rel: February 7, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180936

Ex parte George Cowgill and Elise Yarbrough

PETITION FOR WRIT OF MANDAMUS

(In re: Paul Thomas

v.

Black Mark 2, LLC, d/b/a Black Market Bar & Grill; George Cowgill; and Elise Yarbrough)

(Jefferson Circuit Court, CV-13-45)

SHAW, Justice.

George Cowgill and Elise Yarbrough (hereinafter collectively referred to as "the petitioners"), two of the

defendants below, petition this Court for a writ of mandamus directing the Jefferson Circuit Court to grant their motion seeking a partial summary judgment on the ground that the plaintiff's substitution of them for fictitiously named defendants was made after the expiration of the applicable two-year statute of limitations. See § 6-2-38(l), Ala. Code 1975. We grant the petition and issue the writ.

Facts

The basic underlying facts are largely undisputed. The petitioners are the owners of Black Mark 2, LLC ("Black Mark"), a limited-liability company doing business as Black Market Bar & Grill ("Black Market"), a bar in Birmingham.[1] They are also the managers of Black Market.

In the late evening of December 31, 2012, and into the early morning of January 1, 2013, Paul Thomas, the plaintiff

[1]The initial complaint identified the corporate defendant merely as "Black Market Bar & Grill." Subsequent amended complaints identified two corporate defendants doing business as Black Market Bar & Grill: Black Market 2, LLC, and Black Mark 2, LLC. In a "Statement of Undisputed Facts," the petitioners appear to concede that the appropriate corporate defendant is Black Mark 2, LLC, d/b/a Black Market Bar & Grill. That is the name we use throughout the opinion for the corporate defendant, even though it was not identified as such initially.

below, was at Black Market with his friend, Brian Pallante.[2] An altercation ensued between Pallante and Dalton Teal, another patron, resulting in Black Market staff removing Teal from the building by way of a rear door. After Teal had left the Black Market building but while he still remained on its outdoor premises, an unidentified female apparently returned to Teal a handgun he had dropped inside Black Market; this exchange occurred in the presence of the Black Market employee who oversaw Teal's ejectment.[3] Following the altercation, Pallante, accompanied by Thomas and a female friend, left Black Market by the front entrance. Teal was waiting for friends on a nearby bench, where Pallante and Thomas again encountered him. Within approximately five minutes, a second confrontation ensued between Teal and Pallante during which Teal fired his gun at Pallante but struck and injured Thomas.

---

[2]Pallante, who apparently legally changed his last name subsequent to the relevant events in this case, is also referred to in the materials before us as "Brian Felton," his last name at the time.

[3]Despite the fact that a posted policy prohibits the carrying of firearms on Black Market's premises, the woman who returned the firearm to Teal was, according to Thomas's second amended complaint, a Black Market employee; however, that fact is apparently disputed.

Procedural History

As a result of the above-described events, Thomas initially filed, on January 16, 2013, an emergency petition seeking the permission of the Jefferson Circuit Court to conduct pre-suit discovery against Black Mark and Teal (case no. CV-13-45). The petition sought production and preservation of information including an incident/offense report allegedly completed by the Birmingham Police Department in relation to the shooting,[4] the transcript of a resulting telephone call placed to emergency 9-1-1, any available surveillance video, and information related to any potentially applicable insurance coverage.

Thomas later filed, on May 30, 2013, a complaint against Black Mark, Teal, and 10 fictitiously named defendants (case no. CV-13-902154), which was subsequently consolidated with Thomas's previous emergency petition and with a separate action that Teal had filed against Pallante (case no. CV-14-905269). Thomas's complaint included claims made pursuant to Alabama's Dram Shop Act[5] against Black Mark and the

[4]The materials before us suggest that, ultimately, no criminal charges resulted from the incident.

[5]See § 6-5-71, Ala. Code 1975.

fictitiously named defendants and claims seeking damages for assault and battery, negligence, and wantonness/willfulness against Teal. On December 31, 2014, Thomas filed a first amended complaint substituting Black Mark for the first fictitiously named defendant included in his original complaint, i.e., for "that person, firm, corporation or entity who owned, operated and/or controlled ... Black Market." On June 29, 2018, more than five years after the shooting and the filing of his original complaint and more than three years after the applicable limitations period had expired, Thomas filed a second amended complaint that, among other changes, identified the petitioners as Black Market's owners and purported to substitute them for fictitiously named defendants in prior filings (specifically fictitiously named defendants 5, 6, and 7 in Thomas's prior complaints) and to add a negligence count (count II), a wantonness/willfulness count (count III), and a negligent-supervision count (count VI) against them and Black Mark based on the return of the firearm to Teal.

Subsequently, Black Mark and the petitioners jointly filed a motion seeking a partial summary judgment in their

favor as to counts II, III, and VI of Thomas's second amended complaint. More specifically for our purposes, the petitioners contended that Thomas's claims failed as a matter of law for various reasons and that the newly added counts against them did not "relate back" to the filing of Thomas's original complaint in 2013 and were barred by the statute of limitations and/or the doctrine of laches. See Rule 15(c), Ala. R. Civ. P. According to the petitioners, not only were the newly added claims distinct from Thomas's original Dram Shop claim against Black Mark, but, they asserted, Thomas was also aware of the petitioners' identity by, at the latest, October 2013, when Black Mark responded to interrogatories propounded by Thomas. The petitioners further noted that Thomas possessed ample opportunity before June 2018 to have sufficiently investigated all relevant factual avenues -- including Black Market's management structure -- so as to timely amend his complaint and that his failure to do so demonstrated a lack of due diligence.

As support for their claims, the petitioners pointed to Thomas's first interrogatories to Black Mark, which, in addition to other information, sought the following:

> "2. ... [T]he name, address and job position of the individual(s) at ... Black Market ... responsible for hiring, terminating, and supervising bartenders, servers, staff, and/or employees as of December 31, 2012.
>
> "3. ... [T]he name, address, birth date and job position or job duty of each and every employee at ... Black Market on December 31, 2012 to January 1, 2013 between the hours of 4 p.m. to 2 a.m., indicating which employees are still employed. ...
>
> "....
>
> "7. ... [T]he name, address and job position of the individual(s) responsible for training bartenders at the subject Black Market as of December 31, 2012.
>
> "8. ... [T]he name, address and job position of the individual(s) responsible for training employees, other than bartenders, who were involved with the distribution of alcohol, if different from above at ... Black Market on December 31, 2012.
>
> "....
>
> "20. ... [W]hether it was policy and procedure at the subject Black Market on December 31, 2012 and January 1, 2013 for a manager to be on duty at all times. If your response is in the affirmative, identify the manager(s) on duty on said occasion."

The exhibits to the motion for a partial summary judgment included Black Mark's responses to the foregoing interrogatories, which were filed on October 16, 2013, and, as to the foregoing requests, supplied the following responsive information:

> "2. Subject to our attorney's objection to the terms 'responsible for' and 'supervising,' the answer is George Cowgill, Rebecca Keaton,[6] and James Sharp, all of whom still work at the Bar and can be contacted through our attorney.
>
> "3. Objection. Birthdates are private and confidential information, personal to nonparties to this action. ... All were old enough to serve alcohol at the time: the three above, plus Andrea Nunn, Brendan Owens, Dan Chattam, Dillon Campbell, Lauren Bryant, Wes Greg. All of them still work at the Bar and can be contacted through our attorney.
>
> "....
>
> "7. Subject to our attorney's objection to the phrase 'Responsible for training,' the following worked with the bartenders on duty that night: George [Cowgill] and Rebecca [Keaton].
>
> "8. Subject to our attorney's objection to the phrases 'Responsible for training,' and 'involved with the distribution of alcohol,' the following fit that description that evening: Rebecca Keaton and Elise [Yarbrough].
>
> "....
>
> "20. Subject to our attorney's objection to the phrase 'policy and procedure,' and 'on duty,' yes, and it was George [Cowgill] and Rebecca [Keaton]."

(Emphasis added.)

In his opposition to the motion for a partial summary judgment, Thomas apparently conceded that his

---

[6]Keaton is identified elsewhere in the materials before us as Black Market's "front of the house manager."

willfulness/wantonness claim against Black Mark and the petitioners (count III) was due to be dismissed.[7] As to the petitioners, Thomas also conceded that he was, prior to filing his second amended complaint, aware of their identities and their supervisory roles but not their particular duties at Black Market at the time of the events preceding the shooting.

In a post-hearing filing, the petitioners, in response to an apparent claim by Thomas that any undue delay was the result of an alleged lack of cooperation by the petitioners during the discovery process, explained that Thomas did not take any depositions within two years of filing his original complaint and, in fact, did not notice the deposition of any individual connected with Black Market until May 1, 2018 -- over five years after the shooting and approximately four and one-half years after the filing of Black Mark's initial discovery responses identifying the petitioners. As further purported evidence of Thomas's lack of diligence, they noted that the trial court's case-action summary did not indicate any instance in which Thomas had requested the intervention of

[7]That count was, in fact, ultimately dismissed.

the trial court in compelling discovery of any kind from the petitioners or Black Mark.

Thereafter, the trial court, among other rulings, concluded that Thomas's new claims and the parties added by the second amended complaint related back to timely identified fictitiously named parties and to the timely made claims in his original complaint. Although recognizing that Thomas knew the petitioners' identity before the expiration of the limitations period, the trial court on July 11, 2019, denied the petitioners' motion for a summary judgment as to counts II and VI, based on the following:

> "[The petitioners] repeatedly emphasize that Thomas knew the identities of [the petitioners] well before the date of the 2nd Amended Complaint [on] June 29, 2018. ...
>
> "[The petitioners] heavily rely on Ex parte Nicholson Mfg. Ltd., 182 So. 3d 510 (Ala. 2015), and Ex parte American Sweeping, Inc., [272] So. 3d [640] (Ala. 2018). Each holding emphasizes knowing the identity of a potential defendant, and the time frame when those plaintiffs knew, or should have known, a claim lie [sic] against that person or identity. The cases also focus on just how diligent those plaintiffs were in discovering the identity of the parties sought to be added.
>
> "The Court is more persuaded by Thomas's reliance on Ex parte Bowman, 938 So. 2d 1152 (Ala. 2008) and his arguments. The Court agrees that, just as was significant in Bowman, there is a

distinction to be made between knowing the identity of a potential defendant (whether at the outset of litigation or during the course of), versus knowing the role, or responsibilities, or other case specific circumstances of that potential defendant. In Bowman, [the plaintiff] knew early on that Bowman was in charge of quality control of the subject machine, but did not learn until much later that Bowman actively participated in deciding what machine to acquire, installing it and then modifying it. The subsequent, amended claim there was brought after learning Bowman removed or failed to install a safety device on the machine. Our Supreme Court held the amended complaint in Bowman related back and was proper.

"Here, no doubt Thomas'[s] counsel early on examined corporate filings in the Alabama Secretary of State records and learned of [the petitioners'] participation in ... Black Market ... but refrained from suing them individually, alleging only a dram shop claim against the entity. But it was only after four depositions were taken on June 4, 2018, [that] Thomas learn[ed] more specific facts, including that [the petitioners] weren't merely passive owners of ... Black Market ... they were managers and supervisors, responsible for hiring, training and supervision of staff. And, significantly, both were present in [Black Market] that ... night.

"[The petitioners'] deposition testimony, together with that of [Black Market's] security personnel ... clearly identif[ies] facts sufficient to allege negligence and negligent supervision. From the outset, Thomas's Complaint, First Amended Complaint, and Second Amended Complaint each named fictitious parties responsible for the operation and control of Black Market as well as for the supervision and training of Black Market's employees, particularly including its security personnel.

> "The Court rejects [the] contention the doctrine of laches should be applied here. It is correct that these depositions were taken and other discovery commenced quite some time after suit was filed. But is also correct that, given the history of this action, any blame for delay and such does not rest solely with Thomas. Plaintiff's counsel has been diligent in not only pursuing vigorous discovery, but also in abiding by his professional responsibilities and ethics to not file frivolous claims. The Court notes this action commenced not with a complaint with numerous claims, but with an Ala. R. Civ. Pro. 27 Petition for Pre-Suit Discovery. ... Finally, in this regard, the 2nd Amended Complaint was timely filed under the then controlling Scheduling Order, just twenty-five days after four very significant depositions were taken."

(Capitalization omitted.)

The petition for the writ of mandamus followed; this Court ordered answers and briefs.

Standard of Review

> "This Court will issue a writ of mandamus when the petitioner shows: '"(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 General Motors of Canada Ltd., 144 So. 3d 236, 238 (Ala. 2013) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001)). This Court generally will not review by a writ of mandamus a trial court's denial of a motion for a summary judgment unless one of a limited number of exceptions apply. The case before us satisfies one such exception:

> "'"... 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)...."'
>
> "Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424, 427–28 (Ala. 2011) (quoting Ex parte Jackson, 780 So. 2d 681, 684 (Ala. 2000))."

Ex parte Nicholson Mfg. Ltd., 182 So. 3d 510, 512–13 (Ala. 2015).

Discussion

The substantive question presented by the petition is whether the fictitious-party substitutions and addition of claims in Thomas's second amended complaint, which was indisputably filed after the applicable statute of limitations

had expired,[8] relate back to the filing of his original complaint.

> "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 the party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.'
>
> "This rule permits a party who is 'ignorant of the name of an opposing party' to identify that party by a fictitious name. Once the true name of the opposing party is discovered, the party may amend the pleadings to substitute that true name. Rule 15(c)(4), Ala. R. Civ. P., provides that such an amendment shall 'relate[] 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).'

[8]There appears to be no dispute that a two-year statute of limitations applies to Thomas's claims.

"Ex parte General Motors [of Canada Ltd.], 144 So. 3d at [236] at 239 [(Ala. 2013)].

> "'"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)...."'

"Ex parte Mobile Infirmary [Ass'n], 74 So. 3d [424] at 429 [(Ala. 2011)] (quoting Crawford v. Sundback, 678 So. 2d 1057, 1060 (Ala. 1996) (emphasis added)).

"In addition to being ignorant of the fictitiously named party's identity, the plaintiff has a duty to exercise 'due diligence' in identifying such a defendant. Ex parte Mobile Infirmary, 74 So. 3d at 429; Crowl v. Kayo Oil Co., 848 So. 2d 930, 940 (Ala. 2002). It is incumbent upon the plaintiff to exercise due diligence both before and after the filing of the complaint. Ex parte Ismail, 78 So. 3d 399 (Ala. 2011). Only if the plaintiff has acted with due diligence in discovering the true identity of a fictitiously named defendant will an amendment substituting such a party relate back to the filing of the original complaint. Ex parte Mobile Infirmary, 74 So. 3d at 429. ...

> "'[A]n 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....'
>
> "74 So. 3d at 429 (quoting Ex parte Snow, 764 So. 2d 531, 537 (Ala. 1999) (emphasis added))."

Ex parte Nicholson Mfg., 182 So. 3d at 513-14.

The petitioners contend that the amendment to the complaint, here, does not relate back because, they argue, Thomas failed to exercise due diligence to timely substitute the petitioners for fictitiously named defendants included in his original and first amended complaints. The petitioners argue that Thomas did not act with due diligence in attempting to discover their identity and to substitute them before the expiration of the statute of limitations. More specifically, they assert that Thomas, as of the filing of the original discovery responses in October 2013, possessed sufficient information about their respective responsibilities at Black Market to justify their substitution for the fictitiously named defendants but that he failed to engage in any additional discovery aimed at obtaining sufficient follow-up information to justify their timely substitution for five years.

Thomas, however, although admitting that he learned during pretrial discovery that the petitioners were the purported "managers on duty" at Black Market at the time of the shooting, nonetheless disputes that, despite allegedly exercising the requisite due diligence, he possessed, before follow-up depositions in June 2018, sufficient information explaining the petitioners' respective training and supervisory responsibilities, generally, and their specific duties on the evening of the shooting.[9] He maintains that "[k]nowledge of a party's name and job title is not akin to knowledge of a party's involvement in the claim."

> "In Ex parte Mobile Infirmary [Ass'n, 74 So. 3d 424 (Ala. 2011),] the plaintiff filed a wrongful-death action against an entity he identified in the complaint as Infirmary Health Systems, Inc., which had allegedly treated the decedent. 74 So. 3d at 427. After the statutory limitations period had run, the plaintiff attempted to substitute Mobile Infirmary Association ('Mobile Infirmary') for a fictitiously named defendant. Id. In deciding whether the substitution related back to the filing of the original complaint, we stated:

[9]The allegedly insufficient information appears solely related to, as described by Thomas, "duties and obligations [the petitioners] had to their patrons ... to enforce voluntarily undertaken policies regarding gun possession, incident reporting and reasonable training and supervision."

> "'The evidence attached to Mobile Infirmary's summary-judgment motion indicates that [the plaintiff] 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 [the plaintiff] 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 [Mobile Infirmary] 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,
>
> > "'"[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."

> "'Clay v. Walden Joint Venture, 611 So. 2d 254, 256 (Ala. 1992).'
>
> "74 So. 3d at 429-30 (emphasis added). See 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 her pathologist when the pathologist was identified by name in the plaintiff's medical records)."

Ex parte Nicholson Mfg., 182 So. 3d at 514-15.

As support for their request for a partial summary judgment, the petitioners demonstrated that Black Mark had provided Thomas, within five months of the filing of his original complaint and well before the expiration of the statute of limitations, information identifying them as the persons responsible for training and supervising Black Market employees. Further, the allegations included in Thomas's original complaint establish that he was aware, at the time that original pleading was filed, of the circumstances surrounding Teal's possession of a firearm on the premises of Black Market. As we did in Ex parte Nicholson Manufacturing, we conclude that "[a] reasonably diligent plaintiff" possessing information identifying the owners of Black Market, the managers on duty at the time of the incident, the persons "[r]esponsible for training" Black Market's employees and/or

"involved with the distribution of alcohol," would have been able, before the expiration of the statute of limitations, to ascertain the identity of the proper named defendants.

Thomas, however, citing this Court's decisions in Ex parte Bowman, 986 So. 2d 1152 (Ala. 2007), and Pearson v. Brooks, 883 So. 2d 185, 186 (Ala. 2003), disputes that mere awareness of a party's name or identity equates to knowledge of a duty on that person's part. In Ex parte Bowman, we explained:

> "Bowman argues that Pearson v. Brooks, 883 So. 2d 185 (Ala. 2003), supports his position that the [plaintiffs'] amended complaint does not relate back to the ... original complaint. In Pearson, the plaintiff sought damages for an injury she suffered after becoming caught in a 'neck-skinning' machine in the chicken-processing plant where she worked. She alleged that the guarding mechanism was not properly in place on the machine, and she filed a complaint naming as defendants several co-employees. Two of the co-employees, Glenn Brooks and Michael Black, were not named in the original complaint but were added as defendants approximately nine months after the statute of limitations had expired. The plaintiff claimed that while she knew of Brooks's and Black's names at the time she filed her complaint, she was not aware of any facts to support a claim against them. However, Brooks and Black presented evidence indicating that she also knew their titles and job duties when she filed her complaint. Brooks and Black argued that the plaintiff's attempt to relate the claims against them back to the filing of the original complaint

pursuant to Rule 9(h), Ala. R. Civ. P., must fail. This Court stated:

> "'Based on the record before us, we conclude that [the plaintiff] could not have reasonably been ignorant of the identities of Brooks and Black. At her deposition, [the plaintiff] testified that she had known for over three or four years that Brooks was the superintendent of the sanitation department and that Brooks had personally trained her to clean the machines.
>
> "'"...."
>
> "'... [The plaintiff] also testified that Black was her immediate supervisor in the sanitation department and that he instructed the employees regarding the safety procedures in the plant.
>
> "'"...."
>
> "'<u>It is apparent from [the plaintiff's] testimony that she knew Brooks's and Black's identities as well as their duties regarding plant safety and the safe operation and cleaning of the plant's machinery. These two men were also her department supervisor and her immediate supervisor. It would be unreasonable to believe that [the plaintiff] was ignorant of Brooks's and Black's identities as required to proceed under the fictitious-party practice allowed by Rule 9(h)</u>.'

"883 So. 2d at 187-88. '[T]o gain the protection of Rule 9(h), [the plaintiff] must show that she was ignorant of the existence of a relationship between

> her and her supervisors that might give rise to a duty on their part.' Pearson, 883 So. 2d at 189."

986 So. 2d at 1156-57 (emphasis added).

Subsequent to retaining counsel within two weeks of the shooting, Thomas obtained leave from the trial court to engage in pre-suit discovery pursuant to Rule 27(A)(1), Ala. R. Civ. P. Even assuming that Thomas lacked adequate opportunity to discover the petitioners' identity at the time he filed his original complaint, it is undisputed that approximately five months later, in October 2013, the actual names of the petitioners, who were later added as named defendants, were disclosed to Thomas in Black Mark's original discovery responses. Specifically, the petitioners were identified as the persons responsible for hiring, training, and/or supervising Black Market employees on the policies that were allegedly violated and purportedly led to the shooting. See Ex parte Ismail, 78 So. 3d 399, 406 (Ala. 2011) ("'[I]t is incumbent upon the plaintiff to exercise due diligence to determine the true identity of defendants both before and after filing the original complaint. It is also incumbent upon the plaintiff to "substitute the named defendant for the fictitious party within a reasonable time after determining

the defendant's true identity," and the same policy considerations which require a plaintiff to amend his complaint within a reasonable time after learning the defendant's true identity also require the plaintiff to proceed in a reasonably diligent manner in determining the true identity of the defendant.'" (quoting Ex parte Hensel Phelps Constr. Co., 7 So. 3d 999, 1003 (Ala. 2008) (some emphasis omitted))). Thus, it is apparent that by October 2013 Thomas was well aware of the petitioners' identity and possessed information as to their duties regarding training and supervision of Black Market employees. Compare Ex parte Bowman, 986 So. 2d at 1157 (explaining that knowledge "that Bowman was in charge of quality control is not related to the [plaintiffs' negligence-in-the-workplace] claim" because "[t]here is no logical and necessary linkage between knowledge that an individual had responsibility for the quality of the product produced and knowledge that such individual was a participant in acquiring, installing, and modifying the machine that makes the product" (emphasis added)). Nonetheless, it does not appear that Thomas undertook further efforts to determine who specifically trained and supervised

Black Market's employees in any way material to his claims. As a result, Thomas's complaint was not formally amended to add the petitioners until almost five years later in June 2018.

Thomas fails to adequately explain the undue delay of approximately five years between receiving initial identifying information and seeking to depose persons related to Black Market who might have further delineated the petitioners' precise management roles, their purported knowledge of the gun in Teal's possession on Black Market premises, or the managerial process of investigating and documenting incidents. See Ex parte Bowman, 986 So. 2d at 1158 ("This Court has recognized that delay in amending a complaint to substitute a named party for a fictitiously named party once information is available can defeat the availability of the doctrine of relation back."). See also Denney v. Serio, 446 So. 2d 7, 11 (Ala. 1984) (noting that "this Court has refused to apply the relation-back principle to inordinate delays from the time of knowledge of the fictitious party's true identity until actual substitution of the fictitious party's true name"); Walden v. Mineral Equip. Co., 406 So. 2d 385 (Ala. 1981)(three-year

delay too long); Shirley v. Getty Oil Co., 367 So. 2d 1388 (Ala. 1979) (holding that a 17-month delay was too long where the party sought to be added would be prejudiced thereby); and Ex parte Tidmore, 418 So. 2d 866 (Ala. 1982) (two-year delay in substituting proper defendant was too long where the party sought to be added would be prejudiced thereby). Indeed, as the petitioners note, Thomas cites nothing more than the routine challenges inherent in all litigation -- "complex" or otherwise -- including, among others, the scheduling difficulties associated with accommodating numerous counsel, Black Mark's retention of replacement counsel, determining Black Market's correct legal name, and the delays in gathering responsive documentary evidence. To the extent that his counsel's medical emergency in 2017, when counsel, as reported to the trial court, underwent surgery to repair "multiple fractures, as well as tendon and ligament damage, to the left ankle and foot," impacted the schedule, Thomas fails to indicate why the necessary depositions could not have been taken in May 2016, when Thomas, Teal, and Pallante were deposed, or, in fact, at any point during the three-year period following the filing of his original complaint and

prior to counsel's unanticipated injury.[10] Certainly, nothing before us suggests that Thomas even attempted to schedule depositions earlier and was denied that opportunity or that he ever resorted to seeking the intervention of the trial court either in scheduling necessary testimony or in obtaining further discovery responses. Instead, the petitioners allege, and Thomas does not refute, that from the time he filed his original complaint he noticed no deposition until early 2018. The case-action summary included with Thomas's answer further suggests that he propounded no further discovery requests to Black Mark following his initial 2013 filing despite his presumed awareness of the impending expiration of the limitations period. Finally, contrary to Thomas's claims to this Court, both Black Mark and the petitioners cited, in their summary-judgment filings below, "the obvious prejudice that comes with so substantial of an amendment to a complaint"

[10]We further disagree, based on our review of the contents, with Thomas's argument that the 2018 depositions elicited any new or different material information than that previously disclosed to Thomas in Black Mark's earlier discovery responses. Interestingly, Rebecca Keaton, who was, during Yarbrough's 2018 deposition, described as the manager responsible for monthly training and testing of Black Market's employees, was never added as a defendant.

in litigation that has been pending in excess of five years. Although Thomas contends that his second amended complaint was filed within the "amendment deadline" established by the trial court's scheduling order, he cites nothing establishing that the scheduling order trumps the operation of Rule 9, Ala. R. Civ. P. See Prattville Mem'l Chapel v. Parker, 10 So. 3d 546, 560 (Ala. 2008) ("'Rule 28(a)(10), Ala. R. App. P., requires that arguments in an appellant's brief contain "citations to the cases, statutes, other authorities, and parts of the record relied on." Further, "it is well settled that a failure to comply with the requirements of Rule 28(a)(10) requiring citation of authority in support of the arguments presented provides this Court with a basis for disregarding those arguments."'" (quoting Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007))).

Here, Thomas was not, for the purposes of Rule 9, ignorant of the petitioners' roles giving rise to a duty on the occasion of the shooting. In fact, nothing prevented Thomas's identification of the petitioners as defendants prior to the filing of his second amended complaint. See Ex parte Tate & Lyle Sucralose, Inc., 81 So. 3d 1217, 1221 (Ala. 2011)

(noting that, "[a]s evidence of due diligence, this Court looks to, among other things, whether the plaintiff has conducted formal or informal discovery" but that "[t]his Court has found a lack of due diligence even when a plaintiff has conducted both formal and informal discovery"). Although Thomas disputes knowledge of the petitioners' precise duties, it is undisputed that he possessed sufficient information from which he should have known or was at least placed on notice of a factual basis for his eventual claims against them. See Jones v. Resorcon, Inc., 604 So. 2d 370, 372-73 (Ala. 1992) ("In order for the substitution to relate back, the plaintiff must show that he was ignorant of the true identity of the defendant and that he used due diligence in attempting to discover it."). Moreover, "[b]ecause [he] knew of [the petitioners'] involvement in [training and supervision of Black Market employees], it was incumbent upon [Thomas], before the statute of limitations on [his] claim expired, to investigate and evaluate the claim to determine who was responsible for [his injuries]." Weber v. Freeman, 3 So. 3d 825, 833 (Ala. 2008). We therefore conclude that the undisputed evidence demonstrates that Thomas failed to

exercise due diligence in identifying the petitioners as proper party defendants.[11] The trial court thus erred in denying the petitioners' motion seeking a partial summary judgment in their favor on statute-of-limitations grounds. Therefore, we grant the petition and issue the writ of mandamus directing the Jefferson Circuit Court to vacate its July 11, 2019, order denying the petitioners' motion and to enter a partial summary judgment in favor of the petitioners on count II and count VI of Thomas's second amended complaint.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

[11]Because we find determinative Thomas's lack of due diligence in sufficiently identifying and substituting the petitioners, we pretermit discussion of any argument that Thomas's second amended complaint also added new or different claims than those asserted in his original complaint.