DOCKET NO. 1200802

IN THE SUPREME COURT OF ALABAMA

STANLEY LOCHRIDGE, M.D. and CARDIO-THORACIC SURGEONS, P.C.,

Appellants/Defendants

v.

FRANCES ANN TOMBRELLA, Individually, and FRANCES ANN TOMBRELLA, In her Capacity as Special Administratrix of the Estate of RONALD SANTO TOMBRELLA,

Appellee/Plaintiff.

On Appeal from the Circuit Court of Jefferson County, Alabama
Case No.: CV-2019-903763

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE ARGUMENT

The Plaintiff's brief to this Court is out of synch with the proceedings in this case thus far. It reads as if authored by a new-comer to the case replying to arguments these Defendants never made,[1] urging this Court to "reframe" the certified question (an argument not made in the Plaintiff's response to the Petition for Rule 5 Certification), and directly contradicting statements and law in the Plaintiff's prior pleadings. It declares the trial court misrepresented facts and issued an inaccurate certifying Order – an Order the Plaintiff could have but never objected to below. It dismisses the question presented as a non-issue, characterizing the 120-day requirement for service set out in Rule 4(b) as merely an "overly rigid" "technicality." (Brief, p. 20-27) It infers the holdings of the Eleventh Circuit on this issue were ignored by these

[1] For example, the Plaintiff's brief declares the Defendants "rely heavily" on the opinions of the Fourth Circuit and devotes pages to discrediting the Fourth Circuit's holdings, debunking an argument the Defendants never made. Even a cursory review of these Defendants' brief shows an accurate discussion of the history of Rule 4(m) and the various ways federal courts have interpreted it, with one cite to one 1995 opinion of the Fourth Circuit, followed immediately by a citation to a 1996 U. S. Supreme Court case which applied a different analysis, followed by a discussion of the leading case from the Eleventh Circuit on the issue and cases from the Northern and Middle Districts of Georgia applying Eleventh Circuit analysis. (Appellant's Brief, p. 31)

Defendants when nothing could be further from the truth. It was these Defendants who first pointed out in this case that ARCP 4(b) is modeled after FRCP 4(m) and analyzed the development of the federal law on this issue including the splits that have evolved between the federal circuits (and even within certain circuits). It was these Defendants who cited the position articulated by the Eleventh Circuit and the U.S. Supreme Court on the application of Rule 4(m). In fact, this federal law and its bearing on the case at hand was *never* even mentioned by the Plaintiff at any point below or to this Court in Plaintiff's opposition to the Rule 5 Petition, making these belated proclamations about the importance of the federal law and accusations that the Defendants are ignoring applicable federal law ring hollow.

Most surprisingly, the Plaintiff's brief misstates numerous points of settled law. These misstatements range from ignoring the correct *de novo* standard of review this Court utilizes in a Rule 5 appeal (as previously specifically acknowledged in the Plaintiff's own Opposition to the Rule 5 Appeal),[2] to contradicting previously acknowledged law

[2] "In conducting a *de novo* review of the question permitted on permissive appeal, this Court will not expand its review beyond the

holding this Court will not stray beyond the question certified for interlocutory review, to an argument that this Court would be "judicially legislating" if it speaks to the intent and meaning of ARCP 4(b). No one – certainly not the trial court or these Defendants – is asking this Court to invade the province of the Legislature. This Court routinely makes and/or adopts rules governing the administration, practice, and procedures in the Courts of this state and is fully empowered to interpret or revise those rules as it sees fit. The trial court and the Defendants seek guidance from this Court on an issue of law, *i.e.* Rule 4(b)'s intended meaning and or limitations, as applied to the facts in the case. This is completely consistent with the provisions of ARAP 5 and has nothing to do with the Alabama Legislature.

Returning to the issue presented to the trial court and certified for review by this Court, as stated in these Defendants' original brief, the ten-month delay in perfecting service was definitively shown to be due to admitted inaction and "inadvertence" at the trial court level by two different attorneys, both of whom had ample opportunity to request an extension prospectively but failed to do so. The trial court was asked to

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question of law stated by the trial court." Plaintiff's Amended Response to Defendants' Rule 5 Petition, p. 11.

excuse that delay retroactively and initially agreed to do so. But, as set out in the certification Order, the trial court expressed reservations about whether Rule 4(b) (and the limited case law in Alabama interpreting that Rule) permits an extension under these circumstances given the length of time that had passed, the lack of any prior request for an extension, and the lack of an explanation for the 10-month failure to perfect service by either attorney other than that the initial attempts failed and an inadvertent failure to follow-up despite admitted knowledge of the problem. (C. 884)

Obviously, Alabama's Rule 4(b), while modeled on the federal rule, is not a verbatim copy of Rule 4(m). This Court was well-within its powers when it adopted slightly different wording and added a 14-day notice requirement which, as this Court later explained in several opinions, was an addition made for the specific purpose of providing an opportunity to show good cause to extend the time for service. None of the opinions issued by this Court thus far which discuss Rule 4(b) and the good cause aspect of the rule specifically state there is no need for a showing of good cause for a trial court to extend the time for service.

To the contrary, there are several opinions from this Court (set out chronologically in these Defendants' original brief) which stop short of that and discuss the 14 days allowed to demonstrate good cause in order to obtain an extension but go no further. And, there is one opinion of this Court which contains language, in a dissent, which *does* go further, indicating that at least one member of this Court read Rule 4(b) as requiring service within 120 days unless there is a showing of good cause for delay. *Precise v. Edwards*, 60 So. 3d 228, 236 n. 4 (Ala. 2010)("Absent a showing of good cause for the delay, Rule 4(b) requires service on a defendant within 120 days of the filing of the complaint.")[3]

Likewise, as demonstrated by comparing the various federal cases cited to this Court (none of which are binding on it), there is not agreement among federal courts regarding the breadth of a district court's discretion to extend the time for service under Rule 4(m). There are, however, numerous well-reasoned federal opinions – several of which are from within the Eleventh Circuit – which state discretion under Rule 4(m) is not boundless. This is the question the trial court is

[3] As acknowledged in these Defendants' original brief, this statement in *Precise*, like the federal opinions interpreting the federal rule, are not binding authority but instead provide context as persuasive authority. (Brief, p. 25)

asking of this Court in its Certifying Order with regard to Rule 4(b). This is what these Defendants ask this Court to clarify *in Alabama*. While the Plaintiff suggests there is no basis for a difference of opinion on the issue worthy of this Court's consideration, the history of the law which has developed over time on this issue in Alabama and in the federal courts (as set out chronologically in these Defendants' original brief) demonstrates a reasonable basis for difference of opinion on the issue and one which is properly before this Court pursuant to the provisions of ARAP 5.

REPLY ARGUMENT

The Plaintiff's brief contains a number of statements which require correction and/or clarification as follows:

STANDARD OF REVIEW

- "*Appellants state an incorrect standard of review for this appeal. The standard of review is not de novo. The correct standard of review in this appeal is whether the trial court abused the discretion afforded under Ala. R. Civ. P. 4(b)…*" (Plaintiff's Brief, p. 9)

The Plaintiff's brief relies on one Alabama case,[4] *Voltz v. Dyess*, 148 So. 3d 425 (Ala. 2014), to support her argument that these

[4] The two federal cases cited on this issue are, of course, not binding on this Court.

Defendants have misstated the standard of review. *Voltz,* however, was not a Rule 5 appeal. This Court has stated repeatedly and recently that the standard of review in an appeal under Rule 5, ALA. R. APP. P., is *de novo* with no presumption of correctness because, in a Rule 5 appeal, the Court is asked to answer a question of law. *See e.g., Wright v. Cleburn County Hosp. Board, Inc.*, 255 So. 3d 186, 190 (Ala. 2017) ("[A]n appeal under Rule 5, Ala. R. App. P., presents a question of law. This Court has held: On appeal the ruling on a question of law carries no presumption of correctness and this Court's review is de novo."); *Mid-Century Insur. Co. v. Watts*, 323 So. 3d 39, 43 (Ala. 2020) ("This Court has stated the following with regard to permissive appeals:…In conducting our *de novo* review of the question presented on a permissive appeal…"); *Alabama Powersport Auction, LLC v. Wiese*, 143 So. 3d 713, 716 (Ala. 2013); *Northstar Anesthesia of Alabama LLC v. Noble*, 215 So. 3d 1044, 1047 (Ala. 2016) ("[We conduct] a *de novo* review of the question presented on a permissive appeal.").

The question certified here is a jurisdictional one and seeks clarification of Rule 4(b) and whether a trial court in Alabama has is intended to have discretion to extend the time for service under Rule

4(b), and thereby *in personum* jurisdiction over a belatedly served party, with no finding of good cause and under the circumstances presented here, and if so, what the bounds of that discretion are intended to be in this state. It is only logical that this Court would not afford a presumption of correctness to the holding of a trial court which has certified a legal question under Rule 5 seeking guidance from the Court because there is a reasonable basis for a difference opinion on its ruling.

Lastly, and perhaps most importantly, it is noteworthy that the Plaintiff, in her own Amended Response to Defendants' Rule 5 Petition filed with this Court on September 15, 2021, specifically cited the case of *ENT Assoc. of Ala. P.A. v. Hoke*, 223 So. 3d 209 (Ala. 2016). *Hoke* is a Rule 5 appeal to this Court which discussed the provisions of Rule 4(b) and in which this Court specifically applied a *de novo* review. (Plaintiff's Amended Response, p. 11, citing *ENT Assoc.'s of Ala., P.A. v. Hoke, supra*) ("In conducting our *de novo* review of the question presented on a permissive appeal…"). Her new-founded criticism of this as an incorrect standard of review does not merit any credence.

REFRAMING THE QUESTION CERTIFIED BY THE TRIAL COURT

- *"[I]f this Court chooses to consider this appeal, it should reframe or reword the certified question that has been submitted to it."* (Brief, p. 20)

The Plaintiff advises this Court to "reframe or reword the certified question submitted to it," continuing her efforts to minimize the issue presented and cast it as a mere factual dispute governed by an abuse of discretion standard. There are several reasons this is flawed and incorrect advice.

First, the Plaintiff never objected below to the wording of the certifying Order or asked the trial court to reword the Order, though she had weeks to do so. The Defendants' Motion to Certify Question for Interlocutory Appeal was filed August 9, 2021. (C. 871) The certifying Order was entered the afternoon of August 11, 2021.[5] (C. 884) These Defendants filed their Rule 5 Petition for Permissive Appeal with this

[5] The Plaintiff's brief derogatorily refers to this Order as "rubber-stamped" and inaccurate, seeming to suggest without basis that there was some impropriety in the trial court's consideration and entry of an Order proposed by the Defendants. (P's Brief, p. 21) The trial court could have and would have changed the wording of the Order if it had misrepresented anything. There is nothing improper about the standard submission of a Proposed Order in conjunction with a Motion for Rule 5 Certification or in the trial court's entry of that Order, especially given that there was no filing from the Plaintiff asking the trial court to include any alternative wording.

Court two weeks later, on August 25, 2021. At no point before it was entered or during the two weeks between August 11th and August 25th did the Plaintiff object to the wording of the Order, point out any inaccuracy in the Order to the trial court, or ask the trial court to reframe or reword the Order or the issue. If the Plaintiff felt the Order misstated facts or improperly stated the legal question presented, she could have and should have asked the trial court to address those concerns and/or submitted a revised Order for the trial court's consideration. Her belated argument that the appeal is invalid and the Order is improperly worded when she never objected to or asked the trial court to word it differently is a flawed one.

Second, her suggestion that the issue certified be *completely* revised from a jurisdictional one to one which already presumes the trial court had discretion to do what it did, *i.e.* presuming the answer to the legal question in the question itself, goes far beyond this Court's willingness to clarify or rephrase certified questions on rare occasions in the past. The Plaintiff cites *Alabama Powersport Auction LLC v. Wiese*, 143 So. 3d 713 (Ala. 2013) as support for her suggestion. She fails to mention, however, that in that case this Court merely clarified the issue

due to unclear wording but specifically stated that it will not expand the question itself in so doing:

> It is not clear from the wording of the question exactly what controlling question of law the circuit court would have this Court answer; thus we will reframe the question. In reframing the above question, however, **we are mindful that this Court is to provide a *de novo* review** of the controlling question of law presented by the circuit court and, as noted above, "**this Court will not expand its review on permissive appeal beyond the question of law stated by the trial court [as] any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a**).

Wiese, supra, at 720 (quoting *BE&K, Inc. v. Baker*, 875 So. 2d 1185, 1189 (Ala. 2003)).[6] Notably, *BE&K v. Baker* and this premise that the Court will not expand or significantly alter the question certified was also cited with authority in the Plaintiff's Amended Response to

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[6] The Plaintiff also cites *Okeke v. Craig*, 782 So. 2d 281, 282 (Ala. 2000) as support for urging this Court to rewrite the question certified. However, in that case as in *Wiese*, this Court only minimally rephrased the question certified without changing its meaning or expanding its parameters. ("Dr. Okeke presented the following question for our review: 'Whether an action for wrongful death is barred by the statute of limitations when the decedent was time-barred from filing the underlying medical malpractice suit on the date of her death.' We rephrase the question, as follows: 'Whether a wrongful-death action *against a physician* is barred by the statute of limitations *if, at the time of her death,* the decedent would have been time-barred from filing a medical-malpractice action *based on the physician's treatment that is now alleged to have caused the decedent's* death.").

Defendant's Rule 5 Petition filed with this Court on September 15, 2020. (P's Response, p. 11)

Third, the Plaintiff's efforts to have this Court edit out the jurisdictional aspect of the certified question disregard "settled law that failure to effect proper service under Rule 4, ALA. R. CIV. P., deprives the court of jurisdiction and renders a [subsequent] judgment void." *Image Auto, Inc. v. Mike Kelley Enterprises, Inc.*, 823 So. 2d 655, 657 (Ala. 2001). The jurisdictional implications of untimely service are similarly referenced by federal courts within the Eleventh Circuit analyzing the application of Rule 4(m). *See e.g., Lawrence v. Bank of America N.A.*, 2014 WL 12859731 at *5 (N.D. Ga. May 30, 2014) ("Ultimately, a plaintiff is responsible for timely serving process on the defendant…Accordingly, service of process that is not in substantial compliance with the requirements of the Federal Rules is ineffective to confer personal jurisdiction over the defendant even when a defendant has actual notice of the filing of the suit.") Importantly, as pointed out by these Defendants' original brief, an asserted lack of jurisdiction also triggers *de novo* review with no presumption of correctness. (Appellant's Brief, p. 15)

"JUDICIAL LEGISLATION"

- "*This Court should…reject the Appellants' improper invitation to engage in a form of judicial legislation…inconsistent with the doctrine of separation of powers*." (P's Brief, p. 32)

The Plaintiff suggests these Defendants (and presumably the trial court) are improperly asking this Court to invade the province of the Legislature. This argument has no basis in law or in fact. Alabama's Legislature plays no role in writing or revising the Rules of Civil Procedure. That power belongs strictly to this Court pursuant to a mandate in Alabama's Constitution at Article VI § 150 (Amend. No. 328). As this Court stated in *Ex parte Sorsby*, 12 So. 3d 139 (Ala. 2007):

> This Court's rulemaking authority as set out in Amendment No. 328, § 6.11, provides that this Court may promulgate rules governing procedure in the courts of this State. "The mandate to this Court in § 6.11 to make and promulgate ... rules governing practice and procedure in all courts is an **empowerment by and from the people; it does not depend on legislative enactment for its existence or implementation**.

Id. at145 (emphasis added). As mentioned above, this Court regularly interprets and (in conjunction with its rules committees) adopts and revises the rules governing practice and procedure in Alabama's courts. To interpret Rule 4(b) here is in no way a violation of separation of

powers, and the Plaintiff's suggestion to the contrary is due to be rejected out of hand.[7]

ALLEGED "INACCURACIES" IN TRIAL COURT'S CERTIFYING ORDER

- *"The statements in the trial court's certified question that there was 'no follow up or subsequent attempts at service until June of 2020'…are incorrect and not accurate. The record plainly shows Tombrella attempted to serve Lochridge and CTS on May 7, 2020 and May 18, 2020 through the clerk by certified mail prior to their eventual service on June 22, 2020."* (P's Brief, p. 22)

The Plaintiff's brief points to two incomplete Summons filed in May of 2020 as events which should have been included in the trial court's certifying Order. (C. 361, 462) The Plaintiff fails to mention, however, that the Summons she refers to, filed in May of 2020, were not valid or bona fide attempts at service by certified mail and do not

[7] The Plaintiff cites several cases, including *Moffett v. Stevenson,* 909 So. 2d 824 (Ala. 2005), which stand for the proposition that, when interpreting a rule of procedure, this Court gives the wording of the rule its plain meaning just as when a statute is being interpreted. That principle is not in dispute. (P's Brief, p. 31-32) It is these Defendants' position, which the trial court obviously shared, that the wording of the rule is less than clear and that the opinions of this Court regarding Rule 4(b) this far have not directly addressed the issue presented here beyond the statement in *Precise* which supports these Defendants' position. The federal courts have most definitely debated the meaning of Rule 4(m). None of the cases cited hold that this Court cannot construe the provisions of the rules of procedure or even reword those rules if it sees fit, and none come even close to holding this would improperly invade the province of the Legislature.

change the fact that there was not a second bona fide attempt to serve these Defendants until June of 2020 in keeping with the trial court's Order. It was *only* on June 16, 2020 that the Plaintiff filed the required "Notice to Clerk" mandatory for accomplishing service by Certified mail:

DOCUMENT 152 493

JUN 16 2020

NOTICE TO CLERK

REQUIREMENTS FOR COMPLETING SERVICE BY CERTIFIED MAIL OR FIRST CLASS MAIL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
FRANCES TOMBRELLA V. STANLEY LOCHRIDGE ET AL

01-CV-2019-903763.00

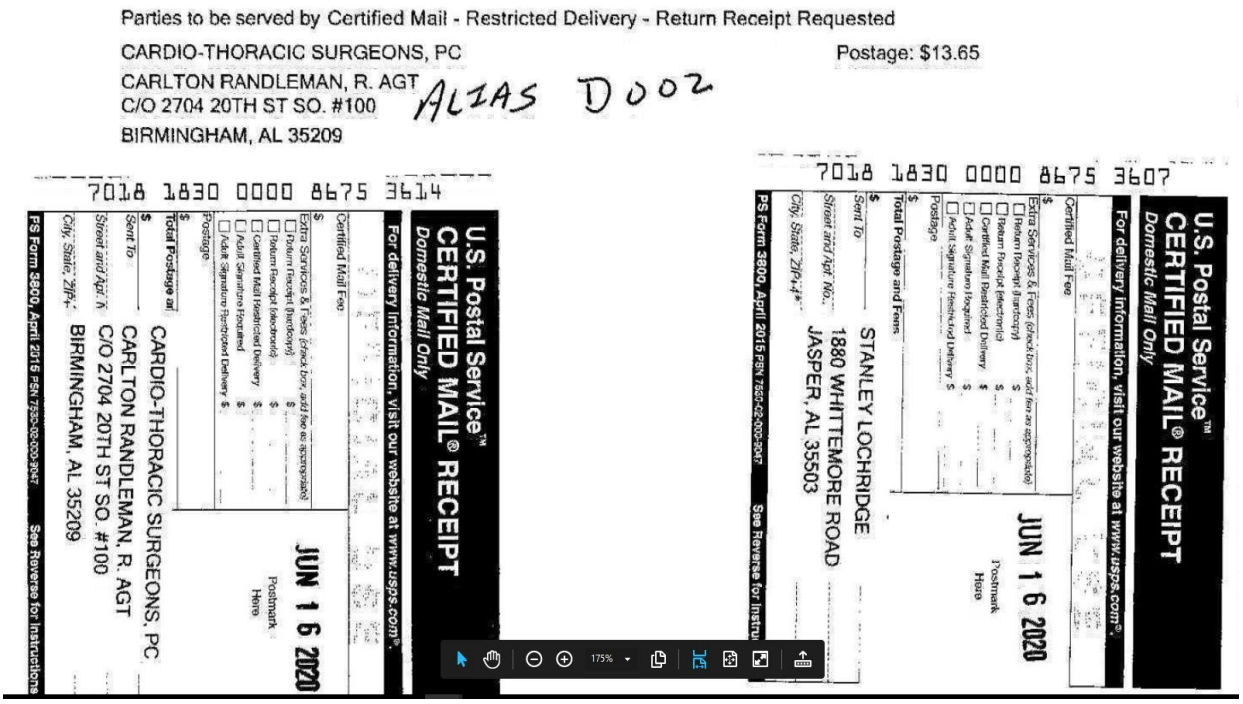
To: CLERK BIRMINGHAM
clerk.birmingham@alacourt.gov

TOTAL POSTAGE PAID: $21.85

Parties to be served by Certified Mail - Return Receipt Requested

STANLEY LOCHRIDGE ALIAS D001
1880 WHITTEMORE ROAD
JASPER, AL 35503

Postage: $8.20


Parties to be served by Certified Mail - Restricted Delivery - Return Receipt Requested
CARDIO-THORACIC SURGEONS, PC
CARLTON RANDLEMAN, R. AGT
C/O 2704 20TH ST SO. #100
BIRMINGHAM, AL 35209
ALIAS D002
Postage: $13.65
7018 1830 0000 8675 3614
U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only
For delivery information, visit our website at www.usps.com®.
Certified Mail Fee
JUN 16 2020
Postmark Here
Total Postage and Fees
Sent To
CARDIO-THORACIC SURGEONS, PC
Street and Apt. No.
CARLTON RANDLEMAN, R. AGT
C/O 2704 20TH ST SO. #100
City, State, ZIP+4®
BIRMINGHAM, AL 35209
PS Form 3800, April 2015 PSN 7530-02-000-9047
See Reverse for Instructions
7018 1830 0000 8675 3607
U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
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For delivery information, visit our website at www.usps.com®.
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STANLEY LOCHRIDGE
Street and Apt. No.
1880 WHITTEMORE ROAD
City, State, ZIP+4®
JASPER, AL 35503
PS Form 3800, April 2015 PSN 7530-02-000-9047
See Reverse for Instru

(C. 493) Prior to this filing in June of 2020, the Plaintiff *never* filed the proper written request with the clerk for service by certified mail as required by ARCP 4(i)(2)(A). Her filings in May of 2020 (which were nonetheless also well beyond 120 days after the filing of the Complaint in August of 2019) were inconsequential.

The Plaintiff's newly-raised attempt to blame the extent of the delay until June of 2020 on the clerk and her statement to this Court that "for some inexplicable reason the clerk did not immediately issue the alias summonses and copies of the Complaint to Lochridge and CTS…[but] waited until June 16 2020 to issue [them]" was never raised below and is inaccurate. There was no "inexplicable" delay by the clerk.

It is a matter of record that the clerk did not receive the proper, required notice containing the heading "Required for completing service by certified mail" until June 16, 2020 when the Plaintiff filed Doc. 152. (C. 493) The trial court's Order conveys accurately that there was no filing which prompted the clerk to attempt reservice until June 16, 2020.[8] It is, however, completely inaccurate and contrary to the record to blame the delay until June 16th on the clerk, who could not act on service by certified mail until Doc. 152 was filed on June 16, 2020 by the Plaintiff. *See also, Abele v. Hernando County*, 161 Fed. Appx. 809, 812 (11th Cir. 2005) (Case in which the Eleventh Circuit rejected a similar attempt to blame the clerk for a delay in stamping the summonses given the Plaintiff's failure to mail the proper documents to the clerk until seven months after the complaint was filed).

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[8] Pursuant to the law cited by Ms. Tombrella regarding this Court's ability to make minor clarifications to a certification Order if indicated, this Court could add the phrase "bona fide" or "proper" before the words "subsequent attempt" within the Order if it deems this a point worth clarifying. It is certainly accurate to state that there was "no **proper** follow up or **bona fide** subsequent attempt at service until June 16, 2020."

RULE 4(B)'S TIMING REQUIREMENTS AS A "PROCEDURAL TECHNICALITY"

- "*Lochridge and CTS aim to have this Court dismiss the claims against them based upon an alleged procedural technicality*." (P's Brief, p. 27)

This argument perfectly sums up the Plaintiff's position in this case. She asked the trial court, and now asks this Court, to interpret Rule 4(b) in a way that renders the 120-day service requirement as optional -- a mere technicality which is "overly rigid" and can (and should) always be trumped by the interests of the Plaintiff's "right" to have her claims tried on the merits. (P's Brief, p. 27) Under this logic, Ms. Tombrella urges this Court: (1) to disregard the obligation of the attorneys (and of a *pro se* litigant) to know and comply with the rules of civil procedure, (2) to excuse (and in fact give an advantage waiting until just a few days before the statute runs to file a Complaint and yet allow almost 10 months to lapse before filing the proper information with the clerk to perfect service, and (3) to treat the failure to seek an extension prospectively as a mere technicality.

Ms. Tombrella's brief states she is not arguing "that a court's discretion under Rule 4(b) to extend the time for service is unbridled or unlimited." (P's Brief, p. 14) However, that is precisely what this Court

would be doing if it holds that in Alabama, trial courts have discretion to extend service for such a significant period of time without requiring any stated reason for the extension, with no effort by the Plaintiff to seek an extension before the time ran or when new counsel entered a case in which the time had run, and with no showing of a reason an extension was not requested or why service was not pursued in a timely manner beyond an initial attempt which was not followed up on for the better part of a year.

THE PLAINTIFF'S PRO SE STATUS

- "*Tombrella's change in counsel and her 93-day stint as a pro se litigant…justified the…discretionary extension of time*." (P's Brief, p. 51)

Ms. Tombrella does not cite any Alabama law which states the time she was *pro se* should be subtracted out of the time it took to perfect service and not considered at all. (See P's brief, p. 53) ("If that inoperative time period is excused, and it should be, Tombrella actually perfected service on Lochridge and CTS 92 days after the 120-day time limit for service under Rule 4(b) ran.") Instead, Ms. Tombrella cites *Ex parte Ghafary*, 738 So. 2d 778 (Ala. 1999) as a basis for this Court to completely disregard the time that passed while she was *pro se*. (P's

Brief, p. 51) Ironically, *Ex parte Ghafary* was the case the nursing defendants relied upon in their motions to dismiss this case because the Plaintiff was *pro se*. (C. 256-260) The trial court did not immediately dismiss the case under *Ex parte Ghafary* but instead agreed to allow Ms. Tombrella time to find new counsel. (C. 262) Now, having benefited from the trial court's allowance of more time *despite* the holding in *Ex parte Ghafary,* Ms. Tombrella embraces that case and cites it affirmatively in support of an argument that the lack of service during those months cannot be held against her. She does not explain, however, how she was able to successfully ask the trial court for more time to find counsel but should be deemed unable to ask for more time to serve the Defendants.

Ms. Tombrella also cites several federal district court cases, such as *Boyd v. Koch Foods of Alabama, LLC*, 2011 WL 6141064 (M.D. Ala. December 8, 2011) for the proposition that *pro se* status may be considered under the federal rules as one factor explaining a delay in service. She fails to mention, however, that in the *Boyd* case, the district court specifically noted the formerly *pro se* Plaintiff "corrected service promptly once represented by counsel." *Id*. at *3. There was no

such prompt correction of the problem in the case at hand and no colorable justification given for the failure to do so at the trial court level beyond being distracted by attending to overdue discovery responses.

While she points to language regarding *pro se* status in a few district court opinions, Ms. Tombrella does not address the Eleventh Circuit holding in *Idumwonyi v. Convergys*, 611 Fed. Appx. 667 (11th Cir. Aug. 4, 2015), finding a *pro se* Plaintiff not only did "not show good cause for failing to serve the defendants within the time allowed by Fed. R. Civ. P. 4 (m)" but also that "no other circumstances warrant an extension of time." This finding cuts directly against Ms. Tombrella's asserting that *pro se* status alone justifies the exercise of discretion to extend the time for service. *See also, Lawrence v. Bank of America NA*, 2014 WL 12859731 (N.D. Ga. May 30, 2014) ("Ultimately, a plaintiff is responsible for timely serving process on the defendant…And although courts are to give liberal construction to the pleadings of *pro se* litigants, such generosity does not excuse *pro se* litigants from failing to confirm to procedural rules."); *Corning v. Lodgenet Interactive Inc.*, 2009 WL 3294837 (M.D. Fla. October 13, 2009) ("*Pro se* status does not exempt a

party from compliance with relevant rules of procedural and substantive law…[T]he court finds that circumstances militate against exercise of the Court's discretion to extend the time for service.").[9]

The bottom line is that none of the federal opinions cited by either side are binding on this Court. There is no basis under any opinion of this Court analyzing the provisions of Rule 4(b) upon which to completely disregard the time that passed while Ms. Tombrella was *pro se*. Nor is there any reason to be swayed by federal case law describing service "promptly corrected" once a *pro se* Plaintiff obtained counsel, as that did not occur here. Even under the Plaintiff's forgiving calculations, service was still significantly untimely and was not attempted or perfected until well after the 120 days had passed even using her creative math – *and* there was no request for an extension during any of the 10 months that passed despite counsel's admitted

[9] Similarly, a change of counsel should not be deemed a proper basis to justify excusing both lawyers' failure to seek an extension or timely perfect service. Federal law suggests current counsel should be bound by the actions or inactions of previous counsel relative to the failure to timely perfect service. *See, Durgin v. Mon*, 659 F. Supp. 2d 1240, 1259 (S.D. Fla., September 21, 2009) ("[T]he current lead plaintiff has not demonstrated why it should not be bound by the actions or inactions of previously named lead plaintiff relative to the failure to serve [the Defendant] timely.")

knowledge of the timing and the lack of service. These Defendants urge this Court to clarify that these circumstances cannot justify a retroactive extension of this length in Alabama as to do so would render meaningless the 120-day time requirement and create precedent that bestows the most license to disregard service requirements in the cases filed closest to the running of the statute of limitations or with the most inconsistent changes of counsel.

PREJUDICE/ NOTICE TO THE DEFENDANT

- "*Lochridge and CTS had received notice of the lawsuit…and cannot argue that they are or would be prejudiced by extending the time for service on them and denying their motion to dismiss*." (P's Brief, p. 47-48)

The Plaintiff asks this Court to hold there could be no prejudice to these Defendants because, she argues, they should be deemed "on notice" of the pendency of this action because of a mistaken entry of appearance on their behalf. Alabama law establishes, however, that a party is relieved from any consequences of an unauthorized appearance such as this was proven to be. *See*, ALA. CODE § 34-3-22. The record is clear. The evidence submitted established there was a mistaken entry of appearance on their behalf that was completely unauthorized. (C. 247-252) The trial court entered an Order deeming that appearance as

void and without legal consequence to the Defendants pursuant to § 34-3-22. (C. 254) The Plaintiff's urging that this Court should nonetheless presume an unauthorized and voided entry of appearance has the legal effect of establishing notice on the part of these Defendants would fly in the face of that statute and the trial court's Order deeming the appearance to have been unauthorized.

Furthermore, and importantly, there is persuasive federal precedent from the Second Circuit, expressed in *Zapata v. City of New York*, 502 F.3d 192 (2nd Cir. 2007) -- a case cited with approval by the Plaintiff in her brief to this Court (P's Brief, p. 60-61) – that courts can be justified in presuming *prejudice to the belatedly served Defendant*, as opposed to the Plaintiff, when service is not perfected until after the running of the statute of limitations. *Id* at 198. ("It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action…[W]e leave to the district courts to decide on the facts of each case how to weigh the prejudice to the defendant that arises from the necessity of defending an action after both the original service period and the statute of limitations have passed before service.") This approach has been

articulated in the Eleventh Circuit as well. *See, Madison v. BP Oil Co.*, 928 F.Supp. 1132, 1138-1139 (S.D.AL 1996)("While the undersigned is not unmindful of the fact that plaintiff will lose her cause of action against Jones unless she is allowed to serve this defendant out of time, the Court cannot ignore the prejudice to be felt by Jones for allowing out of time service of the original complaint.")

Here, these Defendants were not served until both the original service period and the statute of limitations had long passed and, at the time their Motion to Dismiss was denied in July of 2021 (C. 841), the case had been pending for approximately two years. The prejudice of being belatedly brought in under these circumstances is self-evident. Were this Court to adopt the analysis of Rule 4(m) utilized by federal courts, these Defendants urge this Court to consider a similar approach to the one discussed in *Zapata* and *Madison*, recognizing that prejudice cuts both ways. *See also, Corning v. Lodgenet Interactive Inc., 2009 WL 3294837* at *4 (M.D. Fla, October 13, 2009) ("It is arguable that…Defendant [was] on notice of the impending suit…However, the Court finds this alone is not sufficient to warrant an extension of

time…The Court finds no circumstances warrant an extension of time in the instant case.")[10]

DISCUSSION OF ALABAMA LAW IN PLAINTIFF'S BRIEF

- "*Lochridge and CTS's citation to and reliance upon this Court's no-opinion affirmance in Coleman v. Smith…reveals how truly weak and unsupportable the Appellants' arguments are in this appeal….Additionally, [citation to] footnote 4 to the Precise opinion…should highlight even more the weak and unpersuasive nature of their arguments and positions in this appeal*." (P's Brief, p. 33, 35-36 fn.4)

The Plaintiff's pronouncement that reference to *Coleman* and *Precise* are indicative of some kind of desperation on the part of these Defendants completely ignores what was actually stated about each of these cases in the Defendants' brief. These cases were referenced in a chronological summary of the case law in Alabama addressing or even mentioning Rule 4(b). These Defendants' brief specifically stated that *Coleman* involved an affirmance without opinion and explained that it was referenced not as binding authority but rather as part of the

[10] In this same vein, the Plaintiff's vehement claim that it would be improper to consider that her case will still proceed against the hospital and nursing Defendants is an incorrect one. As stated by the Alabama federal court in *Madison, supra*, "Moreover, [the Plaintiff] will not be without a remedy should the Court not exercise its discretion in this matter by allowing late service of process. f.n. 8: The plaintiff's claim against BP Oil…will not be affected by this Court's ruling on this motion." 928 F. Supp. at 1139.

chronological summary and "because there was a dissent written setting out facts very similar to the case at hand which bears mention as part of the handful of cases in which the members of the Court have analyzed the application of Rule 4(b)." (Appellants' Brief, p. 21, f.n. 4)

Likewise, these Defendants mentioned *Precise* as "a case ultimately decided on the related but different question of whether the plaintiff had a bona fide intent to have the defendants immediately served," but as part of an effort to trance chronologically the cases in Alabama bearing on how this Court has discussed the intent of Rule 4(b) heretofore. It would have been remiss indeed not to even reference *Precise* given that there is a footnote in the dissent which specifically states that "absent a showing of good cause for delay, Rule 4(b), Ala. R. Civ. P., requires service on a defendant within 120 days of the filing of the complaint." (Appellants' Brief, p. 25) While not binding authority and admittedly *dicta*, that statement speaks directly to the issue presented in this appeal and was affirmatively noted as being cited in that appropriate context.(Appellant's Brief, p. 25)

- *"As recently as December 18, 2020, this Court has acknowledged Rule 4(b) as …giving trial courts discretion to extend [the 120 day] deadline. This Court's statement in Varden Capital Properties …acknowledges…a separate and distinct context which does not require a showing of good cause*." (P's Brief, p. 28)

It is unclear how the Plaintiff reads *Varden Capital Properties LLC v. Reese*, 329 So. 3d 1230 (Ala. 2020) as some type of recognition by this Court that Rule 4(b) provides discretion to grant an extension of time for service without any showing of good cause. That is not what happened in *Varden*. Rather, unlike in the case at hand, the Plaintiff in *Varden* requested an extension and demonstrated to the Court that more time was needed to serve *Varden* due to confusion over a proper address, and "the trial court entered orders giving Reese more time to serve Varden's agent at the appropriate address." *Id*. at 1231. No one disputes that a trial court has discretion to grant an extension given such a request and showing. Neither was made in the case at hand, and *Varden* does not demonstrate the direct relevance to this case which the Plaintiff's brief suggests.

Along these same lines, the basis of Plaintiff's citation to *Moore v. Ala. Dpt. of Corrections*, 60 So. 3d 932 (Ala. Civ. App. 2010) as support for her position is unclear. The Court in *Moore* specifically held, "Moore

failed to take advantage of his opportunity to demonstrate good cause for the failure of service or to request additional time in order to perfect service. Thus we conclude that the trial court did not err when it dismissed Moore's petition." *Id.* at 934. Applying the same analysis here, Ms. Tombrella's failure to demonstrate good cause for her failure of service of these Defendants or to request additional time to perfect service on them supports enforcement of the 120-day rule.

FEDERAL LAW CITED IN PLAINTIFF'S BRIEF

- "*Lochridge and CTS's argument that the trial court was required to state an explain its reasoning for its decision to extend the time for effecting service on them…has no foundation or supporting legal authority*." (P's Brief, p. 57)

To the contrary, were this Court to find that Alabama trial courts should follow the federal approach used under Rule 4(m), these Defendants raise well-established federal authority from several circuits, including the Eleventh Circuit, in which district courts have been required to make a formal inquiry with stated grounds for using discretion to extend the time for service. *See, e.g. Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3rd Cir., 1995)(Court remanded the issue back to the district court, discussing the requirement on district courts to engage in a formal two-step inquiry to first evaluate whether good

cause has been shown and then demonstrate awareness of any other basis upon which to grant an extension in the absence of good cause); *Panaras v. Liquid Carbonic Industries Corp.*, 94 F.3d 338 (7th Cir. 1996); *Lepone-Depsey v. Carroll County Com'rs*, 476 F.3d 1277 (11th Cir. 2007) ("We agree with our sister circuits and hold that when a district court finds that a plaintiff fails to show good cause for failing to effect timely service pursuant to Rule 4(m), the district court must consider whether any other circumstances warrant an extension of time based on the facts of the case…We remand the case for reconsideration in light of this opinion.")

- "*There are many cases where federal district courts and the Eleventh Circuit have determined that…denial of a defendant's motion to dismiss was justified in the presence of facts and circumstances the same as or similar to those present in this case*." (P's Brief, p. 49)

Without going through each case in the string-cite of federal cases from this Circuit listed in the Plaintiff's brief upon which she relies, suffice it to say that for each of these cases, these Defendants can point to a case out of the Eleventh Circuit which cuts the other way and which weighs against a discretionary extension of time in similar circumstances. *See, Madison v. BP Oil Co.*, 928 F. Supp. 1132, 1138 (S.D. Ala., May 1996) ("[T]he running of the statute of limitations does

not require the district court to extend time for service…and does not establish good cause and to read the rule and advisory note otherwise would effectively eviscerate Rule 4(m) and defeat the purpose and bar of statues of repose."); *Melton v. Wiley,* 262 Fed. Appx 921, 924 (11th Cir. 2008) ("In light of the Plaintiff's failure to take action…failure to seek an extension of time…and absence of evidence the Defendant evaded service…the district court concluded the Plaintiff's predicament was of his own making."); *Cox v. Nobles*, 2020 WL 1541698 *1-*2 (S.D. Ga., March 31, 2020) ("Plaintiff fails to offer any good cause for the extensive delay. The Court also finds there is no other reason warranting it to exercise its discretion and extend the time to service… [B]ecause Plaintiff had notice of the lack of service…yet declined to effect service, request an extension, or take any action to rectify the known deficiency, the Court is disinclined to exercise discretion to grant an extension…and the Court lacks jurisdiction over [the Defendant]."); *Daker v. Donald*, 2008 WL 1766958 *4 (N.D. Ga. April 14, 2008) ("Plaintiffs delay in this action has been exclusively the result of his own dilatory conduct…Simply stated, this court finds nothing in the

record before it to justify the exercise of its discretion in favor of departing from the presumptions established by Rule 4(m).")

CONCLUSION

These Defendants reiterate their previous prayer for relief and for clarification of Rule 4(b). They respectfully urge this Court to consider that allowing unbridled discretion to trial courts in Alabama to disregard Rule 4(b)'s time limitations without any requirement of giving a reasoned basis to exercise discretion would make a mockery of those time requirements.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28(j)(1) because, excluding the parts of the document exempted by Ala. R. App. P. 32(c) and 28(j)(1), it contains 6,908 words as counted by the word count function of Microsoft Word word-processing software.

2. This motion also complies with the typeface requirement of Ala. R. App. P. 32(a)(7) because it has been prepared in a proportionately spaced typeface using the Microsoft Word word-processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I do hereby certify that on **March 28, 2022**, I electronically filed the foregoing with the Clerk of the Court via ACES, the Alabama Supreme Court's electronic filing system, and I will serve it upon the following by email as noted below:

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