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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

1120629

Ex parte General Motors of Canada Limited

PETITION FOR WRIT OF MANDAMUS

(In re: Gerardo Poole

v.

General Motors Corporation et al.)

(Choctaw Circuit Court, CV-09-900019)

SHAW, Justice.

General Motors of Canada Limited ("GM Canada") petitions this Court for a writ of mandamus directing the Choctaw

Circuit Court to enter a summary judgment in its favor on the ground that the plaintiff's substitution of GM Canada for a fictitiously named defendant was made after the expiration of the applicable statute of limitations and does not relate back to the filing of the original petition. We grant the petition and issue the writ.

Facts and Procedural History

The complaint in the underlying action was filed on April 6, 2009. It alleged that the plaintiff, Gerardo Poole, was injured in a motor-vehicle accident that occurred on April 11, 2007. Poole sought damages on a products-liability claim against General Motors Corporation n/k/a Motors Liquidation Company ("MLC"), the company that allegedly designed, tested, made parts of, and distributed the 2004 Chevrolet Impala automobile that Poole was operating at the time of the accident, and Stewart Motor Company, the dealership that sold

the vehicle to Poole's mother.[1] Poole's complaint also included fictitiously named defendants.[2]

On June 10, 2009 -- two months after the expiration of the two-year statutory limitations period -- Poole sought leave from the trial court to amend his original complaint to substitute GM Canada for the fictitiously named defendants.

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[1]General Motors and, thus, MLC filed for bankruptcy protection on June 1, 2009. In conjunction with that bankruptcy proceeding, Poole ultimately settled his claim against MLC. Nothing in the record before us suggests that GM Canada participated in that bankruptcy filing.

[2]More specifically, Poole's complaint identified the following fictitiously named defendants:

> "Fictitious Defendant 'A' [is] that person, corporation or other legal entity who or which designed, engineered, tested, manufactured, marketed and distributed the 2004 Chevrolet Impala or any components thereof which is the subject matter of this lawsuit; Fictitious Defendant 'B' [is] that person, corporation or other legal entity who or which designed, manufactured, engineered, sold or otherwise placed into the stream of commerce any component parts of the 2004 Chevrolet Impala which is the subject matter of this lawsuit; Fictitious Defendant 'C' [is] that person, corporation or other legal entity who tested and developed the warnings for or developed the manual for the 2004 Chevrolet Impala which is the subject matter of this lawsuit; Fictitious Defendant 'D' [is] that person, corporation or other legal entity whose negligence, wantonness or other wrongful conduct combined and concurred with the conduct of the defendants herein to cause the injuries as alleged herein ...."

In support of that request, Poole's counsel submitted affidavit testimony indicating that he had been diligently investigating in order to identify all potentially responsible parties and had, on June 10, 2009, learned for the first time that the vehicle had been manufactured by GM Canada.[3] The trial court granted Poole's motion, and, on June 15, 2009, Poole filed an amendment substituting GM Canada for the fictitiously named defendants.

GM Canada filed an answer and raised as an affirmative defense that Poole's claims were barred by the applicable statute of limitations. Thereafter, GM Canada sought a summary judgment in its favor on that ground. Specifically, it argued that it was added as a party after the two-year statute of limitations had expired and that its substitution as a party did not "relate back" to the date the original complaint was filed. Following a hearing, the trial court denied GM Canada's motion. GM Canada then petitioned this Court for a writ of mandamus.

Standard of Review

[3]Poole's counsel stated that he discovered GM Canada's identity by means of an Internet resource.

This Court will issue a writ of mandamus when the petitioner demonstrates: "(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001). This Court generally does not review by writ of mandamus a trial court's decision denying a motion for a summary judgment; however, an exception exists in situations like the one before us:

> "'... In a narrow class of cases involving fictitious parties and the relation-back doctrine, this Court has reviewed the merits of a trial court's denial of a summary-judgment motion in which a defendant argued that the plaintiff's claim was barred by the applicable statute of limitations. See Ex parte Snow, 764 So. 2d 531 (Ala. 1999) (issuing the writ and directing the trial court to enter a summary judgment in favor of the defendant); Ex parte Stover, 663 So. 2d 948 (Ala. 1995) (reviewing the merits of the trial court's order denying the defendant's motion for a summary judgment, but denying the defendant's petition for a writ of mandamus); Ex parte FMC Corp., 599 So. 2d 592 (Ala. 1992) (same); Ex parte Klemawesch, 549 So. 2d 62, 65 (Ala. 1989) (issuing the writ and directing the trial court "to set aside its order denying [the defendant's] motion to quash service or, in

> the alternative, to dismiss, and to enter an order granting the motion")....'
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> "Ex parte Jackson, 780 So. 2d 681, [684] (Ala. 2000)."

Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424, 427-28 (Ala. 2011).

Discussion

The parties do not dispute that Poole's claims are covered by the two-year statute of limitations found in Ala. Code 1975, § 6-2-38(l).[4] Poole was injured on April 11, 2007, and his original complaint was timely filed on April 6, 2009. It is undisputed that on June 10, 2009, when Poole sought leave to add GM Canada, the two-year limitations period had expired.

Rule 9(h), Ala. R. Civ. P., provides a mechanism by which a party who is "ignorant of the name of an opposing party" may designate that party by a fictitious name. When the opposing party's true name is later discovered, the party may amend the

[4]Although the motor-vehicle accident made the subject of the underlying action actually occurred in Mississippi, the parties appear to agree that Alabama's statute-of-limitations provision applies.

pleadings to substitute that true name.[5] Under Rule 15(c)(4), Ala. R. Civ. P., such an amendment "relates back to the date of the original pleading when ... relation back is permitted by principles applicable to fictitious party practice pursuant to Rule 9(h)." However, the relation-back principle applies only when the plaintiff "is ignorant of the name of an opposing party." Rule 9(h); Harmon v. Blackwood, 623 So. 2d 726, 727 (Ala. 1993) ("In order to invoke the relation-back principles of Rule 9(h) and Rule 15(c), a plaintiff must ... be ignorant of the identity of that defendant ...."); Marsh v. Wenzel, 732 So. 2d 985 (Ala. 1998).

> "'The requirement that the plaintiff be ignorant of the identity of the fictitiously named party has been generally explained as follows: "The correct test is whether the plaintiff knew, or should have known, or was on notice, that the substituted defendants were in fact the parties described fictitiously." Davis v. Mims, 510 So. 2d 227, 229 (Ala. 1987)....'

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[5]Rule 9(h), Ala. R. Civ. P., provides:

> "When a party is ignorant of the name of an opposing party and so alleges in the party's pleading, the opposing party may be designated by any name, and when that party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name."

> "Crawford v. Sundback, 678 So. 2d 1057, 1060 (Ala. 1996)."

Mobile Infirmary, 74 So. 3d at 429 (emphasis added). Thus,

> "'[i]f the plaintiff knows the identity of the fictitiously named parties or possesses sufficient facts to lead to the discovery of their identity at the time of the filing of the complaint, relation back under fictitious party practice is not permitted and the running of the limitations period is not tolled.'"

74 So. 3d at 430 (quoting Clay v. Walden Joint Venture, 611 So. 2d 254, 256 (Ala. 1992) (emphasis added)).

GM Canada contends that Poole did not act with due diligence in attempting to discover its identity because, it argues, Poole and/or his counsel of record should have known that GM Canada manufactured and/or assembled, at least in part, the subject vehicle. Specifically, GM Canada notes that, pursuant to the Code of Federal Regulations, see 49 C.F.R. § 567 (2000), it was required to affix a label to the driver's door area of the Impala stating its name as the manufacturer of the vehicle. In its summary-judgment filings below, GM Canada provided a photograph of the door of the vehicle depicting a clearly legible label that indicated that the motor vehicle was "MFD BY GENERAL MOTORS OF CANADA LTD."

GM Canada thus argues that Poole had sufficient and readily available facts--via the door label--to lead to the discovery of its identity. We agree.

In Ex parte Mobile Infirmary, supra, the plaintiff, Shaw, attempted to file a wrongful-death action against several hospitals who had treated the decedent. Shaw filed the action against an entity called Infirmary Health System, Inc. Later, after the statutory limitations period had run, Shaw attempted to substitute Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center ("Mobile Infirmary") for a fictitiously named defendant. In addressing whether this substitution related back to the filing of the original complaint, we stated:

> "As this Court said in Ex parte Snow, 764 So. 2d 531, 537 (Ala. 1999), an amendment substituting a new defendant in place of a fictitiously named defendant will relate back to the filing of the original complaint only if the plaintiff acted with 'due diligence in identifying the fictitiously named defendant as the party the plaintiff intended to sue.' Ignorance of the new defendant's identity is no excuse if the plaintiff should have known the identity of that defendant when the complaint was filed....
>
> "....
>
> "The evidence attached to Mobile Infirmary's summary-judgment motion indicates that Shaw did not

> act with due diligence. When he filed the original complaint, [the decedent's] family had possessed her medical records for 20 months, and Shaw had possessed [the decedent's] medical records for at least 3 months, including various paperwork from Mobile Infirmary, which indicated that [the decedent] had been admitted to the Medical Center, had undergone surgery there, and had been treated there following her surgery. A reasonably diligent plaintiff possessing that information should have at least attempted to identify the corporation doing business as Mobile Infirmary Medical Center and include it as a defendant. See Fulmer v. Clark Equip. Co., 654 So. 2d 45, 46 (Ala. 1995) (holding that where plaintiff knew the allegedly defective forklift was manufactured by 'Clark' and possessed forklift manuals providing Clark's name but did not attempt to amend the complaint until after the limitations period had run, the plaintiff 'did not act diligently in attempting to learn Clark Equipment's identity'). As this Court has said,
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> > "'[i]f the plaintiff knows the identity of the fictitiously named parties or possesses sufficient facts to lead to the discovery of their identity at the time of the filing of the complaint, relation back under fictitious party practice is not permitted and the running of the limitations period is not tolled.'
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> "Clay v. Walden Joint Venture, 611 So. 2d 254, 256 (Ala. 1992)."

74 So. 3d at 429-30 (emphasis added). See also Ex parte Nationwide Ins. Co., 991 So. 2d 1287, 1291 (Ala. 2008) (finding that a substitution of a party for a fictitiously named party did not relate back where the plaintiff could have

discovered an insurer's identity by, among other things, examining her policy or reviewing an accident report), and Marsh v. Wenzel, 732 So. 2d 985, 990 (Ala. 1998) (holding that one could not reasonably conclude that a plaintiff was ignorant of the name of a pathologist when the pathologist's name was set forth in her medical records).

Like the plaintiff in Mobile Infirmary, Poole had a source of information that would have led him to the identity of the manufacturer of the Impala--that vehicle's legally required manufacturer's identification label. Poole argues, however, that he nevertheless acted with due diligence in investigating and discovering GM Canada's identity. Specifically, he argues that his counsel of record had assumed representation approximately one month before the filing of the original complaint, and that counsel did not have access to the vehicle, which, he says, was in the possession of his prior counsel.[6]

[6]The location of the Impala for the nearly two-year period preceding the filing of the complaint is unclear. However, the materials before us suggest that the vehicle was owned by Poole's mother and that, for a period before and after the complaint was filed, the vehicle was in the possession of attorneys retained by Poole.

The purported lack of possession of an allegedly defective product that is the subject of a products-liability action, this Court has previously held, does not necessarily excuse the failure to examine it to learn its manufacturer. In Jones v. Resorcon, Inc., 604 So. 2d 370 (Ala. 1992), the plaintiff, Jones, was injured at his place of employment, USX, by a blower fan. He attempted to initiate a products-liability action against the manufacturer of the fan; after the statute of limitations had run, Jones discovered the name of, and attempted to substitute, the actual manufacturer of the fan, Resorcon, Inc., as a party for a fictitiously named defendant.

This Court held that Jones had failed to exercise due diligence in discovering Resorcon's identity. Specifically, the blower fan in question was marked with an identification plate indicating that Resorcon was the manufacturer. Jones's counsel had requested from USX the opportunity to inspect the fan to determine the manufacturer, but his request had been denied. We held that the failure of Jones's counsel to do more to inspect the fan to discover the name of the manufacturer indicated a lack of due diligence:

> "It is relevant to the question of due diligence that an inspection of the fan would almost certainly be necessary to maintain the product liability action against any defendant. If Jones's assertions that USX refused access are true, then due diligence would have required an attempt to obtain a court-ordered inspection."

Jones, 604 So. 2d at 373. Thus, despite the fact that the information in question--the identity of the manufacturer of the fan as disclosed on the identification plate--was held in the hands of a noncooperative third party, due diligence required that Jones act to inspect the allegedly defective product and to discover that information. See also Fulmer v. Clark Equip. Co., 654 So. 2d 45, 46 (Ala. 1995) (holding that the plaintiff failed to exercise due diligence to learn the identity of a forklift manufacturer because, among other things, "Clark Equipment forklifts have their names clearly listed on the nameplate ....").

In the instant case, unlike Jones, the information needed by Poole--the identification of the manufacturer of the motor vehicle as stated on the vehicle--was actually in the possession of his own agents or his family. There is no allegation that either Poole or his subsequent counsel was denied access to the motor vehicle; instead, Poole's counsel

stated in an affidavit that no one acted to "physically inspect the vehicle prior to filing the lawsuit." Further, if Poole had been denied access to the Impala, under Jones, due diligence would have required him to seek a court order to inspect it.

Poole contends that MLC's answer "misled Plaintiff's Counsel to believe [MLC] was in fact the primary manufacturer ...." Poole's brief, at 18.[7] However, we see nothing misleading in MLC's answer, in which it "admit[ted] that it designed, tested, engineered, in part, manufactured, in part, marketed and sold to authorized distributors the subject 2004 Chevrolet Impala." MLC's answer was filed after the expiration of the applicable limitations period and, as the emphasized portions above indicate, suggests that MLC acknowledged only that it was partially responsible for the vehicle's manufacture. It does not support the belief that MLC accepted full -- or even primary -- responsibility for the manufacture of the alleged defective vehicle, as it appears to

[7]We note that, in the trial court, the affidavit of Poole's counsel stated not that he had been misled, but that it was his "interpretation" of MLC's answer that "led" him "to believe" that MLC had manufactured the vehicle.

explicitly state that some additional party was responsible for other parts of the design, testing, manufacturing, and marketing process.[8]

Poole, citing Ex parte Nail, 111 So. 3d 125 (Ala. 2012), appears to contend that an inspection of the vehicle for manufacturing information before filing the complaint would have amounted to more than due diligence.[9] However, this case presents none of the legibility issues requiring extensive formal discovery and/or "'detective work'" as was the case in Nail or in Oliver v. Woodward, 824 So. 2d 693, 699 (Ala. 2001). Instead, as GM Canada argues, Poole "could have

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[8]Poole's counsel also testified that, prior to filing the request to substitute GM Canada for the fictitiously named defendants, he collected certain evidence regarding the vehicle, such as an accident report and photographs, and argues that "all of these documents and photographs identified [MLC] as the proper product liability defendant." Poole's brief, at 17. However, we note that in the trial court it was asserted that these items did not "reveal[] [GM] Canada as the manufacturer of the subject vehicle," not that they indicated that GM Canada was the manufacturer. We have examined the evidence cited for this assertion, "'Ex. B' to Def.'s Attach. 7," which appears to be photographs of the Impala; none of those photographs seems to indicate either MCL or GM Canada as the manufacturer.

[9]See Ex parte Nail, 111 So. 3d 125, 131 (Ala. 2012) ("'Due diligence means ordinary, rather than extraordinary, diligence.'" (quoting United States v. Walker, 546 F. Supp. 805, 811 (D.C. Haw. 1982))).

discovered [GM Canada's] identity ... simply by examining [the vehicle]." Ex parte Nationwide Ins. Co., 991 So. 2d 1287, 1291 (2008). Here, nothing prevented Poole's identification of GM Canada as a defendant other than his failure to conduct an inspection of the allegedly defective vehicle.

Because the label on the vehicle, which was required by law, was conspicuous, legible, and in the possession of Poole's agents or his family, he should have readily discovered it, and his failure to do so amounted to a failure to act with due diligence. The "'"undisputed evidence shows that the plaintiff failed to act with due diligence in identifying the fictitiously named defendant as the party the plaintiff intended to sue,"'" Ex parte Mobile Infirmary, 74 So. 3d at 428 (quoting Ex parte Jackson, 780 So. 2d 681, 684 (Ala. 2000), quoting in turn Snow, 764 So. 2d at 537); thus, the trial court had no discretion to do anything other than to grant GM Canada's motion seeking a summary judgment in its favor on the statute-of-limitations ground. For the foregoing reasons, we grant GM Canada's petition and issue a writ of mandamus directing the Choctaw Circuit Court to enter an order granting GM Canada's motion for a summary judgment.

PETITION GRANTED; WRIT ISSUED.

Stuart, Bolin, Parker, Murdock, Main, Wise, and Bryan, JJ., concur.

Moore, C.J., dissents.

MOORE, Chief Justice (dissenting).

I respectfully dissent because General Motors of Canada Limited ("GM Canada") has not demonstrated that it is entitled to the writ of mandamus. GM Canada focuses on Gerardo Poole's burden of demonstrating that he acted with due diligence to ascertain GM Canada's identity. However, GM Canada has its own burden "to show that each element required for issuance of the writ [of mandamus] has been satisfied." Ex parte Patterson, 853 So. 2d 260, 263 (Ala. Civ. App. 2002). GM Canada has not pleaded the required elements for the issuance of the writ, let alone demonstrated that each element has been satisfied.

I. Standard of Review

Our standard for mandamus relief is as follows:

> "A writ of mandamus is an extraordinary remedy, and one petitioning for it must show: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court."

Ex parte Jackson, 780 So. 2d 681, 683 (Ala. 2000). "The general rule is that '"a writ of mandamus will not issue to review the merits of an order denying a motion for a summary judgment."' In all but the most extraordinary cases, an appeal

is an adequate remedy; however, there are exceptions ...." 780 So. 2d at 684 (citation omitted).

One exception involves fictitiously named parties and the relation-back doctrine:

> "'[T]he fact that a statute of limitations defense is applicable is not a proper basis for issuing a writ of mandamus, due to the availability of a remedy by appeal.' Subject to a narrow exception, that statement remains true. In a narrow class of cases involving fictitious parties and the relation-back doctrine, this Court has reviewed the merits of a trial court's denial of a summary-judgment motion in which a defendant argued that the plaintiff's claim was barred by the applicable statute of limitations."

780 So. 2d at 684 (quoting Ex parte Southland Bank, 504 So. 2d 954, 955 (Ala. 1987) (citation omitted)). "'[A] writ of mandamus is proper ... if the undisputed evidence shows that the plaintiff failed to act with due diligence in identifying the fictitiously named defendant as the party the plaintiff intended to sue.'" Id. (quoting Ex parte Snow, 764 So. 2d 531, 537 (Ala. 1999)).

GM Canada, however, presents the writ-of-mandamus standard of review in an extremely truncated fashion. GM Canada's standard of review and argument omit entirely any

reference to the four elements a petitioner must show in order for mandamus to lie.

I also note that it is not enough that GM Canada demonstrates that this case is one of the "narrow class of cases involving fictitious parties and the relation-back doctrine." Ex parte Jackson, 780 So. 2d at 684. Rather, GM Canada must also demonstrate it satisfies the four elements necessary for mandamus relief.

II. GM Canada Cannot Show That it is Entitled to Mandamus Relief

Even if GM Canada carried its burden by properly pleading its entitlement to the writ of mandamus in this case, I believe mandamus would not lie. First, GM Canada lacks a clear legal right to the order sought. The clear legal right must be an "indisputable right to a particular result." Ex parte Rudolph, 515 So. 2d 704, 706 (Ala. 1987) (emphasis added). "[T]he right to the relief sought [must be] clear and certain, with no reasonable basis for controversy." Ex parte Nissei Sangyo America, Ltd., 577 So. 2d 912, 914 (Ala. 1991) (emphasis added). "In a case involving fictitiously named defendants, the answer to [the] question [whether the

amendment relates back to the filing of the original complaint] depends upon the plaintiff's conduct." Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424, 428 (Ala. 2011) (emphasis added).

A petitioner can hardly show a clear legal right to a summary judgment where relevant facts are disputed in the trial court. "A writ of mandamus is proper ... if the undisputed evidence shows that the plaintiff failed to act with due diligence in identifying the fictitiously named defendant ...." Ex parte Snow, 764 So. 2d 531, 537 (Ala. 1999) (emphasis added). The main opinion even recognizes the uncertainty of an important fact in this case: whether Poole had sufficient and readily available facts to lead to the discovery of GM Canada's identity. ___ So. 3d at ___. Specifically, as to who possessed the Chevrolet Impala vehicle at issue, the opinion equivocates, stating on one hand it was "in the possession of Poole's agents or his family," ___ So. 3d at ___ (emphasis added), while conceding that "[t]he location of the Impala for the nearly two-year period preceding the filing of the complaint is unclear. However, the materials before us suggest that the vehicle was owned by

Poole's mother and that, for a period before and after the complaint was filed, the vehicle was in the possession of attorneys retained by Poole." ___So. 3d at ___ n.6.

According to the record, when Poole's attorney filed the complaint on April 6, 2009, he was not aware of the location of the Impala, nor was he aware who had possession of the vehicle. Poole's attorney also stated that neither "[Poole] nor anyone acting on [Poole's] behalf had possession of the vehicle." Indeed, it was not until after the June 10, 2009, motion to amend the complaint that Poole's attorney learned that the Impala was in the possession of one of Poole's prior attorneys. The facts do not indicate whether Poole's prior attorney acted as the "referring attorney" to Poole's current attorney or was twice removed from the attorney-client relationship. Further, the facts do not indicate whether Poole's prior attorney undertook representation on this matter, which would make his prior attorney his agent for this matter.

With such a significant fact still in dispute, I fail to see how the main opinion glosses over the question in order to issue the writ of mandamus here. When there is no clear

factual record on the past possession and location of the Impala and the label that indicates its manufacturer, there can be no clear legal right to a summary judgment.

The main opinion relies primarily upon Jones v. Resorcon, Inc., 604 So. 2d 370 (Ala. 1992) (concerning a label on a blower fan), and Fulmer v. Clark Equipment Co., 654 So. 2d 45 (Ala. 1995) (concerning a label on a forklift). In both of those cases, the presence of a manufacturer's label was only one aspect of the due-diligence inquiry. In Jones, the plaintiff went to an industrial plant and visually inspected a label that identified the fan manufacturer, but read the label incorrectly. 604 So. 2d at 373. We observed: "When Jones did begin efforts to determine the true manufacturer, his efforts were sporadic and ineffectual, and he did not amend to state a claim against the true manufacturer until September 17, 1991." 604 So. 2d at 374. In Jones, the plaintiff filed a motion to substitute Resorcon for a fictitiously named defendant about 14 months after filing his initial complaint and after he had received the codefendant's answer denying that it had manufactured the fan. Id. at 372.

In Fulmer, "although Mr. Fulmer talked with three witnesses concerning the accident, he did not inquire as to the identity of the manufacturer of the forklift; and ... [later] learned that the forklift was a 'Clark' model, but still did nothing calculated to determine the full name of the manufacturer." 654 So. 2d at 46. The plaintiff in Fulmer attempted to amend his complaint and substitute Clark Equipment for a fictitiously named defendant nearly a year after he had filed his initial complaint. 654 So. 2d at 45.

Unlike the plaintiff in Jones, Poole was unable to investigate the vehicle label by himself, having been rendered a quadriplegic in the automobile accident. Unlike the plaintiff in Fulmer, Poole had not learned anything indicating that the Impala was a "GM Canada" model. In contrast to the plaintiffs' dilatory actions in Jones and Fulmer, Poole's attorney diligently attempted to discover the manufacturer's identity. Poole's complaint specifically included as a fictitiously named defendant that "corporation ... which designed, engineered, tested, manufactured ... the 2004 Chevrolet Impala." Poole's attorney served discovery with the initial complaint on General Motors Corporation that sought

the identity of the manufacturer of the Impala. Poole's attorney later discovered the identity of GM Canada and immediately filed the motion to substitute GM Canada for the fictitiously named party. Unlike the 14-month delay in Jones and the 12-month delay in Fulmer, the delay between Poole's filing the initial complaint and his filing the motion to substitute GM Canada was only 2 months.

Upon consideration of all the facts before us, "reasonable people could differ as to whether [Poole] proceeded in a reasonably diligent manner in identifying [GM Canada]." Ex parte FMC Corp., 599 So. 2d 592, 595 (Ala. 1992). There is a "reasonable basis for controversy" in the facts that renders GM Canada's right to relief unclear and uncertain. Nissei Sangyo, 577 So. 2d at 914. A plaintiff's due diligence in identifying a fictitiously named defendant should not be reduced to a one-factor test of whether a car had a manufacturer's label, and, indeed, in Jones and Fulmer the Court did not so hold. Because reasonable people could dispute whether Poole exercised due diligence here, GM Canada does not have an indisputable or clear legal right to a summary judgment.

Second, where there is no "clear legal right" to the order sought, there can be no imperative duty for the trial court to act. "[W]here the right sought to be enforced is a clear legal right, the allowance of which is a matter of peremptory duty, and not of judicial discretion, there can be but little doubt or difficulty in determining the propriety of the remedy by mandamus." Bank of Heflin v. Miles, 294 Ala. 462, 466-67, 318 So. 2d 697, 701 (1975) (emphasis added). The trial court denied GM Canada's motion for a summary judgment. "After careful consideration of [GM Canada's] motion and [Poole's] response in opposition and his supplemental report," the trial court found that Poole "exercised due diligence in ascertaining the identity of [GM] Canada and amending the Complaint to include that Defendant as a party to this litigation." The trial court in carefully considering GM Canada's motion did not clearly exceed its discretion; neither did the trial court act in an arbitrary and capricious manner. Here, the evidence simply does not indisputably show that Poole failed to act with due diligence in identifying GM Canada as the party to be sued. This Court should not second-guess the reasonable judgment of the trial court.

Third, GM Canada has not demonstrated that it lacks another adequate legal remedy. We have previously stated:

> "The trial court's order denying Dr. Jackson and Brookwood's motion for a summary judgment is the kind of interlocutory order that is appropriate for review under the procedure set forth in Rule 5, Ala. R. App. P. Dr. Jackson and Brookwood did not attempt to use that procedure. If they had asked the trial court to give the certification required by that rule and the trial court had refused, this might be a different case. ...
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> "This case is not within an exception to the rule that a writ of mandamus will not issue to review the merits of an order denying a motion for a summary judgment. The petitioners could have sought permission to appeal that order, but they did not. Because another adequate remedy, i.e., an appeal, was available, we deny the petition for the writ of mandamus."

Ex parte Jackson, 780 So. 2d at 685. Because GM Canada could have sought permission to appeal the trial court's order under Rule 5, Ala. R. App. P., and did not, we should deny its petition for a writ of mandamus.

III. Conclusion

Because GM Canada completely failed to plead the required elements for mandamus relief, the Court must deny the writ. Moreover, if GM Canada had adequately pleaded the required elements, GM Canada would still not be entitled to the writ. GM Canada has not demonstrated that Poole indisputably failed

to exercise due diligence in discovering its identity. Thus, GM Canada, even under the fictitious-party exception, is not entitled to the writ. I therefore dissent.