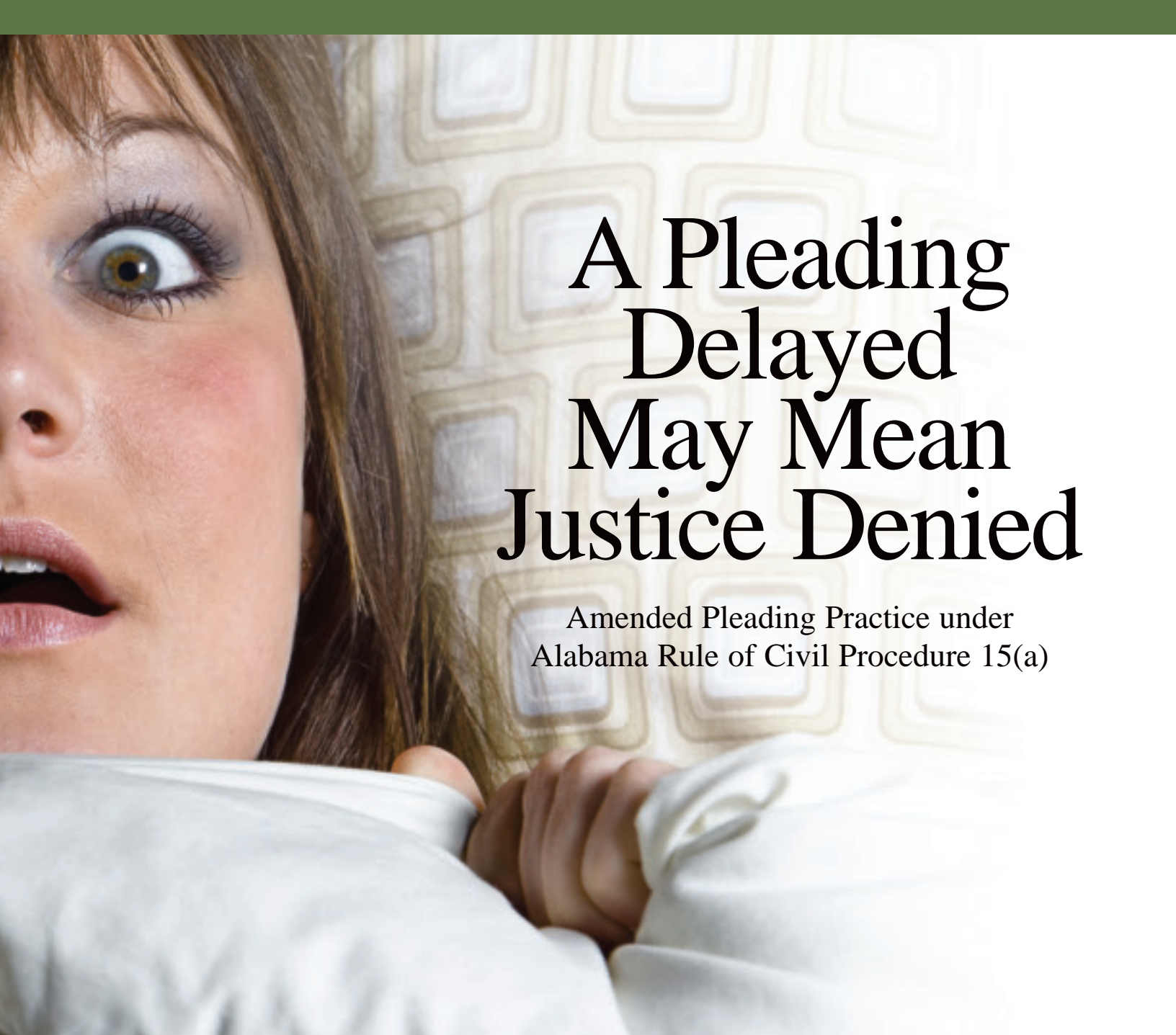




*By Christian Hines*



# A Pleading Delayed May Mean Justice Denied

Amended Pleading Practice under  
Alabama Rule of Civil Procedure 15(a)

**Nothing in our profession makes attorneys lose more sleep than the horror of missing a deadline.**

**T**he king of deadlines, or perhaps the grim reaper of plaintiff's attorney nightmares, is the statute of limitations. Although not as draconian as the dismissal of an action in its entirety, the inability to pursue a claim or defense can have an equally devastating effect on the outcome of a case. Moreover, the preclusion of a particular theory is a fear shared by both sides of the bar, in that restrictions on amendments shadow both plaintiff and defendant alike.

Alabama Rule of Civil Procedure 15 governs a party's ability to amend pleadings during the course of litigation.

Justice Champ Lyons, Jr. has described the rationale behind Rule 15:

Pleadings are a means, not an end, and the action should be resolved on its merits, not upon technicalities. . . . Without the Rule's permissive approach to the right to amend, the allegiance to substance over form which permeates these rules would not be attainable.

*Alabama Practice*, p. 308 (1<sup>st</sup> Ed. 1973), quoted with approval in *McElrath v. Consolidated Piping Supply*, 351 So.2d 560, 564 (Ala. 1977).

Much has been written on Rule 15(c), which deals with the relation back of amendments. Obviously, the ability of an amendment to add a party to avoid the statute of limitations, as referenced above, can have dire consequences for a plaintiff. This article, instead, will focus on the general ability of *either party* to amend pleadings under Rule 15(a), without reference to relation back. As demonstrated below, the availability of an amended pleading can have a significant impact on the success, or failure, of a claim or defense.

## The Liberal Construction of Rule 15(a)

The Alabama Supreme Court instructs that “Rule 15(a) calls for a liberality in allowing amendments, and the rules on amendments themselves are liberally construed by the courts, in order to ensure, so far as possible, that cases are decided on their merits.” *McElrath*, 351 So.2d at 564, quoting 1 A. Barron and Holtzoff, *Federal Practice and Procedure*, § 442 comments. Stated another way, “[t]he purpose of this rule is to allow maximum opportunity for the

parties to state each claim and have those claims decided on the merits of the issues.” *Ex parte Reynolds*, 436 So.2d 873, 874 (Ala. 1983). In short, “Rule 15 must be liberally construed by the trial judges.” *In Re Stead*, 310 So.2d 469, 471; 294 Ala. 3, 6 (Ala. 1975).

## The 1992 Amendment

Possibly due to this mandate for a liberal construction of Rule 15, the Alabama Supreme Court has admitted that “the extent of the trial court’s discretion in permitting amendments has not been precisely delineated and has been, at times, unclear.” *Ex parte Liberty National*, 858 So.2d 950, 958 (Ala. 2003). In 1992, the Alabama Rules Committee made an effort at delineation, drafting an amendment to Rule 15(a). This amendment placed limitations on, and a stricter scrutiny of, amendments filed closer to trial. The prior version of Rule 15, on the other hand, had permitted amendments to pleadings without relation to the proximity of trial.

The 1992 amendment, which remains unchanged today, reads as follows:

## RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

**(a) Amendments.** Unless a court has ordered otherwise, a party may amend a pleading without leave of court, but subject to disallowance on the court’s own motion or a motion to strike of an adverse party, at any time more than forty-two (42) days before the first setting of the case for trial, and such amendment shall be freely allowed when justice so requires. Thereafter, a party may amend a pleading only by leave of court, and leave shall be given only upon a showing of good cause. A party shall plead in response to an amended pleading within the time remaining for a response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be longer, unless the court orders otherwise.

The change in the rule was deemed “necessary to accommodate the constraints imposed by time standards for the disposition of litigation.” *Committee*

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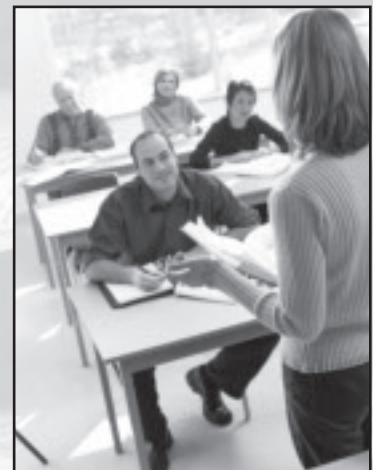
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Comments to August 1, 1992 Amendment to Rule 15(a). Additionally, since the Committee was now further restraining the ability to amend pleadings based upon the date of a trial, it was cognizant of Rule 40. Specifically, "Rule 40 requires a sixty- (60-) day notice of a trial setting. Thus, [given the 42-day cut-off in the new rule,] a party has an eighteen- (18-) day period within which to file an amendment after the notice of first setting for trial without the need for obtaining leave of court." *Id.* In sum, the 1992 amendment attempted to strike a balance between the need for liberal amendments and the potential prejudice which could arise from an amended pleading filed on the eve of trial.

The Committee further predicted: "Because an amendment within the forty-two- (42-) day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period." *Committee Comments to August 1, 1992 Amendment to Rule 15(a).* For Alabama trial and appellate courts, consequently, the question became: "What constitutes 'good cause?'"

### Amendments Filed within 42 Days of Trial and the "Good Cause" Standard

Despite the committee's anticipation, Alabama courts have repeatedly applied the 1992 Amendment to *allow* amended pleadings within 42 days of trial. Obviously, no rigid test has evolved to

define or gauge "good cause." Instead, with the phrase "good cause" ripe for interpretation, and when coupled with the traditional, liberal application of Rule 15(a), the test has naturally become fact specific. Alabama courts, however, have placed the strongest emphasis on one factor: *when* the information which triggered the amendment became available.

For example, in *Todd v. Kelley*, 783 So.2d 31 (Ala.Civ.App. 2000), a city police officer brought an action against a city, mayor, police chief and supervisor, asserting civil rights and wrongful discharge claims. Only 18 days before the first trial setting, the plaintiff moved to amend his complaint to name three additional defendants. *Id.* at 36. The trial court denied the plaintiff's motion for leave to amend.

The Alabama Court of Civil Appeals reversed. The court noted that "[i]n order to comply with the 42-day requirement under Rule 15(a), [the plaintiff] would have had to amend his complaint to add the three new defendants . . . only eight days after taking the last relevant deposition." *Id.* at 38. In light of these circumstances, the "trial court abused its discretion by determining that [the plaintiff] had not established 'good cause for leave to amend' the complaint to add the three [new defendants]." *Id.*

As the spouse or colleague of any lawyer knows, no case is more interesting to an attorney than his or her own. This lawyer is no exception. Nevertheless, even objective observers may agree that the bizarre factual scenario of *Ziade v. Koch*, a case I recently



**"Because an amendment within the 42-day period will frequently force a continuance of the trial of the case, the committee anticipates that such an amendment will not be allowed as a matter of course. Consequently, the rule requires a showing of good cause for any amendment within this period."**



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**On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face.**

defended with one of my partners, played out more like a law school exam question than an actual case. It is also pertinent to an analysis of “undue delay” under Rule 15.

In *Ziade* (pronounced Zee-ah-dee), the plaintiffs claimed that the defendants’ negligence led to the death of a fetus. The death was first confirmed on September 12, 2000, although the fetus was not delivered stillborn until September 14, 2000. The suit was filed on September 11, 2002.

The plaintiffs initially identified two experts, who both opined that the fetus died *at least* 48 hours before the death was first detected on September 12, 2000. These witnesses were deposed on September 6 and 22, 2005, with the trial being scheduled for November 14, 2005. Pursuant to the trial court’s scheduling order, all witnesses were to be identified no less than 60 days before trial. Two days before this deadline expired, the plaintiffs identified a third expert witness. The trial court extended the expert deadline, further ordering that all expert depositions be completed by September 26, 2005. The trial remained set for

November 14, 2005. On September 26, 2005, the deposition of the third plaintiffs’ expert was taken.

The third expert confirmed the testimony of the prior two, meaning that each of the plaintiffs’ experts now opined that the fetus had died *at least* by September 10, 2000. Since the plaintiffs had not filed suit until September 11, 2002, however, the plaintiffs’ experts had, essentially, testified the plaintiff’s case outside the statute of limitations. The defendants filed a motion for summary judgment based upon the statute of limitations in a wrongful death suit. The defendants subsequently submitted a motion for leave to file an amended answer asserting those affirmative defenses, which was filed within 42 days of trial. The trial court granted these motions, and an appeal by the plaintiff ensued.

On appeal, the defendants noted that based upon the date of death alleged in the original complaint, the suit was not time-barred on its face. It was only after the depositions of the plaintiffs’ experts, who pushed fetal death back to at least September 10, 2000, that the statute of limitations defense became cognizable. As the supreme court summarized, it “only became clear, after the completion of the *Ziades*’ experts, that the entirety of the *Ziades*’ proof . . . was that the death occurred . . . more than two years prior to the filing of the complaint.” *Ziade v. Koch*, 952 So. 2d 1072, 1075 (Ala. 2006). Furthermore, the date for completion of this evidence had been pushed closer to trial by the plaintiffs, rather than the defendants, when a third expert was added. *Id.* Finally, the plaintiffs were only “prejudiced” by the timing of the amended pleading to the extent that “they were deprived of the theoretical opportunity to procure an expert *who would refute the unequivocal testimony of their three experts as to the date of death.*” *Id.* at 1078.

*Ex parte Liberty National*, 858 So.2d 950 (Ala. 2003), of all the reported Alabama decisions, particularly demonstrates how alive the liberal spirit of Rule 15(a) remains. In this case, the plaintiff filed suit against Liberty National on February 13, 2001 based upon actions that took place in or before December 1978. The defendant filed an answer that did not include the rule of repose as an affirmative defense. An opinion was released by the Alabama Supreme Court in January 2002

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which clarified the law as to the rule of repose. The defendant then filed a motion for summary judgment in February 2002, asserting the rule of repose. The plaintiff filed a response, claiming waiver, since the rule of repose had not been pled as an affirmative defense. *Id.* at 952.

At the March 2002 hearing on the motion, the defendant was granted a continuance to address the waiver claims. *After the hearing*, a motion for leave to file an amended answer was submitted, but the trial court denied the motion. *Id.* at 952. On appeal, the Alabama Supreme Court *reversed* the trial court's ruling and allowed the amendment. The court noted that at the time Liberty National filed its answer, the state of the law precluded its use of the defense. Two months after the law was clarified, Liberty National filed its motion to amend, which was acceptable to the court. *Id.* at 954.

## The Test for Amendments after a Showing of "Good Cause"

After a party has shown "good cause" for an amended pleading filed within 42

days of trial, the analysis is not necessarily finished. A major hurdle, however, has been overcome. That is, the Alabama Supreme Court has determined that,

in light of the overarching liberal policy of allowing amendments under Rule 15, the appropriate way to view the request for leave to amend, if a party demonstrates 'good cause,' is as though the request had been brought more than 42 days before trial, when the court does not have 'unbridled discretion' to deny the leave to amend, but can do so only upon the basis of a 'valid ground' . . .

*Ex parte Liberty National*, 858 So.2d 950, 953 (Ala. 2003).


In other words, the amendment is now treated as if it was timely filed, is subject to far less scrutiny, and "the burden is [now] on the trial court to state a valid ground for its denial of a requested amendment." *Id.* (emphasis added).

"Actual prejudice or undue delay" are the "valid grounds" repeatedly cited by

the Alabama Supreme Court as a justification for denying a timely-filed, amended pleading. *Ex Parte Thomas*, 628 So.2d 483, 486 (Ala. 1993). As to the latter, the Alabama Supreme Court has interpreted "undue delay" to mean "flagrant abuse, bad faith, truly inordinate and unexplained delay." *McElrath*, at 560, 564 (Ala. 1977). "A long delay is not good cause, by itself, to deny an amendment." *Ex parte Neely Truck Line*, 588 So.2d 484, 485 (Ala.Civ.App. 1991). The Alabama Supreme Court does consider, however, whether "the amendment, if allowed, will cause any undue delay in the resolution of the case." *Ex parte Liberty National*, 858 So.2d at 955.

## Undue Delay

"Undue delay can have two different meanings" under Rule 15(a). *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180, 1189 (Ala. 2006). Primarily, delay deals with when the party learned of the information in relation to the amendment. *See Rector v. Better Houses, Inc.*, 388 So. 2d 75, 78 (Ala. 2001) (affirming the striking of amended complaint, when plaintiff gave no evidence to rebut trial court's



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finding that facts which were the basis of the amendment were known from the start of the suit); *Burkett v. American Gen. Fin., Inc.*, 607 So. 2d 138 (Ala. 1992) (affirming the striking of an amended complaint where the plaintiff learned of the fact six months prior to the amendment). Alternatively, a trial court may deny an amendment when it would cause a delay of the trial. *Blackmon*, 953 So. 2d at 1190; *Horton v. Shelby Med. Ctr.*, 562 So. 2d 127 (Ala. 1989).

A peculiar scenario of potential “undue delay” arises when the filing of a motion for summary judgment is followed by a subsequent attempt to amend an answer. That is, the motion for summary judgment *precedes* the filing of the very affirmative defense upon which the motion is based. The Alabama Supreme Court “has held that a defendant’s failure to plead an affirmative defense in its answer does not prevent it from raising the defense in a motion for a summary judgment, when

the defendant amends its answer to include the affirmative defense *before the trial court rules on the summary judgment motion.*” *Avery v. Beverly Health and Rehabilitation Services, Inc.*, 902 So.2d 704, 707 (Ala.Civ.App. 2004) (emphasis added).

In *Piersol v. ITT Phillips Drill Division, Inc.*, for example, the court affirmed a trial court’s decision to consider a motion for summary judgment based on the statute of limitations, even though the defendant did not attempt to amend its answer until *four months* after filing the motion. 445 So.2d 559, 560 (Ala. 1984). This was because the amended pleading had been filed prior to the hearing on the statute of limitations. *Id.*

Likewise, in *Alexander, Corder, Plunk, Baker and Shelly, PC v. Jackson*, 811 So.2d 506 (Ala. 2001), the court again affirmed a trial court’s decision to allow an amended answer which asserted, for the first time, the statute of frauds. The answer was filed *after* the motion for summary judgment. Because the defendant amended its answer before the trial court ruled on his summary judgment motion, the Alabama Supreme Court affirmed. *Id.* at 508.

### Actual Prejudice

What constitutes “actual prejudice” has caused some confusion, with some finding the phrase to be a legal misnomer. Alabama courts have made clear that the test is *not*, as has been argued, whether the amended claim or defense harms or “prejudices” the opponent’s case. Instead, the non-movant must demonstrate actual prejudice to its ability to develop facts or evidence which it could have used had the amendment been timely. *Ex parte GRE Ins. Group*, 822 So.2d 388, 390 (Ala. 2001).

The true force of this concept was demonstrated in *Ex parte GRE Ins. Group*, where a defendant amended its answer in such a fashion that would completely extinguish the plaintiff’s claims. *Id.* at 390. The trial court granted the plaintiff’s motion to strike the amended complaint, and the defendant appealed. *Id.*

In supporting the trial court’s refusal to allow the amended defense, the plaintiff asked the Alabama Supreme Court what was likely intended to be a purely *rhetorical* question on the true meaning of “prejudice:”



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“Because ‘actual prejudice’ to the opponent of the amendment is a criterion to be considered when allowing or disallowing an amendment to the pleading. . . . it bears mentioning the obvious: allowing the amendment effectively extinguishes Glenda Galvin’s claim against [the defendant], in all probability. How much more prejudice *could* exist?”

*Id.* at 390-91 (emphasis in original).

The court, however, chose to *answer* this question. In *reversing* the trial court’s denial of the asserted defense, based upon an abuse of discretion, the court answered:

“[The plaintiff. . .] misunderstands the meaning of ‘prejudice’ in the context of the test for allowing amendments. ‘[I]t is obvious that an amendment, designed to strengthen the movant’s legal position, will in some way harm the opponent.’ ‘In the context of a [Rule] 15(a) amendment, prejudice

means that the nonmoving party “must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence *which it would have offered had the . . . amendments been timely.*” ‘And by prejudice to the rights of the other party is meant, without loss to him other than such as may result from establishing the claim or defense of the party applying.’ In other words, the *defense asserted in the amended answer is not prejudicial, merely because it might constitute a meritorious defense to the plaintiff’s claim.*”

*Id.* at 391 (first alteration and last emphasis added).

The court has also instructed that when an amended pleading “merely changes the legal theory of a case or adds an additional theory, but the new or additional theory is based upon the same set of facts and those facts have been brought to the attention of the other party by a previous pleading, no prejudice is worked upon the other party.” *Bracy v.*



**...the non-movant must demonstrate actual prejudice to its ability to develop facts or evidence which it could have used had the amendment been timely.**

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*Sippial Elec. Co.*, 379 So.2d 582, 584 (Ala. 1980). In *Ex parte Reynolds*, for example, the court reversed the striking of an amended complaint which added a count of fraud. 436 So.2d 873, 874 (Ala. 1983). In supporting its decision, the court noted that the amendment was filed more than a month before the date set for the defendant's motion for summary judgment and added no new parties. Most critically, it "was based on a combination of facts previously alleged by [plaintiff] in support of his original complaint and facts set forth by the defendants in the affidavit in support of their motion for summary judgment." *Id.*

In contrast, an amended complaint filed within 30 days of trial was deemed appropriately struck by the trial court, when the "new allegations of fraud and suppression [were] based upon information that was known or should have been known . . . at the time she filed the original complaint." *Rector v. Better Homes, Inc.*, 820 So.2d 75, 77 (Ala. 2001) (alteration in original). Likewise, the court affirmed a trial court's decision to strike a plaintiff's second amended complaint, where it was filed six weeks before trial, two years after the original complaint, after the court's deadline to amend pleadings, and after the defendants had filed motions for summary judgment. *Brackin v. Trimmier Law Firm*, 897 So.2d 207, 228 (Ala. 2004); *see also, Government Street Lumber Co. v. AmSouth Bank, N.A.* 553 So.2d 68 (Ala. 1989).

## Rule 15's "Liberal Application" Has Its Limits

Despite the overall theme of this article, and the majority of Rule 15 case law, parties should certainly not confuse the intentionally liberal application of Rule 15 with a "carte blanche authority to amend . . . at any time." *Burkett v. American Gen. Fin. Inc.* 607 So. 2d 388, 390 (Ala. 2001), quoting *Stallings v. Angelica Uniform Co.*, 388 So. 2d 942, 947 (Ala. 1980). Rule 15 specifically vests a trial court with the discretion to deny *any amended pleading*, even if filed outside 42 days. In short, a trial court has the discretion to deny *any* amendment for good cause.

No case better emphasizes this discretion than *Blackmon v. Nexity Financial Corp.*, 953 So. 2d 1180 (Ala. 2006). In fact, *Blackmon* demonstrates how a trial court can exercise its discretionary muscle in multiple ways. The internal flexibility of Rule 15 can be used by trial judges to void the very time limits of the rule itself. For example, the trial court in *Blackmon* entered a scheduling order that changed the deadline for amended pleadings. The Alabama Supreme Court held that this scheduling order overrode the "default" time provision of Rule 15(a). *Id.* at 1189.

The plaintiff incorrectly assumed, however, that as long as his amended complaint was filed prior to the trial court's scheduled

(Continued on page 274)

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(Continued from page 272)

deadline, he was entitled to this amendment. The trial court disagreed, striking three new counts filed prior to its own deadline. It did so, because: (1) the plaintiff's amendment was based upon his own deposition testimony, so that there was undue delay in waiting until the eve of trial to amend the complaint; and (2) the amendment would cause more discovery and, consequently, a delay in the trial.

On appeal, the plaintiff argued there was no prejudice, because the defendants had been aware of the information upon which the amendment was based for at least eight months—this was the time period between the plaintiff's deposition and the amendment. The Alabama Supreme Court, however, noted that the trial court had relied on undue delay, rather than prejudice. Thus, the plaintiff's "no prejudice" argument effectively proved his own delay, since the plaintiff

would have likewise been aware of his own testimony long before it was amended into legal claims by the amendment.

## Conclusion

As shown generally above, the Rules Committee's hope to mark a fine, if not absolute, line for amending pleadings has not been completely achieved. Through the "good cause" crack in the dam of Rule 15(a), a steady trickle of decisions defining

that phrase continues to this day. Indeed, the unanticipated factual scenarios which the real world creates, and these cases exhibit, are the very reason the committee could not, and should not, create an absolute rule of preclusion like the statute of limitations. Thus, because the application of Rule 15(a) remains so fact-specific, the ability to add claims, or foreclose them, will remain fodder for new case law, and the likely stuff of attorney nightmares, for years to come. ▲▼▲



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