# Surprise Act: Pending Appeal Involving Last-Minute Amendment Could Presage the Revival of Trial by Ambush in Pa.

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Pleadings are the opening act of litigation—setting the stage, defining the cast, and signaling the story to come. But *Bernavage v. Green Ridge Healthcare Group, LLC, et al.*, No. 1576 MDA 2023 (Pa. Super. Ct.), which is pending on appeal before the *en banc* Superior Court, presents a plot twist: what happens when a plaintiff introduces an entirely new theory just as the curtain is about to fall and the house lights begin to rise? Specifically, the appeal poses the question of whether a plaintiff is permitted to amend her complaint in the middle of trial to add allegations of the defendants' recklessness and request an award of punitive damages.

## Standard to Amend Pleadings

Rule 1033 of the Pennsylvania Rules of Civil Procedure governs amended complaints. It states, in relevant part, that a party may amend a pleading—whether to "change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading"— "at any time" "either by filed consent of the adverse party or by leave of court." Pa.R.Civ.P. 1033(a). On its face, Rule 1033 does not impose a time limit on when a pleading such as a complaint must be amended. Indeed, the Superior 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 take therefrom." *Biglan v. Biglan*, 479 A.2d 1021, 1025–1026 (Pa. Super. Ct. 1984); *see*, *e.g.*, *Wilson v. Howard Johnson Rest.*, 219 A.2d 676, 679 (Pa. 1966) (amendments to pleadings "should be liberally granted at any stage of the proceedings" (citation and quotation marks omitted)).

That is not to say that the timeliness of a request to amend a pleading is wholly irrelevant. While the denial of a request to amend a pleading is an abuse of discretion when based on nothing more than unreasonable delay, *see*, *e.g.*, *Gutierrez v. Pa. Gas & Water Co.*, 507 A.2d 1230, 1233 (Pa. Super. Ct. 1986), the timeliness of the request is a proper consideration "insofar as it presents a question of prejudice to the opposing party." *Capobianchi v. BIC Corp.*, 666 A.2d 344, 347 (Pa. Super. Ct. 1995). The Pennsylvania Supreme Court has addressed prejudice in this context, writing:

> If the amendment contains allegations which would have been allowed inclusion in the original pleading (the usual case), then the question of prejudice is presented by the Time at which it is offered rather than by the substance of what is offered. The possible prejudice, in other words, must stem from the fact that the new allegations are offered late rather than in the original pleading, and not from the fact that the opponent may lose his case on the merits if the pleading is allowed[.]

*Bata v. Central-Penn Nat'l Bank of Phila.*, 293 A.2d 343, 357 (Pa. 1972) (citation and quotation marks omitted).

Applying that standard, Pennsylvania courts traditionally have looked unfavorably upon the late introduction of new theories of recovery. *See*, *e.g.*, *W. Penn Power Co. v. Bethlehem Steel Corp.*, 384 A.2d 144 (Pa. Super. Ct. 1975); *Newcomer v. Civil Serv. Comm'n of Fairchance Borough*, 515 A.2d 108 (Pa. Commw. Ct. 1986); *Smith v. Athens Twp. Auth.*, 685 A.2d 651 (Pa. Commw. Ct. 1996).

## The *Bernavage* Decision

The *Bernavage* case arose from a fall sustained by an elderly woman while being transferred at a long-term care facility. The woman subsequently passed away from unrelated causes. Thereafter, her daughter filed a professional negligence claim against two healthcare providers on her mother's behalf. Notably, the complaint did not include any allegations of recklessness or willful or wanton misconduct. The matter was eventually tried to verdict before two different juries. During the first trial, the daughter elicited testimony from two of the defendants' employees that the defendants' conduct was reckless. The daughter then moved for a directed verdict on the issues of negligence and recklessness based on the employees' admissions. The daughter also made a request to file an amended complaint to conform with the evidence elicited at trial, specifically, to characterize the defendants' mental state as reckless and to make a claim for punitive damages. The trial court denied the daughter's request for a directed verdict but granted her request for leave to file an amended complaint. In doing so, the trial court severed the issues related to the factfinder's consideration of whether punitive damages should be awarded.

The first jury was asked to consider whether the defendants' conduct fell below the standard of care, and if so, whether their negligence was a factual cause of the mother's harm. The jury answered both questions in the affirmative and awarded the daughter $300,000 in compensatory damages. The jury was also asked two verdict interrogatories as to whether the defendants acted with the requisite state of mind that would allow for the recovery of punitive damages. The jury answered those questions in the affirmative as well. Based on that verdict, the pleadings were reopened, and the parties proceeded to conduct punitive damages discovery. At the ensuing second trial, the trial court required the parties to proceed using transcripts of the trial testimony for all witnesses called in the first trial; the only new evidence introduced was the wealth of the defendants and their ability to pay a punitive damages award. The second jury ultimately awarded the daughter $2.7 million in punitive damages—nine times the compensatory damages award. The defendants moved for judgment notwithstanding the verdict on punitive damages and the jury's finding of negligence. The defendants also moved for a new trial. The trial court denied both requests.

On appeal, a Superior Court panel affirmed the award of compensatory damages but vacated the award of punitive damages. With regard to the punitive damages award, the panel determined that this was not a case where a plaintiff simply sought an amendment to conform the complaint to the evidence adduced at trial. "Rather," the panel continued, "it was an introduction of a new theory of recovery," because the specific theory of recovery to support the daughter's punitive damages claim was "substantively different from the theory she developed during discovery and alleged in her complaint." *Bernavage*, *slip op.* at 20. The panel held that this amounted to unfair surprise because, among other reasons, the daughter "never introduced the concept of recklessness into the case" "[i]n the three years prior"; the daughter's counsel "introduced the concept of recklessness at the latest possible time—during day one of presentation of liability evidence"; "[t]he witnesses used the word reckless at counsel's prompting"; and the daughter's counsel "asked questions at trial that he could have, but did not, ask two years prior at the witnesses' depositions." *Id.* at 19, 21. In the process, the panel established the rule that "unfair surprise exists . . . where a negligence plaintiff, without explanation, withholds the precise theory of recovery until the latest possible time." *Id.* at 21. The panel concluded its opinion by writing: "And while we ascribe no motive to [the daughter], to reach a different conclusion than the one we reach would be to invite negligence plaintiffs to withhold their theory of recovery, be it negligence, gross negligence, or recklessness, until the last possible minute for the specific purpose of creating unfair surprise." *Id.*

The daughter moved for reargument *en banc*, which the Superior Court granted—resulting in the panel's opinion being vacated. Briefing is underway, and it is anticipated that oral argument will take place before the *en banc* Superior Court in the spring of 2026.

**What's Next?**

Depending upon how the *en banc* Superior Court rules, the impact of *Bernavage* could be far-reaching. Affirming the trial court in its entirety would, in practice, reintroduce trial by ambush, which the Pennsylvania Rules of Civil Procedure "were intended to prevent." *Clark v. Hoerner*, 525 A.2d 377, 384 (Pa. Super. Ct. 1987); *see Gregury v. Greguras*, 196 A.3d 619, 628 (Pa. Super. Ct. 2018) (*en banc*) ("One of the primary purposes of discovery is to prevent surprise and unfairness of a trial by ambush, in favor of a trial on the merits."). Plaintiffs would be incentivized to withhold their theory of recovery (and withhold their intention to seek punitive damages or possibly other damages) until the last possible moment, as noted by the panel.

Such a regime undoubtedly would unleash a series of preemptive measures by defendants, including filing motions in limine as a matter of course to bar plaintiffs from introducing evidence or argument on undisclosed theories of recovery or damages at trial to guard against last-minute amendments—although query whether such measures would prove effective if a plaintiff is automatically allowed to amend her complaint, in the middle of trial, to seek

damages based on a previously undisclosed theory. Regardless, affirming the trial court, in full, would appear to raise due process concerns for defendants, particularly when punitive damages are sought. Such damages already "pose an acute danger of arbitrary deprivation of property," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), and that danger seemingly would be exacerbated if punitive damages could be introduced for the first time at trial.

Accordingly, the *en banc* Superior Court must decide in *Bernavage* whether a last-minute amendment of this magnitude belongs in the final act—or whether it impermissibly rewrites the performance after the audience is already waiting for the final bow.

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