Trial Law TIPS

Roy D. Wasson's
TIP #19

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Motions to Amend to Conform to the Evidence—Risky Business

Introduction

The Florida and Federal Rules of Civil Procedure both provide mechanisms for amending your complaint during trial if you learn too late that you have failed to allege important facts or legal theories in your original pleadings. However, the availability of such remedies should not be used as a substitute for proper pleading in the first place, especially in light of some appellate decisions which apparently misapply the standard for amending to conform to the evidence at trial.

While this TIP gives you all the ammunition you should need to successfully amend your complaint during trial, it is almost always a better procedure to study your pleadings before trial and making a written motion to amend. Even if you may lose your trial date, you should seriously consider filing such a motion in order to

increase the odds that you will be afforded the right to amend your complaint, rather than taking the chance that you can satisfy the elements for amending to conform to the evidence.

But here's how to do it if you wait until trial to amend:

Two Ways to Amend at Trial

Fla. R. Civ. P. 1.190 (b) provides two very different ways to amend your pleadings to "conform to the evidence" at trial. First is "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties," in which case the rule provides that "they shall be treated in all respects as if they had been raised in the pleadings [and s]uch 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." Rule 15(b) of the Federal Rules of Civil Procedure is almost identical.

"An issue is tried by consent where the parties fail to object to the introduction of evidence on the issue." *Department of Revenue v. Vanjaria Enterprises, Inc.,* 675 So. 2d 252, 254 (Fla. 5th DCA 1996). However, just because you introduce evidence which supports an unpleaded issue does not always mean that you can amend under this first method, as there are two situations in which the lack of an objection by the defense attorney will be excused.

The second way in which one can amend to conform to the evidence at trial is when the issue in question is not tried by implied consent, but where the evidence you offer is objected to as being outside the scope of the existing pleadings. That portion of Rule 1.190(b) and Federal Rule 15(b), provides in pertinent part as follows:

> If the 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 to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the ***objecting party fails to satisfy the court that the admission of such***

> ***evidence will prejudice the objecting party*** in maintaining an action or defense upon the merits.

(Emphasis added).

The Federal Rule is slightly different, in that it goes on to provide that "[t]he court may grant a continuance to enable the objecting party to meet such evidence" as a condition of granting leave to amend. This rule applies a standard which is not much different than that applicable to pretrial amendments.

Trial By Consent of Unpleaded Issue—Immaterial Evidence Needed

In order to demonstrate entitlement to amend your complaint to conform to the evidence under the theory that the issue has been tried by consent, it is first necessary to demonstrate to the trial court that you introduced evidence which was not objected to, and which is ***not relevant*** to any existing cause of action, affirmative defense, or avoidance which has been pleaded. That's right, you need to admit some evidence that has nothing to do with your existing case!

Your unpled theory which you would like to have made part of the case probably has factual elements which are unlike those already framed by the pleadings, so such testimony as will support that unpleaded theory would otherwise be irrelevant in your lawsuit. However, if there is some way for the defense attorney to argue that the evidence in question was relevant and admissible to an already-pleaded issue, then he or she cannot be faulted for failing to stand up and object when that evidence was offered, as being outside the scope of the pleadings. Similarly, the defense attorney's failure to object to the evidence will not be construed as having impliedly consented to trying your unpleaded legal theory.

The trial court granted a motion for leave to amend the pleadings to conform to the evidence in *Freshwater v. Vetter*, 511 So. 2d 1114 (Fla. 2d DCA 1987), but that ruling was reversed on appeal, because the evidence to which the amendment allegedly would "conform" was not admitted by consent. The court held as follows:

> Freshwater further argues that since evidence of fraud was introduced against Vetter without objection, the trial court was correct in allowing the pleadings to be amended. The fallacy in this argument as Vetter points out, is that he was not in a position to object to the evidence offered by Freshwater since ***it was consistent with the claim framed by Freshwater's pleading that Vetter was an alter ego*** of Royal Cove. Thus, we think Vetter's failure to object did not constitute an expressed or implied consent to try the unplead issue.

Id. at 1115 (emphasis added). Thus, to amend in this fashion, make sure that you have introduced some proof on your unpleaded claim that is plainly irrelevant to another pleaded issue. And make sure that it is enough proof to avoid a directed verdict on your new theory.

No Discretion to Deny Amendment Where Issue Tried By Consent

Some Florida courts are somewhat confused by the seeming absolute character of the right to amend to conform to the evidence, where an issue is tried by consent, as compared to the broad discretion which trial judges normally have to grant or deny amendments to the pleadings. The correct rule of law applicable to this inquiry, however, and the one largely applied by the federal courts, is that the trial court has no discretion to ***deny*** a request to amend your complaint where an issue truly has been tried by implied consent.

For example, in *Borden, Inc. v. Florida East Coast Railway Co.*, 772 F.2d 750 (11th Cir. 1985), the court noted the interplay between the normal rule of discretion and the mandatory character of a requested amendment to conform to evidence which was introduced without objection:

> Allowing an amendment to the pleadings at the close of trial to conform to the evidence presented is within the trial court's discretion . . . . When issues outside the pleadings are tried by the expressed or implied consent of the parties, however, Rule (b)

> requires that the amendment be allowed . . . . Aetna's amendment therefore, ***had to be allowed*** if the parties either impliedly or expressly consented to the trial of the Frosts' liability to Aetna.

Id. at 758 (emphasis added). It is a tough sell to a Florida judge to say that he or she "must" do anything, so be careful with that argument.

Excuses for Failure to Object to Immaterial Evidence

A few cases excuse a defense attorney's failure to object to irrelevant evidence and hold that an unpleaded issue was ***not*** tried by consent, where the lack of an objection was somehow understandable. For example, where the evidence is nearly the same as evidence which is relevant to a pleaded issue, the failure to object may be excused.

One example of that situation is *Buday v. Ayer*, 754 So. 2d 771 (Fla. 2d DCA 2000). In that case, the court reversed a ruling permitting an amendment at the time of trial, where the issue was not tried by consent, because the failure to object was excusable. The court held:

> In this case, we conclude that the issue was not tried by consent and that the admission of the evidence prejudiced Ms. Buday within the meaning of Rule 1.190 (b).
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> * * *
>
> [W]e find that, even if Ms. Buday's counsel did neglect to object, this failure, "whether due to mistake or momentary lapse of attentiveness," is insufficient to establish consent for purposes of Rule 1.190 (b).

Id. at 772-73.

Thus, it may help if you have a marching band playing a drum roll as you shake to alertness your adverse counsel, starting your question of the witness with something like: "Mr. Witness, I

want to ask you about circumstance X, which as ***we all know has nothing to do with the issues in this case*** . . . ." Use your judgment how far to take this wake-up call to the DA.

What if the Defense Objects?

The usual discretionary rule we all have come to rely on (usually by the time of our Third Amended Complaint in a case) is applicable where a party seeks to introduce evidence at trial that is irrelevant to a pleaded issue, and an objection is raised to that evidence on the basis that it is immaterial, or the failure to object is excused. Then, the inquiry is no longer one about amending to conform to the evidence but is an ordinary inquiry whether leave to amend should be granted, applying the usual balancing test.

One example of that situation is *Buday v. Ayer*, 754 So. 2d 771 (Fla. 2d DCA 2000). In that case, the court reversed a ruling permitting an amendment at the time of trial where the issue was not tried by consent, because the failure to object was excusable. The court held:

> A trial court, in the exercise of its discretion, may permit the amendment of pleadings pursuant to Rule 1.190, Florida Rules of Civil Procedure. This discretion is at its nadir when the trial court has, as in this case, heard all of the evidence." . . . Under Rule 1.190 (b), however, a party is entitled to amend a pleading to conform to the evidence if that party can establish that the issue was tried by the expressed or implied consent of the opposing party. ***An opponent who objects must satisfy the trial court that admission of the evidence will cause it to suffer prejudice.***

Id. at 772 (emphasis added).

In *Anglo American Auto Auctions, Inc. v. Tuminello*, 732 So. 2d 1218 (Fla. 5th DCA 1999), the defendant moved to amend its pleadings to conform to the evidence at the close the evidence at trial, to raise the defense of the statute of frauds. That motion was denied. The Fifth District reversed on appeal, not holding that the evidence was tried by implied consent, but that the trial court

abused its discretion in denying an amendment because there was no prejudice to the plaintiff from allowing the amendment, stating: "[u]nder the rule, a test of prejudice is the primary consideration in determining whether a motion for leave to amend should be granted."

In *Tuminello*, the appellate court found an abuse of that discretion in denying the defendant's motion to amend its answer, because the plaintiff was on notice of the issue which the defendant sought to raise by the amendment. *See also*, *e.g. Viscito v. Fred S. Carbon Co.*, 636 So. 2d 194 (Fla. 4th DCA 1994), in which the court held:

> If the evidence is objected to on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform to the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting party in maintaining an action or defense on the merits.

Id. at 196 (reversing trial courts failure to conduct prejudice inquiry and noting that, as a matter of law, no prejudice was demonstrated in the record which would have prevented amendment even in the presence of the objection).

Cases Confusing the Standards

Some judges have lost sight of their diminished discretion to deny amendment where issues are tried by consent, due to appellate decisions intermingling their analyses of the issues. Other cases have just botched the standards altogether. For example, in a decision rendered by the Third District called *Simon, Pipes & Ross, Inc. v. Cuartas*, 834 So. 2d 870 (Fla. 3d DCA 2002), the court overbroadly stated that "[w]here an objection is raised by the defendant, it is reversible error to permit a plaintiff to amend at the close of evidence to allege a new theory of recovery." As established by the wealth of authorities cited above, that statement of law is not accurate, because the court can always determine

whether to allow the amendment on the alternative basis that the objecting party shows no prejudice.

A case jumbling the standards applicable to the issues of amending to conform to the unobjected-to evidence and amending under a discretionary standard is *City of Miami v. Ross*, 695 So. 2d 486 (Fla. 3d DCA 1997). That was a case in which the complaint was amended to conform to the evidence which was introduced without objection.

The Third District went farther than it needed to in affirming that ruling, and confused the issue somewhat by addressing the absence of prejudice to the defendant, holding that "because this issue was tried by implied consent and the record clearly demonstrates that the City was not prejudiced since they anticipated the evidence that was presented, we find that the trial court did not abuse its discretion by granting the plaintiff's motion to amend the pleadings to conform to the evidence." *Id.* at 47.

Other cases use similar language, and those decisions have been used to support the proposition that you need to show a ***lack of prejudice*** to amend under the trial-by-consent method of Rule 1.190(b). So your best bet is to argue lack of prejudice to the other side ***and*** trial by implied consent, even if the law should not require any showing of lack of prejudice where an issue is tried by consent.

Why Bother With Amending if the Jury Hears the Evidence?

Under the language of the rule, even if you don't move to amend to plead previously-unpled issues, if such issues were tried by implied consent they should be considered to be part of the case, because Rule 1.190(b) states: "they shall be treated in all respects as if they had been raised in the pleadings." While trial by consent permits or compels the court to allow you to amend, the rule also states: "but the failure to so amend shall not affect the result of the trial of these issues."

Some cases have held that it is error to refuse to treat an issue as if it had been pleaded (where it is tried by consent) even if no motion to amend is made during trial. In *The Twenty-Four*

Correction, Inc. v. M. Weinbaum Constr., Inc., 427 So. 2d 1110 (Fla. 3d DCA 1983), the court reversed the trial judge's refusal to consider an unpleaded issue as if it had been pleaded, on the ground that it was tried by implied consent. Even though there had been no formal motion to amend the pleadings, it was error for the judge not to consider the pleadings as having been amended, in light of the evidence admitted without objection. The court held "that when an issue is so tried, it is treated in all respects as if raised by the pleadings without a motion to amend the pleadings to conform to the evidence." *Id.* at 1112. *See also DiTeodoro v. Lazy Dolphin Dev. Co.*, 418 So. 2d 428 (Fla. 3d DCA 1982).

In *Woodard v. Armenian Cultural Ass'n.*, 724 So. 2d 669 (Fla. 4th DCA 1999), the court reversed the trial judge's refusal to consider an issue as having been pleaded, holding: "the Woodards adduced evidence at trial that Woodard was not standing on the Association's premises at the time of the accident. As the Association failed to object that the evidence on the basis that it was outside the scope of the pleadings, the parties tried the issue by implied consent and the amendment of the Woodards' complaint was not necessary."

Why even mention the issue, if the mere fact of the evidence coming in is enough to allow the issue to be part of the case? After all, the jury heard the evidence, right? Who needs an amendment?

While the evidence you present to the jury is most of the case, the jury instructions and verdict form are very important as well. You should be looking for every theory you can put on the verdict form to allow the jury to check "yes" in your client's favor. Imagine the situation of an ordinary malpractice case in which you pled only negligent treatment by the defendant. The defense has a great expert who testifies that the results of the surgery were practically unavoidable, and that the defendant did nothing wrong. The jury looks troubled by the prospect of finding that the doctor botched the procedure.

However, during trial, evidence came in without objection which would entitle you to an instruction on lack of informed consent. It would be easier to sell the jury on the idea that your client would not have gone through the surgery, if consent had been properly given, than it would be to sell them on the idea that the

surgery was performed incorrectly. If you wait until all sides have rested and ask for a jury instruction on informed consent, you may be less likely to get one. If the defense says that no instruction should be given because "that theory was not pled,"the judge may be less likely to grant your request for a blank on the verdict form, than he or she would have been to allow an amendment to conform to the evidence before you rested your case.

Make your motion instead of hoping to sneak in a jury charge on an unpled claim. And make the motion before the defense has sent all its witnesses home, to obviate the "prejudice" argument. You may be right on the law, if you decide to not make any motion at all, but why wait for an appellate court to straighten-out things, if you can get the trial judge to rule correctly in the first place?

Conclusion

If you are going to try to amend your pleadings at the time of trial to conform to the evidence, please note that you will need to cite to the trial judge specific examples of evidence which you should not have be able to admit on any issue already pleaded in the case. Even if the defense objects, you can attempt to amend under ordinary prejudice/abuse of discretion standards. Your better bet is to review your complaint now and move to amend before trial.

Keep Tryin!

Roy