

CPLR 3113(b): Court Allows Videotaping of Pretrial Examination

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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

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).

would create a "circus type atmosphere" at the trial,¹⁰⁰ the court granted the defendant's motion to videotape an ailing doctor's pretrial examination in addition to making a stenographic transcript. Prior to *Rubino*, New York courts had allowed the tape recording of depositions.¹⁰¹

The *Rubino* decision is in company with progressive decisions in other jurisdictions.¹⁰² As the court noted, videotape is "an avenue of great procedural significance in the efficient and economic administration of justice."¹⁰³ It allows courts to save jury time by editing delays and nonevidentiary portions of proceedings.¹⁰⁴ Additionally, the expense of expert testimony may be reduced.¹⁰⁵ The court may safeguard against abuse by requiring a simultaneous stenographic transcription and a proper foundation for admissibility.¹⁰⁶

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Court of Appeals allows consideration of evidence excludable under the dead man's statute to defeat motion for summary judgment.

The several departments in New York have divided as to whether evidence excludable at trial under CPLR 4519¹⁰⁷ should nonetheless

¹⁰⁰ *Id.* at 448, 340 N.Y.S.2d at 575. The court predicted that "theatrics and histrionics" would be curtailed. *Id.* at 450, 340 N.Y.S.2d at 577.

¹⁰¹ *Catapano v. Shapiro*, 6 App. Div. 2d 1054, 179 N.Y.S.2d 458 (2d Dep't 1958) (mem.); *Gotthelf v. Hillcrest Lumber Co.*, 280 App. Div. 668, 116 N.Y.S.2d 873 (1st Dep't 1952); *Howell v. Wood*, 207 N.Y.S.2d 482 (App. T. 2d Dep't 1960) (mem.); *Lester v. Lester*, 69 Misc. 2d 528, 330 N.Y.S.2d 190 (Sup. Ct. Sullivan County 1972), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 162 (1972). *Contra*, *Bradshaw v. Best*, 7 App. Div. 2d 136, 180 N.Y.S.2d 951 (3d Dep't 1958) (per curiam) (based on the CPA which required that depositions "be taken down").

¹⁰² See *Carson v. Burlington Northern Inc.*, 52 F.R.D. 492 (D. Neb. 1971); *Symposium — First Videotape Trial: Experiment in Ohio*, 21 DEF. L.J. 267 (1972).

¹⁰³ 73 Misc. 2d at 449, 340 N.Y.S.2d at 577. See *Morrill, Enter — The Video Tape Trial*, 3 JOHN MARSHALL J. PRAC. & PROC. 237 (1970).

¹⁰⁴ This technique was employed in a recent Ohio trial in which testimony was pre-videotaped. *Symposium — First Videotape Trial: Experiment in Ohio*, 21 DEF. L.J. 267 (1972).

¹⁰⁵ See *Meyer, The Expert Witness: Some Proposals for Change*, 45 ST. JOHN'S L. REV. 105, 109 (1970).

¹⁰⁶ The court in *Rubino* cited the following admissibility requirements for videotape depositions: (1) proper identification of the videotape as an accurate reproduction; (2) proof that the device used was capable of taking accurate testimony; (3) proof of the operator's competence; (4) proof that the videotape has not been tampered with; and (5) identification of the speakers. 73 Misc. 2d at 450 n.8, 340 N.Y.S.2d at 578 n.8, citing *Miller, Videotaping the Oral Deposition*, 18 PRAC. LAW. 45, 56-57 (1972). CPLR 3117(a)(3), governing the use of depositions, must also be satisfied before the videotaped deposition may be used at trial.

¹⁰⁷ More commonly known as New York's dead man's statute, CPLR 4519 provides that an interested witness may not testify in his own behalf against the representative of a decedent as to personal transactions or communications he had with the decedent.