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.\textsuperscript{7}

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.\textsuperscript{79}

In \textit{Kenford Co. v. County of Erie},\textsuperscript{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.\textsuperscript{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.\textsuperscript{82}

\textit{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.

\textbf{CPLR 3101(d):} \textit{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


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

\textsuperscript{81} Id. at 587, 340 N.Y.S.2d at 302, \textit{citing 7B McKINNEY's CPLR 3101}, commentary at 25-27 (1970). In his commentary, Professor Siegel states:

\textit{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?}

\textit{Id. at 27.}

\textsuperscript{82} 41 App. Div. at 587, 340 N.Y.S.2d at 302.
trial. Where, however, the witness was an active participant in the events relied on by the party seeking disclosure, or if it would otherwise be impossible for the party to establish the events that occurred, 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, some lower courts nonetheless adhered to the participant-observer distinction 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.

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. Where the identity of such witnesses was uncovered through post-accident investigation, however, this information was deemed "material prepared for litigation" and therefore unobtainable unless it could "no longer be duplicated" and withholding it would result in "injustice or undue hardship." This rule was adopted by the Second Department and became known as the Hartley-Varner rule.

In Zellman v. Metropolitan Transportation Authority, the Ap-
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. 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),
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. While this
is not an invalid concern, a likely effect of the old rule was that all re-
sisting parties would automatically allege that the information sought
was the product of a post-accident investigation. The court, in re-
jecting 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 eye-
witnesses under CPLR 3101. Hopefully, it will be followed by the
other departments. What remains unclear is whether additional require-
ments 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., the Supreme Court,
Nassau County, permitted the first New York videotaping of a deposi-
tion. Rejecting the plaintiff's contention that the use of videotape

95 The Second Department also reached the same decision as to a third-party de-
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
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 deter-
mination of fees to be paid by the party seeking disclosure to the resisting party.
98 Id.