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CPLR 3212: Court of Appeals Allows Consideration of Evidence Excludable Under the Dead Man's Statute To Defeat Motion for Summary Judgment

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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 4519[107] should nonetheless

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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 prevideotaped. *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.

be admitted as a basis for denying a motion for summary judgment. It has been uniformly established that a motion for summary judgment will not be granted on such evidence.[108] Courts have been more reluctant, however, to exclude evidence otherwise relevant and material where to do so will defeat an action or defense at this early stage of litigation. The First Department has consistently held that proof subject to exclusion at trial[109] may be considered competent in determining whether a triable issue of fact exists to deny a motion for summary judgment.[110] Originally, the Second Department held CPLR 4519 to be an absolute bar to the consideration of excludable evidence on a motion for summary judgment.[111] Subsequently, in *Raybin v. Raybin*,[112] it followed the First Department approach.

The Third Department broke with the foregoing rule when it held in *Lombardi v. First National Bank*[113] that "where . . . the only evidence is incompetent and it is abundantly clear that no additional evidence can be adduced at the trial, summary judgment [is] properly granted."[114] The Second Department eventually assented to this view,[115] as did the First Department in *Phillips v. Joseph Kantor & Co.*,[116] which was appealed to the Court of Appeals.

Phillips was a malpractice action against an accounting partnership, wherein one of the partners died during the pretrial discovery proceedings. The plaintiff's evidence consisted of declarations made to him by the deceased partner and written matter sent to him by the decedent. Although the Court of Appeals acknowledged that the written, nonexcludable evidence might establish a prima facie case,[117] it was not this evidence on which the Court based its decision that a triable issue of fact existed.

The Court read CPLR 4519 as being incapable of assertion or

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108 Raybin v. Raybin, 15 App. Div. 2d 679, 224 N.Y.S.2d 165 (2d Dep't 1962) (mem.); Sprung v. Halberstam, 28 Misc. 2d 636, 208 N.Y.S.2d 203 (App. T. 1st Dep't 1960) (per curiam).

109 Lindner v. Eichel, 34 Misc. 2d 840, 846, 232 N.Y.S.2d 240, 247 (Sup. Ct. N.Y. County), *aff'd mem.*, 17 App. Div. 2d 735, 233 N.Y.S.2d 238 (1st Dep't 1962).

110 Bourgeois v. Celentano, 10 App. Div. 2d 825, 199 N.Y.S.2d 87, 88 (1st Dep't 1960) (mem.); Tichonchuk v. Orloff, 36 Misc. 2d 623, 627, 233 N.Y.S.2d 321, 325 (Sup. Ct. Queens County 1962); *cf.* De Huff v. Bulova Fund, Inc., 36 Misc. 2d 28, 30, 231 N.Y.S.2d 928, 929 (Sup. Ct. N.Y. County 1962).

111 Ditkoff v. Prudential Sav. Bank, 245 App. Div. 748, 280 N.Y.S. 437 (2d Dep't 1935) (mem.).

112 15 App. Div. 2d 679, 224 N.Y.S.2d 165 (2d Dep't 1962) (mem.).

113 23 App. Div. 2d 713, 257 N.Y.S.2d 83 (3d Dep't 1965) (mem.).

114 *Id.*, 257 N.Y.S.2d at 84.

115 Friese v. Baird, 36 App. Div. 2d 727, 320 N.Y.S.2d 469 (2d Dep't 1971) (mem.).

116 39 App. Div. 2d 521, 330 N.Y.S.2d 557 (1st Dep't) (mem.), *rev'd*, 31 N.Y.2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882 (1972) (6-1).

117 31 N.Y.2d at 315, 291 N.E.2d at 133, 338 N.Y.S.2d at 888.

waiver until trial,[118] thereby permitting the consideration of evidence otherwise excludable to defeat the motion for summary judgment. In support of this construction, the Court cited the possibility that the incompetency might be waived at trial.[119]

Chief Judge Fuld dissented, attacking the decision on several grounds: (1) that CPLR 4519 had been consistently read to apply to pretrial motions as well as at trial;[120] (2) that the claim that the incompetency might subsequently be waived was unrealistic;[121] and (3) that the plaintiff had been unable to produce, after a continuance for that purpose, other competent evidence to support his claim.[122]

CPLR 4519 has been criticized;[123] its repeal has even been suggested.[124] A technical construction of the statute to restrict it to the trial stage of litigation and a denial of summary judgment "upon the assumption that a party will shortly do something utterly inconsistent with his own best interest"[125] are unwelcome. Inhibition in exercising the power to grant summary judgment in an appropriate case "not alone defeats the ends of justice . . . but contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation."[126]

CPLR 3212: Defendant held not entitled to summary judgment in negligence action when plaintiff has been precluded from establishing a prima facie case.

In *Jawitz v. British Leyland Motor, Inc.*,[127] a personal injury action, the defendant moved for summary judgment on the ground that since the plaintiff, pursuant to CPLR 3042(c), was precluded from offering certain evidence for failure to serve a bill of particulars, he would be unable to establish a prima facie case. The Supreme Court, New York County, in denying the motion, felt constrained to follow *Israel v. Drei Corp.*,[128] a 1958 decision of the Appellate Division, First Department, which held that the existence of a preclusion order against

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118 *Id.* at 313, 291 N.E.2d at 132, 338 N.Y.S.2d at 887.

119 *Id.* at 315, 291 N.E.2d at 133, 338 N.Y.S.2d at 888. "[I]t cannot be said as a matter of law that the Dead Man's Statute will not be waived so long as a matter of law it may be waived."

120 *Id.* at 316, 291 N.E.2d at 133, 338 N.Y.S.2d at 889.

121 *See* 7B McKINNEY'S CPLR 3212, supp. commentary at 21 (1972); 5 WK&M ¶ 4519.06.

122 31 N.Y.2d at 316, 291 N.E.2d at 133-34, 338 N.Y.S.2d at 889.

123 *See* 1 J. WIGMORE, EVIDENCE § 578 (2d ed. 1923).

124 *See* 5 WK&M ¶ 4519.06.

125 7B McKINNEY'S CPLR 3212, supp. commentary at 21 (1972).

126 DiSabato v. Soffes, 9 App. Div. 2d 297, 299, 193 N.Y.S.2d 184, 188 (1st Dep't 1959).

127 72 Misc. 2d 594, 340 N.Y.S.2d 305 (Sup. Ct. N.Y. County 1972).

128 5 App. Div. 2d 987, 173 N.Y.S.2d 360 (1st Dep't 1958) (per curiam).