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Pleading--Amendment of Pleadings by Leave of Court

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the service of a dependent servant, based on a pseudo-family relationship, no longer exists.²³ The necessary shift in the function of the action is to the protection of the employer's business interests, and the cases indicate that the law has moved in that direction.

John Campbell Palmer IV

Pleading—Amendment of Pleadings by Leave of Court

The prior practice of "gamesmanship" in pleading has been replaced by a judicious emphasis on substance rather than on form under the West Virginia Rules of Civil Procedure. The Rules focus on the orderly presentation of all the relevant issues.¹ Under the Rules, substantive law need no longer seem to be "secreted in the interstices of procedure."² Unfortunately, lawyers, and even judges are often too busy with the business of the day to lay aside the habits of decades. Perhaps, more for this reason than any other, the West Virginia Supreme Court of Appeals gave a restrictive treatment to Rule 15(a) of the West Virginia Rules of Civil Procedure in deciding the case of *Perdue v. S. J. Groves and Sons Co.*³ The pertinent facts of that case are as follows:

Plaintiffs, who were landowners in Huntington, West Virginia, alleged their home was damaged as the proximate result of de-

possibility of his servant injuring a third party. Conversely, when the servant is injured by a third party, it is difficult to find that the tortfeasor should foresee an injury to a person with whom the servant has merely a contractual relation. This is subject to the criticism that a tortfeasor should be held to foresee such an injury since most people are employed; however, courts usually hold that this is too remote. Another rationale commonly employed is that the employer usually is the one who is best equipped to bear the loss, whether his servant injures a third person or a third person injures his servant. Thus while the two doctrines may be symmetrical factually, the rules of the courts result in the balance being weighted unequally.

²³ *City of Philadelphia v. Philadelphia Rapid Transit Co.*, 337 Pa. 1, 5, 10 A.2d 434, 436 (1940). See Note, *The Action Per Quod Servitium Amisit*, 26 AUSTL. L. J. 122 (1952). See also *United States v. Standard Oil Co.*, 153 F.2d 958, 960 (9th Cir. 1946), *aff'd* 332 U.S. 301 (1947) (the modern relationship of employer-employee is basically one of contract).

¹ The Rules contemplate that a decision will be made on the merits of the controversy. Moreover, Rule 1 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of any action." W. VA. R. Crv. P. 1.

² "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." SIR HENRY MAINE, *EARLY LAW AND CUSTOM* 389 (1907).

³ 161 S.E.2d 250 (W. Va. 1968).

defendant's work on a highway construction project. Prior to trial, but after defendant had answered, plaintiffs made a motion pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure to amend their complaint to contain allegations of additional damages. The trial court denied plaintiffs' motion and later granted a defense motion for summary judgment. Plaintiffs then appealed to the West Virginia Supreme Court of Appeals, alleging in part that the trial judge erred in refusing to grant plaintiffs' motion to amend their complaint. *Held*, the trial court did not err on the basis that the Rules of Civil Procedure substantially recognize the pre-existing law of West Virginia relating to the amendment of pleadings and the sound discretion of the trial judge in refusing or granting leave to amend. The court stated, in conclusion, that plaintiffs' motion disclosed no basis for amendment. *Perdue v. S. J. Groves and Sons Co.*, 161 S.E.2d 250 (W. Va. 1968).

Rule 15(a) of the West Virginia Rules of Civil Procedure provides, in part, that once a responsive pleading has been filed a party may amend his plea only by leave of court or with the written consent of his adversary. Moreover, Rule 15(a) provides such leave shall be freely given when justice requires.⁴ Because the West Virginia Rule on amended and supplemental pleadings is identical with the Federal Rule, the West Virginia court's interpretation of this rule in the *Perdue* case may be profitably compared with the treatment given Rule 15(a) by the federal judiciary.⁵

A perusal of the federal decisions on the subject reveals a strong liberality in allowing amendments under Rule 15(a).⁶ The federal

⁴ "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and 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 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." W. VA. R. Civ. P. 15(a).

⁵ "Another useful source will be interpretations of the Federal Rules Yet interpretations of the Federal Rules should be considered in the context of federal jurisdiction and practice as a whole" Silverstein, *A Basic Introduction to the New West Virginia Rules of Civil Procedure*, 62 W. VA. L. REV. 117, 134 (1959). Compare FED. R. Civ. P. 15(a).

⁶ *E.g.*, *Dombrowski v. Murff*, 24 F.R.D. 302, 304 (1959). It is clear that the principal reason for allowing amendments so liberally is to facilitate a disposition of cases on the merits. F. JAMES, *CIVIL PROCEDURE* § 5.2 (1965). For a discussion of the liberality with which the federal courts have allowed

courts have uniformly held that amendments should be freely granted under this rule.⁷ The cases make it evident that Rule 15(a) declares an affirmative doctrine.⁸ For example, the United States Supreme Court stated in *Foman v. Davis* that, in the absence of any apparent or declared reason to the contrary, an amendment offered under Rule 15(a) should be allowed.⁹ Justice Goldberg, speaking for the Court, recognized the discretionary power of the trial court, but said, in effect, that a refusal to grant leave without justification is an abuse of discretion.¹⁰ In general, the federal courts are disinclined to deviate from the mandate of Rule 15(a).¹¹ The trend of federal opinion points to a policy which views proposed amendments in a light most favorable to the movant.¹² These courts have uniformly placed the burden on the trial court and the opposing party to *support* any denial of a motion to amend under Rule 15(a).¹³ This view is in sharp contrast to the view of the West Virginia court in the *Perdue* case.

The court there said in substance, that unless the movant can show good reason why leave to amend should be granted, the trial court may properly, in its discretion, refuse to allow the amend-

leave to amend, and many illustrative cases, see 3 J. MOORE, FEDERAL PRACTICE 15.08 (2d ed. 1968). See also 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 447 at 746, 747 (C. Wright ed. 1960).

⁷ In fact, it can be said with little qualification that there must be a showing of undue prejudice to the opposing party before a motion pursuant to Rule 15(a) will be denied. However, note that no satisfactory definition of "undue prejudice" can be synthesized from the cases. See *Shelley v. The Maccabees*, 26 F.R.D. 10 (D.C.N.Y. 1960). Bad faith and undue delay have also received considerable attention in the federal courts. However, these factors are usually secondary to the "prejudice" factor. For a general discussion of "bad faith" and "delay" as factors affecting the trial judge's discretion, see Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. CAL. L. REV. 529, 535 (1964).

⁸ *E.g.*, *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69, 75 (5th Cir. 1961). This case states emphatically that Rule 15(a) declares an affirmative policy.

⁹ 371 U.S. 178, 182 (1962).

¹⁰ Compare the following pertinent language with the decision in the principal case. "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id.*

¹¹ *E.g.*, *Dombrowskis v. Murff*, 24 F.R.D. 302, 304 (1959).

¹² 1 A. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 447 at 746, 747 (C. Wright ed. 1960).

¹³ *E.g.*, *Midwestern Developments, Inc. v. City of Tulsa*, 319 F.2d 53 (10th Cir. 1963).

ment.¹⁴ This is a restricted view of Rule 15(a). However, insight into the court's adoption of this interpretation may be had by examination of West Virginia case and statutory law prior to the Rules.¹⁵ Such an examination leads to the conclusion that the *Perdue* court was strongly guided by past practice.

The general rule in West Virginia, prior to 1960, relating to the amendment of pleadings was less affirmative and more restrictive than the present rule.¹⁶ The prior statute which embodied these general rules provided a limitation on changing the cause of action by amendment. The present Rule contains no such restriction. Moreover, as compared with the prior statute, Rule 15(a) limits the trial judge's discretion. The statute provided that an amendment *may be permitted if, in the court's opinion*, substantial justice will be promoted thereby.¹⁷ The present Rule provides that "leave [to amend] *shall be freely given* when justice so requires."¹⁸ The emphatic difference between "may be" and "shall be" is one of critical importance and seems to lie at the foundation of the West Virginia court's restrictive interpretation of Rule 15(a) in *Perdue v. S. J. Groves and Sons Co.*¹⁹

The consistency of the federal courts' interpretation of Rule 15(a) with the spirit of the Rules as a whole suggests that the West Virginia Supreme Court of Appeals' contrary interpretation of its Rule 15(a)

¹⁴ The Court stated that it was of the opinion that plaintiff's motion for leave to file an amended complaint under Rule 15(a) of the Rules of Civil Procedure, disclosed "*no basis* for an amendment of the complaint and that the trial court did not abuse its discretion in refusing to grant the motion." *Perdue v. S. J. Groves and Sons Co.*, 161 S.E.2d 250, 257 (W. Va. 1968) (emphasis added).

¹⁵ For a discussion of the law relating to the amendment of pleadings prior to the adoption of the West Virginia Rules of Civil Procedure and a comparison of those Rules with the Federal Rules see Lugar, *Common Law Pleading Modified Versus the Federal Rules*, 53 W. Va. L. Rev. 27 (1950).

¹⁶ Id. W. VA. CODE ch. 56, art. 4, § 24 (Michie 1949). "The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant; and, notwithstanding such appearance, in any action, suit, motion or other proceeding, the court, if in its opinion substantial justice will be promoted thereby, may . . . permit any pleading to be amended . . . changing the form but not the cause of action . . . and the court may allow any other amendment in matter of form or substance in any . . . pleading . . . which may enable the plaintiff to sustain the action, suit, motion or proceeding for the cause for which it was intended to be brought . . ." Note that the present statute, W. VA. CODE ch. 56, art. 4, § 24 (Michie 1966), is identical but has no application to actions which are within the scope of the West Virginia Rules of Civil Procedure.

¹⁷ W. VA. CODE ch. 56, art. 4, § 24 (Michie 1949).

¹⁸ W. VA. R. Crv. P. 15(a) (emphasis added).

¹⁹ 161 S.E.2d 250 (W. Va. 1968).

should be re-examined. While the West Virginia court in the *Perdue* case requires the movant to disclose some basis for his proposed amendment, the federal courts grant such leave freely and only deny a motion to amend when certain conditions exist which would make it unfair to allow the amendment.²⁰

Joseph Robert Goodwin

**Property—Implied Warranty of Fitness in the Sale
of a New House**

Morton, who was in the business of building and selling new houses, contracted to sell a completed house and lot to Humber. The only warranty contained in the deed was the warranty of title. No other warranties, written or oral, were connected with the sale. Humber alleges that the house was not suitable for human habitation because the fireplace and chimney were not properly constructed. As a result of this defect, the house caught fire and partially burned the first time a fire was lighted in the fireplace. Morton defended on the ground that the doctrine of caveat emptor applied to all sales of real estate. In the Court of Civil Appeals, Morton's motion for a summary judgment was granted and Humber appealed. *Held*, reversed and remanded. The caveat emptor rule as applied to new houses is outdated and out of harmony with modern home buying practices. Consequently, the builder-vendor (house-merchant) impliedly warrants that such house was constructed in a good workmanlike manner and was suitable for human habitation. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

The doctrine of caveat emptor flourished during the nineteenth century in an atmosphere of rugged individualism where emphasis was placed on secure business transactions.¹ However, caveat emptor was not used extensively in the sale of homes because the home-buyer often hired an architect for designing and planning and then hired a contractor to build according to the plans.² If the home were defective, the home-owner had a cause of action against either the architect or the contractor.³

²⁰ For a full discussion of judicial discretion in the federal courts see Donnici, *The Amendment of Pleading—A Study of the Operation of Judicial Discretion in the Federal Courts*, 37 S. CAL. L. REV. 529 (1964).

¹ Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1 (1953-4).

² Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967).

³ *Id.* at 837.