

5-20-2016

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

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Gallagher v. Best Western Cottontree Inn Appellant's Reply Brief Dckt. 43695" (2016). *Idaho Supreme Court Records & Briefs*. 6129. [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6129](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6129)

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).



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 REPLY 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

TABLE OF CONTENTS

I. Facts .....1  
II. Argument .....2  
III. Conclusion .....7

**TABLE OF AUTHORITIES**

<i>Cases</i>	<i>Page</i>
<i>Hoopes v. Deere &amp; Co</i> , 117 Idaho 836, 389 Idaho (1990) .....	6
<i>Ketterling v. Burger KingCorp.</i> , 152 Idaho 555, 272 P.3d 527 (2012) .....	6
<i>Ketterling v. Burger KingCorp.</i> , 152 Idaho 555, 272 P.3d 527 533 (2012) .....	6
<i>Winn v. Campbell</i> , 145 Idaho 727, 728, 184 P.3d 852, 853, (Idaho 2008) .....	6
<i>Winn v. Campbell</i> , 145 Idaho 727, 731, 184 P.3d 852, 856 (2008).....	4

I.

FACTS

The name of the business where Plaintiff was injured was the Best Western Cottontree Inn. This was the name of the business identified in the original pleadings on file with the District court in Bonneville County, which Snake River admits was filed in Bonneville County, Idaho, before the statute of limitations ran.

There is only one Best Western Cottontree Inn in Idaho. There is no question this is the name of the business that owned the location where Plaintiff was injured.

The Plaintiff, Gallagher, correctly identified the address of the location of the business where she was injured, in the complaint originally filed in this case prior to the running of the statute of limitations: 900 Lindsay Boulevard, Idaho Falls, Idaho. Snake River complains that this information was not on the Idaho Secretary of State website; while that is true, it is also true that this is the correct location of the business named Best Western Cottontree Inn in Idaho Falls where she fell; it does not matter if the address is listed on the website, because the Plaintiff correctly identified the address of this one hotel operated as Best Western Cottontree Inn.

The date of injury at this correctly-named business at this correctly-identified location was July 10, 2012.

The Idaho Secretary of State public records shows this business, during the period from 2005-2015 as being owned by L&L Legacy Limited Partnership, not Snake River Petersen Properties, LLC, A Wyoming Close Limited Liability(hereinafter "Snake River").

Prior to July 10, 2012, Snake River Petersen Properties, LLC, purchased Best Western Cottontree Inn. When it did so, it did not, contrary to the requirements of I.C. Section 53-504, file a proper notice with the Idaho Secretary of State's office. Therefore, when Plaintiff's attorney checked the ownership of Best Western Cottontree Inn shortly before filing this suit in July, 2014, it verified that ownership in this business had not changed during the relevant time period.

Snake River does not deny this.

Plaintiff relied on the accuracy of the official state website concerning ownership of businesses operating under an assumed name.

Snake River does not deny this.

Snake River had the duty and the opportunity to correct the record on the official state website. It failed to do so.

Plaintiff had no duty or opportunity to correct the official state record. Plaintiff certainly had no obligation to assume the owner of Best Western Cottontree Inn failed to file a report with the Idaho Secretary of State that for 2012, 2013 and 2014, this business was owned by someone other than L&L Legacy Limited Partnership.

## II.

### ARGUMENT

The fault in this case lay completely with Snake River.

For all of Snake River's pounding the table in its responsive brief concerning filing deadlines, the only one that was missed was the deadline for suing the owner of the Best Western Cottontree Inn as of July 10, 2012. Everything else was accomplished in a timely fashion.

The entire controversy in this appeal is quite simple, and counsel merely asks the court this one question. When the Idaho Supreme Court state in *Winn* and *Ketterling* that the Statute of Limitations could be tolled when the plaintiff identifies the location of the place where the plaintiff was injured and correctly identifies the business that controls that location, did it mean it?

This appeal is based upon the Court's explicit language in *Winn v. Campbell*, that in a situation where the Plaintiff does not name the correct defendant because the defendant did not file its assumed name ownership with the Idaho Secretary of State, yet does identify the actual motel where she fell, and did not name the correct owner because the owner failed to file as required with the Idaho Secretary of State, tolling is appropriate:

**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).

The language of Winn indicates that plaintiff's counsel's due diligence consists in finding the right business where the plaintiff fell, and getting ownership information from the Secretary of State's website. If the plaintiff finds that information on the Secretary of State's website and relies on it, he has done his due diligence. If he does not find that information on the Secretary of State's website, he must look in other places.

There is only one "Best Western Cottontree Inn" identified in the records of the Secretary of State. Plaintiff did not misidentify the specific business. Defendant can't say Plaintiff identified the wrong "Best Western Cottontree Inn" because there is only one, and there was only one at the time Plaintiff was injured.

Snake River grasps at straws to complain that Plaintiff might have gotten her information wrong. The problem with Snake River's argument is that Plaintiff did not get her information wrong. The only thing she got wrong was the owner of the correct business, and she got that wrong only because Snake River failed to tell the Idaho Secretary of State that it bought Best Western Cottontree Inn. That situation is covered in Winn; the spurious hypothetical raised by Snake River is not.

Respondent complains Plaintiff did not search enough different places to find information concerning the owner of the Best Western Cottontree Inn. The language cited in *Ketterling* concerns a factual problem for appellant in that case which does not exist in the case at bar. The key difference regarding *Ketterling* is that it involved the very specific question of the relationship between a franchisor Burger King could remain in the suit as franchisor. When a franchisor is sued, the plaintiff has sued the wrong business unless it can prove the franchisor retained control over the specific aspect of the business which allegedly caused the harm:

A franchisor may be held vicariously **liable** for the tortious conduct of its franchisee only if the franchisor has control or a right of control over the daily operation of the specific aspect of the franchisee's business that is alleged to have caused the harm.

*Ketterling v. Burger King Corp.*, 152 Idaho 555, 561, 272 P3d 527, 5333 (Idaho 2012). That is what happened when Ketterling sued the franchisor instead of the franchisee; it was not enough to identify the franchisor because the defendant had no evidence the franchisor corporation retained control over the daily operation of the franchise where Ketterling was hurt.

The Court stated that what Ketterling did was not enough, and Ketterling was required to keep looking and not assume the franchisor was liable. This Court never said there is a requirement to search multiple locations to find the correct business after you have found the correct business on the Idaho Secretary of State website. The search continues until, not after, you find the official, current information regarding where the plaintiff was injured on the day she was injured, and you are entitled to rely upon that website to identify who owned the fictitiously-named business.

At some point there is a duty for the business to properly identify itself 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." *Id.*

This case involving Gallagher and Snake River properly identifies the place and time to hold the business responsible for failing to properly identify itself with the Idaho Secretary of State.

There is no prejudice to either party in tolling the statute under these facts. Plaintiff has to prove her case and Snake River has its opportunity to defend.

If Snake River does not want this to happen in the future, it will file notice of its ownership of Best Western Cottontree Inn with the Idaho Secretary of State, as it is required.

The plaintiff in *Hoopes v. Deere & Co*, 117 Idaho 836, 389 (Idaho 1990), named the wrong business. Plaintiff named the right business, Best Western Cottontree Inn.

The plaintiff in *Winn v. Campbell*, 145 Idaho 727, 728, 184 P.3d 852, 853, (Idaho 2008) had the wrong location and the wrong business. Plaintiff's complaint named the right business and the correct location (900 Lindsay Boulevard, Idaho Falls, Idaho. (R., Vol. I. p7 L. 2-3).

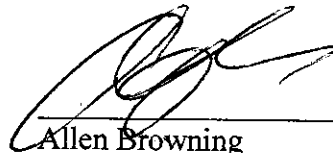
The plaintiff in under *Ketterling v. Burger KingCorp.*, 152 Idaho 555, 272 P.3d 527 (2012), did not know which of many franchises of Burger King to name, and did not name the correct business where the plaintiff was injured. Plaintiff did name the correct business and the correct location of the business where plaintiff was injured. Ketterling had 12,000 Burger King restaurants to choose from; Plaintiff had only one Best Western Cottontree Inn.

III.

CONCLUSION

Plaintiff did everything right. Under the clear guidance of *Winn v. Campbell*, the decision of the District Court should be reversed, and this Court should rule the statute of limitations was tolled in this case because Plaintiff had a right to rely upon the Idaho Secretary of State's website to identify the owner of Best Western Cottontree Inn for July 10, 2012.

Dated this 17th day of May, 2016.



---


Allen Browning  
Counsel for Plaintiff/Appellant  
Geraldyn Gallagher

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document was served upon the following person(s) this 17<sup>th</sup> day of May, 2016, by the following method:

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

- US MAIL
- FAX
- HAND DELIVERY
- COURTHOUSE BOX
- EXPRESS DELIVERY

  
\_\_\_\_\_  
Allen H. Browning