IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JERRY FORT and MONICA FORT, h/w,	)	
	)	C. A. No. 03C-07-087 PLA
Plaintiffs,	)	
v.	)	
ANGELA M. KOSMERL,	)	
Defendant.	)	

Date Submitted: February 17, 2004
Date Decided: March 11, 2004

Upon Defendant's Motion To Quash Purported Service
And
To Dismiss Due to Lack of Personal Jurisdiction
And
To Dismiss Due to the Expiration of the Statute of Limitations
GRANTED.

ORDER

Joseph M. Jachetti, Esquire, Kenneth R. Schuster & Associates, P.C., Wilmington, Delaware, Attorney for Plaintiffs.

Arthur D. Kuhl, Esquire, Michael A. Pedicone, P.A., Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

This is an action for personal injury arising out of an automobile accident that occurred on July 11, 2001. At all times, Angela M. Kosmerl ("Defendant") was a resident of the Commonwealth of Pennsylvania. Jerry and Monica Fort, husband and wife ("Plaintiffs"), at all times were residents of the State of Delaware. Plaintiffs attempted service of process on the Defendant under the provisions of the Delaware non-resident motorist "long-arm" statute, 10 *Del. C.* § 3112. Defendant has moved to quash that service on the ground that Plaintiffs failed to comply with the mandatory provisions of the statute. As a result, not only is the service defective, but this Court lacks *in personam* jurisdiction, and the claim is now barred by the statute of limitations. As the Court will further explain, because the Court finds that Plaintiffs failed to perfect service upon the Defendant under the Delaware non-resident motorist "long-arm" statute, Plaintiffs' personal injury cause of action is dismissed due to lack of *in personam* jurisdiction by this Court and due to expiration of the statute of limitations.

Factual and Procedural History

Since determination of the issue before the Court hinges on the series of chronological events, which are both highly relevant to, and determinative of, the Court's interpretation of the parties' statutory compliance with 10 *Del. C.* § 3112, the Court deems it necessary to present the following detailed synopsis of the

factual circumstances leading up to the parties current motions under consideration by the Court.

On July 11, 2001, Plaintiffs and Defendant were involved in an automobile traffic accident at the intersection of West 4th Street and N. Adams Street, Wilmington, Delaware. Exactly two years later to the day, on July 11, 2003, Plaintiffs filed a personal injury complaint against the Defendant. On July 18, 2003, Plaintiffs sent a certified letter, with a copy of the complaint enclosed, to the Defendant at her residence in Pennsylvania. In the letter, counsel for Plaintiffs stated to the Defendant that he "strongly recommend[ed] that you [Defendant] immediately turn this Complaint over to your insurance carrier." On July 19, 2003, the Defendant personally accepted service of the summons and complaint as evidenced by the signed certified mail return receipt.

Pursuant to 10 *Del. C.* § 3112(b), on July 21, 2003, Plaintiffs caused the Prothonotary to order the Sheriff of Kent County to issue service of the summons and complaint on the Secretary of State of Delaware. On July 31, 2003, the Sheriff's Return of Service was filed with the Prothonotary of New Castle County. On or about July 23, 2003, the Defendant's insurance carrier retained counsel for Defendant. At that same time, counsel for Defendant sent a letter to Plaintiffs' counsel requesting copies of any service of process documentation. When no response was received, Defendant's counsel sent another letter to Plaintiffs'

counsel on August 22, 2003, again requesting copies of any service of process documentation. On or about August 27, 2003, counsel for Plaintiffs responded by forwarding to Defendant's counsel a copy of the July 18, 2003 letter, the certified mailing receipt, and copies of the Sheriff's Return of Service, indicating that service had been made on the Secretary of State on July 21, 2003 and return of service had been filed with the Prothonotary on July 31, 2003.

On August 22, 2003, Defendant filed an answer, raising the affirmative defenses of insufficient process and insufficient service of process, lack of *in personam* jurisdiction, and expiration of the statute of limitations. Defendant filed the instant motion to quash service and to dismiss Plaintiffs' complaint on September 2, 2003. On September 3, 2003, approximately six weeks after sending a copy of the summons and complaint via certified mail return receipt requested to the Defendant, Plaintiffs filed an Affidavit of Service with the Court evidencing such service. On September 11, 2003, Plaintiffs filed a Motion for Enlargement of Time, requesting that the Court "enlarge the time period for service by an additional 60 days from November 8, 2003 in which to effect[uate] service upon the Defendant pursuant to 10 Del. C. § 3112, i.e., service of the Summons and Complaint upon the Secretary of State of Delaware and upon the Defendant by registered mail with notice of service upon the Secretary of State of Delaware pursuant to 10 Del. C. § 3112."

In addition, Plaintiffs caused an alias summons to be issued on September 12, 2003, directing the Sheriff of Kent County to issue service of the summons and complaint on the Secretary of State of Delaware. Due to an apparent clerical error in the Prothonotary's Office, the alias summons was not forwarded to the Sheriff of Kent County until October 16, 2003. According to the Sheriff's Office, service upon the Secretary of State would take approximately two weeks. Based on this series of facts, Plaintiffs filed a Supplement to Motion for Enlargement of Time on October 21, 2003, citing these events as "good cause" for the granting of an extension of time. On October 27, 2003, Plaintiffs made service of process again on the Secretary of State.

The Court conducted a hearing on Plaintiffs' motion for enlargement of time on November 3, 2003. At the conclusion of the hearing, the Court ruled that, based on the arguments presented, the Court would reserve its decision until after Plaintiffs submitted their answer, with supportive case law, in response to Defendant's motion to quash.

On November 6, 2003, the Sheriff's Return of Service was filed with the Prothonotary of New Castle County. On that same date, in compliance with 10 *Del. C*. § 3112(b), Plaintiffs re-sent a certified letter, with a copy of the complaint enclosed, to the Defendant at her residence in Pennsylvania. On November 10, 2003, Defendant accepted service of the summons and complaint.

Parties' Contentions

In her motion, Defendant argues that service of process, pursuant to 10 *Del. C.* § 3112(b), was not properly effectuated upon her as a non-resident of Delaware. Proper service was made upon the Secretary of State on July 21, 2003 and the Sheriff's Return of Service was filed on July 31, 2003. Plaintiffs had seven days from the return of service date to send notice to the Defendant via registered mail, such notice containing certain mandated statutory language and a copy of the summons and complaint. Plaintiffs failed to send this registered notice to the Defendant within the prescribed statutory period. Defendant contends that strict compliance with the requirements of 10 *Del. C.* § 3112 is necessitated under Delaware law to perfect service on a non-resident defendant in order to bring the defendant into the Court's jurisdiction. Since service of process was not perfected, Defendant submits that this Court has no jurisdiction to consider Plaintiffs' cause of action. Additionally, Defendant argues that, since Plaintiffs failed to send the required registered letter within the seven-day period, the statute of limitations on the personal injury civil action was not tolled. Therefore, Plaintiffs' claim is now time barred. Defendant requests that the Court dismiss Plaintiffs' civil suit with prejudice.

Acknowledging Superior Court Civil Rule 4(j)'s one hundred twenty day time limit for service of a summons and complaint, Plaintiffs respond by invoking

Super Court Civil Rule 6(b)'s granting of enlargement of time to effectuate service for cause.[1] Plaintiffs allege that the law suit was timely filed. Since Rule 6(b) allows for discretionary enlargement of time to serve the Defendant, they assert that Defendant's motion to quash is premature, as a timely filed motion for enlargement of time is still pending with the Court. In contradiction to Defendant's claim that the statute of limitations has expired, due to insufficient service of process, Plaintiffs rely on Superior Court Civil Rule 15(c) (Relation back of amendments) in conjunction with *Crumpler v. Phipps*[2] for the proposition that Defendant received actual notice on July 19, 2003, eight days after the filing of the complaint, and well within the one hundred twenty days granted by Rule 4(j). Plaintiffs remind the Court that, at the time Defendant raised the "technical defect" affirmative defense argument in her answer, Plaintiffs timely filed a motion for enlargement of time.

It is Plaintiffs' contention that, since they re-served the Secretary of State on October 27, 2003, and served the Defendant properly on November 10, 2003, the Court retained *in personam* jurisdiction over the Defendant and, additionally, at that time, Plaintiffs were subject to an enlargement of time to serve the Defendant,

[1] Rule 6(b) states, in pertinent part, "[w]hen by these Rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the Court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order . . . ." SUPER CT. CIV. R. 6(b).
[2] *See Crumpler v. Phipps*, 2000 WL 201190 (Del.).

at the Court's discretion. In essence, Plaintiffs argue that, "[b]ecause the claimed violation of the Statute of Limitations in this case is "derivative' of the claimed 'defective service of process,' and Defendant remains subject to service, the statute of limitations claim necessarily fails."

Discussion

The fulcrum upon which Defendant's motion hinges, and which Plaintiffs' answer seeks to challenge, rests on the determination of the proper statutory interpretation and legal significance, consigned by Delaware law, to the seven-day notice requirement found in 10 *Del. C*. § 3112(b). As the Court will further clarify, this is not a new issue before the Court, but one that is well settled by the constitutional guarantees of due process and equal protection under the law afforded to residents and non-residents who, in particular, may be involved in a motor vehicle accident in the State of Delaware.

The Court believes that it would be in the best interests of the parties to conduct a brief overview of the history and the legislative intent supporting the long-arm statute, which formulated together, resulted in the enactment of the

present provisions set forth in 10 *Del. C*. § 3112.[3] Such an analysis is instrumental to an understanding of the functionality and importance of the seven-day notice requirement to a non-resident defendant.

For years, long-arm statutes have provided states with a sound, constitutional mechanism, through which residents of different states are able to obtain jurisdictional control over each other when a cause of action may arise. In *Purnell*, this Court succinctly summarized the beneficial aspects of long-arm statutes, noting that, "[t]he genesis of statutes enlarging the ability of a plaintiff to secure jurisdiction over a non-resident defendant in claims arising out of motor vehicle accidents lies in the efforts by the States to provide a remedy to persons using its highways against other persons not normally subject to the amenability of

[3] 10 *Del. C*. § 3112 provides, in pertinent part:

(a) Any nonresident owner, operator or driver of any motor vehicle, who accepts the privilege extended by law to nonresidents of this State to operate or drive such motor vehicles on the public streets, roads, turnpikes or highways of this State by operating or driving such motor vehicle or by having the same operated or driven on any public street, road, turnpike or highway of this State shall by such acceptance of the privilege be deemed thereby to have appointed and constituted the Secretary of State of this State, as such nonresident owner's agent for the acceptance of legal process in any civil action against such nonresident owner, operator or driver arising or growing out of any accident or collision occurring within this State in which such motor vehicle is involved. The acceptance shall be a signification of the agreement of such nonresident that any such process when so served shall be of the same legal force and validity as if served upon such nonresident personally within this State, and that such appointment of the Secretary of State shall be irrevocable and binding upon his or her executor or administrator . . .

(a) Service of the legal process provided for in this section with the fee of $2, shall be made upon the Secretary of State of this State in the same manner as is provided by law for service of writs of summons, and when so made shall be as effectual to all intents and purposes as if made personally upon the defendant within this State; provided, that not later than 7 days following the filing of the return of services of process in the court in which the civil action is commenced or following the filing with the court of the proof of the nonreceipt of notice provided for in subsection (e) of this section, the plaintiff or a person acting on the plaintiff's behalf shall send by registered mail to the nonresident defendant, or to the defendant's executor or administrator, a notice consisting of a copy of the process and complaint served upon the Secretary of State and the statement that service of the original of such process has been made upon the Secretary of State of this State, and that under the provisions of this section such service is as effectual to all intents and purposes as if it had been made upon such nonresident personally within this State. DEL. CODE ANN. tit.10, § 3112 (1999 & Supp. 2002).

its Courts."[4] In particular, the State of Delaware's non-resident motorist "long-arm" statute, 10 *Del. C.* § 3112, was enacted on February 12, 1953, as part of an overall revision and codification of the general statutes of the State. The presently revised version of § 3112 effected some modifications in the previous law which, up until that time, appeared as 1935 Code, § 4590. In *Monacelli v. Grimes*, the Delaware Supreme Court held that, by the adoption of the Code of 1953, the changes in the 1935 Code, § 4590, effected by 10 *Del. C.* § 3112, had been enacted into law.[5]

Almost two years later, in the seminal case of *Castelline v. Goldfine Truck Rental Serv.*, the Delaware Supreme Court addressed constitutional challenges to Delaware's non-resident motorist "long-arm" statute.[6] The Court found that the statute was constitutional and did not violate due process under the 14th Amendment, holding that, "[w]e think these statutory directions adequately comply with the requirement of due process that the non-resident be given notice of the pendency of the action against him, and that he be afforded an opportunity to defend himself."[7] The Court emphasized that the significance of the statute was to provide an important safeguard which must contain a "scheme of procedure which will make reasonably certain that the non-resident defendant receives notice of the

[4] *Purnell v. Dodman*, 297 A.2d 391, 393-94 (Super. Ct. Del. 1972).
[5] *Monacelli v. Grimes*, 99 A.2d 255, 256 (Del. 1953).
[6] *See Castelline v. Goldfine Truck Rental Serv*., 112 A.2d 840 (Del. 1955).
[7] *Castelline*, 112 A.2d at 844.

fact that he has been sued, and which insures that he have a fair opportunity to defend against the action."[8]

In finding that the requirements of federal and state due process were satisfied by the notice provisions of 10 *Del. C.* § 3112, the Court in *Castelline* maintained that *in personam* jurisdiction is automatically acquired over non-residents and that it may be enforced by merely giving notice that an action has been commenced.[9] In its opinion, the *Castelline* Court focused mainly on the issue of the statute's constitutionality, as well as upholding the necessity that a non-resident defendant receive notice of the fact that he has been sued, ensuring that he would be given an opportunity to defend against the action, and bringing him under the Court's jurisdiction. While the Court underscored the necessity for compliance with the notice-giving elements of the statute, it somewhat relegated the relevancy of the statutory procedure and timing requirements of the notice to be sent by a defendant. The Court stated, "[t]o comply with this requirement [non-resident receive notice of pendency of the action and given opportunity to defend], it is not necessary, we think, that he be notified that[,] in fact[,] formalistic gestures have been completed. It is sufficient if he is given notice that an action has been instituted against him."[10] It is this same relaxed, non-formalistic approach to the

[8] *Id*. at 843.
[9] *Id*. at 842.
[10] *Id*. at 843.

notice requirement that Plaintiffs now seek to adopt, and rely on, in support of their claim that the seven-day notice can be dispensed with as a technicality.[11]

At the time *Castelline* was decided, and before the 1955 amendment,[12] § 3112(b) of the long-arm statute differed in its notice requirements from its present version. At that point in time, the statute required that the plaintiff, no later than the day following the commencement of the action, send to the non-resident by registered mail, a copy of the process and notice that service of the original has been or will soon be made upon the Secretary of State, and further required the plaintiff to file in the action the defendant's return receipt and proof of mailing of the notice within ten days of receipt by the plaintiff of the non-resident's return receipt.[13]

As discussed above, following the advent of *Castelline* and *Monacelli*,[14] 10 *Del. C*. § 3112 was, generally, redrafted in 1955.[15] As originally enacted, § 3112(b) provided for the mailing of one notice.[16] Presently, as rewritten, the requirement of one mailed notice was retained in § 3112(b), and subsection (e) has

---

[11] *Id*. It is upon this contention, that Plaintiffs erroneously seek support in *Castelline* for the proposition that the notice requirement of 10 *Del. C*. § 3112(b) has been fulfilled because Defendant received actual notice of the cause of action on July 19, 2003, two days before causing service on the Secretary of State. But, as 10 *Del. C*. § 3112(b) has undergone subsequent revisions since *Castelline* was decided, Plaintiffs cannot rely on, and, *Castelline* is no longer good law for stare decisis purposes, as to the particular issue of the requisite statutory scheme and seven day time limit of the notice requirement.

[12] *See infra* note 15.

[13] *Castelline*, 112 A.2d at 844 (explaining the statutory procedural requirements of 10 *Del. C*. § 3112(b) in conjunction with their compliance with the requirements of due process).

[14] In addition to *Castelline*, for further instruction and explanation of the evolution of 10 *Del. C*. § 3112, see *Monacelli v. Grimes*, 99 A.2d 255 (Del. 1953); 50 Del.L. Ch. 333 (1955); 51 Del.L. Ch. 341 (1958).

[15] 50 Del.L. Ch. 333.

[16] 35 Del.L. Ch. 225; 1935 Code § 4590.

been added to address the situation of a return of undelivered notice mailed in accordance with subsection (b)'s requirements. Thus, for the first time, with the introduction of subsection (e), these subsections distinguished, legislatively, a "non-receipt" from a "refusal of delivery" of the notice.[17] As the Delaware Supreme Court later confirmed in *Griffin*, "[t]he legislative evolution of § 3112(b) demonstrates that the General Assembly deliberately added the requirement of a second notice after 'non-receipt' (as distinguished from refusal of delivery) of the first notice . . . ."[18]

Three years later, in 1958, the General Assembly further amended § 3112(b) by adding the present text:

> [P]rovided, that *not later than seven days following the filing of the return of services* [sic] *of process in the Court in which the civil action is commenced* or following the filing with the Court of the proof of the nonreceipt of notice provided for in subsection (e) of this section, the plaintiff or a person acting on the plaintiff's behalf shall send by registered mail to the nonresident defendant, or to the defendant's executor or administrator, a notice . . . .[19]

In discussing this latest revisionary language added to § 3112(b), the Court in *Griffin*, although directing its opinion specifically to the second notice requirement

---

[17] *Griffin v. Granger*, 306 A.2d 725, 727 (Del. 1973) (denoting the connection between the subsections as emphasized first in *Creadick*, which held that service against nonresident motorist was not invalidated, where noncompliance with statute was caused by motorist's refusal to receive letter and sign receipt (*Creadick v. Keller*, 160 A. 909 (Del. Super. Ct. 1932)); 35 Del.Laws, c. 225, § 2; and, later, as explained in *Castelline v. Goldfine Truck Rental Serv.*, 112 A.2d 840 (Del. 1955)).

[18] *Griffin*, 306 A.2d at 727.

[19] *See* 51 Del.L. Ch. 341, Section 1(1958) (emphasis added).

contained in the new statutory language, made it clear that, there could be "no doubt" that the addition in § 3112 of this new language was "deliberate" and "intentional."[20] Supporting this finding, the Court stated, "[w]e think, however, that the 1958 requirement of a follow-up notice, after the return of a non-receipt of the first, was the continued legislative pursuit of maximum fairness and of the constitutionally requisite 'scheme of procedure which will make reasonably certain that the non-resident defendant receives notice of the fact that he has been sued,' . . ."[21] The Court concluded by reiterating that the above language was "deliberately added" and "its mandate is clear and unequivocal; it may not be denigrated to something less than a jurisdictional requirement."[22] Although not expressly stated in *Griffin*, this Court must infer, and subsequent case law evidences the fact that, the Delaware Supreme Court's holding in *Griffin* as to the second notice requirement, also extends and applies to the seven-day notice requirement, as both requirements are contained in the same amended language added to § 3112(b) in 1958. The second notice requirement and the seven-day notice requirement follow the same jurisdictional prefatory language, and compliance is a jurisdictional requirement under § 3112(b). Thus, *Griffin* solidified the fact that, mailing a registered letter to the Defendant as required under § 3112(b) is a precondition to

---

[20] *Griffin*, 306 A.2d at 727.
[21] *Id*. (quoting *Castelline*, 112 A.2d at 843).
[22] *Id*.

this Court's exercise of *in personam* jurisdiction.

In addition to *Griffin*, other Delaware case law, subsequent to *Castelline*, has definitively established that adherence to the seven-day notice requirement is a mandated jurisdictional requirement. In *Purnell*, this Court held that the mailing of notice is to be made within seven days after the return of service upon the Secretary of State.[23] Observing the necessity for statutory compliance, the Court noted, "[w]hile judicial construction of the 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."[24] For this reason, the seven-day requirement is statutory and not subject to enlargement by rule of Court. In *Purnell*, this Court granted non-resident defendants' motion to quash service of process for failure to comply with the mandatory provisions of § 3112 (b), holding that, absent compliance with the statutory requirement of notice given within seven days, "[p]laintiffs have not secured effective service. There is no judicial cure for this defect."[25]

In *Viars*, this Court was presented, once again, with the issue of compliance with the seven-day notice requirement and held that, the phrase "not later than seven days following" contained in § 3112(b), required that the notice be mailed

[23] *Purnell v. Dodman*, 297 A.2d 391, 394 (Del. Super. Ct. 1972).
[24] *Id*. at 394.
[25] *Id*. at 395.

within seven days after the return of service.[26] Examining this phrase more closely, the Court remarked that, "[t]aken out of context, [it] does imply that notice may properly be sent a [sic] any time prior to the return of service. However, the remainder of § 3112(b) requires that the notice contain a copy of the process 'served upon the Secretary' and a statement that such process 'has been made upon the Secretary.' In light of this subsequent language, all in the past tense, the phrase 'not later than seven days following' must be read as 'within seven days after' the return of service."[27]

Nothing could be more distinctly on point to the instant case, than this Court's holding in *Padro*, in which plaintiff caused the Prothonotary to issue service on the Secretary of State pursuant to § 3112(b), but neglected, by his own admission, to mail to the defendants a registered letter as required by § 3112(b).[28] In the instant case, Plaintiffs admit the same failure to send the registered notice within seven days. Likewise, the plaintiff in *Padro* argued, as do the Plaintiffs here, that the seven-day notice requirement portion of § 3112(b) is merely a "technical provision" and that the defendants' awareness of the suit is sufficient to satisfy § 3112(b). Based on a letter from the defendants' insurance carrier to the plaintiff, wherein the carrier stated that it had received the summons and

[26] *Viars v. Surbaugh*, 335 A.2d 285, 288 (Del. Super. Ct. 1975).
[27] *Id*. at 288.
[28] *Padro v. Arzillo*, 1989 WL 158488 (Del. Super. Ct.).

complaint, the plaintiff in *Padro* argued that the defendants had notice of the action filed against them by the plaintiff.[29] This Court struck down that contention, holding that, "[m]ere informal notice of the filing of the suit is not an accepted alternative to compliance with a statutory procedure for acquiring personal jurisdiction."[30] Plaintiffs' mailing of a copy of the summons and complaint to the Defendant on July 18, 2003, and the Defendant's receipt of such on July 19, 2003, *two days* before Plaintiffs caused service on the Secretary of State, falls squarely within this notice deficiency.

In *Viars*, this Court addressed the exact same circumstances, noting that the deliberate omission of the clause "or will soon be made" from § 3112(b) as amended in 1955, could have only meant one thing – that, "[t]he Legislature must have intended that notice should be sent only *after* the return of service on the Secretary of State."[31] This is the exact reason why the General Assembly drafted such a time sensitive, limiting, and specific statutory "technical provision." Otherwise, our judicial system would be overrun with attorneys sending notices of commencement of personal injury civil actions to non-resident defendants under 10 *Del. C*. § 3112(b) in a willy-nilly fashion, at their own leisure, and in their own

[29] *Padro*, 1989 WL 158488, at *1.
[30] *Id*.
[31] *Viars*, 335 A.2d at 289 (emphasis added).

discretionary manner. Thus, it is meaningless and unsubstantiated for Plaintiffs to cling to the tenet of purported compliance with § 3112(b) by imposition of actual notice on the Defendant, viewed within the constraints of the statute.

In *Griffin*, the Delaware Supreme Court held that mailing a registered letter to a non-resident defendant as required pursuant to 10 *Del. C*. § 3112(b) is a precondition to this Court's exercise of *in personam* jurisdiction.[32] The Plaintiffs' failure to satisfy this jurisdictional requirement has deprived the Court of *in personam* jurisdiction over the Defendant.[33] Moreover, when service of process is defective, the Court cannot acquire *in personam* jurisdiction over the matter, and the cause of action must be dismissed if service has not been properly effectuated within the period of the statute of limitations.[34] This Court has no power to excuse non-compliance with the statute.[35]

Plaintiffs attempt to circumvent this critically essential jurisdictional requirement inherent to § 3112(b) by filing a Motion for Enlargement of Time pursuant to Superior Court Civil Procedure Rule 6(b), requesting an additional 60 days from November 8, 2003, and subsequently, serving the Defendant by alias summons. The Court had reserved judgment upon Plaintiffs' motion for

[32] *Id*. (citing *Griffin*, 306 A.2d at 727).
[33] *Id*.; *accord Castelline v. Goldfine Truck Rental Serv*., 112 A.2d 840 (Del. 1955); *Purnell v. Dodman*, 298 A.2d 391 (Del. Super. Ct. 1972).
[34] *Purnell*, 298 A.2d at 395.
[35] *Id*. at 394; *accord O'Donnell v. Lilly*, 2002 WL 31409621, at *3 (Del. Super. Ct.); *Russell v. Fennessy*, 1982 WL 593153, at *2 (Del. Super. Ct.).

enlargement of time until it was presented with legal arguments and briefs from both parties. Based on the Court's findings as detailed above, the motion is moot for two reasons. First, once Plaintiffs failed to effectuate service properly, the Court had no further jurisdiction to consider the motion. Second, a motion for enlargement of time may be granted for "cause shown" and in the Court's discretion. Hypothetically, even if the Court could sustain jurisdiction, Plaintiffs have failed to show cause why they failed to comply with the seven-day notice requirement of § 3112(b).

Plaintiffs valiantly tried to preserve their cause of action by re-serving the Secretary of State on October 27, 2003, and after return of service was filed, re-serving the Defendant on November 6, 2003. Plaintiffs invoke Rule 4(j) and 6(b) in support of their argument for enlargement of time. Superior Court Civil Procedure Rule 4(j) states "if service of summons and complaint is not made upon the defendant within 120 days after the filing of the complaint, and the party on whose behalf such service was required cannot show good cause why such service was not made within the period, the action should be dismissed as to the defendant without prejudice."[36] Interpreted in conjunction with the service of process requirements of § 3112, Plaintiffs have not shown to this Court why such service was not made effectively. Consequently, Plaintiffs cannot employ Rule 6(b) as a

[36] SUPER CT. CIV. R. 4(j).

fail-safe mechanism to preserve their cause of action, nor can they rely upon an alias summons as a "back-door" method to procure an enlargement of time for service of process.[37]

Further, Plaintiffs endeavor to thwart the insufficiency of service of process by also relying on Superior Court Civil Rule of Procedure 15(c) regarding relation back of amendments. Plaintiffs cite to *Crumpler v. Phipps*[38] in support of their argument that Defendant received notice of the institution of the original action within the 120 days prescribed by Rule 4(j), despite the fact that service was not compliant with § 3112(b). In *Crumpler*, the plaintiff timely filed suit against the wrong defendant (not the actual driver of the vehicle), then subsequently filed suit against the proper defendant via an amended complaint, but only after the two-year statute of limitation had expired. The Court held that the statute of limitations had not expired because, even though the proper defendant was not served pursuant to Rule 4(j) until after the two-year statutory period, the amended complaint did relate back to the original filing because the actual driver had received notice of the institution of the action within two years.

But, *Crumpler* is distinguishable from this case for several reasons. First, *Crumpler* did not involve an out of state resident and, second, the Court allowed

---

[37] *Russell v. Fennessy*, 1982 WL 593153 (Del. Super. Ct.) (holding that a plaintiff may not indirectly obtain an enlargement of time by simply issuing an alias summons).
[38] *See supra* note 2.

the "relating back" because the wrong defendant was named in the suit. Plaintiffs contend that service was perfected because Defendant received actual notice on July 19, 2003. But actual notice is not good enough. It does not comport with 10 *Del. C*. § 3112(b). The plaintiff in *Griffin* tried to argue the same point and the Court rejected it, upholding the technical requirement of registered notice to the non-resident defendant within seven days after return of service has been filed.

Naturally, it follows that since the Court has not acquired jurisdiction of this matter through the filing of the complaint and through the properly mandated and effective service of process upon the Defendant within the statute of limitations period, Plaintiffs' action cannot be pursued and must be dismissed. The filing of a complaint interrupts the running of the statute of limitations period only if "the plaintiff diligently seek[s] to bring the defendant into court and subject him to its jurisdiction."[39] This Court, in *Russell*, established that, "[w]hen a plaintiff does not timely comply with the statutory requirement of attempting to notify the defendant by registered mail, he has not diligently sought to subject the defendant to the court's jurisdiction, and has not tolled the running of the limitations period."[40] This holding rings true, whether or not it appears likely that the sending of registered mail would have resulted in actual notice.[41]

[39] *Russell v. Olmedo*, 275 A.2d 249, 250 (Del. 1971).
[40] *Russell*, 1982 WL 593153, at *2.
[41] *Id*.

Finally, finding that the Court lacks jurisdiction in this matter and that the statute of limitations has expired, the Court will address Plaintiffs' remaining defense – invocation and potential applicability of 10 *Del. C*. § 8118, a/k/a the "savings statute,"[42] designed to mitigate against the harshness of the defense of statute of limitations raised against a plaintiff who, through no fault of his own, finds its cause technically barred by the lapse of time.[43] Notwithstanding that the Court finds the issue of present jurisdiction over the Defendant to be dispositive, it will address the issue of whether 10 *Del. C*. § 8118 applies to this particular case, and consequently, whether the equitable remedies inherent to the statute favor the Plaintiffs or the Defendant.

The object of § 8118 is to mitigate against the harshness of the defense of statute of limitations, where through no personal fault, a party finds the cause of action technically barred by lapse of time through a careless oversight or action of counsel.[44] Basically, if a suit has been filed within the statutory period and "something operates to interfere with maintenance of the suit[,] [a] plaintiff is

[42] 10 *Del. C*. § 8118 provides, in pertinent part:
(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or … a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment therein. DEL. CODE ANN. tit. 10, § 8118 (a) (1999 & 2000 Supp.).
[43] *Giles v. Rodolico*, 140 A.2d 263 (Del. 1958).
[44] *Viars*, 335 A.2d at 289; *Leavy v. Saunders*, 319 A.2d 44 (Del. Super. Ct. 1974)(holding that the object of this section is to mitigate against harshness of the defense of statute of limitations where, through no personal fault, a party finds the cause of action technically barred by lapse of time because a careless oversight of counsel would otherwise cause the party to be denied a day in court).

given an extra year within which to file [a] second suit."[45] The statute has a remedial purpose and should be liberally construed.[46] Further, liberal application of the statute is warranted to enable controversies to be decided upon the merits of a dispute rather than upon procedural technicalities.[47] Plaintiffs filed their suit within the statutory period, albeit on the last day permitted by the limitations statute, and clearly, their counsel committed an unfortunate oversight by not complying with the technical requirement of § 3112(b). In light of this, as the statute provides, Plaintiffs should not be penalized for the lack of "follow through" by their counsel, but be afforded the opportunity to advance their suit again.

That being said, in applying § 8118, the courts also give great weight to the fact that a defendant, or his insurer, had timely notice of a plaintiff's litigation or intent to litigate.[48] Plaintiffs' counsel gave actual notice of the filing of the suit to the Defendant a few days after the suit was commenced, also advising Defendant to notify her insurance carrier. Defendant notified her insurance carrier and engaged counsel within days of actual notice. Defendant's counsel and the insurance carrier were also aware of the Plaintiffs' efforts to serve the insured, despite noncompliance with § 3112(b). As this Court similarly found in *Viars*, "[p]laintiff's inartistic handling of the 'notice of service' under § 3112(b), while

[45] *O'Lear v. Strucker*, 209 A.2d 755, 758 (Del. Super. Ct. 1965).
[46] *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964).
[47] *Howmet Corp. v. City of Wilmington*, 285 A.2d 423 (Del. 1971).
[48] *Viars*, 335 A.2d at 289; *Giles*, 140 A.2d at 267-68.

technically deficient, was nevertheless primarily a 'formal failure' of compliance with statutory language where, in effect, notice of intention to litigate was given defendant by an early mailing with a fairly predictable event of satisfactory service upon the Secretary."[49]

Plaintiffs' technical noncompliance with § 3112(b)'s seven-day notice requirement made service of process technically deficient upon the Defendant and violated the requisite jurisdictional requirement. Therefore, as explained previously, Plaintiffs' action is dismissed without prejudice. The dismissal constitutes an abatement of their action, however, within the meaning of 10 *Del. C.* § 8118,[50] should they seek to avail themselves of the beneficial considerations of this section. Where the technical requirement of service of process is deficient, not because of any fault attributable to the plaintiff, it would be a "miscarriage of justice," as the Delaware Supreme Court held in *Giles*, to now hold that no cause of action may be brought by reason of expiration of time.[51] The Court noted that, such a result "[c]omplies with the purpose of Rule 1 of the Superior Court enjoining a construction of the rules 'to secure the just, speedy and inexpensive determination of every proceeding.'"[52] Further, as the *Giles* Court similarly

[49] *Viars*, 335 A.2d at 289.
[50] See *Giles*, 140 A.2d at 267-68 (holding that where a suit was filed and was subsequently dismissed for failure to meet the technical requirements of service of process in order to obtain jurisdiction before the statute of limitations ran, but not because of any fault of the plaintiff, the action "abated" within the meaning of the statute).
[51] *Giles*, 140 A.2d at 267.
[52] *Id*.

emphasized, knowledge by the Defendant of the complaint being filed, placed the Defendant on notice that she was going to be sued. Therefore, it is difficult to see how a new suit, immediately filed, pursuant to § 8118, will harm the Defendant.[53] This Court holds that Plaintiffs' action abated within the meaning of § 8118. Therefore, the circumstances of this case warrant "equitable" treatment of this matter under § 8118.[54]

[53] *Id*. at 268.

[54] The Court recognizes (but does not herein resolve) the apparent unresolved dichotomy in Delaware case law regarding the equitable considerations of § 8118, insofar as attorney neglect or oversight, is concerned. In a line of cases following *Giles*, concerning various forms of attorney neglect involving failure to perfect service of process under § 3112(b), through no fault of the defendant, this Court has held that the purpose of § 8118 is to "mitigate against the harshness of the defense of the statute of limitations against a plaintiff, who, through no fault of his own, finds his case technically barred by lapse of time." *See supra* notes 42-45, 47; *see also Gaspero v. Douglas*, 1981 WL 10228, at *1 (Del. Super. Ct.). However, the Court of Chancery has noted that § 8118 "is not directed to neglect of an attorney." *Pacific Ins. Co. v. Higgins*, 1993 WL 133181, at *6 n.1(Del. Ch.).

In conclusion, for all the foregoing reasons, Plaintiff's Motion for Enlargement of Time is moot. Plaintiff's civil action is dismissed without prejudice, said dismissal constituting abatement for purposes of 10 *Del. C*. § 8118. Defendant's Motion To Quash Purported Service and to Dismiss Due to Lack of Personal Jurisdiction and to Dismiss Due to the Expiration of the Statute of Limitations is **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Joseph M. Jachetti, Esquire
Arthur D. Kuhl, Esquire
Prothonotary