

2009

William Berneau v. Cameron D. Martino, David M. Cameron : Brief of Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM BERNEAU,

Plaintiff/Appellant,

v.

CAMERON D. MARTINO, aka DAVID
M. CAMERON; and THE ESTATE OF
CAMERON D. MARTINO aka DAVID
M. CAMERON,

Defendants/Appellee.

Case No.: 20090134-SC

BRIEF OF APPELLEE

APPEAL FROM A DECISION OF THE THIRD JUDICIAL COURT
JOSPEH C. FRATTO.

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Cameron D. Martino, David Martino,
appearing specially.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated § 78A-3-102(3)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

ISSUE I:

Does the three year statute of limitations period set forth in Utah Code Ann. § 75-3-107 bar an individual from filing a lawsuit against a deceased tortfeasor where no personal representative was ever appointed as required by Utah Code Ann. § 75-3-104?

STANDARD OF REVIEW:

Whether the statutes operate as a statute of limitations to bar the appellant's claim is a question of law, and is reviewed for correctness. *In re Hoopiaina Trust*, 2006 UT 53, ¶ 19, 144 P.3d 1129, *Russell Packard Development, Inc. v. Carson*, 2005 UT 14, ¶ 18, 108 P.3d 741.

ISSUE II:

Does Utah Code Annotated § 75-3-803(4)(b) create a new cause of action, to allow a claim against a decedent in name only, independent of the decedent's estate and any personal representative, thereby avoiding the requirements of Utah Code Ann. §§ 75-3-107 and 104?

STANDARD OF REVIEW:

The standard of review for the interpretation of a rule or statute is for correctness. *State v. Brooks*, 908 P.2d 856, 858-859 (Utah 1995).

DETERMINATIVE STATUTES

§ 75-3-104. Claims against decedent--Necessity of administration

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 75-3-1004 or from a former personal representative individually liable as provided in Section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Utah Code Ann. § 75-3-104 (1993)

§ 75-3-107. Probate, testacy, and appointment proceedings--Ultimate time limit--Presumption and order of intestacy

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(a) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding.

(b) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person.

(c) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death.

(2) The limitations provided in Subsection (1) do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under Subsection (1)(a) or (b), the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this title which relate to the date of death.

(3) If no will is probated within three years from death, the presumption of intestacy is final and the court shall enter an order to that effect and provide for the distribution of the decedent's property in accordance with the laws of intestacy under Title 75, Chapter 2, Part 1, The court has continuing jurisdiction to handle all matters necessary to distribute the decedent's property, including jurisdiction to determine what property was owned by the decedent at the time of death.

Utah Code Ann. § 75-3-107 (1993)

§ 75-3-803. Limitations on presentation of claims

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death; or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801 (1) for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

(4) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(c) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

Utah Code Ann. § 75-3-803 (1993)

STATEMENT OF THE CASE

The plaintiff, William Berneau, claims injury from an accident that occurred on September 23, 2003, which he alleges is the fault of the decedent, Cameron D. Martino. The decedent died on December 12, 2003, from causes unrelated to the accident. Plaintiff first filed a lawsuit naming Cameron D. Martino on September 14, 2007, in the Fourth Judicial District Court. That lawsuit was eventually dismissed by that court for failure to serve, under Utah Rules of Civil Procedure, Rule 4(b). The plaintiff, then knowing of the death and that no personal representative was appointed, filed his second action on August 1, 2008. At that time the plaintiff named as defendants the decedent Cameron D. Martino and “the estate of” the decedent. No type of probate matter was ever pursued to name a personal representative for decedent. The defendant appeared specially below and filed a motion to dismiss, arguing that the plaintiff’s claims were now barred by Sections 75-3-104 and 75-3-107 of the Utah Code. The trial court agreed in a memorandum decision dated January 16, 2009, and filed January 21, 2009. The final Order of Dismissal was signed by the trial court on January 17, 2009, and filed the next day. The plaintiff has appealed from that order.

STATEMENT OF RELEVANT FACTS

1. The plaintiff, William Berneau, and the decedent, Cameron D. Martino, were involved in a minor rear-end accident on September 23, 2003. Complaint, Record at 2, ¶ 10; police records, R. 39; Order of Dismissal, R. 118.
2. The decedent died on December 12, 2003, from causes unrelated to the accident. Complaint, R. 2, ¶ 4; Utah Certificate of Death, R. 48; and Order of Dismissal, R. 118.
3. The plaintiff's first complaint was filed on September 14, 2007, in the Fourth Judicial District Court and named as the defendant Cameron D. Martino. Complaint, R. 2, ¶ 5; and a copy of the court docket for that case, R. 50 to 51.
4. That action was dismissed for failure to serve on February 27, 2008 by the Fourth Judicial District Court. *See* Complaint, R. 2, ¶ 6, and docket, R. 51.
5. The plaintiff filed this action on August 1, 2008, more than three years after decedent's death. Complaint, R. 1; Order of Dismissal, R. 118-119.
6. At that time, the plaintiff knew of the death of Cameron D. Martino and that no representative had been appointed. *See* Complaint, R. 2, ¶ 6 and 7.
7. No type of probate case has been pursued regarding the decedent, and there has never been an Estate of Cameron D. Martino. *See* Complaint, R. 2, ¶ 7; Order of Dismissal, R. 118.

SUMMARY OF THE ARGUMENT

The Utah Uniform Probate Code provides several limitations on the time periods during which a person making a claim against a deceased person must present or file their claims. Specifically, Utah Code Ann. § 75-3-104 requires a personal representative to be appointed before commencing or reviving a claim. Utah Code Ann. § 75-3-107, with certain irrelevant exceptions, prohibits appointing a personal representative more than three years after the death of the decedent. These two sections together create a statutory bar to any claim against a decedent if no personal representative is appointed within three years from the death of a decedent.

Other statutory sections of the code create additional limitations periods. Specifically, Utah Code Ann. § 75-3-803 provides additional limitations if a personal representative is appointed, and also provides exceptions to those limitations. However, the exceptions of Section 75-3-803 apply only to the limitations found in 75-3-803, not those found in Section 75-3-104 and 75-3-107. The plaintiff in this case, even after learning about the death of the decedent, never attempted to comply with the requirement to appoint a personal representative, and no personal representative was ever appointed. Given this, the plaintiff's claims are barred by Section 75-3-107.

ARGUMENT

I. Utah law bars claims raised more than three years after death where no personal representative has been appointed.

The Utah legislature long ago adopted the Utah Uniform Probate Code as Title 75 of the Utah Code. *See* Utah Code Ann. §§ 75-1-101 and -102. There are numerous

provisions of the probate code that provide a time limitation that may bar a plaintiff's claims against a decedent. Two are relevant to this matter. The limitations found in Utah Code Ann. §§ 75-3-104 and 75-3-107 will be discussed in this section. Together they operate to bar the plaintiff's claim in the underlying action. The plaintiff argues an exception exists in the form of Section 75-3-803, which he apparently argues creates a special cause of action. This section of the brief will address the statutory bar found in Sections 75-3-104 and 75-3-107. Section II will address the exception the plaintiff claims pursuant to Section 75-3-803.

The Probate Code addresses the obvious difficulty of pursuing claims against a deceased person by requiring that a personal representative must be appointed before such claims are commenced or revived. This requirement is found in Part 3 of the Code, Section 75-3-104, which states:

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Chapter 3...

This requirement to appoint a personal representative does not leave those who have claims against a decedent without recourse, as they are interested parties who may petition the court to appoint the required personal representative. *See e.g.* Utah Code Ann. § 75-3-301. However, claimants may not delay in filing claims against a decedent as Part 3 of the Code also provides a statute of limitations of three years that limits the time period in which these claims can be filed. This is found in Utah Code Ann. § 75-3-107. The relevant portions of that statute are as follows:

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death...

(emphasis added). The statute goes on to list several exceptions, none of which are applicable to this case. Together, sections 75-3-104 and 75-3-107 require that, in all claims against a deceased person, a personal representative must be sought within three years. If this is not done, no claim against the decedent may be “revived or commenced,” what the title to Section 75-3-107 calls the “ultimate time limit” to file an action against a decedent.

In this matter, the decedent died on December 12, 2003. No type of filing requesting a personal representative was filed by the plaintiff or any other person before December 12, 2006, three years after his death. However, the plaintiff filed a prior lawsuit in the name of the decedent on September 14, 2007, delaying until just before the general statute of limitations, found in Utah Code Ann. § 78B-2-307, would have run. There is no evidence the plaintiff attempted to serve this lawsuit and it was eventually dismissed for failure to serve, pursuant to Rule 4(b) of the Utah Rules of Civil Procedure. The plaintiff filed his second lawsuit on August 1, 2008. Even though the Complaint references the death of the decedent and that no probate had been attempted, the plaintiff did not seek appointment of a personal representative or attempt to comply with Section 75-3-104 in any way. As there was no attempt to comply with Utah Law, the plaintiff’s claims are barred by Section 75-3-803

A. Case law from other jurisdictions supports a bar to the plaintiff's claims.

A Utah Court has not examined these sections of the Probate Code. However, case law from other jurisdiction that have adopted the same language from the Uniform Probate Code are instructive. In the case of *In re Estate of Kruzynski*, 744 A.2d 1054 (Me. 2000), the Supreme Court of Maine construed nearly identical language in sections of the Uniform Probate Code adopted by Maine. In *Kruzynski*, Levine, who was fifteen years old at the time, was injured in an automobile collision on August 20, 1992. The tortfeasor, Kruzynski, died on October 3, 1993. Levine did not learn of the tortfeasor's death for at least three years and later filed a petition to have herself appointed a personal representative in order to pursue her claim. *Id.* at 1055, ¶¶ 2 to 3

The Maine statute which is comparable to Utah's Section 75-3-104 is Me. Rev. Stat. Ann. 18-A, § 3-104. Aside from cross-references to other sections of the statutes, the Maine statute text is identical to Utah's Section 75-3-104, and is as follows:

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Article. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in section 3-1004 or from a former personal representative individually liable as provided in section 3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Me. Rev. Stat. Ann. 18-A, § 3-104. The Maine statute which is comparable to Utah's Section 75-3-107 is Me. Rev. Stat. Ann. 18-A, § 3-108. The language relevant to both *Kruzynski* and this case is also identical in this Maine Statute:

...no informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death...

Me. Rev. Stat. Ann. 18-A, § 3-108.¹ Facing these statutes, the plaintiff in *Kruzynski* faced the same bar as does the plaintiff in this case. *See Kruzynski, supra*, ¶ 7.

In *Kruzynski*, Levine argued, as does plaintiff in this case, that Maine's version of Section 75-3-803(d), Me. Rev. Stat. Ann. 18-A, § 3-803(c), provided an exception which would allow her to pursue her claim. *Id.* ¶ 5. "[Levine] wants us to hold that, when there is a personal injury claim against an estate and that claim is only for the amount of liability insurance held by the decedent, there is no time limit for the appointment of the personal representative." *Id.* The Maine Supreme Court rejected this claim, noting:

Neither section 3-803(a), limiting the time within which claims must be presented, nor section 3-803(c)(2), the liability insurance exception, are applicable in this case because their application would be premature. *Claims cannot be presented to an estate until there is a personal representative.* No personal representative was ever designated for Kruzynski's estate.

Id., ¶ 6 (emphasis added). The Maine Supreme Court therefore affirmed the trial court's dismissal in *Kruzynski*. *Id.* ¶ 10. Like the Court found in *Kruzynski*, in Utah claims against a decedent cannot be revived or commenced until a personal representative is appointed. Where no personal representative is appointed within the three year period after the death, the claims are barred.

¹ Me. Rev. Stat. Ann. 18-A, § 3-108 is different from Utah's statute in two respects. First, it provides the language from the Uniform Probate Code applies only to deaths after January 1, 1981, with different language for deaths before that date, and second, Utah added subsection 75-3-107(3). Neither difference is relevant for this analysis.

B. Commentary supports a bar to plaintiff's claims.

The commentary included in the Uniform Probate Code, and included in the Utah Uniform Probate Code, also supports a statute of limitations that bars plaintiff's claim. The commentary for Utah Code Ann. § 75-3-104 states as follows, "This and sections of Part 8, Article III, are designed to force creditors of decedents to assert their claims against duly appointed personal representatives." Though Utah Code Ann. § 75-3-802 is not at issue here, its commentary from the Uniform Code is instructive, "It [Section 802] implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of Section 3-803 have not been triggered. Hence, the non-claim and limitation provisions of Section 3-803 *are not mutually exclusive*." That comment goes on to list various ways a claim may be barred, which are not mutually exclusive.

The trial court below also cited the Editorial Board Comment to Section 75-3-107, which states, in part,

All creditor's claims are barred after three years from death. See § 75-3-803(1)(b) [which now prescribes shorter periods after notice to creditors]. Because of this, and since any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under § 75-3-101, the three-year statute of limitations applies to bar appointment of a personal representative after the basic period has passed...

R. 108.² The key to these comments is that there are a number of statutory provisions that act as statutes of limitation. They are not mutually exclusive, and any may bar the claims of an untimely claimant. In this case, the three year limitations period of Utah's

² This Editorial Board Comment is not found in the current comments to Section 107, but is found in the 1993 printed version of that statute.

Section 75-3-107 bars the claim, as neither the plaintiff nor anyone else petitioned to appoint a personal representative for the decedent as Section 75-3-104 requires prior to pursuing any claims.

II. Section 803(4)(B) does not create a new cause of action.

A. No cause of action against a decedent alone is created by Section 803.

Much of the plaintiff's brief argues that Utah Code Ann. 75-3-803(4)(b) creates a method for him to pursue a claim without regard to the remainder of the Probate Code. Section 75-3-803 generally deals with how creditors of an estate must present claims when a personal representative has been appointed, and provides time limits when a personal representative is appointed. The specific language the plaintiff looks to is in paragraph four of this section, which states, "(4) Nothing in this section affects or prevents:...(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance..." *Id.*

Plaintiff particularly focuses on the word "or" to make the novel argument that the "plain language" of this statute is that the legislature authorized Plaintiff to file a claim against "the decedent" separately from the personal representative, and thereby avoid the requirements that a personal representative be appointed. Brief of Appellants, 11, 12 (*citing HUF v. W.P.W.*, 2009 UT 10, ¶ 32, 203 P.3d 943.). When read in context, the plain language is that the exception to the limitations set out in Section 75-3-803 applies to those types of proceedings that must establish what the liability of the decedent or the personal representative is, when that liability would be covered by insurance. It does not

create a new class of cases where the only defendant is a deceased person without a representative. It also does not exempt the plaintiff from the requirement of Section 75-3-104 to seek to appoint a personal representative before pursuing the claim.

B. Section 75-3-803 is not applicable.

Regardless of whether a separate action against a dead person is possible, Section 75-3-803(4) is not applicable to this case. By the plain meaning of its words, paragraph 4 applies only to the limitations provisions of section 75-3-803, “(4) Nothing *in this section* affects or prevents...” (emphasis added). The Legislature could easily have written “Nothing in this *title*” if it had wished Section 75-3-803 to exempt a plaintiff from all statutes of limitations in the Probate Code. However, the legislature very clearly limited the exceptions in paragraph 4 to those limitations periods set out in Section 75-3-803. As was stated in the *Kruzynski* case, neither the general provisions of Section 75-3-803, nor the exceptions in Section 75-3-803(4) are applicable “because their application would be premature.” See *Kruzynski, supra* p. 1056, ¶ 6. Section 75-3-803 governs when claims can be presented to a personal representative and when they will be barred under those procedures. Where no representative is appointed and it is no longer possible to appoint a representative, as is the result of filings that do not comply with Utah’s Sections 75-3-104 and 75-3-107, Section 75-3-803 in its entirety never becomes applicable.

C. A deceased person is not a proper party.

It is not possible to create a fiction that it is “the decedent” being sued and no personal representative or other proper defendant is involved. Common sense would indicate that a dead person cannot be a party to a lawsuit. Rule 17(a) of the Utah Rules of

Civil Procedure provides, “[e]very action shall be prosecuted in the name of the real party in interest...” Utah has little case law about how and whether this applies to defendants, or the capacity for defendants to be sued. The closest case is *Green v. Louder*, 2001 UT 62, ¶¶ 41-45, 29 P.3d 638, in which this court held a personal injury plaintiff could not join the insurer as a real party defendant.

Utah’s Rules of Civil Procedure clearly do not contemplate allowing a proceeding to continue in the name of a deceased person alone, as Rule 25(a) requires the substitution of a party within ninety days of when death is suggested upon the records. Therefore, if this case were to proceed in the name of the decedent, a suggestion of death would be appropriate. As no personal representative may now be appointed, Rule 25(a) would then require dismissal of the action within 90 days. This procedure would be nonsensical if Utah law allowed suits against a decedent alone.

D. Utah law does not allow a lawsuit against the tortfeasor’s insurer.

The plaintiff makes many references to the decedent’s insurer, but avoids arguing that he should be allowed to make a claim directly against the insurer. Instead, he argues he should be allowed to make a claim in the decedent’s name, but without “disturbing” or otherwise involving the family of the decedent. *See* Brief of Appellant, at 14. However, creating a fiction that the deceased person is a defendant with the capacity to be sued as the named defendant is simply a *de facto* direct action against the insurer of a tortfeasor.

This is clearly contrary to the law of the State of Utah. “In Utah, a plaintiff must direct his action against the actual tortfeasor, not the insurer.” *Campbell v. Stagg*, 596 P.2d 1037, 1039 (Utah 1979). “Utah adheres to the general rule, that in the absence of a

contractual provision or a statute or ordinance to the contrary, the absence of privity of contract between the injured party and the tortfeasor's insurer bars a direct action by the injured party against the insurer in automobile insurance cases.” *Davis County v. Jensen*, 2003 UT App 444, ¶13, 83 P.3d 405 (citations, internal quotations and alterations omitted); *see also Davis County v. Progressive Northwestern Ins. Co.*, 2008 UT App. 414, ¶7, 193 P.3d 669 (cert den. 90 P.3d 1041). Plaintiff's argument that he should proceed in the name of the decedent to access insurance proceeds is little more than the creation of a legal fiction in order to overturn this long-established case law.

Regardless, the plaintiff has not named any party that could be an appropriate defendant within either a three *or* a four year statute of limitations. If Section 75-3-803 is read to allow a claim against the insurer for the proceeds of the insurance policy, the plaintiff has never attempted to name the insurer as a party. Neither in his first nor in his second claim did he attempt to name the insurer as a party. The plaintiff's claims are therefore time barred as to the insurer even under the general four-year statute of limitations of Utah Code Ann. § 78B-2-307. Similarly, as the plaintiff has never attempted to name anyone in the capacity of a personal representative, any attempt to do so now would face a similar bar due to the general statute of limitations.

III. It is plaintiff who bears the risk for not diligently pursuing his claims.

Throughout the plaintiff's pleadings and brief, he emphasizes the decedent's insurer, claims an “ongoing dialog” with the insurer, and claims other facts irrelevant to the application of Sections 104, 107 and 803. *See generally*, Brief of Appellant, p. 7-8, ¶¶ 6-12. Even though these allegations are made, the plaintiff never put into evidence

any correspondence or other evidence showing this “ongoing dialog” or other evidence to support these allegations. The only documents offered and included in the record below are: copies of the police report and exchange forms, a copy of the certificate of death, and a copy of the docket report of the prior case, each of which were attached to the defendant’s Memorandum in Support of Motion to Dismiss, R. 38-51. A single letter, dated February 1, 2008³ was attached to the Reply Memorandum in Support of Motion to Dismiss, R. 70. The only document attached to the plaintiff’s pleadings on the motion was a copy of Section 75-3-803. R. 62 and 63.

The one bit of this alleged “ongoing dialog” that the trial court had before it to consider is a follow-up letter noting the claim adjustor had contacted counsel’s paralegal on October 4, 2007 and informed her she had learned of decedent’s death. The letter also informed counsel she was closing the file. Despite this prior telephonic notice and letter, the plaintiff did nothing with regard to the pending case, and it was dismissed on February 27, 2008 by Judge Claudia Laycock of the Fourth Judicial Court, pursuant to Rule 4(b). *See* R. 51.

The record establishes that plaintiff waited until September 17, 2007 to file his first Complaint. Plaintiff chose to wait until nine days before the general statute of limitations would have run to file his claim. No evidence was ever produced that the decedent, his successors, or his insurer had any influence in this choice. The first lawsuit was dismissed for failure to serve on February 27, 2008, five months and ten days after it

³ It appears that plaintiff cites this letter in his statement of facts as ¶ 10, but instead cites the date he supposedly received the letter, February 4, 2008.

was filed. This was three and a half months after plaintiff was notified by telephone of the tortfeasor's death, and twenty-three days after receiving the February 1, 2008 letter. There has been no evidence presented that the plaintiff ever attempted to have the first suit served or took other action to preserve that case. Again, plaintiff chose this course of action; there has been no evidence presented that the decedent, his successors, or his insurer had any influence in this decision. Similarly, there is no information presented that the plaintiff sought appointment of a personal representative or otherwise attempted to comply with the requirements of the law prior to the filing of this action on August 1, 2008. Even then, the plaintiff only sought to pursue a claim through a strained reading of Section 75-3-803, ignoring all other requirements of the probate code. Again, plaintiff made these choices. They were not made by the decedent, his successors, or his insurer.

Plaintiff made no claims in the trial court for equitable relief from any statute of limitations or procedures, or any claims other than insisting a cause of action pursuant to 75-3-803 exists. He should not be able to raise such claims now, either explicitly or by implication.

...[T]o preserve an issue for appellate review, a party must first raise the issue in the trial court. That is, a trial court must be offered an opportunity to rule on an issue. A trial court has the opportunity to rule if the following three requirements are met: (1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.

Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998) (citations and internal quotations omitted), *see also Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah Ct. App. 1997). The plaintiff did not sufficiently raise any issues outside of Section 75-3-

803 pursuant to this standard. Given this, he should not raise alleged facts and inferences related to other issues, not relevant to the issues on appeal, which are the limits and exceptions set forth in Section 75-3-104, 75-3-107, and 75-3-803 of the Utah Uniform Probate Code. To raise other facts and allegations in the appeal without providing evidence of them in the trial court below prevents the appellee from responding with legal arguments and supporting evidence, and denies the trial court the opportunity to rule upon them.

The relevant facts that were presented and ruled upon by the trial court, were included in the Order of Dismissal, “this matter arises from an accident that occurred on September 23, 2003; the driver who would have been the proper defendant, Cameron Martino died on December 3, 2003; no probate or other proceeding to appoint a personal representative was ever filed; and this matter was not filed until more than three years after the death of Cameron Martino.” It is these facts that must be applied to Sections 75-3-104 and 75-3-107, which support the trial court’s dismissal below.

CONCLUSION

The law adopted by the Utah State legislature provides for an ultimate time limit in which claims against a decedent may no longer be pursued. Utah Code Ann. § 75-3-104 requires a personal representative to be appointed before a lawsuit may be “revived or commenced.” Section 75-3-107 provides a bar against all such actions not filed three years from decedent’s death, as was recognized by the Maine Supreme Court in *Kruzynski, supra*. As no personal representative was appointed, Section 75-3-803 is not applicable. Even if it were, the exception is limited by the wording of section 75-3-803

to only the limitations provisions set forth in Section 75-3-803. Therefore, this Court should uphold the order of the trial court below, and find that the plaintiff's claims in this matter are barred.

DATED this 10th day of June, 2009.

Victoria K. Kidman & Associates

A handwritten signature in black ink, reading "Todd A. Turnblom", written over a horizontal line.

Todd A. Turnblom

Tajha L. Ferrara

Attorneys for Defendant/Appellee

ADDENDUM


1. Memorandum Decision, R. 102-110
2. Order of Dismissal, R. 118-120
3. Complaint, R. 1-4
4. Certificate of Death, R. 48
5. February 1, 2008 Letter, R. 70

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of June, 2009, the foregoing Brief of Appellee was mailed for filing with the Third Judicial District Court below at the address below and that a true and correct copy of the foregoing was delivered by first class mail, postage prepaid, to each of the following additional parties:

Clerk of the Court
THIRD JUDICIAL DISTRICT COURT
P.O. Box 1860
Salt Lake City, UT 84114

Mark T. Flickinger
Brett R. Boulton
Flickinger & Sutterfield, P.C.
3000 N. University Ave., #300
Provo, Utah 84604

A handwritten signature in cursive script, reading "Jendrey Bodily", written over a horizontal line.

Addendum 1
Memorandum Decision

JAN 23 2009

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILLIAM BERNEAU,

Plaintiff,

vs.

CAMERON D. MARTINO, AKA DAVID
M. CAMERON; AND THE ESTATE OF
CAMERON D. MARTINO AKA DAVID M.
CAMERON,

Defendant.

FILED

JAN 21 2009

THIRD DISTRICT COURT
SALT LAKE COUNTY
MEMORANDUM DECISION

Case No. 080915531

Hon. JOSEPH C. FRATTO, JR.

January 16, 2009

The above-entitled matter comes before the Court pursuant to Defendant's Motion to Dismiss and Plaintiff's Motion to Strike. The Court heard oral argument with respect to the motions on January 9, 2009. Following the hearing, the matters were taken under advisement.

The Court having considered the motions and memoranda and for the good cause shown, hereby enters the following ruling.

Specifically, this matter presents itself the result of an automobile accident occurring on September 23, 2003.

With the motion to dismiss, Defendant asserts the driver who would have been the proper defendant, Cameron Martino, died from causes unrelated to the accident on December 3, 2003. No probate or other proceeding to appoint a personal representative was ever

presented. This is critical, argues Defendant, as the Utah statutes are explicit about the method to bring an action for claimed damages against the estate of a decedent. Indeed, asserts Defendant, Utah Code Ann. § 75-3-104 controls claims made against a decedent or his successors and provides:

No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this Chapter 3. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 75-3-1004 or from a former personal representative individually liable as provided in Section 75-3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

Utah Code Ann. § 75-3-104.

Moreover, contends Defendant, the statute of limitations for when such an action may be commenced is found in Utah Code Ann. § 75-3-107, which provides the following in relevant part:

(1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the

decedent's death. . . .

Utah Code Ann. § 75-3-107.

In the instant, argues Defendant, no probate or other proceeding to appoint a personal representative was ever presented. Accordingly, asserts Defendant, the Utah statutes now bar any proceeding to appoint a special administrator or personal representative as well as any claims against the estate of the decedent. Consequently, contends Defendant, the Plaintiff's claims fail as a matter of law.¹

Plaintiff opposes the motion arguing the limitations on presentations of claims for creditors under the Utah Uniform Probate Code explicitly allows proceedings to establish the

¹Plaintiff has filed a Motion to Strike Defendant's Reply Memorandum in Support of Motion to Dismiss arguing Defendant first asserted that a claim may not be made unless a personal representative has been appointed and in the Reply, Defendant now argues that the claim has abated. Because Defendant's reply argument is new and not rebuttal, contends Plaintiff, such should be stricken.

Defendant opposes the motion arguing he did not raise new issues in his Reply. Indeed, asserts Defendant, his argument has always been that (1) Section 75-3-104 prohibits a claim against a decedent or his successors until a personal representative can be appointed, and (2) Section 75-3-107 prohibits that from occurring more than three years after the death.

While the wording may not be optimal, the Court is not persuaded Defendant raised new issues with his Reply Memorandum. Accordingly, Plaintiff's Motion to Strike is, respectfully, denied.

liability of a decedent up to the limits of insurance protection for this auto collision after one year following the death of Defendant. Specifically, asserts Plaintiff, "The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the three months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow." Utah Code Ann. § 75-3-802. In this case, contends Plaintiff, his claim is for personal injuries arising out of an automobile collision and not the Defendant's death. Therefore, argues Plaintiff, his claim is controlled by the four year statute of limitations found in Utah Code Ann. § 78B-2-307(3) and suit was timely filed within four years.

Indeed, asserts Plaintiff, in the sections that follow Section 802, the time limits for presenting any and all claims are, again, explicitly set forth under Utah Code Ann. § 75-3-803 which provides:

(1) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision of it, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within the earlier of the following dates:

(a) one year after the decedent's death;
or

(b) within the time provided by Subsection 75-3-801(2) for creditors who are given actual notice, and where notice is published, within the time provided in Subsection 75-3-801(1) for all claims barred by publication.

(2) In all events, claims barred by the nonclaim statute at the decedent's domicile are also barred in this state.

(3) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any of its subdivisions, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative within three months after performance by the personal representative is due; or

(b) any other claim within the later of three months after it arises, or the time specified in Subsection (1)(a).

(4) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal

representative for which he is protected by liability insurance; or

(c) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

Utah Code Ann. § 75-3-803 (Emphasis added).

This action arises from an accident which occurred more than five years ago. Utah Code Ann. § 75-3-104 prohibits a claim against a decedent or his successors until a personal representative can be appointed. In this instant, it is undisputed no probate or other proceeding to appoint a personal representative has ever been presented. This said, Utah Code Ann. § 75-3-107 prohibits the presentation of such an action from occurring more than three years after the decedent's death.

While Plaintiff seems to imply that he is bringing this action against the insurer (who is not a party) such an effort is contrary to Utah law in the absence of a contractual provision, statute or ordinance to the contrary.

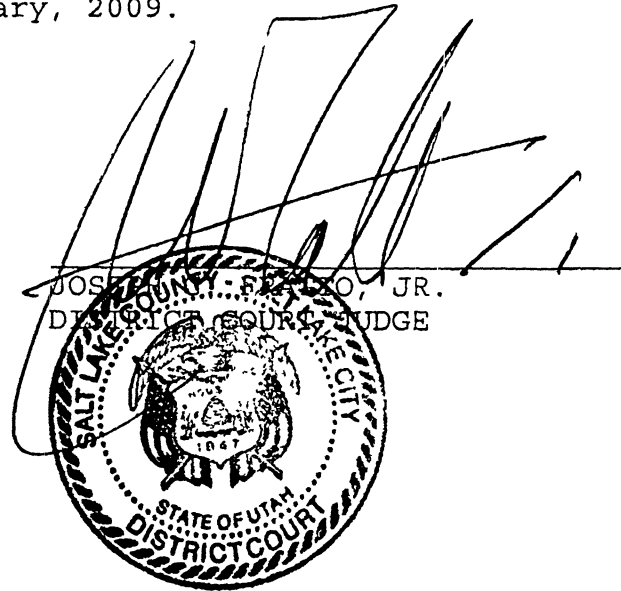
Finally, while Plaintiff has argued § 75-3-803 should apply as such sets forth the statute of limitations as to creditors, which he claims he is, it is important to note that in the Editorial Board Comment to Section 75-3-107 the following is stated:

All creditors' claims are barred after three years from death. See § 75-3-803(1)(b) [which now prescribes shorter periods after notice to creditors]. Because of this, and since any possibility that letters may be issued at any time would be seen as a "cloud" on the title of heirs or devisees otherwise secure under § 75-3-101, the three-year statute of limitations applies to bar appointment of a personal representative after the basic period has passed. Section 83 of the Model Probate Code barred probate and administration after five years, and other statutes imposing time limits on these proceedings are cited at pp. 307-310 of Model Probate Code. A qualification covers the situation where a closed administration is sought to be reopened to administer after-discovered assets. See § 75-3-1008. If there has been no probate or appointment within three years, and if either exception to § 75-3-102 applies, devisees under a late-discovered will may use a will to establish their title. But, they may not secure probate of the will, nor may they obtain appointment of a personal representative. The same pattern applies to heirs who, in a case where there has been no administration discover assets after the three-year period has run. Such persons will not be able to protect purchasers with the ease of those interested in an estate where a personal representative has been appointed.

Utah Code Ann. § 75-3-107 (Emphasis added).

In sum, after reviewing the record in this matter, as well as the relevant statutory and case law, the Court finds Defendant's Motion to Dismiss is well taken and grants the same.

DATED this 16th day of January, 2009.



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080915531 by the method and on the date specified.

METHOD NAME

Mail	MARK T FLICKINGER Attorney PLA 3000 N UNIVERSITY AVE STE 300 PROVO, UT 84604
Mail	TODD A TURNBLOM Attorney DEF 111 E BROADWAY STE 750 P O BOX 457000 SALT LAKE CITY UT 84145

Dated this 21 day of Jan, 2009.

lm
Deputy Court Clerk

Addendum 2
Order of Dismissal

COPY

Todd A. Turnblom, Bar #: 7331
Victoria K. Kidman & Associates
P.O. Box 457000
Salt Lake City, UT 84145
Telephone: (801)257-7200
Facsimile: (801)257-7215
Attorneys For Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

WILLIAM BERNEAU,
Plaintiff,

v.

CAMERON D. MARTINO, AKA
DAVID M. CAMERON; AND THE ESTATE
OF CAMERON D. MARTINO AKA
DAVID M. CAMERON,
Defendant.

ORDER OF DISMISSAL

CASE NUMBER 080915531

JUDGE JOSEPH C. FRATTO, JR.

This matter comes before the Court on the motion of the putative estate and/or next of kin of Cameron Martino, David Martino, to dismiss the current action pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Oral arguments were heard on January 9, 2009, and the Court issued its Memorandum Decision, which was filed on January 21, 2009, and which is incorporated herein. Therefore, having fully considered the motion, the memoranda submitted by the parties, the oral arguments, and the law, the Court now makes the following:

FINDINGS AND ORDER OF DISMISSAL

The following facts are not in dispute and therefore the Court finds: this matter arises from an accident that occurred on September 23, 2003; the driver who would have been the proper defendant, Cameron Martino, died on December 3, 2003; no probate or other proceeding to appoint a personal representative was ever filed; and this matter was not filed until more than

three years after the death of Cameron Martino. Therefore, the Court finds that Utah Code Ann. § 75-3-104 prohibits a claim against a decedent or his successors until a personal representative is be appointed, and § 75-3-107 prohibits an action to appoint such a representative more than three years from the decedent's death. The plaintiff's claims must therefore fail as a matter of law. Therefore, the Court orders the above entitled matter to be dismissed.

DATED this 17 Day of Feb 2009.

BY THE COURT

JS
Joseph C. Fratto, Jr.
District Court Judge

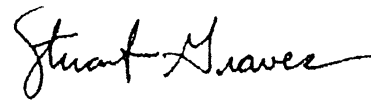
Approved as to Form

Brett Boulton
Mark T. Flickenger
Brett R. Boulton
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of January 2009 served a true and correct copy of the foregoing **proposed ORDER OF DISMISSAL**, by United States first class mail, upon:

Mark T. Flickinger, Esq.
Brett R. Boulton, 10802
FLICKINGER & SUTTERFIELD
3000 North University Avenue, #300
Provo, UT 84604



Addendum 3
Complaint

FILED DISTRICT COURT
Third Judicial District

AUG 01 2008

SALT LAKE COUNTY

By _____ Deputy Clerk

MARK T. FLICKINGER (8180)
BRETT R. BOULTON (10802)
Flickinger & Sutterfield, P.C.
Attorneys at Law
300 Esquire Building
3000 N. University Avenue
Provo, Utah 84604
(801) 370-0505

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

WILLIAM BERNEAU, Plaintiff, vs. CAMERON D. MARTINO, aka DAVID M. CAMERON; and THE ESTATE OF CAMERON D. MARTINO aka DAVID M. CAMERON, Defendants.	COMPLAINT Case No. <u>090915531</u> Division <u>Engle</u> Judge _____
---	--

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff is a resident of Utah County, State of Utah.
2. Defendant Cameron D. Martino, aka David M. Cameron, ("Defendant Martino")
was a resident of Utah County, State of Utah.

3. The acts upon which this Complaint is based occurred in Salt Lake County, State of Utah.

4. Defendant passed away December 3, 2003, at the age of 22, in Utah County due to causes unrelated to this auto accident.

5. Plaintiff timely filed his Complaint against Defendant in this matter on September 14, 2007.

6. Plaintiff's Complaint was dismissed without prejudice on February 27, 2008, for failure to serve.

7. No probate was executed with respect to Defendant's estate.

8. Plaintiff brings the present action against the Estate of Cameron. D. Martino aka David M. Cameron pursuant to Utah Code Ann. § 75-3-803(4)(b).

9. Pursuant to Article VII, §5 of the Utah Constitution and U.C.A. §78-3-4(1) and (3), this Court has jurisdiction over this case.

GENERAL ALLEGATIONS

10. On or about September 23, 2003, Plaintiff was traveling eastbound on 3300 South and stopped at the intersection of 900 East in Salt Lake City, Utah.

11. Defendant Martino was also traveling eastbound on 3300 South directly behind plaintiff Berneau.

12. As the light turned green and traffic proceeded forward, Defendant Martino negligently failed to keep a proper lookout and collided with Plaintiff's vehicle, pushing him

forward into a third vehicle.

13. As a proximate cause of Defendant Martino's negligence, Plaintiff suffered personal injuries including but not limited to: two disc herniations causing severe spinal stenosis at C3-4 and C4-5; stabbing shoulder pain; numbness and tingling in right hand; chronic headaches and bilateral radiculopathy in lower extremity, including pain and numbness in his back.

14. As a result thereof, Plaintiff has incurred, special damages for which he shall be entitled to recover in an amount not yet fully ascertained but is at least \$9,350.89.

15. Plaintiff is entitled to recover from Defendants the special damages referred to herein for medical expenses and for travel expenses incurred in driving to and from the various medical providers.

16. As a further direct and proximate result of the accident, Plaintiff has suffered pain and suffering and a loss of enjoyment of life, significant emotional distress, and permanent injury, for which general damages he is entitled to recover from Defendants in the proceeding.

17. Plaintiff also may incur other additional medical expenses in connection with his treatment for injuries suffered from this accident which he should recover from Defendant in this proceeding.

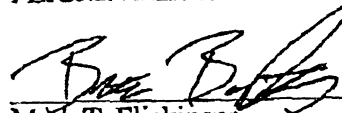
18. Plaintiff is entitled to interest on all special damages as allowed by law, court costs, and other relief as may be deemed proper in the premises.

WHEREFORE, Plaintiff prays for judgment against above Defendant for special damages, general damages, interest on damages, court costs, and other relief as may be proper in

the premises.

DATED this 31 day of July, 2008.

FLICKINGER & SUTTERFIELD, P.C.



Mark T. Flickinger
Brett R. Boulton
Attorneys for Plaintiff

Plaintiff's address:
512 North 150 East
Orem, UT 84057

Addendum 4
Certificate of Death

STATE OF UTAH - DEPARTMENT OF HEALTH CERTIFICATE OF DEATH

STATE FILE NUMBER

1. NAME OF DECEASED Caneval, David Martino		2. SEX Male	3. DATE OF DEATH (Mo., Day, Yr.) December 3, 2003	4. TIME OF DEATH (24 hr. clock) 13:44
5. DATE OF BIRTH (Mo., Day, Yr.) May 5, 1981		6. AGE - Last Birthday 22	7. SOCIAL SECURITY NUMBER [REDACTED]	
8. PLACE OF DEATH X Hospital Y Private Z Other		9. NAME OF HOSPITAL OR OTHER FACILITY Utah Valley Regional Medical Center		
10. CITY, TOWN OR LOCATION OF DEATH Provo		11. COUNTY OF DEATH Utah		
12. MARITAL STATUS X Never Married Y Married Z Divorced		13. DECEASED'S USUAL OCCUPATION (Give kind of work done during most of working life. Do NOT enter retired) Student		
14. ZIP CODE 84601		15. RACE (Specify only "Asian" or "Other") White		
16. FATHER'S NAME (First, Middle, Last) David Carlton Martino		17. MOTHER'S NAME (First, Middle, Last) Barbara Aldean Gilton		
18. NAME, RELATIONSHIP AND MAILING ADDRESS OF INFORMANT David C. Martino, father, 4974 Christi Lane, Aubrey, Texas 76227				
19. METHOD OF DISPOSITION X Burial Y Cremation Z Other		20. DATE OF DISPOSITION Dec. 6, 2003		
21. PLACE OF DISPOSITION (Name of cemetery, crematory, or other place) Rose Lawn Memorial Park Cemetery		22. LOCATION - City or Town, State Denton, Texas		
23. SIGNATURE OF FUNERAL SERVICE LICENSEE [Signature]		24. LICENSEE NUMBER 1144550902		
25. DATE DECEASED WAS LAST ATTENDED BY CERTIFYING PHYSICIAN 12/1/03		26. If not certified by medical examiner, was death reported to M.E.? X Yes Y No		
27. CERTIFIER [Signature]		28. DATE SIGNED (Month, Day, Year) 12/3/03		
29. SIGNATURE AND TITLE OF CERTIFIER Joseph A. Nangle, M.D.		30. DATE REGISTERED (Mo., Day, Yr.) DEC 03 2003		
31. CAUSE OF DEATH (List only one cause on each line) a. Septic Shock b. Candida spori Superficial c. [illegible] d. [illegible]		32. IN YOUR OPINION, TOBACCO USE BY THE DECEASED X 1. Probably contributed to the cause of death Y 2. Was the underlying cause of death Z 3. Did not contribute to the cause of death 4. Is unknown in relation to the cause of death		
33. DATE OF DEATH X Natural Y Accident Z Suicide 4. Undetermined 5. Pending Investigation		34. DATE OF INJURY (Mo., Day, Yr.) [illegible]		
35. LOCATION (Street or rural route number, city or town, county and state) [illegible]		36. PLACE OF INJURY (At home, farm, street, factory, office, building, etc. (Specify)) [illegible]		
37. DESCRIBE HOW INJURY OCCURRED (enter sequence of events which led to the nature of injury should be entered in item 31)				

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of section 26-2-22 of the Utah Code Annotated, 1953 As Amended.

Date Issued: DEC 03 2003

County: Utah

Registrar: Joseph K. Minor, M.D.

Barry E. Nangle

Barry E. Nangle

DIRECTOR OF VITAL RECORDS

By



* 0 1 4 3 2 8 7 7 *

LL01432877

WARNING: IT IS ILLEGAL TO DUPLICATE THIS COPY FOR ANY PURPOSE OTHER THAN THAT FOR WHICH IT WAS ISSUED. ANY ALTERATION OR ERASURE INVALIDATES THIS CERTIFICATION.



Addendum 5
February 1, 2008 Letter

FEB 01 2008

State Farm Insurance Companies



State Farm Insurance Cos.
P.O. Box 339408
Greeley Co 80633-9408

February 1, 2008

Dwight Flickinger Attorney at Law
Flickinger & Sutterfield, P.C.
3000 N. Univ. Ave. Ste 300
Provo, UT 84604

RE: Claim Number : 44-3193-146
Date of Loss : September 23, 2003
Our Insured : Cameron D Martino
Your Reference: William Berneau

Dear Mr. Dwight Flickinger:

I wanted to follow up with you regarding my telephone conversation on October 4, 2007 with your paralegal. We have learned that our insured driver, Cameron Martion, passed away in 2003 from complications following an illness.

As no valid claim has been presented against Mr. Martino, we are closing our file. Dwight, I ask that if you choose to pursue this claim any further that you call me, and then send to me a copy of the same correspondence.

Thank you for your cooperation.

Sincerely,

Linda Edwards
Claim Representative
(800) 324-0704 ext. 25830

State Farm Mutual Automobile Insurance Company

cc: //