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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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**Ex parte Road Gear Truck Equipment, LLC**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Deborah Dement et al.**

**v.**

**Road Gear Truck Equipment, LLC)**

**(Marshall Circuit Court, CV-17-21)**

PER CURIAM.

Road Gear Truck Equipment, LLC ("Road Gear"), a corporation based in Franklin County, petitions this Court for

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a writ of mandamus directing the Marshall Circuit Court to vacate its order denying Road Gear's motion to transfer the underlying action to the Franklin Circuit Court and to enter an order transferring the action. We deny the petition.

### I. Facts

The complaint describes the incident underlying this action:

"On March 22, 2017, Vernon Dement was operating a 1994 Kenworth tractor trailer pulling a log [load] along Hobbs Island Road in Madison County, Alabama. While traveling west along Old Highway 431, Mr. Dement's log truck entered a curve to the left entering Hobbs Island Road and over turned, stopping the forward motion of the truck. The cab guard on the truck was defective and/or unreasonably dangerous in that it allowed the cargo of logs to crash into the passenger compartment, crushing Mr. Dement to death inside the vehicle, and injuring Mrs. Dement who was a passenger in the truck. The cab guard was defective and/or unreasonably dangerous in that it was improperly manufactured and/or designed and lacked proper warnings. The failure of said cab guard was a direct and proximate cause of the death of Mr. Dement and the injuries to Mrs. Dement."

Road Gear manufactures trucking equipment, including "cab guards" designed to prevent passengers in tractor-trailer trucks from being injured by shifting loads. It is undisputed that Road Gear's principal place of business is located in Russellville in Franklin County.

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On August 4, 2017, Deborah Dement filed this action in the Marshall Circuit Court on behalf of herself and in her capacity as the personal representative and administrator of the estate of her deceased husband against Road Gear and fictitiously named defendants. Dement alleged that her injuries and the death of her husband were caused by Road Gear's negligence and wantonness and that Road Gear was liable under the Alabama Extended Manufacturer's Liability Doctrine ("the AEMLD"). Dement alleged in her complaint that venue was proper in Marshall County because she resided in Marshall County and Road Gear "does business in Marshall County."

On September 6, 2017, Road Gear filed a motion for a change of venue in which it contended that venue was not proper in Marshall County because, it said, Road Gear did not conduct business in Marshall County. Road Gear argued that venue was proper in either Madison County, the location of the accident, or in Franklin County, the location of Road Gear's principal place of business, where the subject cab guard was designed and manufactured. In support of its motion, Road

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Gear filed an affidavit from its general manager, Jason Gist, in which he stated, in part:

"2. Road Gear has its principal place of business in Russellville, Franklin County, Alabama. Road Gear's registered agent for service of process is located in Russellville, Franklin County, Alabama.

"3. Road Gear does not have any agents in Marshall County, Alabama.

"4. Road Gear does not have any stores, dealers, salesmen, affiliates or subsidiaries in Marshall County, Alabama.

"5. All activities of Road Gear involving the design, manufacture, and inspection of Road Gear equipment occurs in Russellville, Franklin County, Alabama.

"6. Road Gear sells and distributes its equipment through various truck dealers, trailer dealers and/or aftermarket truck/trailer part dealers, none of which are located in Marshall County, Alabama."

After Dement filed an amended complaint, Road Gear filed a renewed motion for a change of venue in which it reiterated its contention that venue was improper in Marshall County.

On October 19, 2017, Dement filed a response in opposition to Road Gear's motion for a change of venue in which she contended that venue was proper in Marshall County because, she said, Road Gear did business in Marshall County through FleetPride, Inc. ("FleetPride"), which sells truck and

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trailer parts and has a store in Albertville in Marshall County ("the Albertville FleetPride store"). Dement filed three affidavits in support of this contention. The first affidavit, from her attorney's private investigator, Brian Sims, stated, in part:

"1. Prior to August 1, 2017, I called Road Gear Truck Equipment LLC about purchasing a cab guard. I was told by 'Anthony' that I would have to make my purchase from Road Gear's exclusive dealer 'FleetPride'.

"2. On or before August 1, 2017, I went to the FleetPride dealership located at 8941 US Highway 431 North in Albertville, Marshall County, Alabama.

"3. While at the FleetPride location, I asked whether the dealership sold Road Gear Equipment Company, LLC products. I was informed that they did sell Road Gear Equipment Company, LLC products and I was provided with a quote for a Road Gear cab guard size 68x70 with a window and chain rack and tray and mounting kit. ...

"4. The FleetPride dealer also showed me a Road Gear catalog related to the Road Gear products they sold and we used it to select the cab guard model for the quote I received.

5. Subsequently, I purchased a Road Gear cab guard from FleetPride located in Marshall County, Alabama. ..."<sup>1</sup>

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<sup>1</sup>A copy of the check Sims wrote to purchase the cab guard is dated September 22, 2017.

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The two other affidavits Dement submitted in support of her contention that Road Gear does business in Marshall County were from employees of the Albertville FleetPride store.

Bradley Hooper's affidavit stated:

"1. I am an Alabama resident and I have worked for FleetPride Truck and Trailer Parts in Albertville, Alabama for 10 years.

"2. The FleetPride location where I work is an authorized dealer for Road Gear Truck Equipment LLC. FleetPride where I work has sold Road Gear products and been an authorized dealer for Road Gear as long as I have been employed with FleetPride."

FleetPride employee Adam Bridges's affidavit was nearly identical to Hooper's affidavit except that Bridges stated that he had worked at the Albertville FleetPride store for four years.

On October 20, 2017, Road Gear filed a reply to Dement's response to its motion for a change of venue, and Road Gear attached a second affidavit from Gist. In addition to reiterating some observations from his original affidavit, Gist stated:

"3. I have viewed the Road Gear equipment rack that has been made the basis of this lawsuit. I observed that the equipment rack bore serial number 638. A true and correct copy of a photograph of the portion of the equipment rack made the basis of this lawsuit bearing serial number 638 is attached hereto as

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Exhibit 'A'. From review of Road Gear's records, I have determined that the subject equipment rack was sold and delivered to the original purchaser in Russellville, Franklin County, Alabama.

"4. Additionally, all acts with regard to the design, manufacture, assembly, distribution and sale of the equipment rack bearing serial number 638 occurred at Road Gear's facility in Russellville, Franklin County, Alabama.

"5. Road Gear does not have any agents, authorized to act on behalf of or bind Road Gear in any fashion, in Marshall County, Alabama.

"6. Road Gear does sell and distribute its equipment through various vendors, including truck dealers, trailer dealers and/or aftermarket truck/trailer parts dealers. Fleet Pride Truck & Trailer Parts is one such aftermarket parts dealer to whom Road Gear sells its equipment.

"7. With regard to the particular piece of equipment made the basis of this litigation, bearing serial number 638, Road Gear did not sell it to Fleet Pride in Albertville, Alabama.

"8. Fleet Pride in Albertville, Alabama is not set up as a customer in Road Gear's database of customers.

"9. Road Gear does not have any control over which of Fleet Pride's 262 store front locations Fleet Pride sells Road Gear's equipment.

"10. Road Gear has one place of business which is located in Russellville, Franklin County, Alabama. All of Road Gear's business records, design records, production equipment, manufacturing facility and personnel are located in Russellville, Franklin County, Alabama."

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Also on October 20, 2017, the trial court held a hearing on Road Gear's motion for a change of venue. Following the hearing, the trial court entered an order in which it asked for additional briefing on the issue of what constitutes doing business by agent for purposes of determining venue.

On October 30, 2017, Road Gear filed an evidentiary supplement to its motion for a change of venue. The supplement included a copy of the sales order from Sims's purchase of a cab guard, which showed that the sale was made to FleetPride in Irving, Texas, and then shipped to the Albertville FleetPride store. Road Gear also attached a third affidavit from Gist. In his third affidavit, in addition to reiterating some observations made in his previous affidavits, Gist stated:

"2. Road Gear has never authorized anyone, at any store or otherwise, in Marshall County, Alabama to sell products as a dealer on its behalf.

"3. Road Gear has never conferred any authority, by word or act, upon any individual or company in Marshall County, Alabama.

"4. Road Gear does not have a sales team in Marshall County, Alabama, nor a sales team or sales persons that visit Marshall County, Alabama.

"5. Road Gear does have a sales team located exclusively in Franklin County, Alabama.

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"6. Road Gear does not have any employees or personnel who live or work in Marshall County, Alabama.

"7. To the best of my knowledge, Road Gear has never directly marketed to any consumers in Marshall County, Alabama.

"8. All of Road Gear's transactions end at its point of sale. Road Gear ships its products to its purchasers F.O.B. Russellville, Alabama 35653, and/or F.O.B., Origin Freight Prepaid.

".....

"11. Road Gear does not own or lease any facilities, offices, real property, or post office boxes in Marshall County, Alabama and maintains no records, documents, or files in Marshall County, Alabama.

"12. Road Gear does not do business with regularity in Marshall County, Alabama and was not doing business by agent in Marshall County, Alabama when the complaint at issue was filed.

"13. With regard to the piece of equipment purchased by Plaintiff's investigator, Brian Sims, from Fleet Pride Albertville, Alabama, a true and correct copy of the Sales Order Acknowledgment for said order has been attached hereto as 'Exhibit 1'. This Sales Order Acknowledgment is a business record made, kept and maintained in the ordinary course of business by Road Gear. The Sales Order Acknowledgment identifies the purchaser as Fleet Pride, P.O. Box 43369, Irving Texas, 75014-3369, not Fleet Pride Albertville. Further the Sales Order Acknowledgment identifies the date of sale as September 18, 2017. It also identifies the transfer of ownership of the items shipped as 'FOB Freight Collect'.

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"14. Road Gear does not operate a delivery service, but instead utilized a third party carrier for its shipping. Thus, Road Gear did not send a truck to Marshall County with the item purchased by Brian Sims from Fleet Pride Albertville."

On October 31, 2017, Road Gear filed a second evidentiary supplement to its motion for a change of venue to which it attached an affidavit from FleetPride's regional vice president for the Southeast, Harold Johnson, who stated:

"1. I am a Regional Vice President for the Southeast for FleetPride, Inc. In that capacity, I am the person responsible for the regional management for all FleetPride Stores in ... Alabama, ... including the Fleet Pride Store located in Albertville, Marshall County, Alabama.

"2. I am familiar with the products stocked by FleetPride and the stores located in the above-listed states. I am also familiar with the entities from whom FleetPride obtains its products, which entities FleetPride utilizes as stocking vendors, and for which entities FleetPride acts as an authorized dealer. I am also familiar with which entities FleetPride designates as preferred suppliers. To my knowledge, FleetPride does not routinely stock any equipment manufactured by Road Gear, nor does FleetPride routinely sell equipment manufactured by Road Gear. FleetPride is not an authorized dealer for Road Gear, and does not act as an agent for Road Gear in any capacity. Road Gear is not a preferred supplier of FleetPride. Occasionally, FleetPride will purchase products from Road Gear for resale to FleetPride customers.

"3. Generally, sales of Road Gear equipment by FleetPride occur when a customer comes to one of our stores and asks to procure a particular piece of

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equipment. From review of our sales records, FleetPride, Albertville has sold one equipment rack manufactured by Road Gear in the last year. This sale occurred on September 22, 2017.

"4. With regard to Fleet Pride employees Bradley Hooper and Adam Bridges, neither employee had authority to bind FleetPride, Inc. in any type of agency relationship or preferred vendor relationship at any time. Any representation made by Hooper and Bridges as to an agency or authorized dealer type of relationship was not made with the permission, authority, or on behalf of FleetPride."

Also on October 31, 2017, Road Gear filed a motion to strike the affidavits from FleetPride employees Hooper and Bridges. In the motion, Road Gear contended that the employees had been misled by Sims. In support of its motion, Road Gear attached new affidavits from Hooper and Bridges, dated October 30, 2017, in which they appeared to recant much of what they had stated in their earlier affidavits. Hooper's affidavit stated, in part:

"1. I am employed by FleetPride, Inc. in Albertville, Alabama, as a Counter Parts Sales Lead, Senior. I have been so employed for the past ten years. In June or July of 2017, a person I now believe to be Brian Sims came to my place of employment in Albertville, Alabama. Mr. Sims advised that he wanted to purchase a piece of equipment from Fleet Pride. We do not have the equipment he requested in stock in the store, but I issued a quote for the price of the product and Sims left the store.

"2. Thereafter, Mr. Sims returned to FleetPride and asked if I would sign a document because he said he needed it as a 'receipt' to provide additional documentation of the fact that he had purchased the piece of equipment. I did not write the affidavit and did not contribute to the language he wrote in the affidavit, with the exception of providing Mr. Sims with the number of years that I had worked at FleetPride. I did not understand the affidavit to be for the purpose of addressing the business relationship or 'agency' relationship between my employer, FleetPride, and Road Gear Truck Equipment. I am not authorized by my employer, FleetPride, Inc., to bind my employer in any fashion with regard to any type of agency relationship, business relationship or dealership relationship.

". . . .

"4. To my knowledge, FleetPride in Albertville does not regularly sell or stock equipment manufactured by Road Gear. Had I known that Mr. Sims intended to use my affidavit to claim FleetPride was an agent of Road Gear Truck Equipment, I would not have signed the affidavit since I am not authorized to bind FleetPride in that manner.

"5. To the extent that the Affidavit that I originally signed for Mr. Sims states that FleetPride sold him a piece of equipment manufactured by Road Gear such statements are true and correct. Any statement regarding FleetPride being an agent or authorized dealer for Road Gear was made without my understanding as to the meaning and purpose of said statements, and such statements are not my testimony.

"6. I am aware that FleetPride does not stock Road Gear Equipment, either on a regional warehouse level or in the Albertville store. In the past year, I can only recall Fleet Pride Albertville selling one equipment rack manufactured by Road Gear, and that

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was the rack purchased by Mr. Sims in September 2017."

Bridges's affidavit contained substantially similar information.

On December 4, 2017, the trial court entered an order denying Road Gear's motion for a change of venue and its motion to strike the affidavits filed by Dement. The order did not detail the trial court's reasoning.

Road Gear subsequently filed a timely petition for a writ of mandamus challenging the denial of its motion for a change of venue and its motion to stay discovery. On February 20, 2018, this Court stayed all proceedings in the trial court pending the disposition of the mandamus petition. On September 4, 2019, this Court held an oral argument on the issues presented in this petition.

## II. Standard of Review

"The proper method for obtaining review of a denial of a motion for a change of venue in a civil action is to petition for the writ of mandamus." Ex parte Alabama Great Southern R.R., 788 So. 2d 886, 888 (Ala. 2000). "Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner 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) properly invoked jurisdiction of the court." Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995). Moreover, our review is limited to those facts that were before the trial court. Ex parte National Sec. Ins. Co., 727 So. 2d 788, 789 (Ala. 1998).

"The burden of proving improper venue is on the party raising the issue and on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the part of the trial judge." Ex parte Finance America Corp., 507 So. 2d 458, 460 (Ala. 1987). In addition, this Court is bound by the record, and it cannot consider a statement or evidence in a party's brief that was not before the trial court. Ex parte American Res. Ins. Co., 663 So. 2d 932, 936 (Ala. 1995).'

"Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002)."

Ex parte Tyson Chicken, Inc., 72 So. 3d 1, 2 (Ala. 2011).

### III. Analysis

Road Gear contends that the trial court clearly erred in failing to find that venue in Marshall County is improper and in refusing to transfer the case to Franklin County.<sup>2</sup>

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<sup>2</sup>We note that, in oral argument before this Court, Road Gear contended that Franklin County, and not Madison County, was the proper venue for this case.

"The question of proper venue for an action is determined at the commencement of the action.' Ex parte Pratt, 815 So. 2d 532, 534 (Ala. 2001); see also Rule 82(d)(1), Ala. R. Civ. P. 'If venue is not proper at the commencement of an action, then, upon motion of the defendant, the action must be transferred to a court where venue would be proper.' Ex parte Overstreet, 748 So. 2d 194, 196 (Ala. 1999)."

Ex parte Pike Fabrication, Inc., 859 So. 2d 1089, 1091 (Ala. 2002).

Section 6-3-7, Ala. Code 1975, governs venue for actions against corporate defendants. That section provides:

"(a) All civil actions against corporations may be brought in any of the following counties:

"(1) In the county in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of real property that is the subject of the action is situated; or

"(2) In the county of the corporation's principal office in this state; or

"(3) In the county in which the plaintiff resided, or if the plaintiff is an entity other than an individual, where the plaintiff had its principal office in this state, at the time of the accrual of the cause of action, if such corporation does business by agent in the county of the plaintiff's residence; or

"(4) If subdivisions (1), (2), or (3) do not apply, in any county in which the

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corporation was doing business by agent at the time of the accrual of the cause of action."

(Emphasis added.) Under § 6-3-7(a)(3), venue is proper in Marshall County only if, at the commencement of the action (August 4, 2017), Road Gear "d[id] business by agent" in Marshall County.

A. Ex parte Mercedes-Benz U.S. International, Inc.

We note at the outset that, while this petition was pending, this Court decided Ex parte Mercedes-Benz U.S. International, Inc., [Ms. 1170623, Jan. 4, 2019] \_\_\_ So. 3d \_\_\_ (Ala. 2019). In Ex parte Mercedes-Benz, this Court held that Mercedes-Benz U.S. International, Inc. ("MBUSI"), an automobile manufacturer whose principal place of business is located in Tuscaloosa County, was not "doing business by agent" in Jefferson County even though MBUSI purchased essential supplies for its manufacturing business from a supplier located in Jefferson County. The Court concluded that MBUSI "was created to manufacture automobiles," which occurs in Tuscaloosa County, and that "[b]y contracting with its suppliers of automotive parts ... MBUSI is exercising a corporate power that is 'merely a necessary incident' to its

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business of manufacturing automobiles; it is not performing a business function for which it was created." Ex parte Mercedes-Benz, \_\_\_ So. 3d at \_\_\_ (quoting Farmers' & Ginners' Cotton Oil Co. v. Baccus, 207 Ala. 75, 77, 92 So. 4, 5 (1921)). In other words, in Ex parte Mercedes-Benz the Court determined that purchasing supplies for the manufacturing process was not a corporate act that could be used to establish venue for a suit against MBUSI. In reaching that conclusion, the Court expressly overruled Ex parte Scott Bridge Co., 834 So. 2d 79 (Ala. 2002). Because of the possibility that our decision in Ex parte Mercedes-Benz could impact our analysis of the proper venue for this case, we asked the parties for additional briefing with respect to the potential impact of Ex parte Mercedes-Benz on the outcome in this case.

Road Gear argues that the foregoing holding from Ex parte Mercedes-Benz supports its position because

"[t]his Court pointed out that the problem with Scott Bridge is that when applied to MBUSI, its reasoning could create proper venue all over the State of Alabama, as MBUSI buys supplies from over 100 different suppliers in the state. Similarly, in our case, if the sale of goods to a retail consumer by a third party satisfies the requirement of a corporation's 'exercising the function for which the

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corporation was created' such reasoning could create proper venue in any county where Road Gear products can be found, potentially all over the state of Alabama."

Road Gear's supplemental brief, p. 6. Road Gear insists that it "is in the business of manufacturing truck equipment." Id. Although Road Gear concedes that "one of [its] ultimate goals ... is to sell its products," Road Gear observes that it does not sell its products to the general public but, rather, to other businesses. Id. at 6-7. Thus, Road Gear argues, the location where a Road Gear product is ultimately sold to a consumer should be irrelevant to determining venue in a suit against Road Gear involving one of its products. In essence, Road Gear is contending that consumer sales are "incidental" to its corporate purpose, and so those sales should not be viewed as an aspect of Road Gear's "doing business" for purposes of determining venue.

We conclude that the Mercedes Benz Court's analysis with respect to the purchase of supplies in relation to a manufacturer's corporate purpose has no application in this case because, as Dement observes, "this case involves the sale of [Road Gear's] products in [Marshall C]ounty." Dement's supplemental brief, p. 5 (emphasis added). For more than a

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century, this Court has held that the sale of products is typically a function for which a manufacturing business is created. In International Cotton-Seed Oil Co. v. Wheelock, 124 Ala. 367, 370-71, 27 So. 517, 518 (1900), the Court explained:

"Not every act done within the corporate powers will constitute the business meant by the [venue] statute. In Sullivan v. Timber Co., [103 Ala. 371 (1894)], this court, construing this statute, approved the test laid down in Beard v. Publishing Co., 71 Ala. 60 [(1881)], where in defining the acts of business meant by the constitutional requirements of foreign corporations doing business in this State it was said: 'There must be a doing of some of the works or an exercise of some of the functions for which the corporation was created to bring the case within the clause.' In applying that test it may not always be easy to distinguish between acts done in the exercise of corporate functions and those done merely within corporate powers. In the case at bar the chartered purposes of the defendant are not disclosed by the record except as they may be inferred from the business in which it was engaged. From the proof on that subject it appears that the sale of its products is as much an exercise of defendant's corporate functions as is their manufacture. The disposition of products is ordinarily a function necessary to the continued operations of a manufacturing corporation."

(Emphasis added.) The Court quoted this passage with approval in Ex parte Harrington Manufacturing Co., 414 So. 2d 74, 76 (Ala. 1982). See also Ex parte Peabody Galion Co., 497 So. 2d 1126, 1129 (Ala. 1986).

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In short, this Court has repeatedly stated that product sales ordinarily constitute one of the functions for which a manufacturing corporation is created. This Court's holding in Ex parte Mercedes-Benz turned on the distinction between the "incidental" act of purchasing supplies and MBUSI's core purpose of manufacturing automobiles. Therefore, this conclusion of the Mercedes-Benz Court has no bearing on whether Marshall County -- the location of the Albertville FleetPride store where Road Gear products may be purchased -- is a proper venue for this case.

Road Gear also contends that the Mercedes-Benz Court's analysis regarding the sale of Mercedes automobiles to a separate corporation is applicable to Road Gear's sale of truck parts to FleetPride. Specifically, in Ex parte Mercedes-Benz the plaintiff argued that MBUSI did business in Jefferson County because "some of the vehicles it manufacturers are eventually sold to the public at dealerships in Jefferson County." Ex parte Mercedes-Benz, \_\_\_ So. 3d at \_\_\_. The Mercedes-Benz Court rejected this argument because, it said, "[t]here is no evidence indicating that MBUSI is involved in the retail sale of any Mercedes-Benz vehicles."

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Id. Instead, all vehicles were "sold to Mercedes-Benz USA, LLC ('MBUSA'), a separate legal entity with its principal place of business in Atlanta, Georgia. It is MBUSA who controls the distribution or sale of Mercedes-Benz vehicles."

Id.

Road Gear argues that its business model is analogous to MBUSI's because, it says, it "sells its products through intermediaries. Just as MBUSA buys cars from MBUSI, a separate corporation, unrelated to MBUSI, so too do FleetPride ... and other vendors buy products from Road Gear, which are then sold to the public." Road Gear's supplemental brief, p. 2. Road Gear adds that FleetPride "controls where and how products it purchases from Road Gear and other manufacturers are sold and distributed among its 262 stores." Id.

Dement counters that Road Gear's sales are more retail-oriented than Road Gear tries to make them appear when it emphasizes that all sales occur at the point of origin, i.e., Road Gear's manufacturing plant in Franklin County. Dement argues that,

"in Ex parte Mercedes-Benz, Defendant MBUSI sold all of its vehicles in mass to MBUSA, a separate corporate entity. It was MBUSA who decided which retail store received the vehicles and the quantity

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of vehicles. Defendant MBUSI was simply a wholesale manufacturer.

"There is no evidence before this Court that Road Gear mass produces its products. There is no evidence before this Court that Road Gear sells its products in mass to large retail chain stores. Instead, Road Gear targets the market of its after-market dealers by providing them catalogs of its products so that consumers can order specific Road Gear products. Road Gear in turn then ships its product directly to the forum county. Thus, Road Gear 'directs' the arrival of its products to the forum county."

Dement's supplemental brief, pp. 16-17.

We see no need to evaluate whether Road Gear operates as a wholesale manufacturer or as a retail manufacturer because this portion of Ex parte Mercedes-Benz referenced by the parties essentially turned on the fact that MBUSA was not MBUSI's "agent" for venue purposes. See Ex parte Mercedes-Benz, \_\_\_ So. 3d at \_\_\_ (quoting Ex parte Tyson Chicken, Inc., 72 So. 3d 1, 3 (Ala. 2011), for the proposition that "'[t]he language of the statute -- 'does business by agent in the county of plaintiff's residence' -- implies more than the undirected arrival in the county of the plaintiff's residence

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of products produced by the defendant corporation").<sup>3</sup> We address that issue in part B of the analysis.

B. Is FleetPride Road Gear's "Agent" for Business in Marshall County?

Road Gear contends that the evidence submitted to the trial court clearly shows that Road Gear does not do business by agent in Marshall County because: its principal place of business is in Franklin County; all the design, manufacturing, and testing of its products occurs in Franklin County; Road Gear's only sales team is located in Franklin County; Road Gear does not have any employees who live or work in Marshall County; Road Gear has no real property and maintains no records or files in Marshall County; Road Gear does not directly market to consumers in Marshall County; and all Road Gear transactions end at the point of sale in Russellville, including the sale of the cab guard that is the subject of this action.

Dement counters that the evidence shows that Road Gear does business by agent in Marshall County through the Albertville FleetPride store. She argues that FleetPride is

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<sup>3</sup>If MBUSA had been MBUSI's agent, then obviously the fact that MBUSI-manufactured automobiles ended up being sold in Jefferson County would not be "undirected."

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Road Gear's agent because, she says, Road Gear is in the business of selling truck parts that it manufactures and the Albertville FleetPride store is the "means" by which Road Gear sells its products in Marshall County. For support for her argument, Dement relies upon Ex parte Peabody Galion Co., supra, the case that is the genesis of the "means" test of establishing agency for venue purposes.

Peabody Galion concerned a wrongful-death action in which Willie G. Walker, a sanitation worker employed by the City of Tuskegee, was killed when a garbage truck backed over him. The truck was equipped with an "E Z Pack" rear-loading compaction unit that did not have a "back-up" alarm. The compaction unit was manufactured by Peabody Galion Company ("Peabody"), a Delaware corporation that was qualified to do business in Alabama but had no business offices in the State. Peabody sold all of its equipment through distributors, including its codefendant Truck Equipment, the exclusively authorized Peabody dealer in Alabama.

Walker's personal representative filed the action in Macon County. Peabody filed a motion contending that venue in Macon County was improper, and Peabody sought the transfer of

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the case to Jefferson or Montgomery County.<sup>4</sup> Peabody contended that the trial court erred in concluding that venue was proper in Macon County simply because Truck Equipment sold one of Peabody's E Z Packs to the City of Tuskegee. This Court concluded, however, that Truck Equipment was Peabody's agent for doing business in Alabama, and, in so concluding, the Court stated:

"Peabody's lack of control over Truck Equipment's method of conducting its business cannot be used by Peabody as the basis for claiming Truck Equipment is not an agent of Peabody. Clearly, it is through the sales efforts of its exclusively authorized Alabama distributor, Truck Equipment, that Peabody was able to sell an 'E Z Pack' unit to the City of Tuskegee; therefore, Truck Equipment was the means by which Peabody was able to do business in Alabama. Therefore, in the sense here relevant, Truck Equipment was the agent of Peabody."

497 So. 2d at 1129 (final emphasis added).

Dement argues that just as Truck Equipment was the means by which Peabody did business in Macon County, FleetPride is the means by which Road Gear does business in Marshall County.

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<sup>4</sup>Peabody conceded that it did business in Jefferson County through Truck Equipment, whose principal place of business was located in Birmingham, which is where Peabody representatives would meet with Truck Equipment representatives when they would travel to Alabama. Peabody also conceded that it did business in Montgomery County, the address of its registered agent for service of process.

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She contends that, just as in Peabody Galion the fact that Truck Equipment was an independent business did not prevent it from being Peabody's agent for venue purposes, the fact that FleetPride is an independent business not controlled by Road Gear should not prevent FleetPride from being considered Road Gear's agent in Marshall County.

Road Gear responds that Peabody Galion is distinguishable on several grounds. First, Peabody was a foreign corporation whose only means of doing business in Alabama was through its "exclusively authorized Alabama distributor, Truck Equipment." Ex parte Peabody Galion Co., 497 So. 2d at 1129 (emphasis omitted). In contrast, Road Gear is a domestic corporation whose principal place of business is in Franklin County. Second, unlike Peabody, which conceded that Truck Equipment was its only authorized dealer in Alabama, Road Gear did not concede that FleetPride was its authorized dealer or even that it had any authorized dealers. Third, Road Gear argues that the characteristics of the relationship between Peabody and Truck Equipment that the Peabody Galion Court highlighted do not exist between Road Gear and FleetPride. For example, the Peabody Galion Court observed that "Peabody does ... require

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its distributors[, including Truck Equipment,] to maintain a minimum inventory of Peabody parts, to be trained to perform repairs on Peabody equipment, and to engage actively in the sale and distribution of Peabody products within a designated area." 497 So. 2d at 1128.

Unfortunately for Road Gear, the distinctions it notes between this case and the Peabody Galion decision do not warrant ignoring the "means test" enunciated in Peabody Galion. The fact that Peabody was a foreign corporation is irrelevant because Alabama law makes no distinction between foreign and domestic corporations with regard to venue. See Ex parte Fontaine Trailer Co., 854 So. 2d 71, 78 (Ala. 2003) (observing that "'[t]he Alabama Constitution of 1901, as amended by Amendment No. 473, makes venue the same for domestic and foreign corporations and requires that they be treated identically for venue purposes'" (quoting Ex parte Allen, 655 So. 2d 962, 963 (Ala. 1995))). Gist's and Johnson's testimony that FleetPride was not an authorized dealer of Road Gear products was disputed by the original affidavits of FleetPride employees Hooper and Bridges.

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As for the characteristics of the relationship between Peabody and Truck Equipment, the Peabody Galion Court listed those for support of the fact that Truck Equipment was the means by which Peabody did business in Alabama; the Court never indicated that those same characteristics were required for any entity to be the means by which a corporation does business in a particular county. Even though some of those characteristics evinced a right of control by Peabody over Truck Equipment, this Court has subsequently noted:

"Peabody tells us that for the purpose of venue, the element of control, or lack thereof, of the principal over its agent is not determinative. ... If the entity is the 'means' by which the principal is able to do business in a particular county, then the entity is the 'agent' of the principal for venue purposes."

Ex parte Charter Retreat Hosp., Inc., 538 So. 2d 787, 789-90 (Ala. 1989). In other words, as Peabody Galion itself explained:

"Whether an entity is an agent of a ... corporation, as contemplated by the Constitution and the [venue] statute, is not tested by the standard for determining agency in the context of a principal/agent relationship with the attendant burden of the doctrine of respondeat superior (e.g., civil and criminal liability imputed to the principal for the wrongful acts of the agent committed within the scope of the agent's employment)."

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497 So. 2d at 1128-29.

Having concluded that Peabody Galion is applicable, the only remaining question is whether the Albertville FleetPride store is the means by which Road Gear does business in Marshall County? See Charter Retreat Hosp., 538 So. 2d at 790 ("If the entity is the 'means' by which the principal is able to do business in a particular county, then the entity is the 'agent' of the principal for venue purposes."). That question must be answered in the affirmative, given that the evidence reveals that customers are able to purchase Road Gear truck parts at the Albertville FleetPride store by ordering them through a Road Gear catalog. Accordingly, for purposes of determining venue, FleetPride is Road Gear's "agent" for doing business in Marshall County.

C. Does Road Gear Regularly Do Business in Marshall County?

Road Gear also contends that, even if FleetPride is considered Road Gear's agent for venue purposes, venue still would not be proper in Marshall County because, it says, Road Gear has demonstrated that it did not regularly do business there at the time Dement filed her action.

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"To establish that a corporation does business in a particular county for purposes of venue, past isolated transactions are inconclusive. Ex parte Harrington Mfg. Co., 414 So. 2d 74 (Ala. 1982). A corporation does business in a county for purposes of § 6-3-7 if it performs with some regularity in that county some of the business functions for which the corporation was created."

Ex parte Elliott, 80 So. 3d 908, 912 (Ala. 2011).

Gist testified that "Road Gear does not do business with regularity in Marshall County"; that "Road Gear does not have any stores, dealers, salesmen, affiliates or subsidiaries in Marshall County"; that "Road Gear does not have any agents in Marshall County"; and that "[a]ll of Road Gear's transactions end at its point of sale," which is its principal place of business in Russellville. Also, according to Johnson, the only Road Gear cab guard the Albertville FleetPride store sold in the year Dement filed her action was the one ordered by Sims. Road Gear argues that this evidence demonstrates that Road Gear did not regularly do business in Marshall County at the time the suit was filed.

The problem for Road Gear is that Dement countered Road Gear's evidence with the original affidavits of FleetPride employees Hooper and Bridges. As Dement notes, those affidavits "established that FleetPride in Albertville has

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been selling Road Gear products for as much as 10 years." Dement's respondent brief, p. 18. Furthermore, as Dement also observes, Johnson's testimony about the Albertville FleetPride store's sales of Road Gear equipment was "carefully crafted and limited" to avoid any statement about the "many other products" Road Gear sells. Id. at 18, 19. She observes that "[n]one of [Road Gear's] supporting evidence or affidavits attempt to address what other Road Gear products have been sold in the last ten years by the FleetPride location in Marshall County." Id. at 19.

It is true that Hooper's and Bridges's subsequent affidavits appear to undermine their earlier testimony, but that simply raises an issue of fact; it does not settle that Road Gear did not regularly do business in Marshall County. Likewise, the number of cab guards the Albertville FleetPride store sold does not dispositively speak to the regularity of Road Gear's overall business in Marshall County. "The burden of proof on factual issues in a venue dispute is upon the party or parties challenging venue in the forum." Ex parte Wiginton, 743 So. 2d 1071, 1074 (Ala. 1999). Thus, it was Road Gear's responsibility to establish that it did not

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regularly do business in Marshall County by countering Dement's evidence with specific evidence. Road Gear could have introduced its own sales records or at the least had Johnson testify with respect to FleetPride's sales of other Road Gear equipment. Road Gear could have taken depositions of key witnesses.<sup>5</sup> Instead, Road Gear's evidence, taken together with Dement's evidence, leaves open the possibility that Road Gear regularly did business in Marshall County at the time the suit was filed. As we observed in setting out the standard of review: "The burden of proving improper venue is on the party raising the issue and on review of an order transferring or refusing to transfer, a writ of mandamus will not be granted unless there is a clear showing of error on the part of the trial judge." Ex parte Tyson Chicken, Inc., 72 So. 3d at 2

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<sup>5</sup>Parties are entitled to conduct discovery related to the issue of venue. See, e.g., Ex parte Michelin N. America, Inc., 56 So. 3d 604, 612 (Ala. 2010) (quoting with approval the observation in 14D Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 3829 (2007), that "'[o]n occasion a party who has raised a proper objection to venue will make use of discovery before pressing for a decision on the venue objection'"). Accordingly, depositions of the individuals who provided affidavits could have been taken, and the conflicting facts and inferences perhaps could have been resolved, or at least the deposed individuals would have been subject to cross-examination.

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(internal quotation marks omitted; emphasis added). Road Gear failed to establish that the trial judge committed a clear error with respect to the issue of the regularity of Road Gear's business in Marshall County.

#### IV. Conclusion

Based on the foregoing, we conclude, based on the materials before us, that FleetPride was Road Gear's "agent" in Marshall County for purposes of determining venue and that Road Gear failed to show that it did not regularly do business in Marshall County at the time the suit was filed. Therefore, under § 6-3-7(a)(3), Ala. Code 1975, venue is proper in Marshall County, and the trial court did not err in denying Road Gear's motion to transfer the action to Franklin County. Accordingly, we deny the petition for a writ of mandamus.

PETITION DENIED.

Stewart, J., concurs.

Wise, Bryan, Mendheim, and Mitchell, JJ., concur in the result.

Parker, C.J., and Bolin and Sellers, JJ., dissent.

Shaw, J., recuses himself.