Serial: **103865**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99001-SCT

RE: THE RULES OF CIVIL PROCEDURE

ORDER

This matter has come before the Court en banc on its own motion for consideration of amendments to Rule 15 of the Mississippi Rules of Civil Procedure and the Comment thereto, and the Court having considered the matter finds that the amendment of Rule 15 and its Comment as set forth in Exhibit "A" hereto will promote the fair and effective administration of justice and that the amendment should be adopted.

IT IS THEREFORE ORDERED that Rule 15 of the Mississippi Rules of Civil Procedure and the Comment thereto are amended to read as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of *Southern*

Reporter, Second Series (Mississippi Edition) and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 11th day of April, 2003.

/s/ William L. Waller, Jr.
WILLIAM L. WALLER, JR., JUSTICE,
FOR THE COURT

McRAE, P.J. AND EASLEY, J. DISSENT

DIAZ, J., NOT PARTICIPATING

EXHIBIT "A" TO ORDER

MISSISSIPPI RULES OF CIVIL PROCEDURE

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend a ~~his~~ pleading as a matter of course at any time before a responsive pleading is served, or, if a ~~the~~ pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party ~~he~~ may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), ~~thirty days leave to amend shall be granted~~, leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a ~~his~~ pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice ~~him in~~ the maintaining of the ~~his~~ action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(1) has received such notice of the institution of the action that the party ~~he~~ will not be prejudiced in maintaining the party's ~~his~~ defense on the merits, and

(2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party ~~him~~. An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party ~~him~~ to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires.]

Advisory Committee Historical Note

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

Comment

"It is an invariable principle of practice that the admissible proof in any case must come within the allegations of the pleadings and that it avails nothing to prove what is not charged. But courts are organized for the purpose of hearing and determining causes on their actual merits; and, although it is true that good faith and a reasonable diligence are expected of parties in equity and of their solicitors, and that every party when he comes into court will in the first instance unfold his whole case or defense in accordance with the rules that govern the pleadings and proceedings therein, nevertheless it would be a hopelessly visionary and impractical expectation that every party in every case could always successfully communicate at once to his solicitor all the material facts with complete accuracy, or that any solicitor, although having all the facts, may reach such a height of professional perfectibility as to stand above the possibility of error or omission in pleading them -- as a consequence of which there would sometimes be a failure of full justice on the actual merits unless amendment and correction in the pleadings, and in other procedural steps, were seasonably and judiciously allowed." V. Griffith, Mississippi Chancery Practice, § 388 (2d ed. 1950).

The preceding statements state well the theory underlying Rule 15 and demonstrate that amended pleadings have been liberally permitted throughout Mississippi legal history. *See* Miss. Code Ann. §§ 11-5-45, 11-5-57, 11-5-59, 11-5-61, 11-5-63, 11-7-55, 11-7-59(3), 11-7-115, and 11-17-117 (1972); *See* also, *Grocery Co. v. Bennett*, 101 Miss. 573, 58 So. 482 (1912) (courts are organized for the purpose of trying cases on their merits and only in exceptional cases should trial courts refuse to permit amendments to pleadings or proceedings); *Field v. Middlesex Bkg. Co., 77 Miss.* 180, 26 So. 365 (1899) (the presentation of a case on its merits should not be defeated by reason alone of any formal rules of pleading and practice, if within the legitimate powers of a court of conscience to avoid it).

M.R.C.P. 15(a) now varies from Federal Rule 15(a) in one ~~two~~ important instance ~~instances~~. The federal rule permits a party to amend his pleading only once as a matter of course before a responsive pleading is served; the Mississippi rule places no limit on the number of amendments. ~~Further, in the event a Rule 12(b)(6) or 12(c) motion is granted, the losing party will be accorded thirty days leave to amend his defective pleading, pursuant to M.R.C.P. 15(a). This latter provision preserves the traditional demurrer practice but limits it to Rule 12(b)(6) and 12(c) motions on which matters outside the pleadings are not presented. If matters outside the pleadings are presented, then the motion shall be deemed as one for summary judgment, under Rule 56, and no amendment is allowed.~~

Prior to the 2003 amendment of Rule 15(a), a party could, as a matter of right, amend within thirty days after losing on Rule 12(b)(6) and 12(c) motions on which matters outside the pleadings were not presented. In *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964 (2003), the Supreme Court recognized that the rule mandated an opportunity to amend upon dismissal under Rule 12(b) even though circumstances might be such as would make an amendment futile. Recognizing that the federal rule gives no such absolute right to amend, it was suggested there that "the better course is to temper M.R.C.P. 15(a)'s mandate with the paramount concerns of logic, futility of amendment, and judicial economy." *Poindexter*, 838 So. 2d at 972, Waller, J., concurring. Now, M.R.C.P. 15(a) expressly provides that in the event a Rule 12(b)(6) or 12(c) motion is granted, leave to amend may be granted by the trial court where justice so requires.

~~Under Rule 15 it is wholly irrelevant that a proposed amendment changes the cause of action or the theory of the case, or that it states a claim arising out of a transaction different from that originally sued on or that it caused a change in parties. *See I.L.G.W. Union v. Donnelly Garment Co.*, 121 F.2d 561 (8th Cir. 1941); *contra, Bank of Forest v. Capital Nat. Bank*, 176 Miss. 163, 169 So. 193 (1936) (citing V. Griffith, *supra*, § 389).~~

~~The rule provides, simply, that amendments are to be allowed "freely . . . when justice so requires." In practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party. 6 Wright & Miller, Federal Practice and Procedure, Civil § 1484 (1971). Until a responsive pleading has been served, or if no such pleading is permitted and the action is not yet on the trial calendar, the party may amend as~~

~~a matter of course; thereafter, amendment can be only upon leave of court and requires a motion and notice to all parties. Generally, this accords with traditional Mississippi practice. *See* V. Griffith, *supra*, §§ 388-98.~~

Under M.R.C.P. 15(b), when evidence is introduced or an issue is raised with the express or implied consent of the other party, the pleadings shall be treated in all respects as if they had been amended to conform to such evidence. If the opposing party objects but fails to persuade the court that such party ~~he~~ will be prejudiced in maintaining the party's ~~his~~ claim or defense, the court must then grant leave to amend the pleadings to allow the evidence on the issue. If the objecting party can show prejudice, the court may grant a continuance to meet the evidence, but should again allow amendment of the pleadings. 6 Wright & Miller, *supra*, Civil § 1495.

~~Prior to the Mississippi Rules of Civil Procedure, it was the law that amendments relate back to the date of the original pleading only when, generally, the amended bill stated no new cause of action and brought in no new parties. *Brown v. Goolsby*, 34 Miss. 437 (1857); *Potts v. Hines*, 57 Miss. 735 (1880); V. Griffith, *supra*, § 398.~~

Under Rule 15(c) ~~Now~~ the first test for whether an amendment relates back, ~~under Rule 15(c),~~ is merely whether the amended claim or defense arose from the same "conduct, transaction, or occurrence" as the original. The remaining tests are whether the new party to be added by the amendment (if any) is served before expiration of the period provided by Rule 4(h) for service of a summons and complaint. An intended defendant who is notified of an action within the period allowed by Rule 4(h) for service of a summons and complaint may not defeat the action on account of a defect in the pleading with respect to the defendant's name, provided that the requirements of clauses (1) and (2) have been met. If the notice requirement is met within the Rule 4(h) period, a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification. In allowing a name-correcting amendment within the time allowed by Rule 4(h), this rule allows not only the 120 days specified in that rule, but also any additional time resulting from any extension ordered by the court pursuant to that rule, as may be granted, for example, if the defendant is a fugitive from service of the summons.

Amendments pursuant to Rule 9(h) (fictitious parties) are not considered as changing parties and do relate back.

Rule 15(d) permits supplemental pleadings when such are reasonably necessary to show transactions, occurrences, or events which have transpired since the date of the pleading sought to be supplemented. This conforms, generally, to prior Mississippi practice. *See Wright v. Frank*, 61 Miss. 32 (1883).

While Rule 15(d) does not expressly incorporate the relation back doctrine of Rule 15(c), it appears sensible that supplemental pleadings should be subject to the basic relation back tests of 15(c). 6 Wright & Miller, *supra*, Civil § 1508.

[Amended effective September 1, 1987; amended August 21, 1996; amended July 1, 1998; amended effective April 17, 2003.]