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# **SUPREME COURT OF ALABAMA**

**OCTOBER TERM, 2020-2021**

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**Ex parte Dylan McCoy, Stephen Scott, and James Henderson**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: James B. Griffin, as personal representative of the Estate  
of James Richard Olvey, deceased**

**v.**

**Donald Hornsby Wright II et al.)**

**(Jefferson Circuit Court, CV-18-903480)**

MITCHELL, Justice.

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James Richard Olvey was killed when his vehicle was struck head on by a vehicle driven by Donald Hornsby Wright II, who was driving the wrong way on Interstate 65 ("I-65") while attempting to flee the police. James B. Griffin, the personal representative of Olvey's estate, sued Wright, the City of Trafford ("Trafford"), the City of Warrior ("Warrior"), and other named and fictitiously named parties, alleging that they shared responsibility for Olvey's death. Over a year later, Griffin amended his complaint to substitute Trafford police officer Dylan McCoy and Warrior police officers Stephen Scott and James Henderson ("the defendant officers") for fictitiously named defendants. The defendant officers moved the Jefferson Circuit Court to enter a judgment in their favor, arguing that the amended complaint was untimely and thus barred by the applicable statute of limitations. The trial court denied their motion, and the defendant officers petitioned this Court for mandamus relief. We grant their petition and issue the writ.

### Facts and Procedural History

On September 7, 2016, Officer Henderson observed a vehicle within the city limits of Warrior run two red lights on Highway 31 without

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stopping. Officer Henderson turned on his lights and siren and pursued the vehicle, but the driver, later identified as Wright, refused to stop. As the pursuit continued, Officer Scott, Officer McCoy, and at least one other police officer joined in. Wright eventually led the pursuing officers to I-65, near the city limits of the City of Kimberly ("Kimberly"), where he drove the wrong way down an exit ramp -- at which point the pursuing officers say they backed off -- and began driving north in the southbound lanes. After Wright drove against the flow of traffic for approximately a mile, his vehicle collided head on with Olvey's vehicle, killing Olvey. Wright was injured in the collision and taken to the hospital for medical treatment.<sup>1</sup>

Two days later, a Kimberly police officer completed a "uniform incident/offense report" identifying Officer Henderson as the "reporting officer," Officer McCoy as an "assisting officer," and Officer Scott as a "supervisor." The narrative in that report further identified (1) Officer

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<sup>1</sup>Wright was later arrested and indicted for murder under § 13A-6-2(a)(2), Ala. Code 1975 ("A person commits the crime of murder if ... [u]nder circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person.").

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Henderson as the officer who initiated the pursuit of Wright and (2) Officers McCoy and Scott as officers who "followed [Wright] from a distance" once he entered the I-65 exit ramp going the wrong direction.

On December 2, 2016, Griffin filed a "notice of claim" with both Trafford and Warrior, alleging that Olvey's death was caused by the negligence and wantonness of Trafford and Warrior police officers as they pursued Wright. See § 11-47-192, Ala. Code 1975 (explaining that "[n]o recovery shall be had against any [municipality] on a claim for personal injury received, unless a sworn statement be filed with the clerk ... stating substantially the manner in which the injury was received, the day and time and the place where the accident occurred and the damages claimed").

On August 31, 2018, Griffin sued Trafford and Warrior, claiming among other things that their police officers' pursuit of Wright was negligent. Griffin's complaint invoked Rule 9(h), Ala. R. Civ. P., and asserted additional negligence claims against fictitiously named defendants G, H, and I, whom he said were those yet-to-be-identified "officers or individuals who [were] in pursuit of the vehicle being driven

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by [Wright] on September 7, 2016, just prior to the collision made the basis of this lawsuit."

Along with the complaint, Griffin served Trafford and Warrior with interrogatories and document requests. The interrogatories did not specifically ask the municipalities to identify the police officers known to have participated in the pursuit of Wright, but they did request, among other things, the identity of each person known to have witnessed or to have knowledge of "the incident made the basis of this lawsuit." Griffin also asked the municipalities to produce "the entire personnel file for the officer, or individual, who was in pursuit of the vehicle being driven by [Wright]."

On November 16, 2018, Trafford responded to the interrogatories by stating that "Trafford Chief of Police Stephen Scott and part-time Trafford police officer Dylan McCoy may have knowledge concerning the incident made the basis of this lawsuit."<sup>2</sup>

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<sup>2</sup>At the time of the pursuit, Officer Scott was working as a patrol officer for Warrior. Scott also worked part-time as the chief of police for Trafford.

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Two weeks later, Warrior submitted its responses indicating that Wright was the only person known to have witnessed the accident but that "the following persons have knowledge of the pre-accident events of this incident: James Henderson, Stephen Scott, Dylan McCoy, and Terry Williams."<sup>3</sup>

Both Trafford and Warrior objected to Griffin's request to produce the personnel files of the police officers who had participated in the pursuit of Wright, asserting that personnel files are private, confidential, and privileged. See, e.g., HealthSouth Rehab. Hosp. of Gadsden, LLC v. Honts, 276 So. 3d 185 (Ala. 2018) (noting that personnel files are afforded special protection under Alabama law and that there exists a strong public policy against their disclosure).

The materials before us do not indicate what happened over the next six months, but, on June 12, 2019, Griffin sent letters to Trafford and Warrior asking them to supplement their discovery responses and to provide the personnel files for fictitiously named defendants G, H, and I.

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<sup>3</sup>Terry Williams is a City of Morris police officer whose vehicle was struck by Wright at some point during the pursuit.

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Griffin sent a follow-up letter to Warrior on July 24, 2019, and he states that, in a telephone conversation around that same time, counsel for the municipalities revealed for the first time that the defendant officers had participated in the pursuit of Wright. On August 16, 2019, Griffin notified Warrior that he wanted to depose Officers Scott and Henderson. Five days later, Griffin notified Trafford that he wanted to depose Officer McCoy. The defendant officers then gave depositions on September 19, 2019, and, in the course of their testimony, confirmed that they had taken part in the pursuit of Wright.

On October 17, 2019, Griffin filed an amended complaint substituting the defendant officers for fictitiously named defendants G, H, and I. The defendant officers then jointly moved the trial court to enter a summary judgment in their favor, arguing that the claims against them were barred by the applicable two-year statute of limitations.<sup>4</sup> Griffin

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<sup>4</sup>The defendant officers styled their motion as a "motion to dismiss," but they supported it with various exhibits, none of which were referenced in Griffin's complaint. The trial court did not indicate that it was disregarding those exhibits, so the defendant officers' motion to dismiss effectively became a summary-judgment motion. See Ex parte Gray, [Ms. 1180999, April 24, 2020] \_\_\_ So. 3d \_\_\_, \_\_\_ n.3 ("Because the trial court

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opposed their motion, arguing that he had properly substituted the defendant officers for fictitiously named defendants who were specifically described in the original complaint and that his claims against them were therefore timely under Rules 9(h) and 15(c), Ala. R. Civ. P. Griffin further argued that any delay in making those substitutions was attributable to the refusal by Trafford and Warrior to respond to his request for the personnel files of the police officers who had participated in the pursuit of Wright. The trial court denied the defendant officers' motion; they then petitioned this Court for a writ of mandamus.

#### Standard of Review

In Ex parte Integra LifeSciences Corp., 271 So. 3d 814, 817 (Ala. 2018), a similar case involving fictitiously named parties and the statute of limitations, this Court explained the standard of review that applies to mandamus proceedings:

" "A writ of mandamus is an extraordinary remedy, and one petitioning for it must show: (1) a

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had before it materials outside the pleadings that it did not expressly decline to consider, [the petitioner's] motion to dismiss was converted into a motion for a summary judgment.").

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

We further explained that, while mandamus relief is typically not available to a party seeking review of a trial court's ruling denying a summary-judgment motion, we make an exception for cases in which the defendant argues that the plaintiff's claims are barred by the statute of limitations. See id.

### Analysis

The defendant officers argue, among other things, that the claims asserted against them in Griffin's amended complaint are untimely because, they say, he failed to exercise due diligence to discover their identities before filing his original complaint. Thus, they argue, Griffin could not properly substitute them for fictitiously named defendants after the statute of limitations had expired. We agree with the defendant officers.

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In Ex parte Noland Hospital Montgomery, LLC, 127 So. 3d 1160, 1167 (Ala. 2012), this Court summarized the circumstances in which Rules 9(h) and 15(c) permit a plaintiff to amend a complaint after the statute of limitations has expired by substituting a named party for a fictitiously named defendant:

"In order to avoid the bar of a statute of limitations when a plaintiff amends a complaint to identify a fictitiously named defendant on the original complaint, the plaintiff: (1) must have adequately described the fictitiously named defendant in the original complaint; (2) must have stated a cause of action against the fictitiously named defendant in the body of the original complaint; (3) must have been ignorant of the true identity of the fictitiously named defendant; and (4) must have used due diligence in attempting to discover the true identity of the fictitiously named defendant. Ex parte Tate & Lyle Sucralose[, Inc.], 81 So. 3d [1217,] 1220–21 [(Ala. 2011)]."

It is undisputed that Griffin made the first two showings required by Noland Hospital -- his August 2018 complaint (1) identified defendants G, H, and I as those "officers or individuals who [were] in pursuit of the vehicle being driven by [Wright] on September 7, 2016," and (2) alleged that defendants G, H, and I "drove carelessly in disregard for the rights or safety of persons or property, or without due caution and circumspection," and that Olvey died as a result. But the defendant

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officers say that Griffin did not make either of the other two showings required by Noland Hospital. According to the defendant officers, the materials before this Court establish that Griffin was not truly ignorant of their identities when he filed his original complaint and that, even if he was, it was because he had not exercised due diligence to discover their identities. See Ex parte Cowgill, 301 So. 3d 116, 123 (Ala. 2020) (explaining that a plaintiff must exercise due diligence to identify defendants both before and after the filing of a complaint).

In Ex parte General Motors of Canada Ltd., 144 So. 3d 236, 239 (Ala. 2013), this Court discussed the requirement in Rule 9(h) that a plaintiff must be "ignorant of the name of an opposing party" before engaging in fictitious-party practice, explaining that the test essentially amounts to whether the plaintiff knew -- or should have known -- that the substituted defendants were in fact the parties described fictitiously. See also Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424, 430 (Ala. 2011) (explaining that if the plaintiff possessed sufficient facts to lead to the discovery of the identity of a fictitiously named defendant at the time of the filing of the complaint, relation back under fictitious-party practice is not permitted

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and the running of the limitations period is not tolled). Thus, while we may take Griffin at his word that he did not actually know the identities of the defendant officers when he filed his original complaint, that actual ignorance does not entitle him to rely upon Rules 9(h) and 15(c) and to avoid the bar of the statute of limitations if he nonetheless should have known of their identities based on the facts available to him at the time.

A review of the materials submitted to this Court demonstrates that Griffin should have been able to identify the defendant officers by name before filing his original complaint. The notices of claim filed with Trafford and Warrior establish that, within three months of Olvey's death, his estate had retained legal counsel and had decided to pursue legal action against Trafford and Warrior based on their police officers' allegedly negligent pursuit of Wright. But there is nothing in the materials filed with this Court indicating that any steps were taken to identify those officers over the next 21 months before Griffin's original complaint was filed. Rather, it appears that Griffin never asked Trafford and Warrior to identify the officers who were on duty the night in question before initiating this action -- despite the fact that he had known for

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almost two years that Trafford and Warrior employed officers who had taken part in the pursuit of Wright.

Nor has Griffin submitted to this Court any materials indicating that he otherwise attempted to determine the identities of the officers who participated in Wright's pursuit before filing this action. He argues in his response to the mandamus petition that he conducted an appropriate "investigation into the incident." Griffin's answer, pp. 7-8. Specifically, Griffin says that his attorney (1) interviewed Olvey's family members; (2) obtained Olvey's death certificate; (3) interviewed the Alabama state trooper who responded to the collision; and (4) conducted a search on Wright through the Alacourt system that revealed a copy of the criminal indictment returned against him. Griffin states that no part of that investigation revealed the names of the officers who had pursued Wright. But none of those statements by Griffin are backed up by evidence before this Court. And even if we could look past the absence of evidence, Griffin still has not pointed us to any steps he specifically took to identify the police officers who had pursued Wright before the collision.

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Griffin's own description of his presuit investigation underscores the inadequacy of that investigation. Griffin acknowledges that he used the Alacourt system to obtain a copy of the indictment returned against Wright, but he provides no explanation for why he did not also use the Alacourt system to obtain the uniform incident/offense report prepared by the Kimberly police department. The defendant officers state that this report was similarly available on the Alacourt system and that it clearly identified (1) Officer Henderson as the officer who initiated pursuit of Wright and (2) Officers McCoy and Scott as officers who pursued Wright to I-65.<sup>5</sup>

In sum, while plaintiffs are required to exercise only due diligence, not extraordinary diligence, in attempting to identify defendants, see Ex parte Nail, 111 So. 3d 125, 131 (Ala. 2012), it is clear Griffin did not do so. There is no evidence that Griffin ever contacted Trafford and Warrior

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<sup>5</sup>"[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents," Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (footnotes omitted), and the defendant officers note that Griffin has not shown that this report was unavailable or withheld from him.

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before filing suit to obtain the identities of the officers who had pursued Wright -- even though he knew for at least 21 months that Trafford and Warrior officers had taken part in the pursuit. A letter, e-mail, or telephone call to Trafford and Warrior inquiring about the identities of the defendant officers is not the type of overly burdensome activity that this Court excuses plaintiffs from pursuing. See General Motors, 144 So. 3d at 243; Nail, 111 So. 3d at 131. And while the municipalities may not have responded to such an inquiry, Griffin would at least be able to establish, through his written correspondence or an affidavit detailing his attempted communications, that he made appropriate efforts to identify the defendant officers before filing his original complaint. See Ex parte Nicholson Mfg. Ltd., 182 So. 3d 510, 514 (Ala. 2015) (emphasizing that a plaintiff must exercise due diligence before filing a complaint); see also Ex parte Russell, [Ms. 1180317, June 26, 2020] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2020) (cataloguing evidence submitted to this Court indicating that plaintiff's counsel had repeatedly sought information from the defendant about which of its employees had interacted with the decedent). Thus, because Griffin had ample opportunity to discover the identities of the defendant

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officers before filing suit -- and did not follow through -- he is not able to use Rules 9(h) and 15(c) to avoid the bar of the statute of limitations, and the defendant officers are entitled to the writ of mandamus.<sup>6</sup>

### Conclusion

Griffin asserted claims against multiple unidentified Trafford and Warrior police officers in the original complaint he filed following Olvey's death. Over a year later, Griffin substituted the defendant officers for those fictitiously named defendants. The defendant officers moved the trial court to enter a judgment holding that Griffin's claims against them were barred by the statute of limitations because, they argued, Griffin had failed to exercise due diligence in attempting to discover their identities. The trial court denied that motion, but, for the reasons explained above, it erred in doing so. The defendant officers' petition for the writ of mandamus is therefore granted, and the trial court is directed to vacate

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<sup>6</sup>This conclusion makes it unnecessary for this Court to consider defendant officers' alternative argument that Griffin did not exercise due diligence to discover the identities of fictitiously named defendants G, H, and I after filing his original complaint.

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its order denying their motion and to instead enter a judgment in their favor on statute-of-limitations grounds.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, and Mendheim, JJ.,  
concur.

Sellers, J., concurs in the result.

Stewart, J., dissents.