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CPLR 3101(d): Names of Eyewitnesses, Even If Obtained by Investigation, Are Discoverable If They Are Material and Necessary

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hostile, or had special or exclusive knowledge of the facts, the special circumstances rule has been held satisfied and disclosure permitted.[78] Courts have been reluctant, however, to allow pretrial examinations in other than these well-settled cases, for example, if the examination would only assist the moving party in his trial preparation.[79]

In *Kenford Co. v. County of Erie*,[80] a contract action, the defendants intended to interpose the affirmative defenses of fraud and misrepresentation, and in order to aid their preparation, moved to examine three nonparty witnesses without showing any of the traditional special circumstances. The Appellate Division, Fourth Department, modified the trial court's order allowing the examination of two of the nonparty witnesses, unanimously holding that the mere involvement of one of them in transactions which led to the formation of the subject contract constituted sufficient special circumstances to justify his examination.[81] The other nonparty witness was excused since the defendants sought to interrogate him only with respect to his activities after the execution of the contract.[82]

Kenford, in effectively assimilating the special circumstances requirement as to nonparty witnesses within the general rule calling for "full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . ," is a laudable step toward removing the last remnants of distinction between parties and nonparties at the pretrial disclosure stage.

CPLR 3101(d): Names of eyewitnesses, even if obtained by investigation, are discoverable if they are material and necessary.

Generally, under the CPA, a party was not entitled to disclosure of the names of witnesses which the other party intended to use at

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78 *See, e.g.*, Brooklyn Express Co. v. Key Food Stores Cooperative, Inc., 40 App. Div. 2d 608, 335 N.Y.S.2d 1009 (2d Dep't 1972) (mem.); General Bldg. Supply Corp. v. State, 63 Misc. 2d 520, 312 N.Y.S.2d 215 (Ct. Cl. 1970), *discussed in The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 520 (1971); Williams v. Sterling Estates, Inc., 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. Nassau County 1963); 7 CARMODY-WAIT 2d §§ 42:83-85 (1966); 3 WK&M ¶ 3101.31; *cf.* Southbridge Finishing Co. v. Golding, 2 App. Div. 2d 430, 156 N.Y.S.2d 542 (1st Dep't 1956).

79 *See* Pearson v. Pouthier, 33 App. Div. 2d 531, 314 N.Y.S.2d 302 (4th Dep't 1969) (mem.); McDonald v. Gore Mt. Ski Lift Corp., 30 App. Div. 2d 931, 293 N.Y.S.2d 553 (3d Dep't 1968) (mem.); 3 WK&M ¶ 3101.33.

80 41 App. Div. 2d 586, 340 N.Y.S.2d 300 (4th Dep't 1973) (mem.).

81 *Id.* at 587, 340 N.Y.S.2d at 302, *citing* 7B MCKINNEY'S CPLR 3101, commentary at 25-27 (1970). In his commentary, Professor Siegel states:

> If a witness holds the key, or merely a key, to any substantial fact involved in the case, how can any lawyer in this day and age be compelled to go to trial without knowing intimately what that witness is going to say?

Id. at 27.

82 41 App. Div. at 587, 340 N.Y.S.2d at 302.

trial.[83] Where, however, the witness was an active participant in the events relied on by the party seeking disclosure,[84] or if it would otherwise be impossible for the party to establish the events that occurred,[85] disclosure was granted.

CPLR 3101(a), in providing for "full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . ," disregarded this approach. Despite the enactment of this provision and its liberal construction by the Court of Appeals,[86] some lower courts nonetheless adhered to the participant-observer distinction,[87] while other courts permitted disclosure on a showing that, due to injury, a party had been unable to obtain the names of witnesses at the scene.[88]

Subsequently, the participant-observer distinction was abandoned, and disclosure of the names of all eyewitnesses was permitted although hardship or special circumstances were not alleged.[89] Where the identity of such witnesses was uncovered through post-accident investigation, however, this information was deemed "material prepared for litigation"[90] and therefore unobtainable unless it could "no longer be duplicated" and withholding it would result in "injustice or undue hardship."[91] This rule was adopted by the Second Department[92] and became known as the *Hartley-Varner* rule.[93]

In *Zellman v. Metropolitan Transportation Authority*,[94] the Ap-

83 *See* 7B McKINNEY'S CPLR 3101, commentary at 44 (1970); 3 WK&M ¶ 3101.11.

84 Pistana v. Pangburn, 2 App. Div. 2d 643, 151 N.Y.S.2d 742 (3d Dep't 1956) (mem.).

85 McMahon v. Hayes-73rd Corp., 197 Misc. 318, 98 N.Y.S.2d 84 (Sup. Ct. Queens County 1950).

86 Allen v. Crowell-Collier Publishing Co., 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).

87 Coleman v. Kirkey, 53 Misc. 2d 947, 279 N.Y.S.2d 803 (Sup. Ct. Monroe County 1967), *discussed in The Quarterly Survey*, 42 ST. JOHN'S L. REV. 436, 453 (1968). This rule, however, was much criticized. *See* 7B McKINNEY'S CPLR 3101, commentary at 45 (1970); 3 WK&M ¶ 3101.11; McLaughlin, *Civil Practice*, 19 SYRACUSE L. REV. 501, 525-26 (1967).

88 *See, e.g.*, Majchrzak v. Hagerty, 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966), *discussed in The Quarterly Survey*, 41 ST. JOHN'S L. REV. 279, 305 (1966); discussion and cases cited in Hartley v. Ring, 58 Misc. 2d 618, 296 N.Y.S.2d 394, 397-98 (Sup. Ct. Queens County 1969).

89 Hartley v. Ring, 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 140 (1969).

90 *Id.* at 624, 296 N.Y.S.2d at 399. *Accord*, Workman v. Boylan Buick, Inc., 36 App. Div. 2d 978, 321 N.Y.S.2d 983 (2d Dep't 1971) (mem.); Peretz v. Blekicki, 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969) (mem.), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 313, 331 (1969). *Hartley* also held that the names were not part of the attorney's work product unobtainable under CPLR 3101(c).

91 CPLR 3101(d).

92 Varner v. Winfield, 33 App. Div. 2d 807, 307 N.Y.S.2d 3 (2d Dep't 1969) (mem.) Note the dissent by Justice Munder who argued that the *Hartley* distinction was based on a misreading of CPLR 3101(d) and should be discarded to aid the discovery process.

93 *See* 7B McKINNEY'S CPLR 3101, supp. commentary at 10 (1972).

94 40 App. Div. 2d 248, 339 N.Y.S.2d 255 (2d Dep't 1973). *Cf.* Clamp v. Boldt, 62 Misc. 2d 886, 310 N.Y.S.2d 91 (Sup. Ct. Erie County 1970) (mem.).

pellate Division, Second Department, recently discarded the *Hartley-Varner* rule, unanimously holding that the names of eyewitnesses obtained by the plaintiff's investigation were discoverable if material and necessary to the defense of the action.[95] Although in *Zellman* the defendants had, in fact, conducted a fourteen-month investigation which failed to locate any witnesses, and had offered to reimburse the plaintiff for half the cost of her investigation, the court clearly did not base its holding solely on these facts. The court stated that the prior holdings which regarded names of eyewitnesses as material prepared for litigation resulted from a "strained construction" of CPLR 3101(d),[96] and that the basis of the old rule was the belief that one party should not be permitted to reap the benefits of his adversary's work where the facts were equally available to both sides.[97] While this is not an invalid concern, a likely effect of the old rule was that all resisting parties would automatically allege that the information sought was the product of a post-accident investigation.[98] The court, in rejecting the *Hartley-Varner* rule, made no reference to undue hardship or due diligence as a prerequisite to obtaining disclosure.

Zellman removes the last barrier to obtaining the names of eyewitnesses under CPLR 3101. Hopefully, it will be followed by the other departments. What remains unclear is whether additional requirements of good faith, due diligence, or mandatory payment procedures will be added to the new rule.

CPLR 3113(b): Court allows videotaping of pretrial examination.

CPLR 3113(b) specifies no exclusive means of recording pretrial examinations. In *Rubino v. G. D. Searle & Co.*,[99] the Supreme Court, Nassau County, permitted the first New York videotaping of a deposition. Rejecting the plaintiff's contention that the use of videotape

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95 The Second Department also reached the same decision as to a third-party defendant in a companion case, Wolken v. E.W. Howell Co., 41 App. Div. 2d 545, 339 N.Y.S.2d 272 (2d Dep't 1973) (mem.). The court in *Wolken* did not limit disclosure to "the names of eyewitnesses to be called," as a passage in *Zellman* indicated (40 App. Div. 2d at 251, 339 N.Y.S.2d at 258), but ordered "[d]isclosure of the names and addresses of eyewitnesses to the accident, learned by plaintiff in a post-accident investigation. . . ." 41 App. Div. 2d at 546, 339 N.Y.S.2d at 273. *See* McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 47, Mar. 9, 1973, at 4, col. 3.

96 40 App. Div. 2d at 251, 339 N.Y.S.2d at 258. The court noted that the statements of such witnesses constitute material prepared for litigation.

97 See 7B McKinney's CPLR 3101, supp. commentary at 10 (1972), for an analysis of this area, especially discussion of the 1970 Judicial Conference proposal for court determination of fees to be paid by the party seeking disclosure to the resisting party.

98 *Id.*

99 73 Misc. 2d 447, 340 N.Y.S.2d 574 (Sup. Ct. Nassau County 1973).