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CPLR 3101(a): Courts Uphold Right to Discovery of Notes Reviewed Prior to Examination Before Trial, and Right to a Bill of Particulars and Examination as to Damages After Summary Judgment on Liability

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CPLR 3101(a): Courts uphold right to discovery of notes reviewed prior to examination before trial, and right to a bill of particulars and examination as to damages after summary judgment on liability.

The Court of Appeals, in *Allen v. Crowell-Collier Publishing Co.*,[108] held that the "material and necessary" requirement under CPLR 3101(a) must "be interpreted liberally to require disclosure upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and promulgated a test of "usefulness and reason."[109] Two recent decisions reflected the broad interpretation of CPLR 3101(a) set forth in the *Allen* case.

The Appellate Division, Fourth Department, in *Doxtator v. Swarthout*,[110] decided whether a plaintiff in a malpractice action was entitled to compel pre-trial discovery of notes which the defendant-doctor reviewed in order to refresh her recollection prior to her examination before trial. In ruling for the plaintiff, the court held that the rule regarding inspection of a party's notes concerning litigation, when applied to pre-trial examination, should be no more stringent than the rule applicable to trial testimony, which generally permits such discovery.[111] The notes used by the defendant became material affirmatively used in litigation and thus subject to discovery.[112] The court concluded that the plaintiff had a legitimate interest in inspecting these notes, *i.e.*, preparation for a thorough examination.

The issue in *Appeal Printing Co. v. Levine*[113] was whether the

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108 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 324 (1968).

109 *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452. The *Allen* interpretation makes CPLR 3101(a) almost identical to FED. R. CIV. P. 26(b), which permits examination of anything "relevant to the subject matter."

110 38 App. Div. 2d 782, 328 N.Y.S.2d 150 (4th Dep't 1972) (mem.).

111 For a statement of the general rule, see United States v. Socony-Vacuum Oil Co., 310 U.S. 150, *rehearing denied*, 310 U.S. 658 (1940). Texts on evidence support the *Doxtator* court's position that an adversary should have the same right to inspect a writing used to refresh a recollection before trial as he has during a trial. *See* W. RICHARDSON, EVIDENCE 490-91 (9th ed. 1964); 3 J. WIGMORE, EVIDENCE 140 (3d rev. ed. J. Chadbourn 1970). In Alfredsen v. Loomis, 148 N.Y.S.2d 468, 470 (Sup. Ct. Kings County 1956), the court observed:

> The time when the memorandum of statement was referred to by the witness, whether at the trial or examination or prior thereto, would seem unimportant. . . . The important fact is that it was used by him to refresh his recollection and that it accomplished that purpose.

See also Schwartz v. Broadcast Music, 180 F. Supp. 322 (S.D.N.Y. 1959).

112 CPLR 3101(d) exempts from pre-trial discovery "material prepared for litigation," including "any writing or anything created by or for a party or his agent in preparation for litigation." Interpretation of this section remains somewhat ambiguous. *See* 7B McKINNEY'S CPLR 3101, commentary at 34 (1970).

113 69 Misc. 2d 76, 329 N.Y.S.2d 110 (N.Y.C. Civ. Ct. N.Y. County 1971).

defendant was entitled to a bill of particulars and an examination before trial on the question of damages where the plaintiff had been awarded summary judgment on the question of liability and a hearing had been scheduled for the assessment of damages. The Civil Court, New York County, held that the motion for summary judgment foreclosed the opportunities for disclosure which the defendant would have had if the case had proceeded routinely to trial, and that the defendant, in effect, would still have to face a "trial" for damages.[114] The court found that the bill of particulars[115] and examination as to damages[116] were "material and necessary" and so ruled in favor of the defendant.

Doxtator v. Swarthout and *Appeal Printing Co. v. Levine* clearly satisfy the *Allen* test of "usefulness and reason." These decisions are excellent examples of a liberal and enlightened approach to discovery procedure.

CPLR 3101 (a): Courts differ on whether a plaintiff is entitled to discovery and inspection of defendant's automobile liability insurance policy.

The Court of Appeals, in *Allen v. Crowell-Collier Publishing Co.*,[117] broadened the criteria of "material and necessary" under CPLR 3101 to require "disclosure upon request of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity."[118] Prior to *Allen*, the Supreme Court, New York County, in *Gold v. Jacobi*,[119] held that insurance policy limits in negligence suits were not "material and necessary" and refused to allow such discovery. Although alluding to the Federal Rules of Civil Procedure and their emphasis on "relevancy,"[120] the court stated that the Legislature, in adopting the CPLR, had opted for a more restrictive approach to pretrial disclosure and that any change should

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114 *Id.* at 78, 329 N.Y.S.2d at 113.

115 In Glove City Amusement Co. v. Smalley Chain Theatres, Inc., 167 Misc. 603, 604-05, 4 N.Y.S.2d 397, 400 (Sup. Ct. Madison County 1938), the court observed:

> The purpose of a bill of particulars is, generally, to advise the defendant of plaintiff's claims, to enable the defendant to prepare to meet those claims, and to assist the court. It is as necessary and useful upon an assessment of damages as upon a trial.

See also McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 169 N.E. 605 (1930).

116 *See* Shemitz v. Junior Center, 74 N.Y.S.2d 34 (N.Y. City Ct. N.Y. County 1947).

117 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 324 (1968).

118 *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

119 52 Misc. 2d 491, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

120 FED. R. CIV. PROC. 26(b). For discussion of the test of "relevancy," see 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2010 (1970); Annot., 13 A.L.R.3d 822 (1967). For a comparison of different state standards, see Davis, *Pretrial Discovery of Insurance Coverage*, 16 WAYNE L. REV. 1047 (1970); Annot., 13 A.L.R.3d 822 (1967).