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### Rencher/Sundown LLC v. Pearson Appellant's Brief Dckt. 46474

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**STATE OF IDAHO COURT OF APPEALS**

**RENCHER/SUNDOWN LLC,**  
**Appellant,**

**vs.**

**BUTCH PEARSON, and FARMERS**  
**INSURANCE,**  
**Respondents.**

**Case No. 46474-2018**

**APPELANTS BRIEF IN SUPPORT OF  
APPEAL FROM THE BONNEVILLE  
COUNTY DISTRICT COURT,  
PRESIDED BY JUDGE SHINDURLING**

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## **QUESTION PRESENTED**

1. Was dismissal of the Appellant's claim proper when Appellant sought and was granted leave to perform service of process by publication, and the service by publication was completed prior to the hearing on the Respondent's motion to dismiss?

## **JURISDICTION**

This Court has jurisdiction pursuant to Idaho Code section 1-2406.

## **FACTS AND PROCEEDURAL BACKGROUND**

This case was filed on May 25, 2017. At that time the Petitioner was working with Farmers Insurance to settle the claims against their insured, the Respondent Butch Pearson. Respondent's attorney, Gary Cooper, Esq. filed a Notice of Appearance on behalf of Farmers Insurance on August 22, 2017. Attempts to serve the Respondent at his last known residence were unsuccessful, since no one was ever home. The Petitioner filed a Second Summons on November 28, 2017, after attempts to locate the Respondent were unsuccessful. Petitioner finally hired the Sheriff of Bingham County to effect Service of Process. The Court granted the Motion for Service by Publication on June 7, 2018. Respondent waited until June 11, 2018 to file his Motion to Dismiss. The motion was filed after the Court Gave leave of the Petitioner to effect service through publication. Service by Publication was effectively complete on July 7<sup>th</sup>, 2018, prior to the hearing on the Motion to Dismiss.

## **STATUTE INVOLVED**

Rule 4(b)(2) of the Idaho Rules of Civil Procedure states:

Time Limit for Service. 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. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

### **SUMMARY OF ARGUMENT**

The Service of Process by Publication was completed before the Respondent's Motion to Dismiss and therefore the Motion to Dismiss should have been denied by the District Court.

### **ARGUMENT**

The Idaho Supreme Court has stated that, "[T]he determination of whether good cause exists is a factual one." *Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). "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). "When determining whether there good cause existed, the court must consider 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). "Courts look to factors outside of the plaintiff's control including sudden illness, natural catastrophe, or evasion of service of process." *Harrison v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 145 Idaho 179, 183, 177 P.3d 393, 397 (2008).

#### **I. The Order Dismissing This Case Should Be Reversed Because The District Court Gave Leave Of The Appellant To Provide Service By Publication Which Was Effected Prior To The Motion To Dismiss.**

Service of process in this case was first attempted at the last known address of Respondent which was an apartment owned by the Appellant. Unfortunately, Respondent no longer lived in that

location and did not leave a forwarding address. The Petitioner then asked leave of the Court to effect Service by Publication because the Respondent was no longer living at his last known address and failed to leave a forwarding address. Furthermore, the Petitioner could not find where the Respondent had moved to, but upon information and belief, the Respondent was presumed to be living in, or around, Idaho Falls, Idaho. Petitioner believes that the Respondent deliberately moved and left no forwarding address to evade the Service of Process. Therefore, the Petitioner asked for leave of the Court to effect Service by Publication. The Court granted the Petitioner's request and gave an Order for Service of Process by Publication, which the Petitioner relied upon. Service by Publication was completed on July 7, 2018. Respondent's motion to dismiss was held after this date. Since the Respondent's motion to dismiss was held after the conclusion of the Service by Publication, the issue was moot and the District Court should have denied that motion to dismiss.

### **CONCLUSION**

For the foregoing reasons the Motion to Dismiss should be Reversed and Remanded, because the District Court had given leave of the Petitioner to effect Service by Publication and the Service by Publication was effected prior to a hearing on the Motion to Dismiss.

Appellant requests an award of costs and attorney fees pursuant to Idaho Code 12-121.

Dated this the 12<sup>th</sup> day of March, 2019

/s/ Troy Rasmussen  
Troy Rasmussen, Esq.  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on March 13, 2019, I served a copy to:

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**X By mail**

By electronic service  
By personal delivery  
Overnight delivery/Fed Ex

/s/ Troy Rasmussen  
Troy Rasmussen, Esq.  
Attorney for Appellant