MEMORANDUM

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2017-004. Superior Court Rule 35. Final Pretrial Conference Order
Date: March 9, 2017

Justice Lynn requests that the Advisory Committee on Rules consider whether Superior Court Rule 35 ("Trial Management Conference")(attached as Appendix A) should be amended to: (1) require that the trial court issue an order following a final pretrial conference; and (2) make clear that the order will control the course of the action at trial and supersede prior pleadings in the case. Such an amendment would make the New Hampshire rule consistent with subsections (d) and (e) of Federal Rule of Civil Procedure 16 (attached as Appendix B) and the federal courts' interpretation of those subsections. *See e.g., McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491, 1494 (11th Cir. 1990)(noting that pretrial order supersedes the pleadings)(attached as Appendix C).

Appendix A

(b) Upon agreement of the parties, the presiding justice may assign a complex case for intensive mediation. Such assignment may be made at or at any time after the case structuring order has been issued but shall not be made later than 90 days before the trial date except for good cause shown. Assignment of a case to intensive mediation shall not stay, alter, suspend, or delay pretrial discovery, motions, hearings, conferences or trial unless the presiding justice so orders.

(c) The mediator for intensive mediation conducted under this rule shall be an active, senior active or retired superior court justice other than the justice to whom the case has been assigned for trial or who has presided over any pretrial hearings or ruled upon any pretrial motions. The justice who serves as mediator and all persons who participate in the mediation shall have no communication with the justice to whom the case is assigned for trial concerning the mediation or any matter pertaining to the merits of the case. All justices who serve as mediators pursuant to this rule shall have completed an approved mediation training program. The provisions of Rule 32(c)(3) shall apply to all superior court justices who serve as mediators under this rule.

The litigants and counsel must recognize that the neutrals will not be acting as legal advisors or legal representatives. They must further recognize that, because the neutrals are performing quasi-judicial functions and are performing under the auspices of the Court, each such neutral has immunity from suit, and shall not be called as a witness in any subsequent proceeding relating to the parties' negotiations and/or his/her participation, except as set forth in Rule 32(d).

(d) The parties shall be provided at least 30 days advance notice of the date, time and location of the mediation session and of the name of the justice who will be serving as the mediator. Any party claiming grounds to recuse the justice assigned as mediator, shall file a motion for such relief within 10 days after the date of the notice scheduling the mediation. Any such motion shall be referred for ruling to the justice assigned as the mediator and said justice's ruling on the motion shall be final and not subject to further review. In the event the justice assigned as mediator grants the motion to recuse, the case shall be reassigned to another justice for mediation. Mediation sessions shall be held at a court facility but, subject to the availability of facilities, normally shall be held in a location other than the court wherein the case will be tried.—Adopted September 24, 2013, eff. October 1, 2013.

VII. Trials.

Rule 35. Trial Management Conference.

(I) *Jury Trials*

(a) In every case scheduled for jury trial, the court shall schedule a Trial Management Conference which shall take place within 14 days before jury selection, or at such other time as the court shall order. At the Conference, parties will be present or available by telephone, prepared to discuss conduct of the trial and settlement.

(b) 14 days prior to the Trial Management Conference, unless another time is directed by the court or agreed to by the parties, all parties shall file with the court and serve on the other parties Pretrial Statements, which shall include, by numbered paragraphs, a detailed, comprehensive, and good faith statement, setting forth the following:

1. A summary of the case that can be read by the court to the jury at the beginning of trial;
2. Disputed issues of fact;
3. Applicable law;
4. Disputed issues of law;
5. Specific claims of liability by the party making the claim;
6. Defendant's specific defenses;
7. Itemized special damages;
8. Specification of injuries with a statement as to which, if any, are claimed to be permanent;
9. The status of settlement negotiations;

10. A list of all exhibits to be offered in the direct case of each party. The parties, or their counsel, shall bring exhibits, or exact copies of them, to court on the day of the Trial Management Conference for examination by opposing parties or their representatives;

11. A list of all depositions to be read into evidence;

12. A waiver of claims or defenses, if any;

13. A list of the names and addresses of all witnesses who may be called;

14. Whether there will be a request for a view and, if so, who shall pay the cost in the first instance;

15. The names and addresses of the trial attorneys or non-attorney representatives.

(c) Except for good cause shown, only witnesses listed in the Pretrial Statement will be allowed to testify and only exhibits, so listed, will be received in evidence.

(d) Preliminary requests for instructions about unusual or complex questions of law shall be submitted in writing at the Trial Management Conference. Supplementary requests may be proposed at any time prior to the time the court completes its instructions to the jury.

(II) *Bench Trials*

The court may direct the parties to attend a Trial Management Conference in non-jury cases. Written pretrial statements are not required in non-jury cases unless ordered by the court. Requests for findings of fact and rulings of law shall be submitted in writing in accordance with a schedule to be determined by the court.—Adopted May 22, 2013, eff. October 1, 2013.

Rule 36. Standing Trial Orders — Procedures.

(a) *Addressing the Court.* Anyone addressing the court or examining a witness shall stand. The rule may be waived if the person is physically unable to stand or for other good cause. No one should approach the bench to address the court except by leave of the court.

(b) *Opening Statements and Closing Arguments.* Opening statements shall not be argumentative and shall not be longer than 30 minutes unless the court otherwise directs. Closing arguments shall be limited to 1 hour each, unless otherwise ordered by the court in advance. Before any person shall read to the jury any excerpt of testimony from a transcript prepared by the designated court transcriber, he or she shall furnish the opposing party with a copy thereof.

(c) *Copies of Documents for Court.* Counsel shall seasonably furnish for the convenience of the court, as it may require, copies of the specifications, contracts, letters or other papers offered in evidence.

(d) *Examination of Witnesses.*

(1) Only one counsel on each side will be permitted to examine a witness.

(2) A witness cannot be re-examined by the party calling him or her, after his or her cross-examination, unless by leave of court, except so far as may be necessary to explain his or her answers on his or her cross-examination, and except as to new matter elicited by cross-examination, regarding which the witness has not been examined in chief.

(3) After a witness has been dismissed from the stand, the witness cannot be recalled without permission of the court.

(4) No person, who has assisted in the preparation of a case, shall act as an interpreter at the trial thereof, if objection is made.

(5) *Attorney as Witness.*

(i) *Compelling Testimony.* No attorney shall be compelled to testify in any cause in which he or she is retained, unless the attorney shall have been notified in writing previous to the commencement of the term of trial that he or she will be summoned as a witness therein, and unless he or she shall have been so summoned previous to the commencement of the trial.

(ii) *Participation as Advocate.* An attorney who gives testimony at trial or hearing shall not act as advocate at such trial or hearing unless the attorney's testimony relates to an uncontested issue, or relates to the nature and value of legal services rendered in the case, or unless the court determines that disqualification of the attorney would work unreasonable hardship on the attorney's

Appendix B

counting practices and implementation of § 3406(b)(2) of Central Valley Project Improvement Act in 2004 water year. San Luis & Delta-Mendota Water Auth. v United States DOI (2006, ED Cal) 236 FRD 491.

503. Other civil rights

Individual's Fed. R. Civ. P. 15(d) motions for leave to file supplemental pleadings were denied where additional claims against legal services attorney would not survive motion to dismiss since she was not subject to liability under 42 USCS § 1983. Hom v Brennan (2004, ED NY) 304 F Supp 2d 374.

504. Miscellaneous

District Court properly denied seller's motion to file supplemental complaint seeking additional $750,000 for parts that it had delivered to buyer after original complaint had been filed but for which buyer had not paid because of its bankruptcy filing, where (1) fact that buyer may have had notice of seller's claim against it for additional sum did not mean that buyer had notice that it would be required to defend against claim at trial, particularly since almost 2 years had passed since seller had sent invoices to buyer and over 10 months had passed since automatic stay on buyer's bankrupt estate had been lifted, yet seller had not previously sought leave to amend its complaint, (2) additional discovery might have been required by new claim, and (3) buyer's motion was filed only 1 week before trial was to begin, and it would have been improper to postpone trial to accommodate seller's new cause of action. Twin Disc, Inc. v Big Bud Tractor, Inc. (1985, CA7 Wis) 772 F2d 1329, CCH Prod Liab Rep ¶ 10673, 41 UCCRS 1627.

In action by police officer against department, alleging in part that department had unlawfully retained her shield case in connection with separate disciplinary proceeding which ended during pendency of case at bar, claim that department also unlawfully retained shield case following completion of disciplinary proceedings was not issue in present case and could have been at issue only if officer filed supplemental complaint, since events which occur after commencement of action are to be raised by supplemental pleading. Gudema v Nassau County (1998, CA2 NY) 163 F3d 717.

In suit against state officials seeking to halt construction of landfill, allegations in second amended complaint should have been considered in determining whether there was jurisdictional defect, and plaintiffs adequately asserted claims for injunctive relief against state officials under Ex parte Young. Franks v Ross (2002, CA4 NC) 313 F3d 184, 54 FR Serv 3d 811, 33 ELR 20120, dismd, in part, motion to strike den (2003, ED NC) 293 F Supp 2d 599.

Where plaintiff moves to amend complaint but it appears that causes of action she seeks to assert are based on events arising after date First Amendment pleading was filed, motion to amend must be treated as motion to serve supplemental pleading pursuant to Rule 15(d). Lerman v Chuckleberry Pub., Inc. (1981, SD NY) 521 F Supp 228, 7 Media L R 2282, 32 FR Serv 2d 487.

In consolidated actions by farmworkers seeking damages under Fair Labor Standards Act for allegedly excessive rent deductions from their minimum wages, fact that it is difficult to ascertain from proposed amended complaint which plaintiffs seek which relief (i.e., which are seeking to add supplemental claims under Rule 15(d), which wish to join actions pursuant to Rule 21, and which wish to substitute defendant pursuant to Rule 15(a)) does not demonstrate bad faith and is not ground for denying motion to amend and supplement complaints; if defendants believe that this information is essential to them, they may use usual discovery procedures to obtain it. Soler v G & U, Inc. (1984, SD NY) 103 FRD 69, 26 BNA WH Cas 1459, 101 CCH LC ¶ 34568, 39 FR Serv 2d 1412.

Subcontractor is permitted to supplement its complaint with claim against individual, related to corporation which hired subcontractor, in payment dispute where subcontractor alleged that individual and mortgagee entered into settlement after filing of complaint to avoid effect of subcontractor's suit, individual was already party to suit in trustee capacity, it is possible subcontractor would not be able to recover amount owed unless it could attack settlement, and parties would suffer no apparent prejudice as result of supplementation. Structural Systems, Inc. v Sulfaro (1988, DC Mass) 692 F Supp 34.

Individual's Fed. R. Civ. P. 15(d) motions for leave to file supplemental pleadings were denied where judge to be added was absolutely immune from claims arising from his actions in presiding over two family court proceedings and Rooker-Feldman doctrine barred individual from relitigating issues that were decided by judge in those proceedings. Hom v Brennan (2004, ED NY) 304 F Supp 2d 374.

U.S. Air Force (USAF) Academy graduates, in effect, attempted to amend First Amended Complaint and unfiled Second Amended Complaint to include allegations about July 2006 violations; court, however, would not consider allegations which did not appear in First Amended Complaint or in proposed Second Amended Complaint since it was axiomatic that complaint could not be amended by briefs in opposition to motion to dismiss; therefore, court granted USAF and Secretary's motion to strike supplemental response. Weinstein v United States Air Force (2006, DC NM) 468 F Supp 2d 1366.

In case in which animal welfare groups and former circus employee moved for leave to file supplemental complaint to add three former circus employees as plaintiffs, proposed supplemental complaint would prejudice circus; the circus had already been granted partial summary judgment, and adding three new plaintiffs would significantly expand scope of case and require substantial additional discovery. ASPCA v Ringling Bros. & Barnum & Bailey Circus (2007, DC Dist Col) 246 FRD 39.

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation; and
(5) facilitating settlement.

(b) Scheduling. (1) *Scheduling Order.* Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:
(A) after receiving the parties' report under Rule 26(f); or
(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.
(2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.
(3) *Contents of the Order.* (A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
(B) Permitted Contents. The scheduling order may:
(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
(ii) modify the extent of discovery;
(iii) provide for disclosure or discovery of electronically stored information;
(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
(v) set dates for pretrial conferences and for trial; and
(vi) include other appropriate matters.
(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference. (1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.
(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:
(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
(B) amending the pleadings if necessary or desirable;
(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;
(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;
(E) determining the appropriateness and timing of summary adjudication under Rule 56;
(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;
(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;
(H) referring matters to a magistrate judge or a master;
(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;
(J) determining the form and content of the pretrial order;
(K) disposing of pending motions;
(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;
(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;
(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions. (1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)–(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate—or does not participate in good faith—in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

(Amended Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993; Dec. 1, 2006; Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. 1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see A Proposal for Minimizing Calendar Delay in Jury Cases (Dec. 1936—published by The New York Law Society); Pre-Trial Procedure and Administration, Third Annual Report of the Judicial Council of the State of New York (1937), pp. 207–243; Report of the Commission on the Administration of Justice in New York State (1934), pp. (288)–(290). See also Pre-Trial Procedure in the Wayne Circuit Court, Detroit, Michigan, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63–75; and Sunderland, The Theory and Practice of Pre-Trial Procedure (Dec. 1937) 36 Mich. L. Rev. 215–226, 21 J. Am. Jud. Soc. 125. Compare the English procedure known as the "summons for directions," English Rules Under the Judicature Act (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N.J. Comp. Stat. (2 Cum. Supp. 1911–1924); N.J. Supreme Court Rules, 2 N.J. Misc. Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N.J. Misc. Rep. (1933) 955).

2. Compare the similar procedure under Rule 56(d) (Summary Judgment—Case Not Fully Adjudicated on Motion). Rule 12(g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53(b) (Masters; Reference) and 53(e)(3) (Master's Report; In Jury Actions).

Notes of Advisory Committee on 1983 amendments. *Introduction.* Rule 16 has not been amended since the Federal Rules were promulgated in 1938. In many respects, the rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. See 6 Wright & Miller, Federal Practice and Procedure: Civil § 1522 (1971). However, in other respects particularly with regard to case management, the rule has not always been

§ 1407(a) because court had not yet issued final pretrial order under Fed. R. Civ. P. 16, as there remained questions pertaining to subject matter jurisdiction, and summary judgment motions were pending; that there were no common issues remaining between nurse's case and another one that had been assigned to court as part of multidistrict litigation was inconsequential because court was familiar with legal and factual issues in this case, having dealt with same or similar issues in nearly 30 other of multidistrict cases. United States ex rel. Debra Hockett v Columbia/HCA Healthcare Corp. (2007, DC Dist Col) 498 F Supp 2d 25.

Because joint pretrial order of plaintiff broadcast licensee and defendant bar owner omitted licensee's 47 USCS § 553 claim and no cable service appeared to be involved, that claim was deemed abandoned. Garden City Boxing Club, Inc. v Johnson (2008, ND Tex) 552 F Supp 2d 611.

Debtor's post-confirmation trust was allowed to amend its adversary complaint to recover funds withheld by purchaser even though it required modification of deadlines established by scheduling order because trust had been diligent and, accordingly, had met good cause standard where amendment was needed because of contradictory positions taken by purchaser during discovery. Post Confirmation Trust of Fleming Cos., Inc. v Target Corp. (In re Fleming Cos.) (2005, BC DC Del) 323 BR 144, 44 BCD 173, 61 FR Serv 3d 296.

2. Effect on Pleadings

a. In General

33. Generally

Although issue is not raised by pleadings, it is nevertheless real issue in case if pretrial order says so, even though pleadings are not amended to reflect what court and parties have done. Low v Davidson Mfg. Co. (1940, CA7 Ill) 113 F2d 364.

Question whether pleading sufficiently alleges compliance with statutory conditions precedent to bringing of suit or essential element of liability cannot be considered where pretrial order states that some other question is "the sole question for decision." Frank v Giesy (1941, CA9 Or) 117 F2d 122.

Even though pleadings present issue, it may be excluded from case by pretrial order, and if pretrial order excludes issue from case although it is raised by pleadings, court need not make finding on issue at trial, and it is therefore obvious that judgment cannot be reversed merely because there is no finding on issue. Fanchon & Marco, Inc. v Hagenbeck-Wallace Shows Co. (1942, CA9 Cal) 125 F2d 101.

Pretrial order when entered limits issues for trial and in substance takes place of pleadings covered by pretrial order. Basista v Weir (1965, CA3 Pa) 340 F2d 74.

Pretrial order constitutes pleadings insofar as it establishes, enlarges, or limits issues of fact or law in case. In-Sink-Erator Mfg. Co. v Waste King Corp. (1965, CA7 Ill) 346 F2d 248, 145 USPQ 441, cert den (1965) 382 US 835, 15 L Ed 2d 78, 86 S Ct 80, 147 USPQ 540.

Pretrial order supersedes pleadings and becomes governing pattern of lawsuit. Case v Abrams (1965, CA10 Okla) 352 F2d 193, 9 FR Serv 2d 16.32, Case 3.

In addition to Fed. R. Civ. P. 16's "good cause" requirement, determination of potential prejudice to nonmovant also is required when district court decides whether or not to amend scheduling order. Leary v Daeschner (2003, CA6 Ky) 349 F3d 888, 20 BNA IER Cas 1148, 57 FR Serv 3d 216, 2003 FED App 409P.

Evidence in support of issue stated in pretrial order but not included in pleadings cannot be excluded as variance from pleadings. Owen v Schwartz (1949, App DC) 85 US App DC 302, 177 F2d 641, 14 ALR2d 1337.

Pre-trial proceeding is latest summary of state of case before trial and is controlling on issue sought to be raised by defendant concerning scope of pleadings. United States v Wood (1945, DC Mass) 61 F Supp 175.

Pretrial order which contains agreement upon extent of damages is controlling over any assertion in pleadings. Rompe v Yablon (1967, SD NY) 277 F Supp 662, 12 FR Serv 2d 344.

Pretrial order, when entered, limited issues for trial and in substance took place of pleadings covered by pretrial order, and a "theory" or "position" of liability not asserted at pretrial conference or otherwise should be foreclosed at trial, for one of the primary purposes of pretrial is elimination of surprise and unfairness to other side. Idzojtic v Pennsylvania R. Co. (1969, DC Pa) 47 FRD 25.

Pretrial order controls subsequent course of action where it provides that it supplants pleadings therein. Ricker v American Zinser Corp. (1978, ED Tenn) 506 F Supp 1, affd without op (1980, CA6 Tenn) 633 F2d 218.

Claims raised by plaintiff in complaint which were not raised in pretrial order are dismissed, because pretrial order supersedes pleadings and controls subsequent action of litigation; parties are bound by order and may not introduce at trial issues excluded by their pretrial order. Oliver v Russell Corp. (1994, MD Ala) 874 F Supp 367.

Once district court has filed pretrial scheduling order pursuant to FRCP 16 which establishes timetable for amending pleadings, that rule's standards control. Carnrite v Granada Hosp. Group (1997, WD NY) 175 FRD 439, 4 BNA WH Cas 2d 1453.

Once district court has filed pretrial scheduling order pursuant to FRCP 16 which establishes timetable for amending pleadings, motion seeking to amend pleadings is governed first by FRCP 16(b), and only secondarily by FRCP 15(a). Jackson v Laureate, Inc. (1999, ED Cal) 186 FRD 605.

Where motion to amend pleadings is filed after scheduling order's deadline for amendment has passed, two-step analysis is required; movant must first demonstrate to court that it has good cause for seeking modification of scheduling deadline under FRCP 16(b), and if movant satisfies such good cause standard, it must then pass requirements for amendment of pleadings under FRCP 15(a). Colorado Visionary Academy v Medtronic, Inc. (2000, DC Colo) 194 FRD 684, 47 FR Serv 3d 353, subsequent app, remanded (2005, CA10 Colo) 397 F3d 867.

Once scheduling order's deadline for amendment of pleadings has passed, party moving to amend pleading must first satisfy good cause standard of FRCP 16(b); if movant satisfies that standard, movant then must pass tests for amendment under FRCP 15(a). Burton v United States (2001, SD W Va) 199 FRD 194.

When motion to amend pleading is filed after scheduling order deadline, FRCP 16, rather than FRCP 15, is proper guide for determining whether party's delay may be excused, and district court's decision to enforce its pretrial order will not be disturbed on appeal absent abuse of discretion. Williams v Baldwin County Comm'n (2001, SD Ala) 203 FRD 512.

34. Good cause standard

District court's decision to enforce its pretrial order and deny motion to amend pleadings after time prescribed in order was not abuse of discretion since plaintiff failed to demonstrate good cause for belatedly amending her complaint. Sosa v Airprint Sys. (1998, CA11 Fla) 133 F3d 1417, 75 BNA FEP Cas 1665, 72 CCH EPD ¶ 45215, 39 FR Serv 3d 1181, 11 FLW Fed C 980 (criticized in Battistone v Sam Jon Corp. (2002, ED Pa) 2002 US Dist LEXIS 19399).

Despite lenient standard of Rule 15(a) governing motion to amend pleadings, district court does not abuse its discretion in denying leave to amend pleadings after deadline set in scheduling order where moving party has failed to establish good cause, and finding of good cause depends on diligence of moving party. Parker v Columbia Pictures Indus. (2000, CA2 NY) 204 F3d 326, 10 AD Cas 396, 24 EBC 1214, 46 FR Serv 3d 546 (criticized in Nesbit v Gears Unlimited, Inc. (2003, CA3 Pa) 347 F3d 72, 92 BNA FEP Cas 1249, 84 CCH EPD ¶ 41584) and (criticized in Macy v Hopkins County Sch. Bd. of Educ. (2007, CA6 Ky) 484 F3d 357, 19 AD Cas 271, 12 CCH Accomodating Disabilities Decisions ¶ 12-246, 154 CCH LC ¶ 60392, 2007 FED App 133P).

Fed. R. Civ. P. 16(b) governs amendment of pleadings after scheduling order deadline has expired, and only upon movant's demonstration of good cause to modify scheduling order will more liberal standard of Fed. R. Civ. P. 15(a) apply to decision to grant leave to amend; accordingly, plaintiff seeking to amend its complaint after deadline had expired was properly denied leave to amend for lack of good cause, as plaintiff effectively gave no explanation, amendment would assert different cause of action, requiring additional discovery, and continuance would unnecessarily delay trial. S&W Enters., L.L.C. v SouthTrust Bank of Ala., NA (2003, CA5 Tex) 315 F3d 533, 54 FR Serv 3d 663.

In addition to Fed. R. Civ. P. 16's "good cause" requirement, determination of potential prejudice to nonmovant also is required when district court decides whether or not to amend scheduling order. Leary v Daeschner (2003, CA6 Ky) 349 F3d 888, 20 BNA IER Cas 1148, 57 FR Serv 3d 216, 2003 FED App 409P.

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Once scheduling order's deadline for amendment of pleadings has passed, party moving to amend pleading must first satisfy good cause standard of FRCP 16(b); if movant satisfies that standard, movant then must pass tests for amendment under FRCP 15(a). Burton v United States (2001, SD W Va) 199 FRD 194.

Defendants were required to show good cause, under Fed. R. Civ. P. 16, in order to amend their answer and counterclaim after deadline for amendments set forth in scheduling order had passed; since they did not do so, motion to amend was denied. Rent-A-Center Inc. v 47 Mamaroneck Ave. Corp. (2003, SD NY) 215 FRD 100.

Plaintiff, who did not file her motion for leave to amend complaint until after time set forth in scheduling order, failed to show "good cause" as to why she should be granted leave to amend her complaint to add claim for economic damages as required by Fed. R. Civ. P. 16(b) where she did not file motion for leave to amend until approximately six months after discovery had been completed and after summary judgment motion had been fully briefed. Harriman v United States (2004, ED NY) 93 AFTR 2d 2302.

Fed. R. Civ. P. 16(b)(1) requires federal district court to enter scheduling order that limits time to join other parties and to amend pleadings, and modification of such scheduling order is to be granted only upon showing of good cause; Rule 16's good-cause standard governs party's ability to amend his complaint after district court has entered scheduling order. Nobles v Rural Cmty. Ins. Servs. (2004, MD Ala) 303 F Supp 2d 1279, summary judgment gr, summary judgment den, judgment entered (2004, MD Ala) 303 F Supp 2d 1292, affd (2004, CA11 Ala) 116 Fed Appx 253.

b. Particular Applications

35. Bankruptcy

Failure to raise bankruptcy issue as affirmative defense in its answer does not preclude defendant from later raising bankruptcy as bar to recovery where issue is raised at pretrial conference and included in jointly drafted pretrial order. Management Investors v United Mine Workers (1979, CA6 Tenn) 610 F2d 384, 5 BCD 913, 102 BNA LRRM 2653, 87 CCH LC ¶ 11630, 28 FR Serv 2d 591.

Where pretrial order, which was stipulated and agreed to by all parties, stated that issue of law to be litigated was whether exception to discharge was warranted, bankruptcy debtors' argument regarding notice was without merit. Hassan v United States (In re Hassan) (2003, SD Fla) 301 BR 614, 2003-2 USTC ¶ 50622, 92 AFTR 2d 5764.

In action by bankruptcy trustee to recover fraudulent transfers, defendant creditor filed motion to dismiss, arguing that trustee's amended complaint did not incorporate first complaint's claims, and amended complaint failed to sufficiently allege fraud with particularity under Fed. R. Civ. P. 9(b); but bankruptcy court found that was irrelevant because pretrial order, filed under Fed. R. Civ. P. 16(e) four months earlier, superseded pleadings, and pleading fraud with particularity did not apply, because creditor was aware of factual details of allegations from discovery. Malloy v Mulkey Tire, Inc. (In re Universal Factoring Co.) (2002, BC ND Okla) 279 BR 297, 39 BCD 192, 48 CBC2d 689.

36. Breach of fiduciary duty

Although pretrial orders are liberally construed, new

31. Effect of order on appeal

In employee's suit asserting labor law and fraud claims on behalf of putative class and himself individually, orders denying employee's motion to strike and motion to extend Fed. R. Civ. P. 16 schedule were not ripe for review because approval of parties' settlement would have rendered orders moot. Narouz v Charter Communs., LLC (2010, CA9 Cal) 591 F3d 1261, 15 BNA WH Cas 2d 1222.

In plane buyer's breach of contract suit against dealer, where dealer challenged omission of requested jury instruction, dealer did not waive its affirmative defense on contract claim because dealer preserved defense of timely notice of nonconformity by expressly including it in final pretrial order approved by district court. Friedman & Friedman v Tim McCandless (2010, CA8 Iowa) 606 F3d 494.

32. Miscellaneous

District court's decision to decide loan case based on equitable considerations was proper because even if district court's order granting trial setting was treated as pretrial order governed by Fed. R. Civ. P. 16, there was nothing to prevent trial judge from changing his mind about applicable law of case. Amphibious Partners, LLC v Redman (2008, CA10 Wyo) 534 F3d 1357.

In airline passenger's suit regarding tarmac delay, it was not abuse of discretion to deny passenger's motion to amend and to join parties, because passenger filed motion to amend two months after deadline set in final scheduling order without attempting to show good cause, and passenger did not develop argument on appeal concerning good cause. Ray v Am. Airlines, Inc. (2010, CA8 Ark) 609 F3d 917.

In residents' civil rights suit regarding searches, it was not abuse of discretion to deny residents' motion for 60-day adjournment of scheduling order, because lack of adjournment did not prevent them from proceeding with discovery as to police officers, and their inability to depose federal agents did not prejudice residents since claims against agents were dismissed. Marcilis v Twp. of Redford (2012, CA6 Mich) 693 F3d 589, 2012 FED App 310P.

In qui tam case brought under False Claims Act, 31 USCS §§ 3729 et seq., magistrate judge recommended to strike hospital's motion for order to show cause for certified registered nurse anesthetists' failure to comply with court's orders, because hospital's show cause order violated earlier order of court requiring hospital to provide nurse anesthetists, rather than court, with objections to claims that anesthetists identified and exhibits that they relied upon. El-Amin v George Washington Univ. (2009, DC Dist Col) 626 F Supp 2d 1.

2. Effect on Pleadings

a. In General

33. Generally

Pre-trial order superseded pleadings and became governing pattern of lawsuit. N.Y. Skyline, Inc. v Empire State Bldg. Co. L.L.C. (In re N.Y. Skyline, Inc.) (2013, BC SD NY) 497 BR 700.

34. Good cause standard

Guarantor was properly denied leave to amend his answer after expiration of scheduling order deadline for such amendment because his statement that, after reviewing record, his counsel had determined that he could raise defense of release, did not establish good cause, as required by Fed. R. Civ. P. 16(b). Nourison Rug Corp. v Parvizian (2008, CA4 Md) 535 F3d 295, amd, reprinted as amd (2008, CA4 Md) 535 F3d 295.

Sudanese citizens failed to show good cause under Fed. R. Civ. P. 16 for filing third amended complaint under Alien Tort Statute, 28 USCS § 1350, because it would have substantially revised their theory from averring that oil company conspired directly with Sudanese government to violate human rights during country's civil war to averring that oil company conspired with non-governmental oil entities to do same acts. Presbyterian Church of Sudan v Talisman Energy, Inc. (2009, CA2 NY) 582 F3d 244.

Salesman was properly denied leave to amend his counterclaim under Fed. R. Civ. P. 15(a) and 16(b)(4) 15 days before trial to include actual damages and additional commissions under Mo. Rev. Stat. § 407.913 because of undue prejudice to employer in that discovery and evidence would have been different if suit was brought under statute. Fed. R. Civ. P. 54(c) did not require amendment to conform to evidence under statute not pleaded when it unduly prejudiced employer. Trim Fit, LLC v Dickey (2010, CA8 Mo) 607 F3d 528.

District court did not abuse its discretion in denying employee's requested amendment under Fed. R. Civ. P. 16(b), because employee did not make her statement announcing that she would request leave to amend, if district court ruled against her, until forty-one days after deadline set in scheduling order, and eleven days after deadline for conclusion of pleading stage, and employee failed to properly request leave to amend after deadline by showing that good cause existed. Flores-Silva v McClintock-Hernandez (2013, CA1 Puerto Rico) 710 F3d 1.

In tort suit arising from motor vehicle accident, district court properly granted summary judgment for shipper because it was not liable for negligence of truck driver whose tractor was pulling two trailers owned by shipper; district court did not abuse its discretion in denying plaintiffs' untimely motion for leave to amend their complaint, as plaintiffs failed to make showing of good cause to amend outside court's scheduling order. Harris v FedEx Nat'l LTL, Inc. (2014, CA8 Neb) 760 F3d 780, 89 FR Serv 3d 249.

Insured demonstrated good cause under Fed. R. Civ. P. 16(b) to amend her complaint alleging insurance bad faith claim to add request for treble damages pursuant to Cal. Civ. Code § 3345, good cause was demonstrated based on cumulative effect of depositions that established insurance company's alleged constructive knowledge that it was terminating benefits of disabled person, issuance of ruling in another court, and insured's quick response in moving to amend her complaint. Hood v Hartford Life & Accident Ins. Co. (2008, ED Cal) 567 F Supp 2d 1221, 71 FR Serv 3d 200.

In case in which doctor's motion for leave to amend his complaint was governed by Fed. R. Civ. P. 16, his explanation for wanting to add claim for punitive damages fell woefully short of good cause standard in Rule 16(b); doctor sought punitive damages because medical group was seeking relief under its own counterclaim, but doctor failed to explain why he did not assert punitive damages in time to comply with court's scheduling order, as he apparently could have easily done with due diligence. Lurie v Mid-Atlantic Permanente Med. Group, P.C. (2008, DC Dist Col) 589 F Supp 2d 21.

Plaintiff's motion for leave to add claim for reformation of contract was denied because it could not demonstrate "good cause" for its failure to comply with court's scheduling order, because any alleged need for reformation became clear upon defendant's repeated assertion that contract was of indefinite

Appendix C

Brownlee v. Gay and Taylor, Inc., 861 F.2d 1222, 1225 (10th Cir.1988) (trial judge has broad discretion in determining competency of expert witness).

Accordingly, we find that the trial court acted within its discretion in limiting the evidence as it did in this case. Upon the basis of the admitted evidence, the jury found specially that Sarabond did not cause more cracking during the lifetime of a building than did conventional mortar. This finding, Associates conceded below, was dispositive as to all Associates' affirmative claims. Associates cites additional error;[9] however, we note the concession of Associates, and, having reviewed all of the remaining claims, find no issue of merit necessitating further discussion.

AFFIRMED.

Terrell McGINNIS, Plaintiff–Appellee,

v.

INGRAM EQUIPMENT COMPANY, INC., Defendant–Appellant.

No. 88–7596.

United States Court of Appeals, Eleventh Circuit.

Nov. 27, 1990.

Former employee brought § 1981 action against employer. The United States District Court for the Northern District of Alabama, 685 F.Supp. 224, No. 87–C–0276–S, U.W. Clemon, J., found for employee, and employer appealed. After the Court of Appeals, 888 F.2d 109, vacated judgment and remanded case, the Court of Appeals, 895 F.2d 1303, vacated previous opinion and ordered rehearing en banc. On rehearing, the Court of Appeals, Cox, Circuit Judge, held that the employer had waived its right to argue that discriminatory demotion and discharge were not actionable under § 1981 by failing to raise those issues at trial level, even though *Patterson* was not decided until after trial.

Judgment of district court affirmed.

Hill, Senior Circuit Judge, filed dissenting opinion.

1. Civil Rights ⇐118

Section 1981 is substantive statute creating cause of action and *Patterson* merely limits type of conduct that gives rise to actionable § 1981 claim, and, thus, *Patterson* limits scope of § 1981 claim and does not affect federal court's authority to determine whether claimant states cause of action under § 1981. 42 U.S.C.A. § 1981.

2. Federal Courts ⇐242

Test of federal jurisdiction is whether cause of action alleged is so patently without merit as to justify dismissal for want of jurisdiction; test is not whether cause of

9. One error raised involves the court's instruction number 77 which, in substance, instructed that the jury should not consider evidence of scientific advancements discovered subsequent to the time Sarabond was sold by Dow to Associates. Neither party disputes that under Col. Rev.Stat. § 13–21–404, which served as the basis for the instruction, the jury may not consider subsequent scientific advancements, but may inquire into alternative concepts implemented later and known to be possible at the time of manufacture. Associates argues that since the court admitted into evidence tests and reports post-dating the sale of Sarabond to Associates, the court must have determined that these subsequent tests reflected "alternative concepts"; therefore, these tests and reports should have been expressly exempted from the challenged instruction or the instruction should have been omitted. We reject that contention. Under our reading of the instructions as a whole, *see Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir.1987), it is apparent that the court did direct the jury to consider the subsequent tests and reports for their scientific value in aiding jury understanding, but not for holding Dow responsible for post-construction industry advancements. *See* Instruction No. 78. Further, the admitted tests and reports do not fall within the purview of the instruction. These tests involved saran latex, rather than some "alternative concept." Associates made no attempt to present any evidence regarding "alternative concepts" which were "known to be possible at the time of manufacture." Thus, the post-construction tests and reports were not even addressed by the challenged instruction.

action is one in which claimant may recover.

3. Federal Courts ⇐617

Employer alleged to have violated employee's § 1981 rights did not preserve *Patterson* issue by raising lack of subject matter jurisdiction, absent any challenge to employee's stated cause of action under § 1981. 42 U.S.C.A. § 1981.

4. Federal Courts ⇐643

Employer's motion for directed verdict made no reference to defense based on employee's failure to state claim under § 1981, and, thus, issue was not preserved for review, although employer did assert boilerplate "failure to state a claim upon which relief can be granted" affirmative defense, where that defense was abandoned in the pretrial order. 42 U.S.C.A. § 1981; Fed.Rules Civ.Proc.Rules 12(b)(6), 16(e), 28 U.S.C.A.

5. Civil Rights ⇐148

Damages awarded to employee for racial discrimination were not based on claim of failure to promote, and, thus, any effect of *Patterson* on § 1981 claims of failure to promote was irrelevant; employee had been demoted. 42 U.S.C.A. § 1981; Fed. Rules Civ.Proc.Rules 12(b)(6), 16(e), 28 U.S. C.A.

6. Federal Courts ⇐616

Even if employer could not have predicted Supreme Court's resolution of *Patterson*, general argument that § 1981 did not extend to conduct with which employer was charged was available to employer at time of trial and at time of appeal, and, thus, employer was not entitled to raise *Patterson* claims for first time on appeal. 42 U.S.C.A. § 1981.

A. Eric Johnston, Birmingham, Ala., for defendant-appellant.

J. Richet Pearson, Robert L. Wiggins, Jr., Gordon, Silberman, Wiggins & Childs, Birmingham, Ala., for plaintiff-appellee.

John A. Powell, Steven R. Shapiro, New York City, for amicus curiae American Civ. Liberties Union.

Ruben Franco, Kenneth Kimerling, New York City, for amicus curiae Puerto Rican Legal Defense & Educ. Fund, Inc.

Julius L. Chambers, Charles Stephen Ralston, Ronald L. Ellis, Cornelia T.L. Pillard, New York City, for amicus curiae NAACP Legal Defense & Educational Fund, Inc.

Barbara R. Arnwine, Richard T. Seymour, Stephen L. Spitz, Washington, D.C., for amicus curiae Lawyers' Committee for Civ. Rights Under Law.

Antonia Hernandez, E. Richard Larson, Los Angeles, Cal., for amicus curiae Mexican American Legal Defense & Educational Fund.

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, COX, BIRCH, and DUBINA *, Circuit Judges, and HILL **, Senior Circuit Judge.

COX, Circuit Judge:

Ingram Equipment Company, Inc., the defendant, appeals the judgment of the district court in favor of Terrell McGinnis, the plaintiff. We affirm.

I. BACKGROUND

The background most relevant to our disposition of this case is its procedural, rather than factual, history. A more complete description of the facts in this case may be found in the district court's memorandum opinion. *See McGinnis v. Ingram Equip. Co.*, 685 F.Supp. 224 (N.D.Ala.

* DUBINA, Circuit Judge, became a member of the court after this appeal had been orally argued but has participated in this decision after listening to a recording of oral argument. *See* Eleventh Circuit Rule 34-4(g).

** Senior U.S. Circuit Judge James C. Hill participated in the decision in this matter pursuant to 28 U.S.C. § 46(c).

1988), *vacated*, 888 F.2d 109 (11th Cir. 1989), *vacated*, 895 F.2d 1303 (11th Cir. 1990). Ingram Equipment Company, Inc. ("Ingram") hired Terrell McGinnis ("McGinnis"), a black man, in September 1981, and discharged him in March 1986. McGinnis subsequently brought this action in the United States District Court for the Northern District of Alabama, pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* McGinnis presented four claims under each statute: 1) discriminatory conditions of employment, including racial harassment; 2) failure to promote based on McGinnis's race; 3) racially discriminatory demotion; and 4) racially discriminatory discharge.

After a bench trial, the district court entered judgment for McGinnis. *Id.* The court based Ingram's liability solely on section 1981. *Id.* at 224 n. 1. Employers with less than fifteen employees on each working day during a relevant twenty-week period are not subject to Title VII. 42 U.S.C. § 2000e(b). The district court found that Ingram was such an employer.

The district court found that McGinnis had proved that he was subjected to "discriminatory conditions of employment" and that he was "eventually discharged because of his race" *id.* at 224, and awarded McGinnis $156,164.41. *Id.* at 228. The court divided the award into two components. First, the court awarded $80,840.53 in back pay. The court arrived at this figure by determining the amount of pay McGinnis would have received from Ingram had he not been demoted from the position of foreman because of his race. *Id.* at 227. Second, the court decided that McGinnis was entitled to reinstatement, but that reinstatement would be inappropriate in this case. Consequently, the court awarded an additional $75,323.88 in front pay in lieu of reinstatement. *Id.* at 227–28. In sum, the district court awarded damages for discriminatory demotion and discriminatory discharge. No damages were awarded for McGinnis's discriminatory conditions of employment claim. Further, the district court did not find for McGinnis on his failure to promote claim.

Ingram appealed the judgment to this court. It presented four arguments in its initial brief: 1) that McGinnis had not proved intentional discrimination; 2) that the district court's findings of fact should be set aside because they were clearly erroneous; 3) that the district court erred in limiting the use of McGinnis's deposition at trial; and 4) that the district judge impermissibly injected himself into the proceedings.

A panel of this court heard oral argument on June 19, 1989. There, for the first time, Ingram argued that the recent Supreme Court decision in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), decided June 15, 1989, defeated at least some of McGinnis's claims under section 1981. At the conclusion of oral argument, the panel asked counsel to brief the question of whether *Patterson* should affect the outcome of this case.

A two-judge majority concluded that *Patterson* had limited federal jurisdiction over section 1981 claims and that the district court's judgment should be vacated and the case remanded for reconsideration in light of *Patterson*. *McGinnis v. Ingram Equip. Co.*, 888 F.2d 109, 111 (11th Cir. 1989), *vacated*, 895 F.2d 1303 (11th Cir. 1990). The dissenting judge expressed the opinion that *Patterson* had not limited federal jurisdiction over section 1981 claims, but rather had limited only the scope of the section 1981 cause of action. The dissent concluded that Ingram had waived the right to make any argument based on *Patterson* by not preserving the issue on appeal. *Id.* at 112 (Cox, J., dissenting). This court vacated the panel's opinion and granted rehearing *en banc*, primarily for the purpose of determining whether the panel had dealt appropriately with the applicability of *Patterson* to this case. *Ingram Equip. Co. v. McGinnis*, 895 F.2d 1303 (11th Cir.1990).

In its *en banc* brief, Ingram 1) argues that *Patterson* restricts federal jurisdiction over section 1981 claims; 2) asserts that *Patterson* should be applied retroactively

in this case; 3) contends that under the standard adopted in *Patterson*, Ingram is not liable for failure to promote; and 4) preserves the arguments it presented in its initial brief.

II. DISCUSSION

A. *Federal Jurisdiction*

Ingram asserts that *Patterson* limits the jurisdiction of federal courts over section 1981 claims. It then points out that one of its affirmative defenses in its answer in the trial court was lack of subject matter jurisdiction. Therefore, Ingram argues, the issue of jurisdiction, and hence the issue of *Patterson*'s application to this case was preserved in the trial court. Further, subject matter jurisdiction can never be waived, and thus the issue was preserved on appeal also.

[1] We disagree with Ingram's analysis. Section 1981 is not a jurisdictional statute. It is a substantive statute that creates a cause of action. *Patterson* merely limited the type of conduct that gives rise to an actionable section 1981 claim. That is, *Patterson* limited the *scope* of a section 1981 claim. The decision had no effect on a federal court's authority to determine whether a claimant states a cause of action under section 1981.

[2, 3] The test of federal jurisdiction is not whether the cause of action is one on which the claimant can recover. Rather, the test is whether "the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." *Dime Coal Co. v. Combs*, 796 F.2d 394, 396 (11th Cir.1986) (*quoting Hagans v. Lavine*, 415 U.S. 528, 542–43, 94 S.Ct. 1372, 1381–82, 39 L.Ed.2d 577 (1974) (*quoting Bell v. Hood*, 327 U.S. 678, 683, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946)). McGinnis's cause of action is clearly not frivolous or "patently without merit." Where the "defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.) *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981);[1] *see also Simanonok v. Simanonok*, 787 F.2d 1517, 1519–20 (11th Cir.1986); *Dime Coal* at 396. This is such a case. In sum, Ingram has not preserved any *Patterson* issue by raising lack of subject matter jurisdiction in the district court or in this court.

B. *Should Patterson Affect the Outcome of this Case?*

[4] The next question we must consider is whether *Patterson* should affect the outcome of this case. As noted, Ingram first raised its *Patterson* arguments at oral argument. Ingram did not contend at pretrial or at trial that the conduct with which it was charged was not actionable under section 1981. Nor did Ingram's initial brief on appeal make this argument. Rather, until oral argument, Ingram's argument was factual—that it did not intentionally discriminate.

We note that in its answer in the district court, Ingram included a boilerplate "failure to state a claim upon which relief can be granted" affirmative defense, pursuant to Fed.R.Civ.P. 12(b)(6). Answer at 3. It can be argued that this was enough to preserve the *Patterson* issue. We need not decide whether this was sufficient because in the pretrial order, which supersedes the pleadings (*see* Fed.R.Civ.P. 16(e)), Ingram abandoned its "failure to state a claim" defense. Pretrial Order at 2. In addition, Ingram's motion for directed verdict is barren of any reference to a defense based on a failure to state a claim under section 1981. Thus, the issue was not preserved in the district court.

1. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

In order to properly determine whether *Patterson* should affect the outcome of this case, we must review the findings of the district court and the arguments Ingram makes.

1. Discriminatory Conditions of Employment

Ingram argues that under *Patterson*, section 1981 no longer extends to claims of racially discriminatory working conditions. The district court did not award damages on this claim, and no one questions that result. Therefore, the effect of *Patterson* on claims of discriminatory working conditions under section 1981 is irrelevant to this appeal.

2. Failure to Promote

[5] Ingram argues that under section 1981, in light of *Patterson*, McGinnis does not have a cause of action for failure to promote. At the same time, Ingram acknowledges that the district court did not find a failure to promote. *See, e.g.*, Appellant's Supplemental Brief at 4; Appellant's *En Banc* Brief at 48. A careful reading of the district court's memorandum opinion reveals that the district court indeed did not find for McGinnis on his failure to promote claim, and no damages were awarded on that claim. The district court did find that McGinnis had been demoted, but a demotion is not a failure to promote. Obviously then, the question of the effect of *Patterson* on a failure to promote claim under section 1981 is also completely irrelevant to this appeal.

3. Discriminatory Demotion and Discriminatory Discharge

Ingram argues that under *Patterson*, section 1981 does not extend to claims for racially discriminatory demotion or to claims for racially discriminatory discharge.[2] We are faced with the question whether we should confront these new issues.

A general principle of appellate review is that an appellate court will not consider issues not presented to the trial court. "[J]udicial economy is served and prejudice is avoided by binding the parties to the theories argued below." *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n. 10 (5th Cir.1976). We may, however, in the exercise of our discretion consider issues not preserved in the trial court "when a pure question of law is involved and a refusal to consider it would result in a miscarriage of justice." *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir.1976); *see also Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 928 (11th Cir.1990).

We acknowledge the general principle that an appellate court should apply the law in effect at the time it renders its decision. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16, 101 S.Ct. 2870, 2879 n. 16, 69 L.Ed.2d 784 (1981); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *Jones v. Preuit & Mauldin*, 876 F.2d 1480, 1483 (11th Cir. 1989) (*en banc*). Likewise we recognize the general rule that judicial decisions normally are applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Our decision today does not affect these long-standing principles because these maxims are true only with regard to arguments actually presented to trial and appellate courts. Here we confront new arguments and issues not presented until a late stage of the proceedings, rather than simply new

2. We note that Ingram timidly pursues the argument that under *Patterson* section 1981 does not extend to discriminatory discharge. Ingram's supplemental brief on appeal contains a single conclusory reference to the discharge issue. Appellant's Supplemental Brief at 4. Similarly, in its *en banc* brief, Ingram makes two *extremely* cursory references to the discharge issue. Appellant's *En Banc* Brief at 18, 50. Additionally, Ingram acknowledges in its *en banc* supplemental brief that "[t]he issue of discharge has not been raised at anytime [sic] during this proceeding ..." Appellant's *En Banc* Supplemental Brief at v. Nevertheless, we have a practice of reading briefs liberally to ascertain the issues on appeal, *see U.S. v. Milam*, 855 F.2d 739 (11th Cir.1988) and we will assume that Ingram did argue, beginning with its supplemental brief to the panel, that under *Patterson*, section 1981 no longer reaches discriminatory discharge.

law that could be applied to arguments already developed. A party normally waives its right to argue issues not raised in its initial brief. *See FSLIC v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir.1987); *Rogero v. Noone*, 704 F.2d 518, 520 n. 1 (11th Cir.1983).

[6] We conclude there would be no miscarriage of justice if we decline to address any arguments based on *Patterson* in this case. Ingram asserts that it should be allowed to present its *Patterson* arguments because there was no way it could have predicted the Supreme Court's ultimate conclusions in the *Patterson* case. Although it may be true that no one could have predicted the Supreme Court's resolution of the *Patterson* case, it is also true that the general argument that section 1981 does not extend to the conduct with which Ingram was charged was available to Ingram at the time of trial and at the time of appeal.

The Fourth Circuit rendered its decision in *Patterson* on November 25, 1986, *Patterson v. McLean Credit Union*, 805 F.2d 1143 (1986) *aff'd in part and vacated in part*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), approximately eight months before McGinnis filed his claim (July 17, 1987), about fourteen months prior to the beginning of the trial in this case (January 19, 1988) and over two years before Ingram filed its initial brief on appeal (January 6, 1989). The Fourth Circuit opinion clearly limited the scope of a section 1981 claim, at least with regard to racial harassment. *Id.* at 1145–46 (claim for racial harassment not cognizable under section 1981).

Further, the Supreme Court granted certiorari to review the scope of section 1981 on October 5, 1987, *Patterson v. McLean Credit Union*, 484 U.S. 814, 108 S.Ct. 65, 98 L.Ed.2d 29 (1987), still over three months before trial. After certiorari was granted, the Court requested counsel to brief and argue an additional question that went to the heart of the scope of section 1981: Whether the decision in *Runyon v. McCrary*[3] should be reconsidered. *Patterson v. McLean Credit Union*, 485 U.S. 617, 108 S.Ct. 1419, 99 L.Ed.2d 879 (1988). This took place on April 25, 1988, three months after trial, but over eight months before Ingram filed its initial brief on appeal.

It is true that the Fourth Circuit found that racially discriminatory discharge was still actionable under section 1981, *Patterson v. McLean Credit Union*, 805 F.2d 1143, 1145 (1986), *aff'd in part and vacated in part*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), so that arguably Ingram could not have predicted that the Court might intimate that section 1981 might not extend to discharge. Regardless, the argument that the scope of section 1981 did not extend to the conduct in question in this case was available to Ingram. Ingram, for whatever reason, chose not to make it. Instead, Ingram argued only that it did not intentionally discriminate.

The dissent suggests that if Ingram had made this argument, Rule 11 sanctions would have been appropriate. We are aware of no case in this circuit or anywhere in the nation in which a court imposed sanctions on a party who had acknowledged adverse precedent, but argued that the precedent should be reversed. Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Fed.R.Civ.P. 11, advisory committee notes on 1983 amendment. Not surprisingly, all the cases cited by the dissent[4] to support its contention that we are "forcing attorneys into a Hobbesian dilemma" involve failures, through inexcusable ignorance or dishonesty, candidly to present relevant precedent.[5] The attorneys

3. 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). In *Runyon*, the Supreme Court concluded, *inter alia*, that section 1981 "prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 167–69, 96 S.Ct. at 2593.

4. *See infra*, p. 1500, n. 4.

5. The facts of one of the cases cited by the dissent, *Collins v. Walden*, 834 F.2d 961 (11th Cir.1987), are inapposite. There, the court affirmed the district court's imposition of sanctions because "[t]he complaint ... was factually groundless and patently frivolous." *Id.* at 964.

in those cases misrepresented what the law actually was instead of arguing what the law should be; sanctions therefore were appropriate.

Two recent cases are instructive on this point. The circumstances in *Bailey v. Northern Indiana Public Service Co.*, 910 F.2d 406 (7th Cir.1990) and in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir.1990) were very similar to the circumstances in this case. In these cases, the Seventh Circuit addressed arguments based on *Patterson* in cases that were pending on appeal when *Patterson* was decided. However, these cases differ from ours in one very important respect. In each case, the plaintiff had waived its argument that the defendant had waived its right to argue that the conduct in question was not actionable under section 1981. In other words, the waiver argument had itself been waived. *See Bailey* at 409–10 n. 2; *McKnight* at 108. By contrast, McGinnis presented a timely waiver argument in response to Ingram's belated *Patterson* arguments. Had the defendants in *Bailey* and *McKnight* presented waiver arguments, the result in those cases might very well have been different. Judge Posner makes this point in *McKnight:*

> But the order to reargue *Patterson* was issued more than five months before the trial in the present case began. General Motors had plenty of time to mount a timely challenge to the applicability of section 1981 ...
>
> Even if by this delay General Motors waived its right to invoke *Patterson,* a question we need not answer, McKnight cannot benefit. For while vigorously contesting the applicability of *Patterson* to the facts of his case, he has never argued that General Motors has waived its right to rely on *Patterson.*

McKnight at 108. Here, we answer the question that Judge Posner found unnecessary to confront.

In *Patterson* itself the Court refused to consider the argument that Patterson's failure to promote claim was not actionable "[b]ecause respondent has not argued at any stage that petitioner's claim is not cognizable under § 1981...." *Patterson,* 491 U.S. 164, ——, 109 S.Ct. 2363, 2377, 105 L.Ed.2d 132 (1989). Similarly, in *Jett v. Dallas Independent School District,* —— U.S. ——, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) the plaintiff was permitted to challenge his discharge under section 1981 because the defendant had "at no stage in the proceedings ... raised the contention that the substantive scope of the 'right ... to make ... contracts' protected by § 1981 does not reach the injury suffered by petitioner here." *Id.* at ——, 109 S.Ct. at 2709.[6]

Finally, we believe our decision to decline to address arguments based on *Patterson* in this case comports with our role as a decision-making body. Any questions that *Patterson* might raise regarding the scope of section 1981 are not properly presented for decision in this case. We simply decide the issues that were timely presented to us by the litigants.

In conclusion, we hold that under these circumstances, Ingram waived its right to argue that discriminatory demotion and discriminatory discharge are not actionable under section 1981 and that in the exercise of our discretion we should decline to address these issues in this case.

C. *The Arguments Ingram Preserved*

Having concluded that we will not hear any arguments based on *Patterson,* we now turn to the timely arguments Ingram makes. A review of the record demonstrates that these arguments lack merit.

The judgment of the district court is AFFIRMED.[7]

6. We recognize the distinction between the nature of review by the Supreme Court and the nature of review by a court of appeals. In *Patterson* and *Jett,* however, the Supreme Court refused to consider new arguments because those arguments had never been presented during the proceedings, not because of the special nature of the Court's review of lower court decisions.

7. All pending motions in this case are rendered moot by this opinion.