rel: May 24, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1170249

Douglas Ghee, as personal representative of the Estate of Billy Fleming, deceased

v.

USAble Mutual Insurance Company d/b/a Blue Advantage Administrators of Arkansas

Appeal from Calhoun Circuit Court
(CV-15-900383)

STEWART, Justice.

Douglas Ghee, as the personal representative of the estate of Billy Fleming, deceased, appeals from an order of the Calhoun Circuit Court dismissing a wrongful-death claim

brought against USAble Mutual Insurance Company d/b/a Blue Advantage Administrators of Arkansas ("Blue Advantage"). These parties have previously been before this Court. See Ghee v. USAble Mut. Ins. Co., 253 So. 3d 366 (Ala. 2017) ("Ghee I").

Facts and Procedural History

This Court, in Ghee I, set forth the factual and procedural history of this case. Because those facts and procedural history are applicable to the disposition of the issues presented by this appeal, we again set forth the facts and procedural history as set forth in Ghee I:

> "Blue Advantage was the claims administrator for Fleming's self-funded employee-health-benefits plan, which Fleming received through his employment with Wal-Mart Stores, Inc. There is no dispute that the health-benefits plan falls under the auspices of the Employee Retirement Income Security Act of 1974 ('ERISA'), 29 U.S.C. § 1001 et seq. That plan will be referred to hereinafter as 'the ERISA plan.'
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> "Ghee filed a complaint in the Calhoun Circuit Court alleging a wrongful-death claim against Blue Advantage, among others, based on Fleming's death. The circuit court granted Blue Advantage's Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss Ghee's complaint against it based on federal preemption under ERISA, specifically based on 29 U.S.C. § 1144(a). The allegations in Ghee's complaint were pivotal to this determination; therefore, it is best to relay the facts exactly as alleged in the complaint:

"'18. On June 11, 2013, [Fleming] presented to the [Northeast Alabama] RMC [Regional Medical Center] emergency department. According to records, he was complaining of constipation and abdominal pain that he rated as a 10 on a 10-point scale.

"'19. [Fleming] was diagnosed with abdominal pain with constipation and fecal impaction.

"'20. [Fleming] was admitted to the hospital.

"'21. On June 12, 2013, a CT of [Fleming's] abdomen showed, according to a written report, a moderate amount of fecal material within [Fleming's] sigmoid colon and rectum.

"'22. On June 14, 2013, Dr. Rosen attempted to perform a colonoscopy on [Fleming], but according to Dr. Rosen's notes, he was unable to pass the scope beyond 30 centimeters, and stated that, "[g]iven the marked severity of constipation, the inadequate colon prep despite multiple colon preparations, the patient would benefit [from] subtotal colectomy."[1]

"'23. On June 15, 2013, Dr. Crawford was consulted, and according to his notes, agreed that [Fleming] required a colectomy and scheduled the procedure for two weeks later as an outpatient procedure in order to give [Fleming's] colon an opportunity to flatten out.

"'24. [Fleming] was discharged home from RMC on June 17, 2013.

"'25. On July 2, 2013, [Fleming] visited Dr. Crawford as a followup at the Crawford Clinic and was scheduled to undergo his colectomy on July 10, 2013.

"'26. Dr. Crawford and/or the Crawford Clinic, according to its records, sought pre-approval for the surgery from [Blue Advantage] via CPT code 564.9, which is unspecified functional disorder of intestine.

"'27. On July 3, 2013, [Fleming] presented to RMC for his pre-anesthetic evaluation.

"'28. On or about July 5, 2013, an agent of the Crawford Clinic called [Fleming] and informed him that he could not have the surgery because [Blue Advantage] had decided that a lower quality of care--continued non-surgical management--was more appropriate than the higher quality of care--surgery--that [Fleming] needed and that his surgeon felt was appropriate.

"'29. [Fleming] and his family then had multiple conversations with agents of [Blue Advantage] in an unsuccessful attempt to convince the company that the higher quality of care (surgery, as recommended by [Fleming's] doctors) was the more appropriate course. Ultimately, an agent of [Blue Advantage] suggested to [Fleming] that he return to RMC in an attempt to convince hospital personnel and physicians to perform the surgery on an emergency basis.

"'30. On the night of July 10, 2013 (after midnight so that the hospital records indicate a visit of July 11), [Fleming] returned to the RMC emergency department.

> According to records, he was complaining of severe abdominal pain.
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> "'31. [Fleming] explained his history involving his prior admission and canceled surgery.
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> "'32. A CT of [Fleming]'s abdomen showed, according to a written report, a moderate amount of retained stool throughout [Fleming's] colon.
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> "'33. [Fleming] was seen and discharged that day (7/11/13) by Dr. Williams, D.O.
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> "'34. On July 14, 2013, [Fleming] returned to the RMC emergency department and according to the records, complaining of severe abdominal pain and rectal bleeding.
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> "'35. [Fleming] again reported his history involving his prior admission and canceled surgery.
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> "'36. No diagnostic imaging was performed during this visit (7/14/13).
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> "'37. [Fleming] was seen and discharged that day (7/14/13) by Summer Phelps, N.P., and Dr. Proctor.
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> "'38. On July 15, 2013, [Fleming] was brought back to the RMC emergency department by Oxford EMS, and according to records, complaining of urinary retention, severe abdominal pain and constipation.
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> "'39. [Fleming] again reported his history involving his prior admission and canceled surgery.

"'40. Again, [Fleming] was seen and sent home, this time by Dr. Simmons.

"'41. During this entire time, [Blue Advantage] was providing for a certain level of care to be provided to [Fleming]: non-surgical management of his life-threatening bowel obstruction. However, [Blue Advantage] never agreed to provide him with the higher quality of care he needed: life-saving surgical intervention.

"'42. At approximately 10:30 a.m., [Fleming] was brought by Anniston EMS to Stringfellow Memorial Hospital in severe distress.

"'43. [Fleming's] condition declined rapidly, he had to be intubated, eventually coded and died after midnight that night (the night of 7/15/13, the morning of 7/16/13).

"'44. Dr. Thomas Garland performed an autopsy, which confirmed that [Fleming] had a perforated sigmoid colon with abundant fecal material identified within the peritoneal cavity.

"'45. Dr. Crawford attended at least a portion of the autopsy.

"'46. Dr. Vishwanath M. Reddy certified [Fleming's] death certificate listing the cause of death as follows: "septic shock due to peritonitis due to colonic perforation."'

"On July 14, 2015, Ghee, as personal representative of Fleming's estate, filed a wrongful-death action in the Calhoun Circuit Court

against Blue Advantage, Northeast Alabama Regional Medical Center, the Crawford Clinic, four doctors, and a nurse, asserting that their combined and concurring negligence and wrongful conduct proximately caused Fleming's death. Specifically with respect to Blue Advantage, Ghee alleged that it contributed to Fleming's death through the following actions:

> "'68. [Blue Advantage] had or voluntarily assumed one or more of the following duties, jointly or in the alternative: a duty to act with reasonable care in the determining the quality of healthcare [Fleming] would receive; a duty not to provide to [Fleming] a quality of healthcare so low that it knew that [Fleming] was likely to be injured or killed; and a duty to exercise such reasonable care, skill, and diligence as other similarly situated healthcare providers in the same general line of practice ordinarily have and exercise in a like case.
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> "'69. [Blue Advantage] breached those duties, jointly or in the alternative, as follows:
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> > "'a. Negligently providing for a lower quality of healthcare for [Fleming];
> >
> > "'b. Wantonly providing for a lower quality of healthcare for [Fleming];
> >
> > "'c. Breaching the standard by (i) failing to provide a higher quality of healthcare to [Fleming] (necessary, life saving

> surgery) and (ii) failing to communicate adequately with [Fleming]'s healthcare providers his need for surgery.
>
> "'70. Those breaches combined with the actions of other defendants as a legal cause of death for ... Fleming, in that without the breaches, [Fleming] would have more likely than not survived.
>
> "'71. Per Dukes v. US Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995), Ghee makes no complaint that benefits were denied to [Fleming]; indeed, [Blue Advantage] provided multiple, numerous and repeated benefits (a high quantity) to [Fleming] in an attempt to manage his bowel obstruction without surgery. Ghee's only complaint against [Blue Advantage], as detailed above, involves the quality of the benefit received, specifically that it was of such a low quality (did not include necessary surgery) that it caused [Fleming]'s death. Further, considering [Fleming] is deceased, he necessarily cannot attempt to force [Blue Advantage] to provide any benefits to him. He is dead. Because of this indisputable reality, Ghee does not seek any benefits or even compensatory damages (state law does not allow for such damages) but instead only the wrongful death, punitive damages allowed by Alabama state law.'

"On August 20, 2015, Blue Advantage removed the case to the United States District Court for the Northern District of Alabama on the basis of complete preemption under ERISA, specifically under 29 U.S.C. § 1132. On August 27, 2015, Blue Advantage filed a motion in the circuit court to dismiss the claim against it based on federal preemption. On September 9, 2015, Ghee filed a motion to stay all

> proceedings in federal court until the federal district court had ruled on the issue of subject-matter jurisdiction. The federal district court granted that motion the following day. On September 21, 2015, Ghee filed a motion to remand the case to the circuit court on the ground that the claims were not completely preempted by ERISA.
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> "On December 2, 2015, the federal district court entered an order remanding the case to the circuit court. In its order, the federal district court explained that complete preemption[1] did not apply because Ghee was not seeking benefits under the ERISA plan but, rather, was seeking only punitive damages under Alabama's 'unique' wrongful-death statute. The federal district court noted that '[b]ecause the Alabama wrongful death statute does not allow recovery for the value of benefits denied, only punishment for causing a death, the suit could not be brought under the ERISA private enforcement action.' Ghee v. Regional Med. Ctr. Bd., No. 1:15-CV-1430-VEH, Dec. 2, 2015 (N.D. Ala. 2015)(not reported in F. Supp. 3d).
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> "[1]A colectomy is surgery that involves removal of all or part of the colon."

Ghee I, 253 So. 3d at 367-70 (footnote omitted).

Following the remand from the federal district court, Blue Advantage, on December 29, 2015, moved the trial court, pursuant to Rule 12(b)(6), Ala. R. Civ. P., to dismiss the claims against it based on the affirmative defense of defensive preemption under the Employee Retirement Income

[1]Complete preemption and the related defensive preemption will be discussed fully below.

Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., specifically 29 U.S.C. § 1144(a).[2] Blue Advantage argued that Ghee's wrongful-death action "relates to" Blue Advantage's administration of the ERISA plan's benefits and that, therefore, the claims asserted in the wrongful-death action were preempted. Specifically, it explained that, "[w]ithout Fleming's relationship with Blue Advantage and Blue Advantage's coverage determination, Ghee would have no basis to allege that Blue Advantage failed to provide Fleming with the appropriate quality of care." Blue Advantage attached the ERISA plan to its motion to dismiss, noting that Ghee had referenced the plan in his complaint.

On March 1, 2016, Ghee filed a response in opposition to Blue Advantage's motion to dismiss and a motion to continue Blue Advantage's motion to dismiss until after all discovery had been completed. Ghee argued, among other things, that there is no defensive preemption of the wrongful-death claim in this case because "there is too tenuous, remote, and

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[2]29 U.S.C. § 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b)." (Emphasis added.)

peripheral of a connection between Ghee's wrongful death claims and the [ERISA plan]." Ghee also argued that Blue Advantage could be "deemed to be a treating physician" and liable outside ERISA because during the course of a telephone call a Blue Advantage employee advised Fleming to return to the emergency room and seek surgery on an emergency basis. Ghee further argued that the trial court should treat Blue Advantage's Rule 12(b)(6) motion to dismiss as a motion for a summary judgment because (1) the affirmative defense of preemption is not properly adjudicated on a motion to dismiss and (2) Blue Advantage had submitted approximately 300 pages of the Wal-Mart Health Plan documents with its motion to dismiss, which, he asserted, converted the motion to dismiss to a motion for a summary judgment.

Following a hearing, the trial court, on October 4, 2016, entered an order granting Blue Advantage's motion to dismiss the claims asserted against it; granting Ghee leave to file an amended complaint within 30 days to pursue any relief to which he believed himself entitled under ERISA; and certifying the judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. Ghee did not amend his complaint to assert a claim under ERISA. Ghee filed a timely notice of appeal on October 26, 2016.

This Court determined in Ghee I that the trial court's order was not proper for Rule 54(b) certification, stating that the trial court "cannot purport to enter a final adjudication of a claim while making it possible for the plaintiff to revive that very claim." Ghee I, 253 So. 3d at 373. Thus, this Court dismissed the appeal as being from a nonfinal judgment. This Court entered the certificate of judgment on November 14, 2017.

On November 15, 2017, Ghee moved the trial court to temporarily set aside its order of October 4, 2016, and to allow him to amend his claim -- not to add an ERISA claim but to more precisely state in the complaint his state-law claims setting forth the allegations he presented in opposition to Blue Advantage's motion to dismiss. On November 17, 2017, the trial court entered an order denying Ghee's motion to set aside the order of October 4, 2016, and to amend his complaint. Ghee appeals. We reverse and remand.

Standard of Review

> "'The appropriate standard of review under Rule 12(b)(6)[, Ala. R. Civ. P.,] is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [it] to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985);

> Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, the Court does not consider whether the plaintiff will ultimately prevail, but only whether [it] may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v. United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986).'"

DGB, LLC v. Hinds, 55 So. 3d 218, 223 (Ala. 2010)(quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

Discussion

The ultimate issue in this case is whether Ghee's wrongful-death claims against Blue Advantage brought pursuant to § 6-5-410, Ala. Code 1975, are preempted by ERISA. The trial court concluded that the Ghee's claims were defensively preempted by ERISA and denied Ghee's request to amend his complaint to restate his state-law claims in an attempt to circumvent the ERISA affirmative defense. Because we ultimately conclude that the trial court should have given Ghee the opportunity to amend his complaint, we reverse its order of dismissal on procedural grounds.

Although we pretermit discussion of the merits of Blue Advantage's ERISA preemption defense, some background on the

doctrine of ERISA preemption is necessary to an understanding of our decision. The United States Supreme Court has stated the following with regard to ERISA preemption:

> "In ERISA, Congress set out to
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> > "'protect ... participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.' § 2, as set forth in 29 U.S.C. § 1001(b).
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> "ERISA comprehensively regulates, among other things, employee welfare benefit plans that, 'through the purchase of insurance or otherwise,' provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or death. § 3(1), 29 U.S.C. § 1002(1).
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> "....
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> "'[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. "'The purpose of Congress is the ultimate touchstone.'"' Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985), quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978), quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). We have observed in the past that the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523

(1981). As we explained in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983):

> "'The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the present language, and indicated that section's pre-emptive scope was as broad as its language. See H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).'"

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-46 (1987).

ERISA is one of the few federal statutes that give rise to two types of preemption: (1) conflict preemption or defensive preemption and (2) complete preemption. The United States Court of Appeals for the Eleventh Circuit has explained both types of preemption:

> "Conflict preemption, also known as defensive preemption, is a substantive defense to preempted state law claims. Jones v. LMR Int'l, Inc., 457 F.3d 1174, 1179 (11th Cir. 2006). This type of preemption arises from ERISA's express preemption provision, § 514(a), which preempts any state law claim that 'relates to' an ERISA plan. 29 U.S.C. § 1144(a). Because conflict preemption is merely a defense, it is not a basis for removal. Gully v. First Nat'l Bank, 299 U.S. 109, 115–16, 57 S.Ct. 96, 99, 81 L.Ed. 70 (1936); see also Ervast v. Flexible Prods. Co., 346 F.3d 1007, 1012 n. 6 (11th Cir. 2003) (stating that 'defensive preemption ... provides only an affirmative defense to state law claims and is not a basis for removal').

"Complete preemption, also known as super preemption, is a judicially-recognized exception to the well-pleaded complaint rule. It differs from defensive preemption because it is jurisdictional in nature rather than an affirmative defense. Jones, 457 F.3d at 1179 (citing Ervast, 346 F.3d at 1014). Complete preemption under ERISA derives from ERISA's civil enforcement provision, § 502(a)[, 29 U.S.C. § 1132], which has such 'extraordinary' preemptive power that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' [Metropolitan Life Ins. Co. v.] Taylor, 481 U.S. [58,] 65-66, 107 S.Ct. [1542,] 1547 [(1987)]. Consequently, any 'cause[] of action within the scope of the civil enforcement provisions of § 502(a) [is] removable to federal court.' Id. at 66, 107 S.Ct. at 1548.

"Although related, complete and defensive preemption are not coextensive:

> "'Complete preemption is [] narrower than "defensive" ERISA preemption, which broadly "supersede[s] any and all State laws insofar as they ... relate to any [ERISA] plan." ERISA § 514(a), 29 U.S.C. § 1144(a) (emphasis added). Therefore, a state-law claim may be defensively preempted under § 514(a) but not completely preempted under § 502(a). In such a case, the defendant may assert preemption as a defense, but preemption will not provide a basis for removal to federal court.'

"Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1281 (11th Cir. 2005); accord Ervast, 346 F.3d at 1012 n. 6 ('Super preemption is distinguished from defensive preemption, which provides only an affirmative defense to state law claims and is not a basis for removal.')."

Connecticut State Dental Ass'n v. Anthem Health Plans, Inc., 591 F.3d 1337, 1344 (11th Cir. 2009). A federal district court's "holding that [a] plaintiff's claims are not completely preempted by ERISA resolves the jurisdictional question, but is not and cannot be dispositive of [a defendant's] affirmative defense of defensive preemption." Evans v. Infirmary Health Servs., Inc., 634 F. Supp. 2d 1276, 1292 (S.D. Ala. 2009). The issue whether a plaintiff's claims relate to ERISA, and are therefore defensively preempted, is ultimately an issue to be decided by the state court on remand. Evans, supra.

Ghee argues that his complaint alleging a medical-malpractice claim under the Alabama wrongful-death statute, if allowed to be amended, would not be defensively preempted by ERISA because, he says, it would not "relate" to Fleming's ERISA health plan in that the claim does not challenge Blue Advantage's coverage decision or seek benefits under the plan. Rather, Ghee asserts that Blue Advantage interjected itself into the matter as a "health-care provider" for Fleming by "voluntarily under[taking]" a duty beyond the ERISA plan to act with reasonable care in determining the quality of health care Fleming would receive and then breaching that duty by

negligently failing to provide Fleming the necessary health care, i.e., surgery. Ghee contends that if he is allowed to amend his complaint it should be clear that those duties were independent and separate from Blue Advantage's administrative duties under the ERISA plan because, he says, they are ultimately unrelated to the issue whether Blue Advantage was required to provide Fleming benefits under his ERISA plan.

Blue Advantage argues that Ghee's wrongful-death claim--no matter how it is pleaded--relates to Blue Advantage's administration of Fleming's ERISA plan because, it says, Ghee attempts to apply Alabama's wrongful-death statute and the Alabama Medical Liability Act, § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975, to Blue Advantage's decision not to approve the requested surgery for Fleming. Blue Advantage contends that its interaction with Fleming arose only out of its contractual duty to administer Fleming's health benefits under the ERISA plan. Therefore, Blue Advantage contends that Ghee could not assert any version of a wrongful-death claim without that claim being defensively preempted by ERISA.

In the final analysis, the issue to be decided in this case will be whether Ghee's wrongful death-claim is related to the ERISA plan and, therefore, defensively preempted by ERISA

under ERISA § 514(a), 29 U.S.C. § 1144(a). But that issue is premature and not yet before us. On remand following Ghee I, Ghee attempted to clarify his claims by amending his complaint to allege that, instead of seeking to hold Blue Advantage liable for the denial of benefits, he was seeking to hold Blue Advantage liable for negligently interjecting itself as a health-care provider and for "cross[ing] the line from claims administration into the practice of medicine." The trial court refused to allow Ghee to amend his complaint.

Rule 15(a), Ala. R. Civ. P., provides that amendments "shall be freely allowed when justice so requires" and that the amendment is "subject to disallowance on the court's own motion or a motion to strike of an adverse party." Regarding Rule 15(a), Fed. R. Civ. P., which is similar to Rule 15(a), Ala. R. Civ. P., the United States Supreme Court has applied to following standard:

> "'If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely

> given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court], but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.'"

Foman v. Davis, 371 U.S. 178, 182 (1962)(emphasis added).[3]

The Committee Comments on the 1973 Adoption of Rule 15, Ala. R. Civ. P., provide:

> "Under Rule 15(a) and (b) the test as to whether amendment is proper will be functional, rather than, as under present Alabama law, conceptual. Under the rule it will be entirely irrelevant that a proposed amendment changes the cause of action or the theory of the case or that it states a claim arising out of a transaction different from that originally sued on or that it caused a change in parties. ... The rule, instead, is that amendments are to be allowed 'freely ... when justice so requires.' Normally, an amendment should be denied only if the amendment would cause actual prejudice to the adverse party. 6 Wright & Miller, Federal Practice and Procedure, Civil, § 1484 (1971)."

The treatise cited in those Committee Comments states:

> "The only prerequisites are that the district court have jurisdiction over the case and an appeal must not be pending. If these two conditions are met, the court will proceed to examine the effect and the timing of the proposed amendments to determine whether they would prejudice the rights of any of

[3]Federal decisions construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure because the Alabama Rules were patterned after the Federal Rules.

> the other parties to the suit. If no prejudice is found, then leave normally will be granted."

6 Charles Alan Wright et al., Federal Practice & Procedure § 1484 (3d ed. 2012)(footnotes omitted).

Although Rule 15 requires that amendments be freely allowed, the right to amend a complaint pursuant to Rule 15 is not absolute or automatic. Rule 15 "'is not carte blanche authority to amend ... at any time'" and the trial court has the discretion to deny an amendment for good cause. Blackmon v. Nexity Fin. Corp., 953 So. 2d 1180, 1189 (Ala. 2006)(quoting Burkett v. American Gen. Fin., Inc., 607 So. 2d 138, 141 (Ala. 1992)). "[A]n unexplained undue delay in filing an amendment when the party has had sufficient opportunity to discover the facts necessary to file the amendment earlier is also sufficient grounds upon which to deny the amendment." 953 So. 2d at 1189. However, "Rule 15(a), [Ala.] R. Civ. P., does not provide any time limits for determining when an amendment should be allowed, nor have our courts imposed any arbitrary restrictions. Amendment of the pleadings has been allowed at various stages of the litigation." Hughes v. Wallace, 429 So. 2d 981, 984 (Ala. 1983)(Torbert, C.J., concurring in the result).

In this case, Ghee filed his complaint in July 2015. The trial court entered its order of dismissal on October 4, 2016. As this Court held in Ghee I, that judgment was not properly certified as final and thus was not a judgment from which an appeal could be taken. Although Ghee's original complaint had been pending for over a year before the trial court entered its October 4, 2016, order of dismissal, we do not conclude that Ghee engaged in undue delay. One day after this Court issued its certificate of judgment in Ghee I, Ghee filed a motion to amend the complaint to make additional allegations that seek to clarify his wrongful-death claim against Blue Advantage to address the defensive-preemption issue. The additional allegations in the proposed amended complaint are essential to the analysis of whether Ghee's wrongful-death claim is related to Fleming's ERISA plan and, therefore, defensively preempted by ERISA § 514(a), 29 U.S.C. § 1144(a), or whether the Ghee's state-law claims articulate an independent legal duty that is implicated by Blue Advantage's actions. This Court has previously recognized that under Rule 15 a plaintiff has the right to amend a complaint to remedy a defect after the trial court has entered an order of dismissal. Papastefan v. B & L Constr. Co. of Mobile, 356

So. 2d 158, 160 (Ala. 1978). Because the trial court determined that Ghee's allegations against Blue Advantage as stated in the original complaint were defensively preempted by ERISA, Ghee should have had the right to amend his complaint to clarify his state-law claims.

Because we conclude that Ghee should have been afforded the right to amend his complaint, we reverse the judgment of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion. Because of our disposition of this issue, we pretermit discussion of the remaining issues raised by Ghee on appeal.

REVERSED AND REMANDED.

Parker, C.J., and Wise, J., concur.

Bryan and Mendheim, JJ., concur in the result.

Bolin, J., dissents.

Shaw, Sellers, and Mitchell, JJ., recuse themselves.

BOLIN, Justice (dissenting)

Rule 15(a), Ala. R. Civ. P., provides that amendments "shall be freely allowed when justice so requires" and that the "amendment is subject to disallowance on the trial court's or opposing party's motion." This Court has recognized that Rule 15 "'is not carte blanche authority to amend ... at any time'" and that the trial court has the discretion to deny an amendment for good cause. Blackmon v. Nexity Financial Corp., 953 So. 2d 1180, 1189 (Ala. 2006), quoting Burkett v. American Gen. Fin., Inc., 607 So. 2d 138, 141 (Ala. 1992). "[A]n unexplained undue delay in filing an amendment when the party has had sufficient opportunity to discover the facts necessary to file the amendment earlier is also sufficient grounds upon which to deny the amendment." Blackmon, 953 So. 2d at 1189.

Ghee filed his complaint in this case in July 2015. Blue Advantage filed its motion to dismiss on December 29, 2015. Ghee filed his response in opposition to Blue Advantage's motion to dismiss on March 1, 2016, arguing, among other things, that there was no defensive preemption of the wrongful death claim in this case because "there is too tenuous, remote, and peripheral of a connection between Ghee's wrongful death claims and the [ERISA plan]" and that Blue Advantage

could be "deemed to be a treating physician" and liable outside of ERISA because during the course of a telephone call a Blue Advantage employee advised Fleming to return to the emergency room and seek surgery on an emergency basis. On October, 4, 2016, the trial court entered an order granting Blue Advantage's motion to dismiss. On November 15, 2017, following this Court's dismissal of Ghee I as being from a non-final judgment, Ghee moved the trial court to amend his claim so as to more precisely state in the complaint his state law claims setting forth the allegations that he presented in the March 1, 2016, response in opposition to Blue Advantage's motion to dismiss.

In the intervening 15 months from the time the complaint was filed in July 2015 and the trial court granting the motion to dismiss in October 2016, Blue Advantage raised its complete and defensive ERISA preemption arguments. However, during that time Ghee made no attempt to amend his complaint to more precisely state his claim, even though he was free to do so without having to seek leave of court. Rule 15(a), Ala. R. Civ. P. Rather, Ghee waited until November 2017, to seek amendment of his complaint, which is over two years from the time the complaint was filed and approximately 20 months after

filing the motion in opposition to the motion to dismiss.

Based on the foregoing, I respectfully dissent from the main opinion.