Falls, Idaho, on July 10, 2012. Geralyn Gallagher filed her lawsuit on July 9, 2014. Prior to filing her lawsuit, Ms. Gallagher's only attempt to ascertain the owner of the subject hotel was a search of on the Idaho Secretary of State's website. Relying solely on the Secretary of State's online information, the lawsuit originally named the wrong defendant, the previous owner of the hotel, L & L Legacy Limited Partnership ("L & L Legacy").

Approximately two years and nine months after the accident, Ms. Gallagher amended her Complaint to name Snake River Petersen Properties, LLC ("Snake River"), the owner of the hotel at the time of the accident, as a defendant. Service of the Amended Complaint, nine months after the two-year statute of limitations had expired, was the first notice Snake River had of the claim or the lawsuit. Consequently, the Amended Complaint served to Snake River does not relate back to the filing of the original Complaint pursuant to I.R.C.P. 15(c).

Ms. Gallagher asserts that the Amended Complaint, served nine months too late, should relate back, and that the limitations period should be tolled because of her "reliance" upon the information found on the Idaho Secretary of State's website. However, applying the plain language of I.R.C.P. 15(c), the District Court dismissed Ms. Gallagher's Amended Complaint as not relating back because Snake River was served nine months after the statute of limitations had run. It also correctly concluded that Idaho law requires a plaintiff to do more to discover the proper party than a simple search of the Secretary of State's website. There is no justification for tolling the statute of limitations in this case.

B. Course of Proceedings Below.

On July 9, 2014, Ms. Gallagher filed a Verified Complaint for Damages and Demand for Jury Trial against Best Western Cottontree Inn and L & L Legacy. (R. pp. 6-10). In December of 2014, Ms. Gallagher attempted to serve the Idaho registered agent for L & L Legacy, attorney Scott Eskelson, who refused service and informed Plaintiff that the business had been sold. (R. pp. 10-14). Weeks later, on January 8, 2015, Ms. Gallagher filed a Motion to Extend Time for Service of Plaintiff's Complaint and Summons and Affidavit of Allen H. Browning. (R. pp. 10-14). On January 14, 2015, the Court entered an Order to Extend Time for Service ninety days, until April 14, 2015. (R. pp. 19-20). Ms. Gallagher's Amended Complaint and Summons was filed by Plaintiff on April 9, 2015 and served upon Best Western Cottontree Inn and Snake River on April 13, 2015. (R. pp. 23-27, 35). Snake River filed a Notice of Appearance on April 27, 2015 (R. p. 2). The parties filed a Stipulation for Dismissal of L & L Legacy on May 19, 2015. (R. pp. 38-39). On June 4, 2015, the Court entered an Order for Dismissal of L & L Legacy Partnership, LLC With Prejudice. (R. p. 59).

On May 21, 2015, Snake River filed a Motion to Dismiss and Memorandum in Support that requested dismissal based on Ms. Gallagher's untimely service and because Plaintiff's Amended Complaint did not relate back to the original filing date pursuant to I.R.C.P. 15(c). (R. pp. 46-55). On June 5, 2015, Ms. Gallagher filed an objection to Snake River's motion. Snake River filed its Reply Brief on June 19, 2015. (R. pp. 61-78). Following oral argument on June 23, the Court granted Snake River's motion and dismissed Snake River with prejudice. (R. pp. 79-87). Ms. Gallagher filed a Motion to Reconsider on July 10, 2015. (R. pp. 88-89). Ms. Gallagher filed no brief in support of the motion. (R. pp. 93-98). Snake River filed its Opposition to Ms. Gallagher's Motion to Reconsider on August 31, 2015. (R. pp. 90-92). The Court held a hearing

on Ms. Gallagher's Motion to Reconsider on September 8, 2015. Following oral argument, the Court allowed Snake River time for additional briefing before issuing a ruling because Ms. Gallagher had failed to file a brief outlining the arguments she later presented at oral argument. Snake River's supplemental brief opposing Ms. Gallagher's Motion for Reconsideration was filed September 15, 2015. (R. pp. 93-98). Ms. Gallagher "responded" to Snake River's Supplemental Brief on September 21, 2015. Snake River/Best Western filed a reply to Plaintiff's Opposition to Defendant's Supplemental Brief on September 24, 2015. (R. pp. 99-107). On September 28, 2015, the Court entered its Decision and Order, denying Ms. Gallagher's Motion to Reconsider. Ms. Gallagher appealed.

C. Statement of Material Facts.

This case concerns a slip and fall accident that occurred at the Best Western Cottontree Inn, located at 900 Lindsay Boulevard in Idaho Falls, Idaho, on July 10, 2012. (R. p. 24). Geralyn Gallagher hired Allen Browning to pursue her injury claim.

On July 9, 2014, one day before the two-year statute of limitations expired, Ms. Gallagher filed a lawsuit alleging that she fell on a wet floor located in the Best Western Cottontree Inn in Idaho Falls on July 10, 2012. (R. p. 7). The Complaint named Best Western Cottontree Inn and L & L Legacy, the alleged owner and operator of the hotel, as defendants. (R. p. 6).

Prior to filing the lawsuit, Ms. Gallagher's only attempt to ascertain the owner of the subject hotel was a search on the Idaho Secretary of State website. (R. pp. 13-18). The Complaint relied entirely upon the Secretary of State's online information, which provided no address or location for the hotel. (R. p. 6-9, 13-18). Due to Ms. Gallagher's failure to reasonably investigate the identity of the owner, her Complaint named the wrong defendant. (R. pp. 6-9, 13-18).

In December of 2014, near the end of the six-month service deadline, Ms. Gallagher attempted to serve the Idaho registered agent for L & L Legacy, attorney Scott Eskelson, but he refused to accept service. (R. p. 11). Ms. Gallagher's agent was told by Scott Eskelson at that time that Snake River was the owner of the hotel and that James Spatig was the registered agent for Snake River (R.p. 14). On January 8, 2015, one day before the six-month time limit for service under I.R.C.P. 4(a)(2) expired, Ms. Gallagher filed a Motion to Extend Time for Service of Plaintiff's Complaint and Summons. (R. p. 11-12). The alleged basis for the motion was that when Ms. Gallagher attempted to serve the registered agent for L&L Legacy, she was informed that the business had been sold. Ms. Gallagher asserted that she needed more time to research who owned the business and the property at the time of the incident. (R. p. 11). However, Plaintiff admits to being previously told by Scott Eskelson in December 2014 that Snake River owned the hotel and that the registered agent was James Spatig. (R.p.14). At that time, two and a half years had passed since the subject accident.

The Affidavit of Counsel in support of the motion represented that an attempt to serve L & L Legacy's agent was unsuccessful because the Best Western Cottontree Inn was no longer owned by L & L Legacy. (R. p. 14). The Affidavit of Counsel also admitted that efforts to locate the owner of the Best Western Cottontree Inn had consisted only of a web search of the Idaho Secretary of State's webpage. (R. pp. 13-18). On January 14, 2015, the Court granted Plaintiff a 90-day extension for service. (R. p. 19).

On April 9, 2015, five days before the 90-day extension expired, and two years and nine months after the date of the subject accident, Plaintiff's Amended Complaint and Summons were, for the first time, filed and served upon Snake River, the owner and operator of the subject Best Western Cottontree Inn. (R. pp. 21-22). Plaintiff's Amended Complaint correctly alleged

that at all relevant times, Snake River was the owner and operator of the Best Western Cottontree Inn, and the owner of the property upon which the hotel is located, in Idaho Falls. (R. pp. 23-24).

On May 19, 2015, the parties stipulated to dismiss L & L Legacy from the lawsuit as it had been sufficiently demonstrated that Snake River had purchased the hotel prior to Ms. Gallagher's accident. (R. pp. 38-39).

II. ADDITIONAL ISSUES PRESENTED ON APPEAL.

- A. Geralyn Gallagher's Amended Complaint naming Snake River does not relate back to the time of the filing of the original Complaint.
- B. Snake River's failure to file a certificate of assumed business name with the Idaho Secretary of State's Office does not toll the two-year statute of limitations.

III. STANDARD OF REVIEW.

When the Idaho Supreme Court reviews a grant of summary judgment, it does so under the same standard employed by the District Court. *Boise Tower Assocs., LLC v. Hogland*, 147 Idaho 774, 779, 215 P.3d 494, 499 (2009). 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 judgment as a matter of law." *Id.* (quoting Idaho R. Civ. P. 56(c)).

When a motion for summary judgment has been properly supported with evidence indicating the absence of material fact issues, the opposing party's case must not rest on mere speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991); *G&M Farms v. Funk Irrigation*

Co., 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). The question is whether a genuine issue of 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). If the undisputed facts before the court indicate that summary judgment is appropriate, judgment should be entered as a matter of law. *Id.*

IV. ARGUMENT.

A. GERALYN GALLAGHER'S AMENDED COMPLAINT NAMING SNAKE RIVER DOES NOT RELATE BACK TO THE TIME OF THE FILING OF HER ORIGINAL COMPLAINT.

Geralyn Gallagher amended her Complaint to name Snake River as the owner and operator of the subject Best Western nine months after the two-year personal injury statute of limitations¹ had expired on July 10, 2014. Consequently, Idaho Rule of Civil Procedure 15(c) governs the outcome in this issue. The pertinent provisions of I.C.R.P. 15(c) provide as follows:

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.

I.R.C.P. 15(c). (Emphasis added.)

In *Winn v. Campbell*, 145 Idaho 727, 729-730 (Idaho 2008), this Court decided an issue nearly identical to the one presented in this case:

Winn filed her complaint against Wayne Campbell, dba Home Hotel and Motel. However, the location where Winn fell was not the Home Hotel; instead, it was the Tumbling Waters Motel. Both hotels, although owned by separate parties, are operated by Campbell, Inc., not by Wayne Campbell personally. Winn does not dispute that she filed her original complaint against the wrong party. Instead,

¹ This is a claim for personal injuries. The statute of limitations for personal injury is two years. I.C. § 5-219.

she alleges that the District Court interpreted the relation-back rule too narrowly, and that justice demands she be allowed to amend her complaint.

At issue is Idaho R. Civ. P. 15(c), the relation-back rule. This Court has described the rule as follows: [A]n amendment changing the party against whom a claim is asserted will relate back to the date of the original pleading if: (a) the claim arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; (b) within the period provided by law for commencing the action against the new party, he received such notice of the institution of the action that he will not be prejudiced in maintaining a defense on the merits; and (c) within the period provided by law for commencing the action against the new party, he knew or should have known that the action would have been brought against him, but for a mistake concerning the identity of the proper party. *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 794–95, 41 P.3d 220, 222–23 (2001). Winn contends that the District Court gave a strict and narrow reading to the rule that would require an “absolute finding of ‘undue prejudice to the opposing party by virtue of the allowance of the amendment’ every time the party to be included was not notified of the actual *filing* of the Complaint within the applicable statutory limitation period.” Winn's argument, however, is without merit.

The issue in *Wait* was whether the defendant received notice within the period provided by law for commencing the action. In a situation similar to the one at bar, the plaintiff failed to name the correct party in her complaint, naming instead a corporation with a name similar to that of the correct party. The plaintiff argued that the period provided by law for commencing an action included the six-month period within which a summons must be served after a complaint is filed. *Id.* at 795, 41 P.3d at 223. The Court disagreed. It held, “The phrase ‘within the period provided by law for commencing the action’ means before the expiration of the applicable statute of limitations.” *Id.* (citing *Hoopes v. Deere & Co.*, 117 Idaho 386, 788 P.2d 201 (1990)). The Court explained that *Hoopes* “expressly rejected” the argument that “the period provided by law for commencing the action” meant the time within which the summons and complaint must be served. *Id.* The Court stated plainly that a civil action is commenced by the filing of a complaint—not by service of process. Thus, the Court held that the plaintiff's amended complaint did not avoid the statute of limitations because it could not relate back to the original filing.

Winn offers no reason why the plain language of the rule should not apply in her case. Instead, she argues that Campbell, Inc. was not prejudiced by her failure to name it as a party in a timely manner. The district court held that Rule 15(c) does not mandate that Campbell, Inc. demonstrate prejudice. Instead, it focused on the fact that Winn failed to give notice to the proper party within the statutory limitations period. The court noted that Campbell, Inc. received notice of the institution of the lawsuit on July 10, 2006, nearly six months after the statute of limitations had expired. Further, the court held that failure to provide notice is

sufficient to show that the party would be prejudiced in maintaining its defense. Since we review this issue under an abuse of discretion standard, the fact that the district court wrote a reasoned opinion on the issue is sufficient for us to uphold its decision. Furthermore, this is the correct result.

Winn failed to make a proper investigation of whom to sue. Her fall occurred at the Tumbling Waters Motel, not the Home Hotel. Had Winn bothered to determine where she was actually staying or to find out who operated the Tumbling Waters Motel in 2004, she likely could have discovered the proper party to sue. Instead, her attorney acted on information from prior dealings he had with Campbell and the Tumbling Waters Motel and a brief conversation he had with Campbell in the beginning of 2006. However, the record does not show that Campbell, Inc. received notice of the suit before the statute of limitations expired. In *Noreen v. Price Dev. Co. Ltd. P'ship*, 135 Idaho 816, 25 P.3d 129 (Ct.App.2001), the Court of Appeals held that a complaint could not relate back where service occurred only one day after the statute of limitations had run. *Id.* at 819, 25 P.3d at 132. Here, Winn failed to provide notice to Campbell personally until nearly six months after the statute of limitations ran. Even if notice to Campbell in his personal capacity was sufficient to satisfy the notice requirements for Campbell, Inc., the fact remains that Campbell, Inc. did not receive notice of the lawsuit within the limitations period. Thus, Winn's amendment could not have related back and the district court properly denied the motion to amend.

Id. (Emphasis added.)

The same result was reached by the District Court in our case and should now be affirmed by this Court. Ms. Gallagher filed her suit against the wrong party. It is apparent that, as in *Winn*, Ms. Gallagher failed to make a reasonable and proper investigation of whom to sue. The correct party, Snake River, the owner and operator of Best Western Cottontree Inn in Idaho Falls, did not receive notice of the claim or suit until April 9, 2015, nine months after the statute of limitations had expired on July 10, 2014, and two years and nine months after the subject accident. Because Snake River did not receive notice of the lawsuit before the statute of limitations expired, under I.R.C.P. 15(c), the result must be that the amendment does not relate back, and the lawsuit is barred by the two-year personal injury statute of limitations.

In *Hoopes v. Deere & Co.*, 117 Idaho 386, 389 (Idaho 1990), this Court stated:

Consequently, Schiavone² and Chacon³ show that, under amended Rule 15(c), the newly named party must receive notice of the commencement of the action before the statute of limitations runs. This applies where the defendant's name is corrected as well as where the defendant's identity is not initially known.

(Emphasis added.)

There is no dispute on the material facts in this case. Snake River did not receive notice of Ms. Gallagher's lawsuit before the two-year statute of limitations expired on July 10, 2014. In fact, Snake River did not receive notice until nine months after the statute of limitations had expired. The Amended Complaint naming Snake River, the owner and operator of the Best Western, as a defendant does not relate back and is barred by the two-year personal injury statute of limitations.

B. Snake River's failure to file a certificate of assumed business name with the Idaho Secretary of State's office does not toll the two-year statute of limitations.

Ms. Gallagher argues that the statute of limitations controversy in this case centers on the legal effect of the prior owner, L & L Limited Legacy, remaining listed as the business owner with the Idaho Secretary of State. (R. p. 65). While, in dicta, the *Winn* Court acknowledged the possibility of tolling a statute of limitations under circumstances the Court had not yet encountered, *Winn* and then *Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012), decided four years after *Winn*, make it clear that the first step in the analysis is to determine whether a plaintiff used reasonable diligence in ascertaining the correct party to sue.⁴ See *Winn*, 145 Idaho at 731; *Ketterling*, 152 Idaho at 560. The level of due diligence required by a plaintiff to ascertain a business owner, as outlined in *Winn*, is further analyzed in *Ketterling*.

² *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986).

³ *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986).

⁴ Although *Winn* acknowledges that there is "some indication that tolling of the statute is possible," the Idaho Court of Appeals found otherwise, stating that "[t]he only remedies or consequences of noncompliance prescribed in the Act itself are those provided in § 53–509." *Noreen v. Price Dev. Co. P'ship*, 135 Idaho 816, 821, 25 P.3d 129, 134 (Ct. App. 2001). Further, it held that "[t]olling of the statute of limitation on a claim against a noncomplying business is not a remedy provided by the legislation." *Winn*, 145 Idaho at 731 citing *Noreen v. Price Dev. Co. P'ship*, 135 Idaho 816, 820, 25 P.3d 129, 133 (Ct. App. 2001).

In *Ketterling*, a customer brought a negligence action against Burger King for injuries sustained when she slipped on snow in a restaurant parking lot. 152 Idaho at 556. The plaintiff originally filed the lawsuit against Burger King Corporation within the two-year limitations period. *Id.* The plaintiff had searched the Idaho Secretary of State's records for the owner, but because the franchisee never filed a certificate of assumed business name, the entity listed on the website was Burger King Corporation. *Id.* at 559. At that point, the plaintiff discontinued her search for the business owner. *Id.* After the limitations period expired, the plaintiff learned the identity of the franchisee and amended her complaint to include the franchisee. *Id.* at 556. This Court affirmed the District Court's finding that the amended complaint did not relate back because the franchisee was not provided with notice of the lawsuit until over a month after the period provided by law for commencing the action had expired. *Id.* at 558. (Emphasis added.)

This Court also affirmed the District Court's refusal to toll the limitations period for the franchisee's failure to register an assumed business name for the restaurant. *Id.* at 560. The plaintiff in *Ketterling* attempted to differentiate her situation from that of *Winn*, stating that she had done her due diligence by checking with the Idaho Secretary of State, but this Court disagreed, stating:

Ketterling is correct that this is not a situation in which she "fail[ed] to take the simple step of finding out where she fell." Ketterling had the right place, but she still failed to exercise reasonable diligence in figuring out who to sue. Ketterling's search of the Secretary of State's records was reasonable, but she clearly could have done more. There is no indication in the record that she visited the restaurant prior to the end of the limitations period to find out who was responsible for operation of the establishment. Like the situation in a criminal investigation, where some of the best clues are found at the scene of the crime, often evidence relevant to a personal injury action can be found at the scene of the accident.

Ketterling, 152 Idaho at 560. (Emphasis added.) In addition to visiting the restaurant to determine who was responsible for its operation, this Court suggested another method the plaintiff should have pursued to determine the identity of the business owner, stating:

First, *Ketterling* could have visited the restaurant before the statute of limitations ran and simply asked an employee who was responsible for operating the restaurant . . . Second, she could have contacted the health district to learn the identity of the restaurant operator. There is no indication in the record that she did so. Therefore, the district court was correct in concluding that the identity and contact information for [franchisee] was reasonably available and ascertainable prior to the filing of the original complaint.

Id. at 560-61. (Emphasis added.)

In this case, the undisputed record established by Ms. Gallagher illustrates that the only effort she undertook to locate the owner of the Best Western Cottontree Inn was a simple search of the Idaho Secretary of State's webpage. (R. pp. 13-18). Ms. Gallagher does not state when that web search occurred and/or explain why no further action was undertaken to determine the owner/operator of the hotel and/or real property on which the hotel is located. As Idaho courts have clearly stated, simply performing a search of the Secretary of State's database to determine a defendant/party is inadequate, there must be a more comprehensive investigation. For example, oftentimes a defendant business will lease property from another entity. In such a situation, a mere search of the Secretary of State business filings would not provide a plaintiff with all necessary potential defendant/parties, such as the landowner.

A reasonable search was not undertaken in this case. Despite living and working in Idaho Falls, the location of the accident, Ms. Gallagher did not even visit the Best Western during the two years following the accident to simply inquire as to who owned the business and/or property. Further, in *Ketterling*, this Court noted that it is "common knowledge among the public" that in

order to operate a restaurant, a license from the health department is required, and that plaintiff could have determined the owner by contacting the health department. *Id.* at 560. Similarly, for our purposes, it is also common knowledge that ownership of all properties within a county's borders are recorded with the county assessor's and/or recorder's office. Yet, Ms. Gallagher makes no representations that she called or visited the Bonneville County Assessor's and/or Recorder's Office to determine the owner of the subject property. As similarly explained in *Ketterling*, the identity and contact information for the owner/operator of the Best Western Cottontree Inn was reasonably available and ascertainable, and Ms. Gallagher's single attempt to discover such information via a web search falls short of the level of due diligence required by Idaho courts.

Ms. Gallagher asserts that this Court's decision in *Ketterling* does not apply to this case because of a several alleged factual distinctions. Ms. Gallagher takes the liberty of attempting to distinguish the cases based on alleged facts that do not exist in *Ketterling*. First, she contends that the significant difference between the *Ketterling* case and this case is that, in *Ketterling*, "the Defendant had not filed [with the Secretary of State], [so] there was no assumed name of record which would have confused the plaintiff, and the plaintiff did not inquire further."⁵ Appellant's Brief, p. 10. Conversely, Ms. Gallagher asserts that she searched the Idaho Secretary of State's website and found information indicating that L & L Legacy Limited Partnership owned and operated the Best Western hotel. However, in *Ketterling*, this Court's decision states, "Ketterling 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.'" 152 Idaho at 559. This does not mean that there was no filing whatsoever, as Ms. Gallagher asserts. Rather, the plaintiff

⁵ Plaintiff's brief goes on to state that Ketterling "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." Plaintiff's Brief, p. 11 (emphasis added).

in *Ketterling* found on the Secretary of State's website that Burger King Corporation had registered to do business as "Burger King" in the state of Idaho. There was no information demonstrating that HB Boys was the owner/operator of the Burger King restaurant, because HB Boys had not filed a certificate of assumed business name.

In this case, Ms. Gallagher found the same information on the Secretary of State's website: that L & L Legacy Limited Partnerships had registered to do business in Idaho as Best Western Cottontree Inn. There was no information demonstrating that Snake River was the owner/operator of the Best Western Hotel, because Snake River had not yet filed a certificate of assumed business name. The factual distinction asserted by Ms. Gallagher does not exist; Ms. Gallagher found the same information on the website as the plaintiff in *Ketterling*.

In a further attempt to distinguish her case from *Ketterling*, Ms. Gallagher asserts additional factual distinctions which are completely inaccurate and misstate the facts set forth in the *Ketterling* decision and in the record before this Court. Specifically, Ms. Gallagher's brief states the following:

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, and that it had been on file with that name and address for many years prior to the accident, and was 'current' as of the time of filing the complaint.

Appellant's Brief, p. 11. Ms. Gallagher's statement that she had the proper location of the injury elicits an assumption that the plaintiff in *Ketterling* did not, which is false. In *Ketterling*, this Court distinguished it from *Winn* by expressly stating "Ketterling is correct that this is not a situation in which she 'fail[ed] to take the simple step of finding out where she fell.' Ketterling had the right place, but she still failed to exercise reasonable diligence in figuring out who to sue." *Ketterling*, 152 at 560 (emphasis added). Rather than distinguishing the two cases, this fact

illustrates another of their material similarities, that both Ms. Gallagher and Ketterling had the proper location of their respective accidents, but failed to ascertain the proper owner of the business.

Lastly, Ms. Gallagher argues that she “found the address [of the injury] listed in the official record on file with the Idaho Secretary of State, and that it had been on file with that name and address for many years.” Appellant’s Brief, p. 11. This statement is false. As illustrated by Ms. Gallagher’s own submissions, only the business address of L & L Legacy was provided on the Secretary of State’s website, not the address of the hotel (the site of the injury). There is also no evidence that the address of the hotel had ever been listed, let alone for “many years” as asserted by Ms. Gallagher’s brief. Ms. Gallagher’s assertion is simply not true. (R. pp. 15-18). Ms. Gallagher also states that L & L Legacy’s information was “current.” Appellant’s Brief, p. 11. Clearly, Ketterling presumed the Secretary of State’s records were “current” and relied upon their accuracy, just as Ms. Gallagher allegedly did. In *Ketterling*, this Court established that while this was a reasonable first step, a plaintiff is responsible for bringing her own lawsuit, which entails some minor, yet additional steps to ensure the correct parties are included. As such, Ms. Gallagher’s attempt to distance herself from the *Ketterling* case by creating factual distinctions where none exist is illusory, and her arguments actually confirm the glaring similarities between the two cases.

In summation, a review of the facts in *Ketterling* demonstrates that this case and the *Ketterling* case are substantially similar and that the District Court correctly granted Defendant’s Motion to Dismiss based upon the *Ketterling* decision. The following is a brief highlight of the pertinent similarities between this case and the *Ketterling* case:

Ketterling	Gallagher
HB Boys, owner and operator of the Burley Burger King restaurant, <u>failed to file a certificate of assumed business name</u> with the Idaho Secretary of State.	Snake River Petersen Properties, LLC, owner and operator of Best Western Cottontree Inn at the time of the subject accident, <u>failed to file a certificate of assumed business name</u> with the Idaho Secretary of State.
Plaintiff searches the Idaho Secretary of State’s records and <u>finds the records for Burger King Corporation</u> , doing business as “Burger King” in Idaho.	Plaintiff searches the Idaho Secretary of State’s records and <u>finds the records for L&L Legacy Limited Partnership</u> , doing business as “Best Western Cottontree” Inn in Idaho.
Plaintiff contends that she could ascertain <u>no name besides Burger King Corporation</u> registered with the Idaho Secretary of State’s Office to conduct business in Idaho under the name “Burger King.”	Plaintiff contends that she could ascertain <u>no name besides L&L Legacy Limited Partnership</u> registered with the Idaho Secretary of State’s Office to conduct business in Idaho as Best Western Cottontree Inn.
Plaintiff <u>takes no further action to investigate</u> the identity of the owner and/or operator of the Burley Burger King restaurant, and files suit against Burger King Corporation, <u>as registered with the Idaho Secretary of State’s Office</u> .	Plaintiff <u>takes no further action to investigate</u> the identity of the owner and/or operator of the Best Western Cottontree Inn in Idaho Falls, and files suit against L&L Legacy Limited Partnership, LLC., <u>as registered with the Idaho Secretary of State’s Office</u> .
Plaintiff later learns that the restaurant is owned and operated by HB Boys and attempts to <u>amend her complaint</u> and serve the lawsuit on HB Boys <u>after the expiration of the statute of limitations</u> .	Approximately six months after the expiration of the statute of limitations, Plaintiff learns that the Best Western Cottontree Inn is owned and operated by Snake River Petersen Properties, LLC, and <u>amends her Complaint</u> and serves the Defendant nine months <u>after the expiration of the statute of limitations</u> .

As demonstrated above, there are no significant factual distinctions between the *Ketterling* case and our case. Ms. Gallagher’s assertion that factual distinctions exist based upon the information found on the Secretary of State’s website in each case is not supported by the record.

Ultimately, Ms. Gallagher is asking this Court to ignore well-settled case law in an effort to benefit plaintiff parties that fail to take diligent steps to ascertain parties’ identities and adhere to deadlines in a timely manner. Ms. Gallagher has attempted to present a unique case in order to

offer this Court an opportunity to expand on the dicta found in *Winn*. However, this very circumstance was presented to this Court in *Ketterling v. Burger King Corp.* Like HB Boys, Snake River engaged in no efforts to deceive Ms. Gallagher; it merely failed to file a certificate of assumed business name with the Secretary of State following the acquisition of the business. It would be inequitable to allow Ms. Gallagher a windfall at the expense of Snake River, when she failed to initiate and prosecute her lawsuit in accordance with the plain language of the law. Lawsuits are for the benefit of the plaintiff, and as such are commenced and driven forward through their efforts. It is incumbent upon a plaintiff to take the reasonable steps necessary to find the correct defendant party; in the cases of *Winn* and *Ketterling*, the Court outlined what those steps are. Finding for Ms. Gallagher in this case and overturning the District Court's decision would merely be rewarding Ms. Gallagher for failing to timely prosecute her claim. Every deadline given to Ms. Gallagher in this case was pushed to the limit, demonstrating a clear lack of diligence on the part of Ms. Gallagher. This lack of due diligence should not be rewarded.

V. CONCLUSION.

Based upon the foregoing argument, the District Court was correct in determining that Ms. Gallagher's Amended Complaint does not relate back and that the lawsuit should be dismissed pursuant to the two-year personal injury statute of limitations. The District Court also correctly determined that based upon the clear guidance of *Ketterling*, the undisputed facts in this matter do not support a tolling of the statute of limitations based upon the Snake River's failure to file a certificate of assumed business name. Snake River also seeks an award of its attorney fees and costs incurred on appeal and asks that this Court render such other and further relief as it deems just and proper.

DATED this 26th of April, 2016.

MOORE & ELIA, LLP

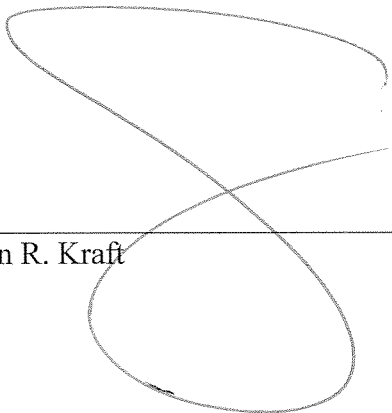
By _____
Steven R. Kraft, of the firm
Attorneys for Defendant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2016, I served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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