St. John's Law Review

Volume 47, October 1972, Number 1 Article 27

Collateral Estoppel: A Misapplication

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party in interest, although useful at trial, is inappropriate at the pretrial level, particularly when, as with automobile coverage, the requirements of compulsory insurance are generally known. The CPLR should be amended to expressly authorize discovery of insurance policies.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: A misapplication.

Donato v. Cataffo[130] was an automobile accident case involving the owner and the driver of one car and the owner and the driver of another car. Both defendants moved for summary judgment, and the plaintiff-owner cross-moved for summary judgment. Prior to this action, a passenger in the plaintiff-owner's vehicle had obtained judgment against all the parties hereto. The absentee plaintiff-owner had not acquiesced in the use of his vehicle for any business reason. The plaintiff-owner contended that the decisive case was *Mills v. Gabriel*,[131] which held that a driver's negligence is not imputable to an absentee owner when he attempts to recover his own damages. The defendants argued that the plaintiff-owner was collaterally estopped under the previous action.[132] They relied on *Schwartz v. Public Administrator of Bronx County*,[133] which established two prerequisites to invocation of collateral estoppel: (1) an identity of issue necessarily decided previously, and (2) a full and fair opportunity to contest the prior decision.[134]

The *Donato* court chose to apply the collateral estoppel theory.[135] In so doing, the court erred. The *Schwartz* case, which involved a suit between two operators, was not in point, for *Donato* was an action by an owner whose liability was wholly different from that of the driver

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of policy limits, will resolve the issue for them. If a case is evaluated below the policy limits, no problem arises. If it is serious enough to call for an evaluation above the limits, in practice it would generally be settled within such limits, *if* the plaintiff knows what they are. Only in rare instances will a plaintiff persist in a demand above policy limits, even if his injuries call for a possible recovery in excess thereof. What's the use of incurring the expenses of a trial, and losing valuable time, if a judgment in excess of the limits is uncollectible?

Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59, 78-79 (1965).

130 69 Misc. 2d 705, 330 N.Y.S.2d 536 (Sup. Ct. Kings County 1972).

131 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), *aff'd*, 284 N.Y. 755, 31 N.E.2d 512 (1940).

132 For a thorough discussion of collateral estoppel, see Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

133 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 136, 153 (1969).

134 *Id.* at 71, 246 N.E.2d at 728, 298 N.Y.S.2d at 959. As to which parties are bound by prior judgments and affected by collateral estoppel, see 5 WK&M ¶ 5011.32-.37. *See also* H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 350-52 (3d ed. 1970).

135 69 Misc. 2d at 707-08, 330 N.Y.S.2d at 539-40.

in *Schwartz*. The *Mills* case should have been deemed controlling. As the Court of Appeals stated in *Molino v. County of Putnam*:[136]

> The statute which imputes to an absentee owner the negligence of his driver, for the purpose of imposing liability to an injured third party, does not impute contributory negligence to such an absentee owner in his action to recover his own damage.

There was no indication in *Schwartz* that *Mills* was overruled. It is apparent that the plaintiff-owner was entitled to litigate the defendants' responsibility for the property damage to his car. The plaintiff-owner's own negligence was not in issue in the first action, so there was no basis upon which he could be collaterally estopped in this action. Indeed, the plaintiff-owner should have been granted summary judgment, since the prior action established the defendants' negligence and since there was no basis for finding that the plaintiff-owner was contributorily negligent.

ARTICLE 41 — TRIAL BY A JURY

CPLR art. 41: Verdicts modified by court where jury failed to render verdicts required by its own findings.

Welborn v. DeLeonardis[137] joined three separate negligence actions based on the alleged negligent operation of two motor vehicles. In action one, plaintiff 1 (P1), a passenger in the car owned and operated by defendant 1 (D1), sued D1, D2, the lessor-owner of the other vehicle, and D3, its lessee-operator. By verdict, P1 recovered against D1. In action two, in which D1 sued D2 and D3, there was a hung jury. In action three, P3, a passenger in the vehicle owned by D2 and operated by D3, sued D1, D2, and D3. A verdict was returned in that action in favor of P3 against D2.

Thereafter, pursuant to CPLR 4404(a),[138] motions were made to set aside the jury's verdicts and for a new trial in actions one and three because of the inconsistency of the verdicts. P1 also moved for a directed verdict in action one against D2 and D3 because of the jury's finding of negligence in action three. In addition, D2 moved for judgment against D1 in action two on the basis of (1) the verdict rendered in action three, and (2) D1's motion for a new trial in actions one and three.

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136 29 N.Y.2d 44, 49, 272 N.E.2d 323, 325, 323 N.Y.S.2d 817, 821 (1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 374 (1971).

137 68 Misc. 2d 853, 328 N.Y.S.2d 132 (Sup. Ct. N.Y. County 1972).

138 CPLR 4404(a) states that after a jury trial, a party or the court itself may move to set aside a verdict or order a new trial where (1) the interests of justice so dictate; (2) the verdict is contrary to the weight of the evidence; or (3) the jury cannot agree after deliberating for a reasonable time.