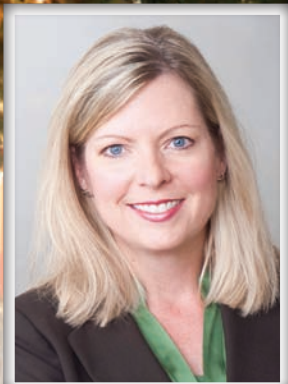


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ENT ASSOCIATES OF ALABAMA, P.A. V. HOKE: PLAINTIFF MUST POSSESS A BONA FIDE INTENT TO SERVE DEFENDANT AT THE TIME OF FILING TO PRESERVE STATUTE OF LIMITATIONS

By: Ashley L. Crank

There is often a certain level of excitement when a civil defense lawyer receives a new assignment. Perhaps the case involves interesting facts, an opportunity to work with a new client, or a complex question of law. Before delving into the nuances of a particular case, we as civil defense lawyers, evaluate several critical components of a case to determine our next steps. We discern whether and when the client was served. We also evaluate a complaint to determine whether a statute of limitations defense should be raised in a motion to dismiss or an answer. These evaluations are seemingly very straight forward. However, a recent decision by the Alabama Supreme Court highlights the interplay between service and the statute of limitations. In *ENT Associates of Alabama, P.A. v. Hoke*,¹ the Alabama Supreme Court held that merely filing a lawsuit is not enough to “commence the action” for statute of limitations purposes.² More specifically, a plaintiff must possess a bona fide intent to serve a defendant *in addition to* filing the complaint for purposes of commencing the action before the statute of limitations runs.³

ENT Associates of Alabama, P.A. v. Hoke

Facts and Procedural History

In *ENT Associates of Alabama, P.A. v. Hoke*, the Alabama Supreme Court reversed the Montgomery County Circuit Court’s judgment denying defendants’ motion for summary judgment finding that the plaintiff lacked a bona fide intent to serve the defendants at the time the complaint was filed.⁴ On April 10, 2013, one day shy of two years after the date the defendants treated her, Hoke filed an action against the defendants alleging that the defendants breached the standard of care when they failed to provide her with a latex-free environment during her surgery or recovery, despite the defendants’ knowledge of the latex allergy.⁵ Hoke claimed she experienced an allergic reaction that caused serious injuries.⁶ Hoke’s counsel of record was an out of state attorney, and no Alabama attorney was listed on the complaint.⁷ However, it was undisputed that Hoke’s complaint was electronically-filed by an attorney licensed in Alabama, who ultimately served as local counsel.⁸ Hoke’s complaint did not include the defendants’ addresses or service of process instructions

to the circuit clerk.⁹ On June 4, 2013, approximately fifty-five days after the filing of Hoke’s complaint, her counsel of record included the defendants’ addresses in the verified application for admission to practice in Alabama. The application also identified Hoke’s local counsel.¹⁰

On June 18, 2013, approximately sixty-nine days after the complaint was filed, the defendants were served.¹¹ In response, the defendants filed motions to dismiss arguing, among other things, that Hoke did not timely file her complaint in accordance with Ala. Code § 6-5-482.¹² More specifically, the defendants asserted that the filing of the complaint did not commence the action for statute of limitations purposes in accordance with Ala. Code § 6-5-482 because Hoke lacked a bona fide intent to serve the defendants when the complaint was filed.¹³ In addition to amending her complaint to include local counsel’s signature line, Hoke responded to the motions to dismiss and maintained she filed her complaint in a timely manner in accordance with Ala. R. Civ. P. 4(b).¹⁴ The circuit court treated the motions to dismiss as motions for summary judgment.¹⁵ In response, Hoke’s counsel supplied an affidavit stating: (1) he intended to use a process server for service of process, and (2) he believed Ala. R. Civ. P. 4(b) allowed him 120 days to effect service of process on the defendants.¹⁶

The circuit court denied the motions for summary judgment. Pursuant to Ala. R. App. P. 5, the circuit court certified two controlling questions of law.¹⁷ The primary question being whether Hoke’s action was time-barred by Ala. Code § 6-5-482 on the grounds that Hoke lacked a bona fide intent to serve the defendants when she filed the complaint as evidenced through the following: (1) Hoke’s failure to provide defendants’ addresses for service of process; (2) Hoke’s failure to provide the circuit clerk with instructions for effectuating service; and (3) Hoke’s unexplained delay of service of her complaint.¹⁸

The Court’s Holding and Rationale

While the Alabama Supreme Court noted that Ala. R. Civ. P. 3 states “[a] civil action is commenced by filing a complaint with the court,” merely filing a complaint “*does not* commence an action for purposes of satisfying the statute of limitations.”¹⁹ An objective standard applies to determine

whether the plaintiff possesses a bona fide intent to serve at the time of filing.²⁰

Relying on *Precise v. Edwards*,²¹ the Court explained that, “when the plaintiff, at the time of filing, does not perform all the tasks required to effectuate service and delays a part of the process, a lack of the required bona fide intent to serve the defendant is evidenced.”²² While Hoke did not have to provide the defendants’ addresses to the clerk at the time of filing, the Court held that Hoke did undertake a duty to obtain a process server.²³ Relying on *Ex parte East Alabama Mental Health-Mental Retardation Board, Inc.*,²⁴ *Inc.*, Hoke contended she did all that was required by the Alabama Rules of Civil Procedure to effectuate service on defendants.²⁵ However, the Court rejected Hoke’s argument, noting that *Ex parte East Alabama Mental Health-Mental Retardation Board, Inc.* dealt with service by certified mail, and further, the record was silent about any steps taken by Hoke’s counsel to effectuate service through a process server.²⁶

After an objective evaluation, the Court determined Hoke did not possess a bona fide intent to serve the defendants because (1) Hoke did not attempt to satisfy the necessary steps to effectuate service at the time her complaint was filed; and (2) Hoke failed to provide evidence that defendants’ addresses were unknown to her at the time of filing.²⁷ The Court also stated that Hoke’s counsel’s desire to serve the defendants after his application for *pro hac vice* was filed did not constitute a valid excuse for intentionally delaying service of the complaint.²⁸ The Court noted the record lacked any explanation as to why Hoke’s local counsel did not attempt to effectuate service while the *pro hac vice* application was pending.²⁹ Therefore, the Court held Hoke’s action was time barred according to Ala. Code § 6-5-482.³⁰

Ex parte East Alabama Mental Health-Mental Retardation Board, Inc.

Despite Hoke’s reliance on *Ex parte East Alabama Mental Health-Mental Retardation Board, Inc.*, the Alabama Supreme Court distinguished, and pointed to an important difference between service via process server and service via certified mail.³¹

Facts and Procedural History

In *Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc.*, Donald W. Walker killed his father in August 2002.³² The personal representative of James Walker’s estate, Arnold Umbach, filed an action in Lee County Circuit Court against the East Alabama Mental Health-

Mental Retardation Board (“the Board”), its director, the Alabama Board of Adjustment, and Donald Walker.³³ The plaintiff alleged defendants’ conduct caused Walker’s death and filed a complaint four days before the expiration of the statute of limitations.³⁴ Along with the complaint, plaintiff’s counsel filed summonses upon the defendants by certified mail.³⁵ The circuit clerk issued the summonses and certified mail cards to plaintiff’s counsel.³⁶

Over two-and-a-half months after the filing of the complaint, on October 24, 2004, the defendants received the complaint and summonses.³⁷ The Board and its director filed a motion for summary judgment on June 7, 2005 arguing that, although the plaintiff filed the action within the two-year statute of limitations, the action did not commence within the limitations period because plaintiff made no attempt to serve the defendants with the complaints and summonses until two-and-a-half months after the limitations period expired.³⁸ After the circuit court denied the motion, the Board and its director petitioned the Alabama Supreme Court for a writ of mandamus directing the circuit court to enter summary judgment in their favor, because the action was commenced after the expiration of the statute of limitations.³⁹

Holding and Rationale

Did the plaintiff comply with the Alabama Rules of Civil Procedure’s requirement regarding the facilitation of service of process, so as to “commence” the action prior to the expiration the statute of limitations? The Court responded in the affirmative.⁴⁰ The Court began by noting the plaintiff filed the complaint within the prescribed statute of limitations period.⁴¹ However, as reinforced in *Hoke*, the filing of a complaint is not dispositive of whether or not the action “commenced” for the purposes of complying with the prescribed limitations period.⁴² Instead, “the filing must be made with the intention of serving process upon the opposing party or parties.”⁴³

The Board and its director predicated their arguments on the allegation that the plaintiff did not possess the requisite intent to serve process at the time of filing, citing numerous cases to support their arguments.⁴⁴ The Court quickly distinguished the plaintiff’s action from the cases cited by the defendants.⁴⁵ The Court pointed to the fact that plaintiff’s counsel provided the circuit clerk with detailed instructions regarding service of process at the time he filed the complaint.⁴⁶ After the clerk received all of the necessary information, the clerk provided plaintiff’s counsel with return-receipt cards, thereby shifting the responsibility

of mailing the summonses and complaints back to the plaintiff.⁴⁷ Thus, according to the Court, “[plaintiff’s counsel] did all that was required by [Rule 4 of] the Rules of Alabama Civil Procedure to facilitate service, short of placing the summonses and complaints in the mail.”⁴⁸

The Court further posited that evidence of plaintiff’s counsel’s inaction for two-and-a-half months constituted at least some evidence indicating that they lacked the requisite intent to serve the complaints and summonses immediately.⁴⁹ However, because the appellants sought a writ of mandamus, they were required to demonstrate “a clear legal right . . . to the order sought” and “an imperative duty upon [the plaintiff] to perform.”⁵⁰ The evidence presented by the Board and its director was not sufficient to meet that standard, and the Court held the plaintiff possessed a bona fide intent to serve at the time of filing and thus, denied the defendants’ petition for writ of mandamus.⁵¹

Ala. R. Civ. P. 4(b)

Ala. R. Civ. P. 4(b) allows for dismissal of an action without prejudice if service of the plaintiff’s complaint is not perfected within 120 days after filing of the complaint.⁵² The rule requires the court to give the plaintiff fourteen days notice before dismissal, and the plaintiff is allowed to show good cause for failure to serve.⁵³ If good cause is shown, “the court shall extend the time for service for an appropriate period.”⁵⁴ In *Hoke*, the plaintiff attempted to rely on Ala. R. Civ. P. 4(b) defensively.⁵⁵ However, following the guidance of *Precise v. Edwards*, the Court rejected plaintiff’s reliance on such an attempt to justify her lack of bona fide intent to serve the defendants.⁵⁶

Precise v. Edwards

The Alabama Supreme Court previously discussed Rule 4(b)’s immateriality in evaluating whether a plaintiff possesses a bona fide intent to serve in *Precise v. Edwards*, a wrongful death action.⁵⁷ In *Precise*, the plaintiff served the complaint over four months after filing at the addresses listed on the complaint and summons provided at the time of filing.⁵⁸ Immediately following service, the defendants filed motions to dismiss on statute of limitations grounds, which the plaintiff opposed.⁵⁹ The trial court granted the motion, holding the plaintiff did not possess a bona fide intent to serve the defendants at the time of filing.⁶⁰ The plaintiff filed a motion to alter, amend, or vacate, contending the trial court failed to provide the plaintiff with fourteen days’ notice to provide good cause to justify

the delay in service pursuant to Ala. R. Civ. P. 4.⁶¹ The trial court denied the motion.⁶² On appeal, the Alabama Supreme Court indicated it was irrelevant that the plaintiff provided the defendants’ addresses to the circuit clerk, because the clerk had no responsibility to act on mere possession of the defendants’ addresses.⁶³ Because the issue was whether plaintiff commenced the action for statute of limitation purposes, the Alabama Supreme Court held Ala. R. Civ. P. 4(b) was immaterial.⁶⁴ The Court held the plaintiff lacked a bona fide intent to serve the defendants at the time of filing, and the circuit court’s judgment was thereby affirmed.⁶⁵

Conclusion

While all civil defense lawyers evaluate a complaint to determine whether it was timely filed, the *Hoke* decision makes it clear that a plaintiff must timely file the complaint *in addition* to possessing a bona fide intent to serve the defendant at the time of filing for statute of limitations purposes. To determine whether a plaintiff possessed a bona fide intent to serve, the court evaluates the circumstances of each case objectively. As seen in *Precise v. Edwards*, a plaintiff cannot solely rely on Ala. R. Civ. P. 4(b) to demonstrate his or her complaint was timely filed. *Hoke* clarified that the method a plaintiff uses to effectuate service is important. As seen in *Ex parte East Alabama Mental Health-Mental Retardation Board, Inc.*, where the plaintiff elected to serve the defendants via certified mail, a bona fide intent to serve was found where the plaintiff did everything short of placing the complaint and summonses in the mail, which is a duty placed on the circuit clerk. However, as seen in *Hoke*, service via process server places an additional burden on the plaintiff to undertake steps to obtain a process server to effectuate service. *Hoke* makes it clear that “filing” alone is not enough for a plaintiff to timely commence an action. Civil defense lawyers should be mindful to evaluate whether evidence suggests that plaintiff’s counsel possessed a bona fide intent to serve at the time of filing the complaint.



Ashley Crank is an associate at **Friedman, Dazzio, Zulanis & Bowling, P.C.** in Birmingham. She earned her B.A., *cum laude*, from the University of Alabama in Huntsville. She graduated from Cumberland School of Law in 2016. While at Cumberland, she served as Editor-in-Chief of the *American Journal of Trial Advocacy* and competed on the

Justice Richard L. Jones National Moot Court Team. She is a member of the Birmingham Bar Association, Alabama State Bar, DRI, American Bar Association and ADLA. Ashley currently serves on the Birmingham Legal Aid Society's Board of Trustees.

1 *ENT Assoc. of Ala., P.A. v. Hoke*, 1141396, 1141401, 2016 WL 4585742 (Ala. Sept. 2, 2016) (per curiam).

2 See *ENT Assoc. of Ala., P.A. v. Hoke*, 2016 WL 4585742, at *4-5.

3 See *id.*

4 *Id.* at *9.

5 *Id.* at *1.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*; see Ala. Code § 6-5-482 (1975) (“All actions against physicians, surgeons, dentists, medical institutions, or other health care providers for liability, error, mistake, or failure to cure, whether based on contract or tort, must be commenced within two years . . .”).

13 *ENT Assoc. of Ala., P.A. v. Hoke*, WL 4585742, at *1.

14 *Id.* at *2; see Ala. R. Civ. P. 4(b).

15 *ENT Assoc. of Ala., P.A. v. Hoke*, WL 4585742, at *2.

16 *Id.*

17 The Alabama Supreme Court pretermitted the certified question of whether plaintiff's Complaint was barred by Ala. Code § 6-5-482 on the grounds that plaintiff's “Complaint was a nullity because it was filed in violation of Rule VII of the Rules Governing Admission to the Alabama Bar . . .” *Id.* at *4.

18 *Id.* at *4. Pursuant to Ala. R. App. P. 5, defendants timely filed petitions for permission to appeal, and the Alabama Supreme Court consolidated the petitions, which were subsequently granted. *Id.*

19 *Id.* (quoting *Precise v. Edwards*, 60 So. 3d 228, 230–31 (Ala. 2010)) (emphasis in original).

20 *Id.* at *5 (citing *Precise v. Edwards*, 60 So. 3d at 233).

21 60 So. 3d 228 (Ala. 2010).

22 *Id.* (quoting *Precise v. Edwards*, 60 So. 3d at 233).

23 *Id.* at *5 (citing *Precise v. Edwards*, 60 So. 3d 228, 233 (Ala. 2010)).

24 939 So. 2d 1 (Ala. 2006).

25 *ENT Assoc. of Ala., P.A. v. Hoke*, WL 4585742, at *5.

26 *Id.* at *6.

27 *Id.* at *9.

28 *Id.*

29 *Id.*

30 *Id.*

31 See *id.* at *6.

32 *Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc.*, 939 So. 2d at 2.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 5.

41 *Id.* at 3.

42 *Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc.*, 939 So. 2d at 3.

43 *Id.* (quoting *Maxwell v. Spring Hill College*, 628 So. 2d 335, 336 (Ala. 1993) (quoting *Latham v. Phillips*, 590 So. 2d 217, 218 (Ala. 1991))).

44 *Id.* at 3-4 (citing *Maxwell v. Spring Hill College*, 628 So. 2d 335, 335 (Ala. 1993) (holding plaintiff did not intend to serve defendants with process when he did not provide the clerk with summonses, service instructions, and addresses so as to facilitate proper service); *Latham v. Phillips*, 590 So. 2d 217, 217-18 (Ala. 1991) (holding plaintiff did not have the requisite intent to serve when she did not provide the clerk with any instructions for service); *Freer v. Potter*, 413 So. 2d 1079, 1082 (Ala. 1982) (holding plaintiff did not have the requisite intent to serve when, upon filing the complaint, he ordered the clerk to withhold service of process); *Ward v. Saben Appliance Co.*, 391 So. 2d 1030, 1034-35 (Ala. 1980) (holding plaintiff did not have the requisite intent to serve when, upon filing of the complaint, his counsel told the clerk to withhold service of process until he could find more information on the case, and defendants were not served until four months after the complaint was filed).

45 *Id.* at 5.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* (quoting *Ex parte Puccio*, 923 So. 2d 1069, 1072 (Ala. 2005) (quoting *Ex parte McInnis*, 820 So. 2d 795, 798 (Ala. 2001))).

51 *Ex parte East Alabama Mental Health-Mental Retardation Bd., Inc.*, 939 So. 2d at 6.

52 Ala. R. Civ. P. 4(b). The Rule does not apply to fictitious-party practice pursuant to Ala. R. Civ. P. 9(h) or to service in a foreign country. *Id.*

53 *Id.*

54 *Id.*

55 See *ENT Assoc. of Ala., P.A. v. Hoke*, WL 4585742, at *5.

56 *Id.* at *6.

57 See *Precise v. Edwards*, 60 So. 3d at 234.

58 *Id.* at 229.

59 *Id.* at 229-30.

60 *Id.*

61 “Absent a showing of good cause for the delay, Rule 4(b), Ala. R. Civ. P., requires service on a defendant within 120 days of the filing of the complaint.” *Id.* at 235 n.4.

62 *Id.* at 230.

63 *Id.* at 233 n.3.

64 *Id.* at 234.

65 *Id.*