12-18-2017

Hansen v. White Respondent's Brief Dckt. 45185

IN THE SUPREME COURT OF THE STATE OF IDAHO

MELANIE HANSEN, Plaintiff-Appellant, vs. GARY E. WHITE, Defendant-Respondent.	Supreme Court Case No.: 45185

RESPONDENT'S BRIEF

Appeal from the District Court of the Seventh Judicial District in and for the County of Bonneville

HONORABLE DANE H. WATKINS, JR.

Michael R. McBride
Residing at Idaho Falls
Attorney for Plaintiff-Appellant

Signature Law Group
1495 East 17th Street
Idaho Falls, ID 83404
Telephone: (208) 525-2552
Facsimile: (208) 525-5288
E-mail: mike@mcbrideandroberts.com

Ryan B. Peck
Residing at Pocatello
Attorney for Defendant-Respondent

Farm Bureau Mutual Insurance
Company of Idaho
P.O. Box 4848
Pocatello, ID 83205
Telephone: (208) 239-4385
Facsimile: (208) 239-4478
E-mail: rpeck@idfbins.com

RESPONDENT'S BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. STATEMENT OF THE CASE

A) NATURE OF THE CASE

This matter comes to this Court due to Ms. Melanie Hansen's, Plaintiff-Appellant's violation of IRCP 4(b) by failing to timely serve Mr. Gary White, Defendant-Respondent. Due to this failure of timely service, the District Court granted Mr. White's motion to dismiss the complaint without prejudice. Ms. Hansen failed to show good cause for the failure of timely service. The District Court ruled from the bench at a hearing on April 27, 2017. R, p. 4. The District Court adopted its oral rulings by reference in the Order for Dismissal without Prejudice filed on May 5, 2017. R, p. 152. Ms. Hansen seeks now to appeal the District Court's decision, but failed to include the transcript of the hearing where evidence was presented and where the District Court issued its oral rulings. The Final Judgment was also filed on May 5, 2017.

B) COURSE OF PROCEEDINGS

While getting some dates correct, Ms. Hansen failed to represent the course of proceedings properly in Appellant's Brief. Therefore, additional information is provided in the following recitation of the course of proceedings in order to provide this Court with a full account of the District Court's actions. The Complaint and Demand for Jury Trial (Complaint) was filed on May 10, 2016. R. p. 6. After over six months had expired since the filing of the Complaint, Mr. White filed a Special Notice of Appearance on November 21, 2016. R. p. 11. Mr. White also filed a Motion to Dismiss supported by a memorandum, the Affidavit of Natalie White and Affidavit of Gary E. White. R. pp. 13-24.

Ms. Hansen responded by filing Plaintiff's Response to Motion to Dismiss and Motion for Extention (sic) of Time for Service of Process and Proper Proof of Service on December 12, 2016. R. p. 25. This response was supported by a memorandum, the affidavit of Officer David R. Barker,

the affidavit of Marc Jorgensen, the affidavit of Kristen H. Walker and the affidavit of Michael R. McBride. R. pp. 28-63.

Mr. White filed the Reply Brief in Support of Motion to Dismiss and Response to Plaintiff's Motion to Extend Time on December 30, 2016. R. p. 64. Plaintiff filed a supplementary affidavit of Kristen H. Walker on January 3, 2017. R. p. 72. The District Court heard the motions on January 5, 2017, and ruled from the bench extending the time to serve Mr. White.

Ms. Hansen filed a Motion for Extension of Time for Service by Publication on January 8, 2017. R. p. 75. The District Court granted this motion on January 13, 2017. R. p. 78. Mr. White filed his Motion for Reconsideration on January 31, 2017, asking the District Court to reconsider its denial of the motion to dismiss. R. p. 82. The hearing on this motion to reconsider was set for April 27, 2017.

Mr. White filed a memorandum in support of the motion to reconsider, the Affidavit of DeVonne Barron, Affidavit of Dan Lansing and Second Affidavit of Gary E. White on April 13, 2017. R. pp. 92-125. Ms. Hansen responded by filing her brief in response to the motion to reconsider, an affidavit of Kristen H. Walker and an affidavit of Marc Jorgensen on April 20, 2017. R. pp. 126-146. Mr. White issued a subpoena to have Officer David Barker testify at the hearing. Mr. White also filed a reply brief on April 25, 2017 and the Third Affidavit of Gary E. White on April 26, 2017. R. pp. 147-156.

The hearing was held on April 27, 2017. At the hearing, Officer David Barker testified in person as to his recollections of his interaction with Mr. White. The District Court heard the testimony and the oral arguments of counsel. The District Court then proceeded to give a reasoned oral decision from the bench granting Mr. White's motion to reconsider. On May 5, 2017, the District Court issued its order adopting its reasoning from the oral decision and ordering that Ms.

Hansen's case be dismissed without prejudice. R. p. 159. The Final Judgment was issued the same day. R. p. 157.

C) STATEMENT OF FACTS

Ms. Hansen's recitation of facts in the Appellant's Brief includes many undisputed facts, but also includes disputed facts, irrelevant allegations and unsupported assumptions. Therefore, following is a statement of the facts that are relevant to this appeal of the District Court's ruling that without good cause Ms. Hansen failed to timely serve Mr. White.

The Complaint was filed on May 10, 2016. R. p. 6. Ms. Hansen was represented by Mr. Michael McBride of Signature Law Group, a law firm located in Idaho Falls. R. p. 6. On May 10, 2016, Mr. White was residing at 3640 Hickory Ct., Idaho Falls, Idaho. R. pp. 121-123.

The undisputed evidence shows that from May 10, 2016, to October 19, 2016, no effort was made to effect service upon Mr. White. R. pp. 55-56. Therefore, over five months transpired from the time of the filing of the Complaint before Ms. Hansen or her attorneys took any steps to serve the Complaint upon Mr. White.

Mr. White went to the United State Post Office on October 17, 2016, to fill out a forwarding change of address order. R. pp. 153, 156. The temporary change of address was to begin on October 25, 2016, and end on April 28, 2017. *Id.* Mr. White's temporary address was 1402 Sea Pines Street, Mesquite, Nevada. *Id.*

On October 19, 2016, Mr. McBride's legal assistant, Kristen Walker, sent the Complaint to Bulldog Legal Services. R. p. 55. Ms. Walker provided Bulldog Legal Services the address of 613 E. 750 N., Firth, Idaho. R. p. 56. This was the address for Mr. White that was on a police report dated May 23, 2014. *Id.*

The process server attempted to serve Mr. White at the Firth address on October 25, 2016. R. p. 43. Mr. White had not lived at the Firth address for over nine years. R. pp. 17-23. The process server admits that he was told that the Firth address was not Mr. White's residence. R. p. 44. The process server reported to Ms. Walker that Mr. White did not reside at the Firth address. R. p. 44. Ms. Walker then searched online for one and a half hours and did not find a definitive address for Mr. White. R. pp. 72-73. After the internet search, Ms. Walker claims that Mr. McBride told her to publish the summons. *Id.* Neither Ms. Walker nor Mr. McBride sought an order for permission to serve by publication. *Id.*

Mr. White moved to Mesquite, Nevada from his Idaho Falls address on or about October 25, 2016. R. pp. 153, 156.

Ms. Walker e-mailed a summons for publication to a local newspaper on October 27, 2016. R. p. 73. The summons could not be published until November 1, 2016. *Id.* On October 31, 2016, Ms. Walker then instructed Bulldog Legal Services to serve the summons on the persons at the Firth address. *Id.* The process server provided a copy of the summons and complaint to Mr. White's daughter-in-law at the Firth address on November 2, 2016. R. p. 44. Mr. White's daughter-in-law informed the process server that Mr. White did not live at that address. R. p. 23.

The residence at 613 E. 750 N., Firth, Idaho, is not Defendant Gary E. White's usual place of abode or his residence. R. pp. 17-18. Defendant Gary E. White has not dwelt or had his usual place of abode at 613 E. 750 N., Firth, Idaho, since he sold the house and property in 2009. *Id.*

The six month time limit to serve Mr. White expired on November 10, 2016. Mr. McBride did not file a motion to extend time prior to the expiration of the six month time limit. Mr. White was never served with process during the six month time period following the filing of the Complaint. R. p. 18. Mr. White never attempted to evade service in this matter. R. pp. 121-122.

A few months after the six month time period expired, three different investigative service providers, including Bulldog Legal Services, located Mr. White's residence at 3640 Hickory Ct. using common searches. R. pp. 108-118; and p. 142. They were able to find Mr. White's address in a matter of days. *Id.* During the six month time period, Mr. White had left a forwarding address for his residence in Nevada. R. p. 153, 156.

II. ISSUES ON APPEAL

A) Whether this Court should Affirm the District Court's Order Dismissing Plaintiff-Appellant's Complaint without Prejudice due to Plaintiff-Appellant's Failure to Timely Serve Defendant-Respondent?

B) Whether this Court should Consider Plaintiff-Appellant's Arguments that are made for the First Time on Appeal?

C) Whether this Court should Give Deference to the District Court's Findings due to Plaintiff-Appellant's Failure to Provide This Court the District Court's Reasoned Oral Ruling?

III. ARGUMENT

The evidence in this case coupled with the relevant case law shows (A) that the decision of the District Court dismissing Ms. Hansen's Complaint without prejudice should be affirmed; (B) that Ms. Hansen should not be able to raise certain arguments for the first time on appeal; and (C) that Ms. Hansen should not be able to challenge the District Court's findings when she failed to provide the District Court's reasoned oral decision.

A) The District Court's Ruling Should be Upheld on Appeal

1) Standard of Review

The Idaho Supreme Court has held that, "In an appeal from a grant of a motion to dismiss for untimely service of process, this court freely review the district court's rulings on questions of law. *Grazer v. Jones*, 154 Idaho 58, 64, 294 P.3d 184, 190 (2013) (citing: *Herrera v. Estay*, 146 Idaho 674, 678-79, 201 P.3d 647, 651-52 (2009). The Court continued holding:

> When reviewing a district court's determination of whether good cause existed to excuse the untimely service of process, this Court applies the summary judgment standard of review, unless the district court conducted an evidentiary hearing, in which case all reasonable inferences are drawn in favor of the district court's judgment.

Id. (citing: *Elliott v. Verska,* 152 Idaho 280, 285, 271 P.3d 678, 683 (2012); *see also Sammis v. Magnetek, Inc.,* 130 Idaho 342, 346, 941 P.2d 314, 318 (1997)).

Idaho Rule of Civil Procedure 12(b)(2) allows a party to move the court to dismiss a case based upon lack of personal jurisdiction. Rule 12(b)(5) provides for a dismissal of an action for insufficient service of process.

Idaho Rule of Civil Procedure 4(b)(2) states that, "If a defendant is not served within 6 months after the complaint is filed, the court, on motion or on its own after 14 days' notice to the plaintiff, must dismiss the action without prejudice against that defendant." Rule 4(c)(1) directs that service requires the service of a copy of the summons and complaint. Service on a competent individual over 14 can be done by "(A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone at least 18 years old who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process." IRCP 4(d)(1).

The Idaho Supreme Court has held that, "When the defendant makes a *prima facie* showing that service of process was not accomplished during the six months prescribed by the rule, the district court must determine whether there was good cause for the untimely service. The burden is on the

party who failed to effect timely service to demonstrate good cause." *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999) (citing: *Simplot v. W.C. Owens, M.D., P.A.*, 119 Idaho 243, 244, 805 P.2d 449, 450 (1990); *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997)).

2) Legal and Factual Analysis

The evidence proves that (a) Mr. White was not properly served with process during the relevant six month time period, (b) Ms. Hansen failed to show good cause why service was not accomplished during the requisite six month time period and (c) the statutes cited by Ms. Hansen do not change the service requirements or the definition of "dwelling" or usual place of "abode" in IRCP 4(d)(1)(B).

a) Mr. White Made a Prima Facie Showing That He was not Served with Process During the Relevant Six Month Time Period

It is undisputed that Mr. White made a *prima facie* showing that service of process was not accomplished during the six month period as required by IRCP 4(d)(1).

Idaho Rule of Civil Procedure 4(d)(1) states:

> Service of Individuals. An individual, other than a person under age 14 or an incompetent person, may be served doing any of the following:
> (A) delivering a copy of the summons and of the complaint to the individual personally;
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone at least 18 years old who resides there; or
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

The evidence provided shows that Mr. White was not personally served with process. R. pp. 17-18. Ms. Hansen has provided no evidence that Mr. White was personally served. The evidence also shows that the Complaint and Summons were not delivered to Mr. White's dwelling or abode during the relevant six month time period. R. pp. 17-18, 22-23, 43-44. The evidence shows that

Mr. White had his dwelling or place of abode at 3640 Hickory in Idaho Falls, Idaho during the majority of the six month time frame. R. pp. 152-156. At the very end of the relevant six month time period, Mr. White moved to Mesquite, Nevada. *Id.* Ms. Hansen did not provide any evidence that the summons and complaint were delivered to Mr. White at either of Mr. White's dwellings during the relevant six month time period or that they were left with a person 18 years or older at those same dwellings. It is undisputed that no service was made upon an agent of Mr. White's or that Mr. White even had an agent authorized to receive service. Finally, it is also undisputed that Ms. Hansen did not serve Mr. White by publication authorized by a court order during the six month time period.

This evidence establishes that Mr. White was not properly served with process during the relevant six month time period as required by IRCP 4.

b) Dismissal of the Complaint is Mandatory Absent Good Cause

The Idaho Supreme Court has made it clear that dismissal of the complaint is mandatory if service is not accomplished within the six month time limit, "absent a showing of good cause." *Elliott v. Verska,* 152 Idaho 280, 288, 271 P.3d 678, 686 (2012); citing: *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 347, 941 P.2d 314, 319 (1997). The Supreme Court has also held that, "By its terms, Rule 4(a)(2) imposes the burden of demonstrating good cause on the party who failed to effect timely service...." *Id.*" *Taylor v. Chamberlain*, 154 Idaho 695, 698, 302 P.3d 35, 38 (2013); citing: *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). A court, "must, considering the totality of the circumstances, determine whether the plaintiff had a legitimate reason for not serving the defendant with a copy of the state complaint during the relevant time period." *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 132 Idaho 531, 534, 976 P.2d 457, 460 (1999).

The Idaho Supreme Court has held that, "The party required to effectuate service must show good cause for failing to serve the defendant timely. Excusable neglect is a lesser standard than good cause." *Taylor v. Chamberlain*, 154 Idaho 695, 698, 302 P.3d 35, 38 (2013). Therefore, the Idaho Supreme Court has found that the good cause standard is higher than the excusable neglect standard.

The Idaho Supreme Court has further defined the focus of the good cause inquiry, holding that "[i]t is this six-month period following the filing of the complaint, therefore, that should be the focus of the court's good cause inquiry regarding why timely service was not made." *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999); citing: *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997).

The Idaho Supreme Court also stated that, "Courts look to factors outside of the plaintiff's control including sudden illness, natural catastrophe, or evasion of service of process." *Elliot v. Verska*, 152 Idaho 280, 290, 271 P.3d 678, 688 (2012); quoting: *Harrison v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008). The Court continued in *Elliot* holding, "In deciding whether there were circumstances beyond the plaintiff's control that justified failure to serve the summons and complaint within the six-month period, the court must consider whether the plaintiff made diligent efforts to comply with the time restraints imposed by Rule 4(a)(2)." *Elliot*, 152 Idaho at 290, 271 P.3d at 688; citing: *Martin*, 133 Idaho at 377, 987 P.2d at 289.

(i) **The Evidence Establishes that Ms. Hansen was not Diligent in Attempting to Serve Mr. White**

Ms. Hansen not only failed to show good cause, but the evidence proves that Ms. Hansen was not diligent in attempting to serve Mr. White. As indicated in the case law above, in order to

show good cause for failure of timely service, a plaintiff must prove that during the six month period for service they made diligent efforts to effectuate timely service coupled with a showing of circumstances beyond the control of Plaintiff that prevented timely service. *Id.*

The evidence shows that Ms. Hansen failed to make diligent efforts to timely serve Mr. White in this matter by (a) waiting over five months to attempt service, (b) failing to use reasonable efforts to serve Defendant and (c) failing to timely utilize proper legal remedies.

In order to show diligence the Idaho Supreme Court has found that the amount of time Plaintiff waited to attempt service is a significant factor. In *Hincks v. Neilson*, 137 Idaho 610, 51 P.3d 424 (2002), the Idaho Supreme Court, in finding lack of diligence noted, that plaintiff waited four and a half months after filing the complaint before beginning to attempt service. The Idaho Supreme Court has noted that a delay in beginning to attempt to serve was an important factor in determining a lack of diligence. *See*: *Elliot*, 152 Idaho at 290, 271 P.3d at 688 (The Court found failure of diligence where plaintiff delayed attempting service for the majority of the six month time period); and *Martin*, 133 Idaho at 377, 987 P.2d at 289 (The Court found it significant that plaintiff waited until 11 days prior to six month deadline to serve in determining due diligence).

The facts of the present case show that Ms. Hansen, her attorney and his assistants waited over five months before beginning to attempt to serve the Defendant. R. pp. 43-44; 55-56. Ms. Hansen provides no evidence for why service was not attempted prior to five months having elapsed since the filing of the Complaint. The Idaho Supreme Court has held that waiting to begin to attempt service for months after the complaint is filed shows a lack of due diligence. *Elliot*, 152 Idaho at 290, 271 P.3d at 688; citing: *Rudd v. Merritt*, 138 Idaho 526, 532, 66 P.3d 230, 236 (2003) (Waiting five and three-fourths months before attempting to effect service does not show due diligence.) Without a showing of due diligence, Ms. Hansen cannot be found to have good cause

for failing to timely serve Mr. White. Ms. Hansen failed to diligently attempt to serve Mr. White in this matter by waiting for over five months before attempting to effect service of process.

The evidence shows that Ms. Hansen's efforts at service after waiting for over five months to start attempting service were not diligent. Ms. Hansen's attorney assigned the matter to an office assistant, Kristen Walker, to effectuate service. R. pp. 55-56. Ms. Walker assigned the matter to a process server to serve the summons on Mr. White at the address listed on the police report. *Id.* The process server reported that the address was not correct. *Id.* Ms. Walker then spent 1.5 hours on the internet attempting to locate Mr. White's current address. *Id.* This was the total effort that Ms. Hansen, Mr. McBride or his assistant expended in attempting to find a current address for Mr. White.

Under Rule 4(a)(2), Ms. Hansen had six months to serve Mr. White. In that six months, Ms. Hansen and her team spent just a few hours attempting to locate Mr. White's address. R. pp. 56, 72-73. The hour and half spent in attempting to locate a new address for Mr. White was done by Kristen Walker. *Id.* Ms. Hansen did not provide any evidence regarding Ms. Walker's experience or ability in being able to locate people by browsing on the internet. Ms. Walker explains what websites she visited, but does not detail what searches she used or what depth she examined results from these websites. There is also no evidence regarding whether Ms. Walker could possibly have exhausted the extent of these websites without paying additional fees or spending additional time. This minimal amount of time spent researching Mr. White's location combined with a lack of evidence regarding Ms. Walker's expertise, shows the lack of diligence by Ms. Hansen to serve Mr. White. Ms. Hansen's efforts are not due diligence under the standards set forth by the Idaho Supreme Court. *See: Elliot v. Verska*, 152 Idaho 280, 290, 271 P.3d 678, 688

(2012); *Hincks v. Neilson*, 137 Idaho 610, 51 P.3d 424 (2002) and *Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999).

Had Ms. Hansen or her attorney been diligent in their attempts to locate Mr. White, they would have easily and with little expense found his current address. The Idaho Supreme Court in the *Elliot* case found that in determining whether plaintiff was diligent consideration of evidence showing the ease with which service could have been accomplished is appropriate. *Elliot*, 152 Idaho at 291, 271 P.3d at 689. The evidence in the present case shows that Mr. White's current addresses could have been found through due diligence.

Mr. White's counsel sought evidence to determine if finding Mr. White's dwelling was difficult. Those efforts revealed that Mr. White's dwelling at 3640 Hickory in Idaho Falls was easily discovered in simple searches based only upon information in the police report. R. pp. 108-118; and p. 142. Mr. White's counsel hired two investigative services to show the ease with which Mr. White's current dwelling can be discovered. Defendant's counsel had a skip trace done by Diamond Skip Search and a separate search done by a private investigator, Dan Lansing. *Id.* Both avenues produced Mr. White's current address in Idaho Falls, Idaho within a few days. *Id.* This evidence shows how routine and simple methods could have been used by Ms. Hansen to find Mr. White's current dwelling place.

Months after the six month time period had expired and Mr. White had filed his Motion to Dismiss, Ms. Hansen also hired an investigator to locate Mr. White's dwelling. That investigator also found Mr. White's current dwelling. *Id.* This investigator was the same person that Ms. Hansen hired to serve Mr. White. Had Ms. Hansen instructed this investigator to do a search for Mr. White's dwelling during the subject six month time period, the investigator would have been able to find Mr. White's dwelling easily. Instead, Ms. Hansen's attorney relied on an office

assistant's ability to search on the internet. Therefore, the proof in this matter shows not only the relative ease in finding Mr. White's address, but also the lack of diligent efforts expended by Ms. Hansen or those representing her during the relevant six month time period.

There was a short period of time during the relevant six month time period, when Mr. White went to his dwelling in Mesquite, NV for the winter. Mr. White signed a change of address form at the post office in order to get his mail while he was temporarily gone. R. p. 156. Therefore, Mr. White's temporary address in Nevada could have been obtained through sending a letter return receipt requested to Mr. White's Idaho Falls address.

The above facts show that had Ms. Hansen or her counsel been diligent, Mr. White's current address in Idaho Falls would have been easily found along with the address in Nevada.

Also important to the diligence inquiry is that Ms. Hansen failed to make a timely motion for extension of time or a proper motion for service by publication. In the *Hincks* case, the Idaho Supreme Court noted that the plaintiff had failed to take advantage of the options of filing a motion to extend time or for publication when the defendant was difficult to locate. *Hincks v. Neilson*, 137 Idaho 610, 613 (2002). In the present case, Ms. Hansen and her attorney failed to avail themselves of the opportunity to file a motion to extend time. Ms. Hansen's attorney assigned a non-lawyer to attempt service by publication without filing for an order to serve by publication as required by IRCP 4 and I.C. § 5-508. Further, at the point Ms. Hansen's attorney assigned his assistant to attempt service by publication, service by publication could not have been accomplished timely. IRCP 4(e)(2). Ms. Hansen has not provided any evidence as to why her attorney failed to take these remedial actions to serve Mr. White and avoid dismissal. Ms. Hansen and her attorney could have solved any problems they were experiencing in finding Mr. White by availing themselves of

the remedies of a motion to extend time or motion to serve by publication. The failure to use these remedies highlights the lack of due diligence by Ms. Hansen to effect proper service on Mr. White.

Based upon the relevant evidence, Ms. Hansen failed to use due diligence in attempting to serve Mr. White. The lack of due diligence prevents Ms. Hansen from showing good cause for her failure to serve Mr. White. Therefore, this Court should affirm the District Court's dismissal without prejudice of Ms. Hansen's Complaint.

(ii) Factors Outside of Plaintiff's Control did not Prevent Timely Service

Ms. Hansen has failed to show any circumstances beyond her control that had an effect on her ability to timely serve Mr. White. The only circumstance Ms. Hansen has identified that was beyond her control was the fact that the Defendant was no longer living at the address identified in the police report.

In the *Elliot* case, the Idaho Supreme Court was summarizing an earlier ruling in the *Martin* case with a similar issue where the Defendant had moved to Washington during the six month period. *Elliot v. Verska*, 152 Idaho 280, 290, 271 P.3d 678, 688 (2012). The Court stated, "The defendant's relocation to the State of Washington was certainly something beyond the plaintiff's control. However, it did not constitute good cause for failing to serve the defendant within the six-month period required by Rule 4(a)(2) because of the lack of diligence in attempting to serve the defendant within that time period." *Elliot*, 152 Idaho at 290, 271 P.3d at 688; citing: *Martin*, 133 Idaho at 377, 987 P.2d at 289. The Idaho Supreme Court in *Hincks* also found lack of diligence on Plaintiff's part where the circumstances were quite similar to the present case.

In *Hincks* the plaintiff was injured in a motor vehicle accident on August 3, 1997. *Hincks v. Neilson*, 137 Idaho 610, 611, 51 P.3d 424, 425 (2002). The complaint was filed two years later on August 3, 1999. The Court notes that when plaintiff attempted to serve the defendants four and

a half months into the six month period the process server they hired found out that, "[a]ll three defendants had moved from the addresses furnished on the accident report..." *Id.* The plaintiff had the process server attempt to locate the defendants by checking local directories, searching the internet and asking neighbors for forwarding addresses. *Id.* at 426, 51 P.3d at 425. The Supreme Court held that those actions had not demonstrated due diligence or good cause to excuse the failure to timely serve the defendants. *Id.* at 427, 51 P.3d at 426.

Similarly, in the present case, Ms. Hansen attempts to excuse her lack of proper service on the fact that Mr. White had moved from the address listed in the police report. This is the same argument that was made in the *Hincks* case that the Idaho Supreme Court rejected. As in *Hincks* and as shown above, Ms. Hansen failed to use diligent efforts to serve Mr. White. Ms. Hansen cannot rely on the address listed on a police report in failing to diligently attempt to serve Mr. White.

(iii) Facts Deemed Irrelevant to Good Cause Determination

The Idaho Supreme Court and Court of Appeals have made several decisions setting forth factors that are irrelevant to the inquiry as to whether plaintiffs have good cause for failure to timely serve. These factors are worth noting considering some of the facts and arguments made by Ms. Hansen in her briefing before the District Court and on appeal.

(a) Status of Litigant

The Idaho Supreme Court has stated that the status of a litigant does not, "excuse parties from adhering to procedural rules, even though they may be unaware of such requirements." *Elliot v. Verska*, 152 Idaho 280, 288-289 (2012); citing: *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). This holding is significant in this matter as Ms. Hansen's counsel presented facts that his assistant, Kristen Walker, was unaware of procedural requirements

regarding timely service and the procedural remedies of obtaining an order for service by publication or for extension of time for service. If *pro se* litigants are not excused from procedural requirements due to inexperience and lack of knowledge, then it should follow that a legal assistant working directly under a licensed attorney should not be excused for their lack of knowledge or expertise. The Supreme Court has specifically held that an "attorney's inexperience and unawareness of the proper procedures did not constitute good cause." *Naranjo v. Idaho Dept. of Correction*, 151 Idaho 916, 922 (2011). Therefore, Ms. Hansen, Ms. Walker and Mr. McBride should all be held to the same standard of performance and diligence that any competent licensed attorney would be held to under the same circumstances. Any facts suggesting lack of knowledge or experience as constituting good cause should be disregarded by this Court.

(b) Effect of Ruling on Ultimate Outcome of Plaintiff's Case

In *Elliot*, the Supreme Court quoting another case found that, "the running of the statute of limitations and the subsequent time-bar to refiling the action is not a factor to be considered in determining whether good cause exists under Rule 4(a)(2)" *Elliot* at 289; quoting: *Sammis* at 347, 941 P.2d at 319. Based upon the above ruling, the impact this Court's ruling will have on the outcome of the merits of the case is not relevant to the consideration of good cause. Even in the case where a dismissal of the action will effectively eliminate Ms. Hansen's cause of action, the Supreme Court does not allow that fact to be a factor in determining good cause.

(c) Mr. White's Knowledge and Actions that do not affect Ms. Hansen's Ability to Effect Service

The Idaho Supreme Court in various holdings has consistently found that a defendant's knowledge and actions that do not directly effect a plaintiff's ability to effect service are not relevant to a good cause inquiry. Specifically, the Supreme Court has held that lack of prejudice to the

defendant, the defendant's knowledge of the complaint, settlement negotiations and even participation by defendant in a pre-litigation screening panel are not relevant to the question of whether good cause exists. *Elliot v. Verska*, 152 Idaho 280, 289 (2012) (Participation in pre-litigation screening panel was not relevant to good cause inquiry); *Campbell v. Reagan*, 144 Idaho 254, 257 (2007) (Defendant's receipt of a mailed copy of process and defendant proceeding as if he had been formally served does not create good cause for failure to timely serve defendant); *Martin v. Hoblit*, 133 Idaho 372, 377 (1999) (Settlement negotiations during the six-month time period does not excuse or constitute good cause for failure to timely serve defendant).

Ms. Hansen raised a number of facts that fall within this category of irrelevant information. Ms. Walker suggested that she had conversations with Mr. White's insurer, who informed her that they had received a copy of the complaint. There was also an argument made that Mr. White knew about the complaint because Ms. Hansen had a process server leave a copy of the complaint with his son and daughter-in-law. Ms. Hansen has also emphasized an improper attempt to serve by publication. Based upon the rulings of the Supreme Court, none of these facts should be considered in this Court's review of the totality of the circumstances, because they have been determined to be irrelevant.

Based upon the evidence and past precedents, the District Court's ruling dismissing Ms. Hansen's complaint for failure of service should be upheld due to Ms. Hansen's failure to show good cause for not serving Mr. White.

c) The Reporting Statutes Cited by Ms. Hansen do not Change the Requirements for Due Process under IRCP 4(d)(1) or Excuse Ms. Hansen's Lack of Due Diligence

(i) Ms. Hansen has failed to provide any reasoning for this Court to alter the requirements or plain meaning of IRCP 4(d)(1)

The evidence shows that during the relevant six month period Mr. White's dwelling or usual place of abode was 3640 Hickory in Idaho Falls or for a short time at 1402 Sea Pines Street, Mesquite, Nevada. Ms. Hansen attempts to argue that certain statutes requiring classes of individuals to report their addresses to governmental entities changes the requirements of IRCP 4(d)(1). Appellant's Brief at 7-9. Idaho Rule of Civil Procedure 4(d)(1) requires that service be had on the individual or left at the individual's "dwelling or usual place of abode". Ms. Hansen would attempt to change these requirements by allowing proper service to consist of leaving process at an old address that at some past date had been reported as the individual's address to a governmental entity. This would change the meaning of the requirements of IRCP 4(d)(1)(B). The Idaho Supreme Court in the case *Davidson v. Davidson*, 150 Idaho 455, 248 P.3d 242 (2011), rejected a similar attempt to change the requirements of IRCP 4(d)(1)(B).

In *Davidson*, the plaintiff had attempted service by leaving the summons and complaint at the defendant's law office. *Davidson*, 150 Idaho at 459, 248 P.3d at 246. Plaintiff's argument that service was proper was that defendant had at times accepted service at his law office and that defendant had used his law office address in court filings. *Id.* The Supreme Court, agreeing with the district court, held that defendant's prior actions in accepting service at the law office or his putting his law office address on court pleadings did not change the requirements of IRCP 4(d)(1). *Davidson*, 150 Idaho at 459-460, 248 P.3d at 246-247.

Similarly, in the present case, Ms. Hansen, without citing any authority for the proposition, is attempting to argue that prior addresses given to governmental agencies should be considered present dwelling places for potential defendants. Such a finding would radically alter the plain language of Rule 4(d)(1)(B). "Statutory interpretation begins with the statute's plain meaning. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). That language 'is to be given

its plain, obvious and rational meaning.' *Id.*" *Bright v. Maznik*, 162 Idaho 311, 314, 396 P.3d 1193, 1196 (2017). The plain definition of "dwelling or usual place of abode" is the current place where someone resides. Ms. Hansen is attempting to expand the plain language to include all addresses previously reported to governmental agencies that had not been corrected upon a person moving from that address. Such an interpretation would require completely ignoring the plain meaning of the words of IRCP 4(d)(1)(B).

Ms. Hansen has not cited any authority for the position that this Court should abandon the plain meaning of IRCP 4(d)(1)(B) or otherwise alter the requirements of that Rule. Appellant's brief did include a citation to *Ghallagher v. Best Western Cottontree Inn Snake River Petersen Properties, LLC*, Idaho Supreme Court Docket 43695, 2017 Opinion 1 (See Addendum A). This opinion has not been published and a copy was not provided with Appellant's Brief. In reviewing the case on the Idaho Supreme Court's website, the facts and holding are not relevant to the present matter. In *Ghallagher*, the Court was examining whether the defendant's failure to file a certificate of assumed business name allowed plaintiff to serve defendant an amended complaint past the statute of limitation date and have it relate back to the filing of the original complaint. *Id.* at 4. The Idaho Supreme Court held that the amended complaint did not relate back and that the statute of limitation was not "tolled." *Id.* at 5. Instead, the Idaho Supreme Court recognized that plaintiff had a cause of action under I.C. 53-509(2), which could still be brought in order to obtain relief for defendant's alleged failure to file a certificate of assumed business name. Therefore, the matter was remanded to the district court to allow a motion to amend the complaint to include a claim under I.C. § 53-509(2). *Id.* at 6.

Nothing in the Court's opinion in *Ghallagher* addressed the issues in the present case. The subject of the present case is Ms. Hansen's failure to timely serve within the six month period as

required by IRCP 4(b). This case does not involve a statute of limitation, relation back doctrine or requirements and penalties for persons filing a certificate of assumed business name. Ms. Hansen's attempt to compare the *Ghallagher* decision to the present case is disingenuous. The futility of making a meaningful comparison is shown by Ms. Hansen's failure to accurately quote the text of the decision in the Appellant's Brief while attempting to compare it to the present matter. Appellant's Brief at 12 and 13. In short, the facts, the law and the analysis in *Ghallagher* are so different from the present case that there is no precedential or persuasive value in attempting to compare the two matters.

Based upon the facts and law, Mr. White's dwelling or abode during the relevant six month time period was, 3640 Hickory, Idaho Falls, Idaho, from April 2016 to October 25, 2016, and then 1402 Sea Pines Street, Mesquite, Nevada. The evidence and law do not support a finding of any other dwelling or abode for Mr. White during the relevant six months.

(ii) The Existence of the Statutes Cited by Ms. Hansen does not Provide Good Cause for Her Failure to Serve Mr. White within the Relevant Six Month Period

Ms. Hansen cites the requirements of I.C. §§ 49-320; 49-401(B)(5); 49-421; and 18-5413 in order to excuse her lack of diligence in attempting to serve Mr. White. The existence of these statutes does not provide an excuse for a plaintiff to wait over five months before attempting to serve process on a defendant and then afterword, failing to make diligent attempts to serve the defendant.

These statutes also existed at the time of the *Hincks* case in which the Idaho Supreme Court did not find that having a different address on the police report was an excuse for failure of service. *Hincks v. Neilson*, 137 Idaho 610, 611, 51 P.3d 424, 425 (2002).

It is also very significant that the requirements of the statutes cited by Ms. Hansen would not have made a difference in Ms. Hansen's failure to serve Mr. White because (a) Mr. White did not violate any of the statutes and (b) if the governmental agencies had Mr. White's current address Ms. Hansen would not have known about it due to her failure to search those sources.

During the time period for service of process in this matter, Defendant was not in violation of any of the statutes cited by Ms. Hansen.

The first statue cited is I.C. § 49-320 which states:

> It is the responsibility of every licensed driver and every person applying for a driver's license to keep a current address on file with the department.
>
> (1) Whenever any person after applying for or receiving a driver's license shall move from the address shown in the application or in the driver's license issued, that person shall, within thirty (30) days, notify the department in writing of the old and new addresses.
>
> (2) Whenever any statute or rule requires a driver to receive notice of any official action with regard to the person's driver's license or driving privileges taken or proposed by a court or the department, notification by first class mail at the address shown on the application for a driver's license or at the address shown on the driver's license or at the address given by the driver, shall constitute all the legal notice that is required.
>
> (3) It is an infraction for any person to fail to notify the department of a change of address as required by the provisions of subsection (1) of this section.

Mr. White had stopped driving at the time Ms. Hansen filed her complaint and did not renew his license. R. pp. 121-122. Therefore, Mr. White had no obligation under this particular statute.

The next statutes are I.C. §§ 49-401(B)(5) and 49-421. These statutes relate to vehicle registration. The evidence shows that Mr. White was not using a vehicle during the relevant time period as he was no longer driving for medical reasons. R. pp. 121-22. Further, Ms. Hansen's investigator found that the only vehicle currently registered to Mr. White was in possession and ownership of his ex-wife. R. p. 146.

The final statute cited is I.C. § 18-5413 which states that:

> (1) A person is guilty of a misdemeanor if he knowingly gives or causes to be given false information to any law enforcement officer, any state or local government or personnel, or to any person licensed in this state to practice social work, psychology or counseling, concerning the commission of an offense, knowing that the offense did not occur or knowing that he has no information relating to the offense or danger.

Ms. Hansen has provided no evidence that Mr. White violated I.C. § 18-5413. Mr. White stated that the officer in this investigation asked him for his driver's license. R. pp. 121-122. Mr. White did not knowingly give false information relating to the commission of an offense, but willingly handed the police officer the documents requested. The police officer stated that he may have just recorded the address information off of the documents provided. R. p. 34. There is no evidence that Mr. White knew or realized that the driver's license would cause the officer to record the incorrect address.

Most importantly, the issue regarding Mr. White's compliance with these statutes is irrelevant due to the fact that Ms. Hansen did nothing to research the addresses the DMV or other governmental agencies had on file for Mr. White during the six month time period. Even if one of the governmental agencies had Mr. White's address of 3640 Hickory Street listed, neither Ms. Hansen nor her representatives would have had that information until months after the six month time limit for service had expired. This evidence simply highlights Ms. Hansen's lack of any diligence in attempting to serve Mr. White. There is nothing in the cited statutes that relieves a party's burden to diligently attempt service in the six months provided.

Ms. Hansen's argument is advocating for the position that if a defendant has an incorrect address on file with the DMV or other agency at any time, then that one fact is good cause for a plaintiff to sit back and do little or nothing in attempting to serve defendant during the six months provided for service. The plaintiff would be able to show after the six months had expired that there was an incorrect address on file somewhere and would automatically be relieved from their

obligation to be diligent. The case law cited above shows that the Idaho Supreme Court has rejected that approach over and over again. The Court has uniformly held party's with the obligation of service to a high standard of diligence.

The totality of evidence in this matter shows that Ms. Hansen was not diligent in attempting to serve Mr. White and that there were no circumstances outside of Ms. Hansen's control that would have prevented service of Mr. White had Ms. Hansen acted diligently.

B) Ms. Hansen Should not be Allowed to Raise Arguments for the First Time on Appeal

The Idaho Supreme Court has held that the Supreme Court, "will not consider issues that are raised for the first time on appeal." *Bell v. Idaho Dept. of Labor*, 157 Idaho 744, 749, 339 P.3d 1148, 1153 (2014) (citing: *Sadid v. Idaho State Univ.,* 151 Idaho 932, 941, 265 P.3d 1144, 1153 (2011)).

Ms. Hansen attempts for the first time on appeal to make an argument regarding equitable estoppel. Appellant's Brief at 14-15. Ms. Hansen did not make any argument of equitable estoppel in the proceedings in front of the District Court. The record is completely devoid of any argument regarding equitable estoppel. Therefore, this claim should be dismissed.

Even if this Court chose to entertain Ms. Hansen's argument regarding equitable estoppel, there is no evidence supporting the elements of equitable estoppel. There is no evidence that Mr. White made a false or misleading statement to Ms. Hansen regarding his address. Further, there is no evidence that Ms. Hansen relied upon a statement by Mr. Hansen regarding his address. Ms. Hansen claims to have relied upon information in the police report, which is not a statement of Mr. White.

Therefore, the record shows that Ms. Hansen's equitable estoppel claim is both improper and unsupported by the evidence.

C) This Court should Give Deference to the District Court's Findings due to Plaintiff-Appellant's Failure to Provide the District Court's Reasoned Oral Ruling

The Idaho Supreme Court has held that, "The party appealing a decision of the district court bears the burden of ensuring that this Court is provided a sufficient record for review of the district court's decision." *La Bella Vita, LLC v. Shuler*, 158 Idaho 799, 805, 353 P.3d 420, 426 (2015). The Court continued stating, "When a party appealing an issue presents an incomplete record, this Court will presume that the absent portion supports the findings of the district court. We will not presume error from a silent record or from the lack of a record. *Id.* (citing: *Gibson v. Ada County*, 138 Idaho 787, 790, 69 P.3d 1048, 1051 (2003) (citations and quotations omitted)).

Ms. Hansen failed to provide a transcript of the hearings in this case wherein the police officer, Officer Barker, testified and afterward the District Court issued a reasoned decision from the bench. The District Court cited case law and commented on the evidence. The District Court adopted his oral rulings by reference in his Order for Dismissal Without Prejudice. R. p. 164. Therefore, Ms. Hansen has prevented this Court from being able to examine the decision that she is attempting to get this Court to overturn. Ms. Hansen has also prevented this Court from being able to read and understand the District Court's comments on the police officer's testimony.

It should be noted that Mr. White is not commenting on the content of the District Court's oral decision or the testimony presented at that hearing. Instead, Mr. White is requesting that this Court not presume error from a silent record and view all evidence absent from the record in a light most favorable to affirming the District Court's ruling.

IV. CONCLUSION

Based upon the evidence showing that Defendant Gary E. White was not served prior to the expiration of the 6 month time limit of IRCP 4(b)(2) and that Ms. Hansen has failed to prove good

cause for failure to timely serve Mr. White, Mr. White requests that this Court affirm the ruling of the District Court in this case.

DATED this 15th day of December 2017.

By _____
Ryan B. Peck

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December 2017, I caused a true and correct copy of the foregoing document to be served by the method indicated below and addressed to:

Michael R. McBride
Signature Law Group, P.L.L.C.
1495 East 17th Street
Idaho Falls, ID 83404

_____ U.S. Mail
_____ Hand Delivery
_____ Overnight Mail
_____ Facsimile
X E-Copy

_____
Ryan B. Peck

ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 43695

GERALYN GALLAGHER,	
Plaintiff-Appellant,	**Twin Falls, November 2016 Term**
v.	**2017 Opinion No. 1**
BEST WESTERN COTTONTREE INN, SNAKE RIVER PETERSEN PROPERTIES, LLC, a Wyoming Close Limited Liability, and DOES 1 through 10 inclusively,	**Filed: January 19, 2017**
Defendants-Respondents.	**Stephen Kenyon, Clerk**

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bonneville County. Hon. Alan C. Stephens, District Judge.

The judgment dismissing the complaint is vacated and the case is remanded for proceedings consistent with this opinion.

Browning Law, Idaho Falls, for appellant. Alan Browning argued.

Moore & Elia, LLP, Boise, for respondent. Steven R. Kraft argued.

HORTON, Justice.

This is an appeal from the district court's order granting summary judgment and dismissing Geralyn Gallagher's (Gallagher) lawsuit against the Best Western Cottontree Inn (the Hotel) and Snake River Peterson Properties LLC (Snake River). The district court held that the amended complaint did not relate back to the date of the original filing and that the statute of limitations was not tolled by Snake River's failure to file a certificate of assumed business name. We vacate and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gallagher was injured when she fell on a wet floor at the Hotel on July 10, 2012. There is only one Best Western Cottontree Inn in Idaho. The Hotel was owned and operated at that time by Snake River. In preparing to file this suit, Gallagher searched the Secretary of State's database to determine who owned the Hotel. According to the database, the Hotel was owned by

L & L Legacy Limited Partnership (L & L) and the certificate of assumed business name was current. Snake River acquired the Hotel before Gallagher's injury but failed to file a certificate of assumed business name with the Secretary of State's office.

On July 9, 2014, Gallagher filed this suit. After filing the complaint, Gallagher attempted to serve Scott Eskelson, who was authorized to accept service on behalf of L & L. The record does not show when Gallagher attempted to serve Eskelson. Mr. Eskelson refused to accept service and informed Gallagher that the Hotel had been sold to Snake River and that Snake River owned the Hotel at the time Gallagher was injured. Gallagher filed a motion to extend the time for service on January 8, 2015. The motion was granted on January 14, 2015. On April 9, 2015, an amended complaint and summons was served on Snake River. Gallagher and Snake River filed a stipulation to dismiss L & L. On June 4, 2015, L & L was dismissed from the case with prejudice.

Snake River filed a motion for summary judgment in which it argued that it had not been timely joined in the case and that the amended complaint should not relate back to the time the first complaint was filed. Following a hearing, the district court granted Snake River's motion for summary judgment and dismissed the case. Gallagher filed a motion to reconsider, which the district court denied. Gallagher timely appealed.

II. STANDARD OF REVIEW

"When reviewing an order for summary judgment, the standard of review for this Court is the same standard used by the district court in ruling on the motion." *Winn v. Campbell*, 145 Idaho 727, 729, 184 P.3d 852, 854 (2008) (citing *Watson v. Weick*, 141 Idaho 500, 504, 112 P.3d 788, 792 (2005)). 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." I.R.C.P. 56(c). "If there is no genuine issue of material fact, 'only a question of law remains, over which this Court exercises free review.'" *Winn*, 141 Idaho at 729, 184 P.3d at 854 (quoting *Watson*, 141 Idaho at 504, 112 P.3d at 792).

III. ANALYSIS

The facts of this case as they relate to the issues on appeal are not in dispute. Neither party disputes that Snake River failed to file a certificate of assumed business name with the Secretary of State's office. Additionally, it is undisputed that Snake River did not receive notice

of this claim until it was served with the amended complaint on April 9, 2015. The only questions presented by this appeal are whether the amended complaint relates back to the date of the original complaint and whether the statute of limitations should be tolled[1] due to Snake River's failure to file the certificate of assumed business name. These issues will be discussed in turn.

A. Relation back under Idaho Rule of Civil Procedure 15(c).

Gallagher contends that the amended complaint should relate back to the date that she filed the original complaint. Gallagher argues that because complaints can be amended at any time, and because the original complaint was filed within the statute of limitations, the amended complaint should relate back to that time. The district court found that because Gallagher was amending her complaint to name a new defendant, Idaho Rule of Civil Procedure 15(c) applied. Because Snake River did not have notice of the suit within the statute of limitations, the district court held that the amended complaint could not relate back. The district court's conclusion was correct.

Idaho Rule of Civil Procedure 15(c) states,

> [a]n 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) know or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

I.R.C.P. 15(c). This Court has found the phrase, "within the period provided by law for commencing the action" to mean within the statute of limitations. *Wait v. Leavell Cattle Inc.*, 136 Idaho 792, 795, 41 P.3d 220, 223 (2001) (citing *Hoopes v. Deere & Co.*, 117 Idaho 386, 389, 788 P.2d 201, 204 (1990)). In *Wait*, the plaintiff attempted to amend her complaint to name a

[1] The district court and the parties have used variations of the verb "toll" in their analysis of the effect of Snake River's failure to file a certificate of assumed business name with the Secretary of State. This Court has recently used the term in this context in *Winn* and *Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012). In doing so, we have been using a convenient shorthand.

"[E]stoppel does not eliminate, toll, or extend the statute of limitations." *City of McCall v. Buxton*, 146 Idaho 656, 664, 201 P.3d 629, 637 (2009); *Ferro v. Soc'y of Saint Pius X*, 143 Idaho 538, 540, 149 P.3d 813, 815 (2006). Rather, estoppel "bars a party from asserting the statute of limitations as a defense for a reasonable time after the party asserting estoppel discovers or reasonably could have discovered the truth." *Id.* Our use of various forms of "toll" in this opinion refers to whether Snake River is estopped from asserting the statute of limitations as a defense.

new party. *Id.* at 794, 41 P.3d at 222. The district court found that the amended complaint did not relate back to the filing date of the original complaint because, while the defendant had notice of the suit within the time allowed for service of process, the plaintiff was unable to show that the defendant had notice of the suit before the statute of limitations expired. *Id.* at 795, 41 P.3d at 223.

In this case, it is undisputed that Snake River did not receive notice of the suit until it was served with the amended complaint on April 9, 2015. The statute of limitations for personal injury claims is 2 years. I.C. § 5-219. As Gallagher was injured on July 10, 2012, the statute of limitations expired on July 10, 2014. Because Snake River did not receive notice of the suit before July 10, 2014, Gallagher failed to meet the requirements of Idaho Rule of Civil Procedure 15(c) and the amended complaint does not relate back to the date the original complaint was filed.

B. Tolling the Statute of Limitations.

Gallagher next asserts that the statute of limitations should be tolled because Snake River failed to file a certificate of assumed business name with the Secretary of State. The district court found that because Gallagher's only search was of the Secretary of State's database, Gallagher did not exercise reasonable diligence in ascertaining the proper party. Because Gallagher did not exercise reasonable diligence in ascertaining the correct party to sue, the district court declined to toll the statute of limitations.

Idaho Code section 53-504[2] provides that "[a]ny 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 proscribed by the secretary of state." I.C. § 53-504(1). The purpose of the statute "is to ensure disclosure on the public record of the true names of persons who transact business in Idaho." I.C.

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[2] Chapter 5, Title 53 of the Idaho Code was repealed effective July 1, 2015, 2015 Idaho Sess. L. ch. 251, § 3, p. 1047. Idaho Code section 53-504 was replaced by Idaho Code section 30-21-805. 2015 Idaho Sess. L. ch. 243, § 14, p. 784. The new statute imposes similar requirements upon those who operate under assumed business names. The newly enacted statute provides:

> (a) Any person who proposes to or intends to transact business in Idaho under an assumed business name shall, before beginning to transact business, deliver to the secretary of state for filing a certificate of assumed business name in a form prescribed by the secretary of state.
> (b) A separate certificate of assumed business name must be filed for each assumed business name a person uses.

I.C. § 30-21-805. This opinion will address the operation of the provisions of Chapter 5, Title 53, Idaho Code which were in effect at the relevant time.

§ 53-502. The consequences of failing to file a certificate are provided by Idaho Code section 53-509. Section 53-509 provides that a business may not maintain a legal action in Idaho until it complies with the statute. I.C. § 53-509(1). It further provides that "[a]ny person who suffers a loss because of another person's noncompliance with the requirements of this chapter shall be entitled to recover damages in the amount of the loss, and attorney fees and costs incurred in connection with recovery of damages." I.C. § 53-509(2). While this Court has previously suggested that we would consider tolling that statute of limitations where a party failed to file a certificate of assumed business name, we have never been presented facts that would warrant a tolling. *See Winn v. Campbell*, 145 Idaho 727, 184 P.3d 852 (2008); *see also Ketterling v. Burger King Corp.*, 152 Idaho 555, 272 P.3d 527 (2012). The facts of this case are readily distinguishable from both *Winn* and *Ketterling* and would likely qualify under the standard announced in those cases, however we find that the statutory remedy is adequate and so decline to apply an equitable remedy in this case. By so holding, we depart from our previous indication in *Winn* and *Ketterling* that we might find circumstances justifying tolling the statute of limitations when a defendant has failed to file a certificate of assumed business name.

As footnote 1 indicates, although the parties and the Court have referred to the remedy sought in this case as tolling the statute of limitations, it is more accurate to say that Gallagher seeks to apply the doctrine of equitable estoppel. It is a fundamental principle that equitable remedies are only available when "there is no adequate remedy at law and if sufficient grounds to invoke equity, such as mutual mistake, fraud, or impossibility, are present." *AED, Inc. v. KDC Investments, LLC.*, 155 Idaho 159, 166, 307 P.3d 176, 183 (2013). In cases where a business fails to file a certificate of assumed business name and another party suffers damage, we hold that there is an adequate statutory remedy at law. Thus, there is no reason to apply the equitable remedy of tolling the statute of limitations.

Idaho Code section 53-509(2) provides a cause of action for parties who suffer damages as a result of a party's failure to file a certificate of assumed business name. In a case where the plaintiff has been misled to his or her prejudice resulting in the failure to timely name the proper defendant before the expiration of the statute of limitations, the plaintiff's damages will include the lost opportunity for recovery in the original action. Thus, in order to recover in a case such as this, the plaintiff must show that she would have prevailed in her personal injury action and the amount of damages she would have recovered, in addition to any other damages that may have

been proximately caused by the defendant's breach of its statutory duty. As this is a statutory remedy, a party must bring this action within 3 years of the accrual of the cause of action. I.C. § 5-218.

Here, although Idaho Code section 53-509(2) was at the heart of the issue before the district court, because of our previous statements the parties and the district court understandably directed their attention to the question whether the statute of limitations should be tolled without consideration of the available legal remedy. Although we find that the district court correctly dismissed Gallagher's personal injury action due to the expiration of the statute of limitations, we remand this case in order to give the district court the opportunity to entertain a motion to amend the complaint to assert a cause of action against Snake River under Idaho Code section 53-509(2). In view of this result, we find that there is no prevailing party.

IV. CONCLUSION

We vacate the judgment of the district court dismissing Gallagher's complaint and remand for further proceedings consistent with this opinion.

Chief Justice J. JONES and Justices EISMANN, BURDICK and W. JONES, **CONCUR.**