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IN THE SUPREME COURT OF THE STATE OF IDAHO

MELANIE HANSEN, Plaintiff-Appellant, v. GARY E. WHITE, Defendant-Respondent.	Docket No.: 45185

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County
CV-16-2496
Honorable Dane H. Watkins, Jr. presiding

Michael R. McBride
Residing at Idaho Falls, for Appellant

McBride Roberts & Romrell, Attorneys
Signature Law Group, P.L.L.C.
1495 East 17th Street
Idaho Falls, Idaho 83404
Telephone: (208) 525-2552
Facsimile: (208) 525-5288
Email: mike@mcbrideandroberts.com
ISB License No: 3037

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INTRODUCTION

Defendant complains that Plaintiff has not provided this Court with the District Court opinion transcript. Plaintiff responds that this Court has the complete record, primarily affidavits of both parties, necessary to determine for itself whether the District Court erred. This is akin to a trial de novo. Plaintiff alleges that the District Court did not construe facts liberally in favor of Plaintiff, contrary to the standard on summary judgment. Boiled down to its essence, Defendant's Response Brief consists of four failed arguments. All are unsupported by existing law.

IV.
APPELLANT'S REPLY ARGUMENT

1. 'Due diligence' does not mean hiring a private investigator.

Defendant wishes this Court adopt a new standard of due diligence. This standard is that upon Plaintiff's failure to find Defendant who has explicitly provided a false address to state officials, a Plaintiff must 1) always hire a private investigator to find Defendant; 2) it must also use a skip trace service; and 3) Plaintiff must spend at least two full days in the search. And, there is no exception to this "new" rule including evasion of service. (Respondent's Brief p. 12)

Interestingly, Defendant utilized a skip trace service based in Colorado and an investigator based in Salmon, Idaho (*R, p. 118),* choices which Defendant's insurer, Farm Bureau, must have utilized in the past. It selected not to duplicate an online computer search, but rather, only enlist the help of vendors. *R, p. 108, 109* There is no case law to support this standard.

Contrary to this proposed standard, Idaho still uses a 'totality of circumstances' test in *Harrison v. Bd. Of Prof'l Discipline of Idaho State Board of Med.* 145 Idaho 179, 183; 177 P.3d 393 (2008), to include a 'failure to act within six months' factor in Harrison v. Board of Prof'l Discipline; and a 'legitimate reason' factor in *Nerco Minerals Co. v Morrison Knudsen Corp.*, 132 Idaho 531, 534; 976 P.2d 457 (1999) when addressing good cause.

As to legitimate reason, Plaintiff reminds the Court that Defendant submitted three affidavits to support his position that he was not served. Not once did he deny that his stated address was in Firth, Idaho. Not once did he deny that he blatantly ignored three Idaho Code provisions in providing an accurate address to: 1) Idaho Department of Motor Vehicles, 2) Bingham County Vehicle Registration Department when registering his 2008 GMC truck (the one involved in the crash) after he moved from his Firth address in 2009 in the registration renewal years in 2010 – 2014; and 3) Investigating Officer Barker on May 24, 2014. In that exchange with Officer Barker, Defendant specifically violated I.C. § 18-8007(1)(c) which states:

> The driver of any vehicle that has been involved in an accident . . . who knows or has reason to know that that said accident has resulted in injury of any person . . . shall: . . . . give his name, address, and the name of his insurance agent or company . . . to the person struck . . . or to the person attending any vehicle collided with. (Emphasis added)

Because Defendant did not speak with Plaintiff directly at the accident scene, he provided his address through an intermediary which was Officer Barker. Officer Barker then passed this information to Plaintiff in the Collision Report. All of these due process statutes converge to form a 'starting point' for service of process, to occur within six months after filing the complaint. In other words, to serve the complaint Plaintiff must start somewhere to locate Defendant. According to Plaintiff's Process Server, Marc Jorgenson, this is normally at the

address listed in the police report which is taken from a driver license and/or proof of registration which is computer verified by the Department of Motor Vehicles. *R, p. 141 - 143*

2. Defendant's skip trace 'experiment' was flawed and is irrelevant.

Defendant constructed a skip trace 'experiment' in an effort to illustrate the relative ease of finding Defendant. But he does not convey the whole story of how his insurance company, Farm Bureau, located Defendant at his Hickory Court address. It appears Defendant had access to and used Defendant's social security number in this search. Plaintiff directs the Court to *Record p. 115* where it will find on the report the words and numbers: "Verifiers: [redacted] [redacted]Also, Defendant's vendors were supplied with a new insured name, "Pamela White," who is not listed in the Police Report. *R, p. 47-53* This means the skip trace service probably had some access to this information, likely in Farm Bureau's file. How else could they get it as it was not in the Police Report? Plaintiff argues that this critical piece of information provides a substantial advantage in a search and one rarely if ever obtained by a plaintiff trying to locate a defendant.

No doubt, Farm Bureau Ins. Co. had a copy of Plaintiff's Summons and Complaint in hand at the Idaho Falls Farm Bureau office on November 8, 2016, all within the six month service time parameters. This is proof that Plaintiff did act to serve within six months. This uncontested fact was put forth by Plaintiff in the Affidavit of Kristen Walker, Plaintiff's legal assistant: "On November 8, 2016 . . . Mr. Pincock informed me that Farm Bureau already had a copy of the complaint and summons because Natalie White had delivered it to their office." Accordingly, she thought Farm Bureau had accepted service. *R, p. 73* It follows that Ms. White

notified Defendant who instructed her to take it there. Thus, Defendant had actual notice of the complaint within the six month time parameter.

Finally, and importantly, even Defendant's professional grade skip trace and private investigator results were inaccurate. The finished product was delivered to Farm Bureau on January 11, 2017 with a claim that: "The subject, Gary Eugene White has relocated from the provided address in Firth, ID and is currently residing in at the following address: 3640 Hickory Court in Idaho Falls, Idaho." *R, p. 115* Yet, according to Defendant's own affidavit he had already moved to Mesquite, Nevada three months earlier in October of 2016. *R, p. 156* In truth, what this search found was Defendant's former address on Hickory Court.

The same holds true for investigator Lansing who on April 11, 2017 attested "Within two days [I] was able to locate Mr. White's current address at 3640 Hickory Ct. Idaho Falls, ID." *R, p. 117* But a knock on the door would show that Defendant was not at that address.

If anything, this experiment stands for the proposition that Defendant was difficult to find and 'on the move.' This is precisely the problem that Plaintiff faced. Even Defendant's son and daughter-in-law stated that Defendant's address was unknown or possibly in Nevada.

In review of the record, this skip trace and private investigator experiment was the only "new evidence" -- inaccurate as it was -- which Defendant presented in his Motion for Reconsideration. *R, p. 82* This somehow changed the District Court's mind from its previous correct finding that Plaintiff had showed good cause.

In retrospect, this evidence should not have been considered at all and is irrelevant, as the correct analysis was to be Plaintiff's attempt to serve Defendant within six months, not Defendant's search thereafter. According to the holding in *Martin v. Hoblit,* 133 Idaho 372, 375,

987 P.2d 284 (1999): "The focus of the good cause inquiry is on the six-month time period following the filing of the complaint."

3. ***Hincks v. Neilson*** **has striking factual differences to the case at bar.**

The Defendant leans heavily on *Hincks v. Neilson*, 137 Idaho 610, 51 P.3d 424 (2002) as the superior precedent in Idaho, urging this Court to use it as a template for 'due diligence' (Respondent's Brief p. 20). Upon scrutiny however, *Hincks v. Neilson* is not similar, much less identical, to the case at bar.

First, in *Hincks*, the Court of Appeals in upholding a motion to grant summary judgment on Plaintiff's failure to show good cause for lack of service contains no finding that the address Defendants had provided to the investigating police officer were in any way falsified or inaccurate. *Id.* at 611

And second, in *Hincks* there was no evidence presented to the District Court that there was any attempt by Plaintiff to serve the summons and complaint within six months. All evidence indicated that the search occurred after the six month period:

> Caesar's affidavit provided no specific dates for when these attempts took place to show that they occurred within the six-month period and Hincks provided no information about any actions she or her counsel personally took during the six-month time period following August 3, 1999. *Id.* at 613

In contrast, the case at bar is one of first impression. Plaintiff has presented a new fact pattern not addressed in any cases that she has researched in the State of Idaho or elsewhere regarding the falsification of Defendant's address in a face to face meeting with the investigating officer. Officer Barker's affidavit stands unrefuted in that no other resident address, other than at

Firth, was reflected on Defendant's license or registration. Officer Barker also testified by way of affidavit that, "I also asked Defendant and he said this [Firth address] was his address." *R, p. 34*

4. Equity requires a reversal.

Finally, though certainly not necessary considering the facts here, an equitable remedy is permissible and can be raised at any time in any proceeding either at the district or appellate level to remedy a wrong. Idaho Rule of Civil Procedure 1(b) - Scope of Rules includes the notion of equity in all proceedings:

> These rules govern the procedure and apply uniformly in the district courts and magistrate divisions of the district courts in the state of Idaho in all actions, proceedings and appeals of a civil nature whether cognizable as cases at law or in equity . . . (Emphasis added)

Also, Idaho Appellate Rule 17(f) – Issues states:

> A notice of appeal shall include substantially the following information: A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provide any such list of issues on appeal shall not prevent the appellant from presenting any other issues on appeal.

Though 'equitable estoppel' is not listed as an issue under this such title, Plaintiff has raised the issue of 'evasion of service' specifically referenced as a 'good cause' exception in *Harrison v. Bd. Of Prof'l Discipline of Idaho State Board of Med.*, 145 Idaho 179, 183; 177 P.3d 393 (2008) citing *Martin v. Hoblit,* 133 Idaho 372, 375, 377, 987 P.2d 284 (1999):

> There is no bright line test in determining whether good cause exists. . . If a plaintiff fails to make any attempt at service within the time period of the rule, it is likely that a court will find no showing of good cause . . . Courts also

> look to factors outside of the plaintiff's control including . . . evasion of service of process. (Emphasis added)

Thus, Defendant's false statements as to his address constitutes evasion and accordingly Defendant should be estopped from asserting a defense of failure to serve.

Further dissecting the 'good cause' determination on an equitable level, James William Moore's, *1 Moore's Federal Practice,* vol. 1, § 4.82, 4.83 (3d. ed, LexisNexis 2017 update) states:

> [E]ven without a showing of good cause, courts have discretion to grant additional time to complete service. . . . *Id.* at § 4.82 While under Rule 4(m) [the current federal equivalent of I.R.C.P 4(b)(2)] an extension is mandatory if good cause is shown and discretionary if not. . . . For example, plaintiff's repeated but unsuccessful efforts to ascertain defendant's address demonstrates diligence in attempting service and warrants granting additional time to make service. . . . Even if plaintiff fails to move for an extension, the court may refrain from dismissing defendant from the action if plaintiff can demonstrate good cause. *Id* at § 4.83 (Emphasis added)

Moore's treatise then directs to *Geller v. Newell,* 602 F. Supp 501, 502 (S.D.N.Y. 1984) This case was subject to the now superseded Fed. Rule of Civil Procedure 4(j) which has language identical to that currently in IRCP 4(b)(2):

> Unless plaintiff's failure to serve the summons and complaint within 120 days was for "good cause", the case must be dismissed F.R.Civ.P. 4(j); . . . . The harsh sanction of Rule 4(j) is appropriate to those cases which no-service was the result of mere inadvertence. . . While it would be prudent for a plaintiff who will be unable to complete service within the statutory period to move for an enlargement of time . . . prior to the running of the 120 days, the failure to do so does not mandate dismissal under Rule 4(j). In this case, plaintiff was diligent in his efforts to serve defendant and he did, in fact complete service only 14 days after the deadline. Defendant has not alleged that he was prejudiced in any way by the brief delay. Under these circumstances, dismissal was unwarranted. *Id.* at 502

Finally, in *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) the 9th Circuit, in application of federal rules for service, held:

> Rule 4(m) provides in part: If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to the defendant or direct that service be effected within a specified time; provided that if Plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. . . .
>
> Rule 4(m) . . . *requires* a district court to grant an extension of time when the plaintiff shows good cause for the delay . . . . Additionally, the rule *permits* the district court to grant an extension even in the absence of good cause. *Id.* at 1040

V.
CONCLUSION

Plaintiff asserts that the District Court correctly decided this case on first review. After having the opportunity to review the affidavits of Kristen Walker, Attorney McBride, Officer Barker and Process Server, Marc Jorgensen, the Court was persuaded that 'good cause' did exist.

Only after Defendant filed a Motion for Reconsideration, did the Court encounter some difficulty in light of Defendant's skip trace and private investigator 'experiment.'

Plaintiff reasserts that the efforts she made constitute due diligence especially regarding the circumstance she encountered within six months, including attempts to personally serve at Defendant's declared address before the six month expiration, the subsequent Internet search which did not result in a finding of his residence either in Idaho or Nevada, the actual service to Defendant's daughter-in-law within the six-month parameters at Defendant's stated address, the

attempt to publish the summons and complaint within six months and finally, the subsequent petition to the District Court to grant addition time to publish, which was granted.

Defendant should not be afforded a free pass here. Defendant's conduct, before and after the crash, was in violation of no less than four statutory laws. It constitutes a de facto evasion of service of process, all part of an attempt to avoid the payment of bodily injury damages sustained by Plaintiff through no fault of her own.

Plaintiff respectfully requests that the District Court Dismissal be reversed and to declare that Defendant was served in a timely fashion, via personal service at his stated address on November 2, 2016, (*R, p. 44, 54*) or by publication with leave of the District Court which was completed on February 9, 2017. *R, p. 84, 85*

RESPECTFULLY SUBMITTED this 8 day of January, 2018.

McBride Roberts & Romrell Attorneys

Michael R. McBride
Attorney for Plaintiff

CERTIFICATE OF SERVICE & COMPLIANCE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on this 8 day of January, 2018, I caused a true and correct copy of the foregoing document to be served upon the person(s) listed below by mailing; and further, that in compliance with all of the requirements set out in I.A.R. 34.1, an electronic copy was also served on each party at the following email addresses:

Ryan B. Peck
Attorney At Law
PO Box 4848
Pocatello, ID 83205-4848
Fax: (208) 239-4478
Email: rpeck@idfbins.com

- ☑ Mail
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Facsimile
- ☑ Email

Clerk of the Idaho Supreme Court
451 W. State Street
PO Box 83720
Boise, ID 83720-0101
Email: sctbriefs@idcourts.net

- ☑ Mail
- ☐ Overnight Delivery
- ☐ Hand Delivery
- ☐ Facsimile
- ☑ Email

McBRIDE ROBERTS & ROMRELL ATTORNEYS

By: _____
Michael R. McBride ISB #3037