NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

MILDRED BERNAVAGE, BY AND THROUGH HER AGENT-IN-FACT, CAROLYN VANSTON	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
GREEN RIDGE HEALTHCARE GROUP, LLC D/B/A GREEN RIDGE CARE CENTER AND SABER HEALTHCARE GROUP, LLC	:	No. 1576 MDA 2023
Appellants	:	

Appeal from the Judgment Entered November 2, 2023
In the Court of Common Pleas of Lackawanna County
Civil Division at No: 2019-06227

BEFORE: LAZARUS, P.J., PANELLA, P.J.E., STABILE, J., DUBOW, J., KUNSELMAN, J., McLAUGHLIN, J., KING, J., SULLIVAN, J., and LANE, J.

DISSENTING MEMORANDUM BY STABILE, J.: **FILED OCTOBER 22, 2026**

I believe that Appellee's eleventh-hour amended complaint was unfairly prejudicial to Appellants, and that Appellants had no reasonable opportunity to respond. For those reasons, I would conclude that the trial court abused its discretion in permitting Appellee to amend her complaint,[1] and I would vacate the award of punitive damages.

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[1] The Majority concludes that Appellants did not preserve their right to present this issue in a post-trial motion for judgment notwithstanding the verdict ("JNOV"), but the Majority nonetheless proceeds to overlook Appellants' waiver and address the merits "out of an abundance of caution." Majority

(Footnote Continued Next Page)

Rule 1033 of the Pennsylvania Rules of Civil Procedure governs amended pleadings:

> **(a) General Rule.** A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.Civ.P. No. 1033(a). Amendments are to be liberally allowed and they may occur at any time, as per the express language of Rule 1033(a), so long as they do not result in unfair prejudice or surprise to the opposing party. ***Thom v. CDM Auto Sales***, 221 A.3d 681, 684-85 (Pa. Super. 2019); ***Hill v.***

Memorandum, at 8-9. Respectfully, I find the Majority's waiver analysis, which it offers *sua sponte*, to be is legally and factually unfounded. During the charging conference, Appellants requested an order directing that recklessness and punitive damages were not at issue in this case, and they objected to the issuance of a jury instruction on recklessness. N.T. 4/6/23, at 3-7, 58. Appellants also filed a timely motion for judgment on the pleadings in response to Appellee's amended complaint. These actions, under the circumstances of this case, were more than sufficient to satisfy the prerequisites for filing a post-trial JNOV motion described in ***Jones v. Foods on First III, Inc.***, 345 A.3d 231, 246-47 (Pa. Super. 2025), and similar cases. The Majority's conclusion to the contrary rests on an exceedingly strict application of the applicable case law. And this rigorous approach to post-trial procedure stands in stark contrast to the Majority's willingness to stretch the liberal standard governing the amendment of a complaint.

Appellee does not argue for waiver. The trial court was apprised of the issues and disposed of Appellants' post-trial motion on the merits. I would conclude that Appellants' challenge to Appellee's amended complaint is properly before us.

Ofalt, 85 A.3d 540 557 (Pa. Super. 2014); ***Discover Bank v. Stucka***, 33 A.3d 82, 88 (Pa. Super. 2011). Indeed, this Court has held that a complaint may be amended "at the discretion of the trial court after pleadings are closed, while a motion for judgment on the pleadings is pending, at trial, after judgment, or after an award has been made and an appeal taken therefrom." ***Biglan v. Biglan***, 479 A.2d 1021, 1025-26 (Pa. Super. 1984). The purpose of the liberal amendment policy is to encourage decisions on the merits rather than dismissals for procedural defects. ***Id.*** Thus, "[d]enial of a petition to amend, based on nothing more than unreasonable delay, is an abuse of discretion." ***Capobianchi v. BIC Corp.***, 666 A.2d 3434, 3437 (Pa. Super. 1995), *appeal denied*, 674 A.2d 1065 (Pa. 1996).

I believe the case before us involves more than unreasonable delay and/or a mere procedural defect. Rather, we are faced here with precisely the type of unfair surprise and prejudice that should have prompted the trial court to refuse to permit Appellee to amend her complaint. Appellee introduced a theory of recklessness (and with it the ability to recover punitive damages) on the day of the liability trial—essentially the latest possible time. Appellee had ample opportunity to explore the issue of Appellants' recklessness during the four years of litigation leading up to the trial, and she offers no explanation for her failure to do so earlier.

The Majority and the trial court would put the onus on Appellants to respond to the last-minute change in strategy by addressing the matter in

their case-in-chief, which they had yet to present as of the time of the amendment, or by seeking a recess. The Majority and the trial court also note that the punitive damages phase was bifurcated from the liability phase, although they ignore the fact that the jury finding of recklessness came at the conclusion of the first trial. The Majority and the trial court further ignore the fact that Appellants were not permitted to recall any fact witnesses during the punitive damages phase. Rather than focus on what Appellants might have scrambled to do after Appellee introduced the concept of recklessness at the last minute, I believe our focus should be on what Appellee could and should have done from the onset of this litigation, and the unfair prejudice to Appellants resulting from her failure to do so.

On this point, I turn to ***Monroe v. CBH20, LP***, 286 A.3d 785 (Pa. Super. 2022) (*en banc*), a procedurally complex case in which this Court explained the ordinary means by which a negligence plaintiff can be expected to discern and articulate the theory of recovery to be proven at trial:

> At the pleadings stage, the rules allow a plaintiff to make a general averment of gross negligence or recklessness. When initially filing a complaint, a plaintiff may not be fully aware of the defendant's state of mind. Only through discovery can the plaintiff ascertain what the defendant knew or should have known about the risk involved. It would place an undue burden on the plaintiff to plead specific facts about a defendant's state of mind at the time a lawsuit is initiated.
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> Discovery gives the plaintiff an opportunity to learn this information. Through interrogatories, depositions, and requests for admission, a plaintiff can learn whether a defendant had notice of a dangerous condition before the plaintiff was injured. A plaintiff can discover information about the defendant's training

> and experience to see if the defendant knew or should have known about the risk involved that lead to plaintiff's injuries. The discovery phase of the case also gives the plaintiff time to hire an expert to investigate and opine on the standard of care and whether it was breached, not only in terms of ordinary negligence, but whether there were gross or reckless deviations from the standard of care.

Monroe, 286 A.3d at 799-800.

The procedure outlined in ***Monroe*** (I am cognizant that ***Monroe*** did not involve an amended pleading) is not the procedure Appellee followed here. Instead, there was no indication Appellee intended to assert recklessness until Appellee's case-in-chief at trial. The matter of recklessness was not explored during depositions, which took place roughly two years prior. And while I ascribe no motive to Appellee's counsel in this case, I believe the result we reach here facilitates a litigation strategy calculated to create, rather than prevent, unfair surprise and prejudice.

Case law on point does not support the Majority's result. This Court in ***Daley v. John Wannamaker, Inc.***, 464 A.2d 355, 361-62 (Pa. Super. 1983) explained that recovery of punitive damages "is a mere incident to a cause of action—an element which the jury may consider in making its determination—and not the subject of the cause of action itself." ***Id.*** at 362 (quoting ***Hibert v. Roth***, 149 A.2d 648, 652 (Pa. 1959)). The ***Daley*** Court permitted an amendment to add a demand for punitive damages just before trial commenced in part because the plaintiff was not altering any of the factual allegations in the complaint. ***Id.*** at 361. Instantly, however, the amendment

arose from facts regarding the state of mind of Appellants' employees—Appellants' reckless state of mind was not alleged in the complaint, and it could have been discovered much earlier, as per ***Monroe***.

Likewise, in ***Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.***, 474 A.2d 605 (Pa. Super. 1984), *affirmed*, 507 A.2d 1 (Pa. 1986), the plaintiff's complaint did not include a separate count of negligence against the defendant priest for his role in the victim's accidental drowning. ***Id.*** at 614. Nonetheless, the priest "participated actively as a party litigant throughout the trial, and there had been a substantial body of evidence which, if believed by the jury showed that he had been negligent." ***Id.*** at 613-14. Counsel entered an appearance on the priest's behalf and an early stipulation correcting the caption provided that the priest would remain in the case as a defendant. ***Id.*** at 614. In a new matter filed by the defendant seminary early in the proceedings, the seminary alleged in part that the priest was liable to the seminary for contribution and indemnity. ***Id.*** When the seminary sought to file an amended pleading to state more specifically the grounds for its claims for contribution and indemnification from the priest, the trial court refused to allow the amendment and directed a verdict in the priest's favor. ***Id.*** This Court held that the trial court abused its discretion, reasoning that the seminary's claims for contribution and indemnification from the priest did not accrue until the seminary had been held liable to the plaintiff. ***Id.*** at 615-16. The amendment also was permissible because it would have

"rendered the pleadings more specific" and "brought them into conformity with the evidence." ***Id.*** at 615. The circumstances of ***Rivera*** are distinct from those of the instant case, and the Court's rationale for permitting the late amendment does not apply here. The defendant priest had been aware, from early in the litigation, of the seminary's claims for contribution and indemnity.

In ***Somerset Community Hosp. v. Allan B. Mitchell & Assocs., Inc.***, 685 A.2d 141 (Pa. Super. 1996), a party was permitted to amend a complaint by adding factual allegations to prove claims of oral contractual modifications where its original complaint alleged breach of both written and oral contracts. The ***Somerset*** panel reasoned that the defendant hospital was "well aware" that the plaintiff "originally claimed both breach of contract and oral modification." ***Id.*** at 147. The amended complaint contained facts intended to supplement the plaintiff's proof of an oral modification to the parties' original contract. ***Id.*** The amended complaint "**did not alter the measure of damages alleged** by [the plaintiff], the defenses intended to be utilized at trial, or the measure of proof." ***Id.*** (emphasis added). The same cannot be said for Appellee's amended complaint in this case.

Finally, late amendments are permissible in some cases because they are based on developments that occurred during the litigation. In ***Capobianchi***, for example, the defendant was permitted to amend a pleading four days before trial to assert a defense of collateral estoppel after the defendant prevailed in a related workers' compensation action. ***Capobianchi***,

666 A.2d at 346-47. The collateral estoppel defense was unavailable until a final decision had been rendered in the workers' compensation case. ***Id.*** at 347. Likewise, in ***Posternack v. American Cas. Co. of Reading***, 218 A.2d 350, 351-52 (Pa. 1966), our Supreme Court held that no unfair surprise resulted to the plaintiff when the defendant sought to amend a pleading to raise a defense of *res judicata* based on a final judgment entered in the defendant's favor in a related federal action.

On the other hand, the courts of this Commonwealth have commonly frowned on the late introduction of new theories of recovery. In ***West Penn Power Co. v. Bethlehem Steel Corp.***, 348 A.2d 144 (Pa. Super. 1975), the original complaint alleged the violation of a specific, agreed upon schedule for the delivery of steel to be used in the construction of powerline towers. After the parties conducted nearly four years of discovery, and on the last day of an eight-week trial, the plaintiffs sought to amend their complaint to allege that delivery was to be made within a "reasonable time." ***Id.*** at 154-55. The ***West Penn*** Court analyzed the case as follows:

> Here, the complaint was filed on November 18, 1968, over a year after the power line was placed in operation; the first interrogatories were filed seven months later, on June 18, 1969; the pre-trial discovery process was continuous until the trial began, almost four years later, on March 12, 1973, and included several rulings by the court below; and the trial lasted almost eight weeks. Yet the motion to amend the complaint was not made until the last day of the trial, May 7, 1973.
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> Had the motion to amend been implicit from developments early in the trial – as was so of the motion to amend by pleading the letters of December 21, 1964 – this sequence of events would

> not be so important. However, the motion sought to make a complete change in the theory of liability

Id. at 155. A provision of the Uniform Commercial Code used the "reasonable time" language, but the plaintiff had never relied on that provision in support of its case. ***Id.*** Because the defendant prepared for the case in response to the claim presented, and because the defendant might have conducted its defense differently had it known that a change in the claim would be permitted, the trial court did not abuse its discretion in refusing to permit the amendment. ***Id.*** at 156.

Similarly, in ***Smith v. Athens Twp. Auth.***, 685 A.2d 651 (Pa. Commw. 1996), *appeal denied*, 693 A.2d 591 (Pa. 1997), the plaintiffs, owners and operators of trailer parks, sued the township over the fee required to tap in to the local sewer system. After the close of testimony in the case, the plaintiffs sought to amend their complaint to include a claim that the sewer tap-in fees were unconstitutional. ***Id.*** at 655. The trial court refused to permit the amendment and the ***Smith*** Court affirmed, reasoning that "where [an] amendment is sought after the testimony has been concluded, prejudice will always result to the extent that the opposing party has not contemplated the subject matter of the proposed amendment in the preparation and trial of the case." ***Id.*** at 655.

Appellants in this case spent years preparing their defense in response to the claim Appellee presented, and then, like the opposing parties in ***West Penn*** and ***Smith***, were met with an uncontemplated eleventh-hour change in

that claim. For that reason, I would conclude that the trial court abused its discretion in permitting the amendment in this case. Appellee's failure to develop the specific theory of recovery during discovery was not a mere technicality subject to being cured by amendment at any point. Rather, the case Appellee developed at trial was substantively different from the case she developed during discovery and alleged in her complaint. Indeed, all of Appellants' trial preparation, including witness preparation, was done in response to the theory Appellee presented in her complaint and developed during discovery. *And the facts of this case were well-known to Appellee prior to trial, but Appellee's counsel introduced a new legal theory through the mouths of lay witnesses as cover for the late amendment.* Appellee's counsel solicited the word "reckless" from witnesses who could not be expected to understand the legal significance of that term.[2] Thus, this was not simply an amendment to conform the complaint to the evidence garnered at trial. Rather, it was counsel's introduction of a new theory of recovery at the latest possible time—an action that I believe is not warranted under Rule 1033(a) or the caselaw governing amended pleadings.

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[2] The witness's use of the word "reckless" in their answers was of no legal significance until the trial court subsequently permitted Appellee's amended complaint. Thus, I would not conclude that Appellants waived the argument they present here because they failed to object at the first mention of the word "reckless." The separate issue we address on appeal is the propriety of the trial court allowing an eleventh hour amendment to the pleadings to allege a claim for punitive damages based upon the assertion of reckless conduct.

Because I believe the trial court abused its discretion in permitting Appellee to amend her complaint to allege Appellants' recklessness, and to include the attendant claim for punitive damages, I would vacate the punitive damages award.

I respectfully dissent.

Judge King and Judge Sullivan join this dissenting memorandum.