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CPLR 3101(a)(1): Perpetuation of a Party's Own Testimony by Deposition Permitted on Basis of Advanced Age

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of CPLR 3101(a) in light of its liberal construction in *Allen*, the court concluded that the policy limits were relevant to the "subject matter" of the case and that *Allen* mandates their discovery.[66] It also reasoned that since the insurer is the real party in interest in a negligence action, disclosure of the limits of coverage would permit the plaintiff's attorney to better assess the depth of his adversary's commitment. Additionally, the court found that such pretrial discovery in the sound discretion of the judge would not serve to invade the defendant's privacy,[67] and it rejected the argument that the plaintiff's counsel might be tempted to demand excessive damages if high policy limits were discovered.[68]

The settlement rationale for permitting disclosure of the defendant's insurance policy limits is compelling, especially in light of CPLR 104, which mandates liberal construction of the CPLR "to secure the just, speedy and inexpensive determination of every civil judicial proceeding." Moreover, should this controversy reach the Court of Appeals, defendants will find it difficult to overcome the force of the liberal construction of CPLR 3101(a) mandated by *Allen*.[69] Insurer opposition to disclosure may well be reevaluated as carriers for co-defendants and third parties increasingly find themselves in the position of adversaries under the apportionment rule of *Dole v. Dow Chemical Co.*[70] While the inception of no-fault insurance in New York may reduce the urgency for change, the Legislature should not thereby be deterred from amending CPLR 3101(a) to effect this needed reform.

CPLR 3101(a)(1): Perpetuation of a party's own testimony by deposition permitted on basis of advanced age.

Pursuant to the full disclosure mandate of CPLR 3101(a)(1), a

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of the defendant's policy since its purpose is to eliminate unnecessary delay, and such discovery, he averred, would not cause any delay. 73 Misc. 2d at 147, 341 N.Y.S.2d at 223. The court was also influenced by the proposed Westchester County Supreme Court rule which would require pretrial disclosure of insurance policy limits in all personal injury and wrongful death cases after the filing of a statement of readiness.

[66] 73 Misc. 2d at 159, 341 N.Y.S.2d at 234.

[67] The court declined to endorse the theory advanced by some authorities that the plaintiff is a third-party beneficiary of the insurance contract and therefore possesses a discoverable interest, characterizing it as "appealing but somewhat tenuous." *Id.* at 155 n.4, 341 N.Y.S.2d at 230 n.4. *See generally* Jenkins, *Discovery of Automobile Liability Insurance Limits: Quillets of the Law*, 14 KAN. L. REV. 59, 71-73 (1965). The court failed, however, to offer a superior argument.

[68] 73 Misc. 2d at 156, 341 N.Y.S.2d at 231. The court refused to impugn counsel's professional responsibility. It noted that, realistically, since New York does not permit indefinite demands for damages or verdicts in excess of the damages sought, plaintiffs will inevitably set the highest monetary amount consistent with the injuries received.

[69] *See* 7B MCKINNEY'S CPLR 3101, supp. commentary at 7 (1972); *Id.*, commentary at 11 (1970); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 237-38 (3d ed. 1970).

[70] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *noted in* 47 ST. JOHN'S L. REV. 185 (1972).

party, by service of notice,[71] may take the deposition of an adverse party without a showing of special circumstances.[72] CPLR 3101, unlike CPA 288, however, does not expressly permit a party to perpetuate his own testimony by self-deposition. Case law has construed the statute as permitting this practice without a showing of special circumstances.[73] *Boyo v. New York City Transit Authority*[74] reaffirms the validity of this practice.

In *Boyo*, the defendant opposed the plaintiff's motion to perpetuate her testimony pursuant to CPLR 3101 on the ground that the plaintiff, a 75-year-old woman, failed to submit a medical affidavit proving that illness, likelihood of death, or other special circumstances mandated the deposition. The Supreme Court, Kings County, held that the plaintiff was entitled to perpetuate her testimony solely on the basis of her advanced age,[75] relying on the legislative intent expressed in CPLR 3403, which provides for a trial preference as a matter of right "in any action upon the application of a party who has reached the age of seventy-five years."

Such a motion should be granted regardless of the absence of special circumstances.[76] Clearly, the intent of the CPLR is to liberalize disclosure. Moreover, CPLR 3117,[77] by restricting the use of depositions at trial, discourages needless self-depositions. Where this practice would be burdensome to the adverse party, he may seek a protective order under CPLR 3103.

CPLR 3101(a)(4): Fourth Department allows disclosure against nonparty witness where it will aid preparation for trial.

CPLR 3101(a)(4) provides that a nonparty witness may be required to disclose information material and necessary to a party's claim or defense provided that there exist adequate special circumstances. When the nonparty witness might have been unavailable for trial, or was

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71 CPLR 3107.

72 *In re* Estate of Keljikian, 44 Misc. 2d 176, 253 N.Y.S.2d 238 (Sur. Ct. Westchester County 1964).

73 Lapensky v. Gordon, 41 Misc. 2d 958, 246 N.Y.S.2d 442 (Sup. Ct. Kings County 1964), *discussed in The Biannual Survey*, 38 ST. JOHN'S L. REV. 406, 433 (1964) (72-year-old plaintiff permitted to take her own deposition without a showing of special circumstances). *See* 7B MCKINNEY'S CPLR 3101, commentary at 18, 22 (1970); 7 CARMODY-WAIT 2d, § 42:79, at 132 (1966); 3 WK&M ¶ 3101.22. *Cf.* Shaw v. Hospital Ass'n, 57 Misc. 2d 461, 292 N.Y.S.2d 984 (Sup. Ct. Schenectady County 1968).

74 72 Misc. 2d 165, 339 N.Y.S.2d 501 (Sup. Ct. Kings County 1972).

75 *Id.* at 166, 339 N.Y.S.2d at 502.

76 *See* note 73 *supra*. *Cf.* CPLR 104, 3101(a)(1).

77 CPLR 3117 requires that a party seeking to introduce a deposition at trial show that the witness is either: (1) dead; (2) more than 100 miles from the courtroom; (3) unavailable because of age, sickness, infirmity, or imprisonment; (4) unavailable despite diligent efforts to procure his attendance; or that exceptional circumstances exist.