

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD R. COOCH  
RESIDENT JUDGE

NEW CASTLE COUNTY COURT HOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0664

John C. Landis, Esquire  
P.O. Box 713  
New Castle, DE 19720  
Attorney for Plaintiffs

Colin M. Shalk, Esquire  
Casarino, Christman & Shalk, P.A.  
800 N. King Street, Suite 200  
P.O. Box 1276  
Wilmington, Delaware 19899  
Attorney for Defendant

**Re: *Donnette F. Plummer, individually, and as parent of Quincy Plummer and Loxlie Plummer, and Loxlie M. Plummer v. Susan A. Sherman, as Personal Representative of the Estate of Mark Fose***  
**C.A. No. 99C-08-010 RRC**

Submitted: December 2, 2003

Decided: December 9, 2003

**Upon Motion to Dismiss of Defendant Susan A. Sherman, as Personal Representative of the Estate of Mark Fose. GRANTED.**

Dear Counsel:

Currently before this Court is a motion to dismiss the complaint filed by defendant Susan A. Sherman ("Sherman"). Sherman was named Administratrix of the Estate of defendant Mark Fose upon Mark Fose's death.<sup>1</sup> The Court finds that

---

<sup>1</sup> After Fose's Death Certificate was obtained from the State of Florida, Plaintiff's counsel opened a Delaware estate for him on December 27, 2001 with the New Castle County Register of Wills with Sherman as Administratrix.

plaintiffs Donnette F. Plummer, individually and as parent of Quincy Plummer and Loxlie Plummer, and Loxlie M. Plummer ("Plaintiffs") failed to perfect service upon Mark Fose under Delaware's nonresident motorist "long-arm" statute (title 10, section 3112 of the Delaware Code). This Court does not have personal jurisdiction over Defendant. Accordingly, Sherman's motion is **GRANTED**.

### ***FACTUAL AND PROCEDURAL HISTORY***

On October 29, 1995, Mark Fose, operating an automobile insured by State Farm Fire & Casualty Company under a policy maintained by Clifford Fose, Mark Fose's brother, was involved in an automobile accident with Plaintiffs. Mark Fose fled the accident scene on foot, but was later apprehended by the police and charged with Driving Under the Influence.<sup>2</sup> On October 28, 1997, Plaintiffs filed a complaint against Mark Fose and Clifford Fose alleging that Mark Fose negligently caused the accident, causing physical injuries to them. At the time of the accident, Mark Fose was a resident of Delaware. Because Plaintiffs were unable to serve Mark Fose, the complaint against him was dismissed on August 3, 1998 pursuant to Superior Court Civil Rule 4(j).<sup>3</sup> Clifford Fose was dismissed through a stipulation of dismissal with prejudice on June 14, 1999.<sup>4</sup>

---

<sup>2</sup> DEL. CODE ANN. tit. 21, § 4176(a) (1995).

<sup>3</sup> Plummer v. Mark Fose and Clifford Fose, Del. Super., C.A. No. 97C-10-284, Bifferato, J. (August 3, 1998) (ORDER).

<sup>4</sup> Dkt. #8, Plummer v. Mark Fose and Clifford Fose, C.A. No. 97C-10-284.

Plaintiffs did not appeal or seek reargument of either the Court's August 3, 1998 decision dismissing the complaint against Mark Fose or of the stipulation of dismissal on June 14, 1999.

On August 2, 1999, pursuant to the "savings statute,"<sup>5</sup> Plaintiffs filed a second complaint against Mark Fose alleging a similar cause of action as the first complaint.<sup>6</sup> Prior to filing this second complaint, Plaintiffs had learned that Mark Fose was no longer a resident of Delaware.<sup>7</sup> Pursuant to the nonresident motorist "long-arm" statute, the summons and complaint were served upon the Delaware Secretary of State on August 17, 1999, and the writ evidencing such service was returned on September 2, 1999.<sup>8</sup> Plaintiffs attempted to locate Mark Fose in August 1999, through the services of a private investigator, in order to mail notice of the summons and complaint.<sup>9</sup>

On March 10, 2000, November 28, 2000, and July 9, 2001, the Court sent letters to Plaintiffs, pursuant to Superior Court Civil Rule 41(e), requiring some

---

<sup>5</sup> DEL. CODE ANN. tit. 10, § 8118(a) (1999) (providing an additional one-year time period within which to re-file a lawsuit under certain circumstances).

<sup>6</sup> Dkt. #1, Plummer v. Sherman, C.A. No. 99C-08-010-RRC.

<sup>7</sup> Plaintiffs' Responding Brief at ¶ 9.

<sup>8</sup> Dkt. #4, Plummer v. Sherman, C.A. No. 99C-08-010-RRC.

<sup>9</sup> Landis Aff. ¶ 3.

kind of action on the part of the Plaintiffs to serve Mark Fose.<sup>10</sup> On September 21, 2001, Plaintiffs' investigator informed Plaintiffs' counsel that he had discovered that Mark Fose had been struck and killed on December 4, 1999 by an automobile in St. Petersburg, Florida while walking intoxicated on the roadway of a bridge. Plaintiffs' counsel opened a Delaware estate for Mark Fose on December 27, 2001 with the New Castle County Register of Wills and Susan A. Sherman was appointed as the Administratrix.<sup>11</sup> Sherman was served with process on January 4, 2002.<sup>12</sup>

The Court sent another 41(e) notice on July 22, 2002, due to no activity by the Plaintiffs.<sup>13</sup> On August 7, 2002, Sherman notified Mark Fose's insurance company, State Farm Fire & Casualty Company, of the lawsuit. State Farm alleges that up to that point it did not know that the complaint had been re-filed on August 2, 1999.<sup>14</sup> The current motion to dismiss was filed on February 6, 2003.

### ***CONTENTIONS OF THE PARTIES***

Sherman argues that the complaint in this second lawsuit must be dismissed on two separate and independent grounds. First, Sherman argues that this second

---

<sup>10</sup> Dkt. #5, #7, #9, Plummer v. Sherman, C.A. No. 99C-08-010-RRC.

<sup>11</sup> Susan A. Sherman was a law clerk for the attorney of the Plaintiffs.

<sup>12</sup> Dkt. #19, Plummer v. Sherman, C.A. No. 99C-08-010.

<sup>13</sup> Dkt. #21, Plummer v. Sherman, C.A. No. 99C-08-010.

<sup>14</sup> Defendant's Opening Brief at ¶ 11.

complaint must be dismissed, pursuant to Superior Court Civil Rule 41(b), for Plaintiffs' failure to prosecute.<sup>15</sup> Sherman argues that Plaintiffs have failed to pursue and prosecute this case aside from filing the original complaint in 1997 and then refileing it in 1999, asserting that Plaintiffs have simply responded to notices of dismissal by the Court. As part of this argument, Sherman asserts that Plaintiffs' lack of attention and neglect is evidenced by Plaintiffs' failure to use timely appropriate methods to discover Mark Fose's death and Plaintiffs' failure to notify State Farm Fire & Casualty Company of the second complaint until four years after Mark Fose was dismissed from the original lawsuit. Second, Sherman argues that the Plaintiffs failed to establish the jurisdiction of the Court over her pursuant to Delaware's nonresident motorist long-arm statute because they failed to send Mark Fose notice of the second lawsuit within the seven day period after the return of service on the Secretary of State.

Plaintiffs concede that there have been delays in this litigation, but argue that Mark Fose is primarily responsible for the delays because of his flight from the accident scene and then from the State of Delaware. Also, Plaintiffs argue that they have responded diligently to each of the 41(e) notices and that this Court has allowed the case to continue after each response. Second, Plaintiffs argue that

---

<sup>15</sup> Superior Court Civil Rule 41(b), in pertinent part states, "For failure of the plaintiff to prosecute or to comply with these Rules, or any order of Court, a defendant may move for dismissal of an action or of any claim against the defendant."

they established jurisdiction of the Court by personally serving the Administratrix of Mark Fose's estate.

### ***DISCUSSION***

Because the Court finds the issue of personal jurisdiction pursuant to Delaware's non-resident motorist long-arm statute to be dispositive, it need not decide whether the complaint could be dismissed for Plaintiffs' failure to prosecute.

"Delaware's nonresident motorist 'long-arm' statute codifies a detailed procedure whereby a person injured in Delaware as a result of a motor vehicle operated by a nonresident motorist has a means of civil redress against that nonresident motorist."<sup>16</sup> Also, the long-arm statute "appl[ies] to a resident who departs from the State subsequent to the accident or collision and remains absent therefrom for 30 days continuously...."<sup>17</sup> Under the statute, service of process must be made upon the Secretary of State, followed by the mailing of notice to the nonresident defendant within seven days after the return of service upon the Secretary of State.<sup>18</sup> "Th[e] seven day period is statutory and not subject to

---

<sup>16</sup> O'Donnell v. Lilly and Nixon Unif. Serv., Inc., 2002 Del. Super. LEXIS 266, \*11 (Del. Super. Ct.) (holding that Plaintiffs failed to perfect a "jurisdictional requirement" of Delaware's long-arm statute by not sending a second notice of suit to Defendant following return of the first notice as "unclaimed"); see DEL CODE ANN. tit. 10, § 3112 (1999).

<sup>17</sup> DEL CODE ANN. tit. 10, § 3113 (1999).

<sup>18</sup> Purnell v. Dodman, 297 A.2d 391, 394 (Del. Super. Ct. 1972) (granting motion to dismiss due to Plaintiffs' failure to provide notice to Defendant within seven days after the return of the Secretary of State's service); Lamontagne v. Wise, 2003 Del. Super.

enlargement by rule of Court."<sup>19</sup> "While judicial construction of the nonresident motorist statute should be approached with a view toward accomplishing its purpose, the Court has no power to enlarge statutory time or excuse non-compliance with jurisdictional norms."<sup>20</sup>

Here, the Court finds that Plaintiffs' noncompliance with the nonresident motorist long-arm statute require it to grant Sherman's motion to dismiss. When Plaintiffs' counsel failed to send Mark Fose notice of the suit within the seven day period after the return of service on the Secretary of State, counsel failed to comply with the statutory requirements under title 10, section 3112 of the Delaware Code. Plaintiffs' argument that jurisdiction was established by serving the Administratrix of Mark Fose's Estate is not persuasive. The statute requires notice being sent to Mark Fose.

Also, Plaintiffs' argument that it would have been "unethical" to send notice to a fictitious address outside of Delaware is without merit.<sup>21</sup> Delaware law requires the plaintiff to make a reasonable effort to notify defendant at the address

---

LEXIS 289, \*2 (Del. Super. Ct.) (holding that default judgment was inappropriate in the absence of Plaintiff sending notice via registered mail to Defendants within seven days of service upon the Secretary of State); see DEL CODE ANN. tit. 10, § 3112 (b).

<sup>19</sup> Id.

<sup>20</sup> O'Donnell, 2002 Del. LEXIS at \*12 (citing Purnell, 297 A.2d at 394).

<sup>21</sup> Plaintiffs' Further Reply Brief at ¶ 2.

where it is probable that delivery will be made to the defendant.<sup>22</sup> The statute does not require the defendant to actually receive the notice.<sup>23</sup> Therefore, to fulfill the statutory requirements under title 10, section 3112 of the Delaware Code, Plaintiffs needed to send notice of the suit to an address where it was probable that Mark Fose would receive it.<sup>24</sup> Because Plaintiffs did not mail notice of the suit to any address, Plaintiffs failed to comply with the statute.

The Court takes no pleasure in dismissing this case not on the merits, but the Court cannot excuse non-compliance with the statute.<sup>25</sup> Accordingly, Sherman's motion to dismiss is **GRANTED**.

**IT IS SO ORDERED.**

Very truly yours,

oc: Prothonotary

---

<sup>22</sup> Sommers v. Gaston, 295 A.2d 578, 580 (Del. Super. Ct. 1972); In re \$7726 in the United States Currency, 1998 Del. Super. LEXIS 683, \*3 (Del. Super. Ct.).

<sup>23</sup> Sommers, 295 A.2d at 580.

<sup>24</sup> Id.

<sup>25</sup> Purnell, 297 A.2d at 394.