

## CPLR 8102: Discretion Exercised in Allowing Costs in County Court Action

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*CPLR 8102: Discretion exercised in allowing costs in county court action.*

CPLR 8102(3) disallows the disbursement of costs to a plaintiff when an action brought in a county court could have been brought, except for the amount claimed, in a court of lesser jurisdiction, unless he recovers \$250 or more in the county court. The purpose of this limitation is to relieve the congestion and expense occasioned by prosecution of small claims in higher courts.<sup>250</sup> Recently, in *Fusco v. Roberts*,<sup>251</sup> a motion for disallowance of costs was denied where, although the recovery was below \$250, the court found that the purpose of the statute had not been infringed.

Relevant to this determination was the presence of joint plaintiffs: an infant suing for personal injury and an adult suing for property damage. Since both claims arose from the same automobile accident, common issues were involved. Nevertheless, the infant was adjudged to have no cause of action, and the adult recovered only \$200.

On the basis of these facts, the court reasoned that the plaintiffs were justified in joining their actions and suing in the county court particularly because the injuries sustained by the infant plaintiff were serious. And, by joining their claims, the plaintiffs had, in fact, relieved court congestion.

Although the *Fusco* decision is a well-reasoned one, the language of CPLR 8102(3) does not appear to sanction the discretion exercised by the court in allowing costs. Indeed, the section is purposely designed to encourage foresight by an attorney,<sup>252</sup> rather than hindsight by a court. Admittedly, the section's value as a deterrent is questionable.<sup>253</sup> However, reading discretion into the section could render it totally meaningless. And, repeal of the section should be legislative — not judicial.<sup>254</sup>

<sup>250</sup> FOURTH REP. 304.

<sup>251</sup> 62 Misc. 2d 624, 309 N.Y.S.2d 232 (Nassau County Ct. 1970).

<sup>252</sup> FOURTH REP. 304.

<sup>253</sup> [T]he devices that have been effective in moving cases into the lower courts are the stringent calendar-preference rules and the transfer provisions . . . Keeping a large differential in fees between the courts and reducing the delay in the lower court . . . are more effective than the sanction imposed by CPLR 8102.

<sup>254</sup> 8 WK&M ¶ 8102.01, at 81-41.

<sup>254</sup> The Advisory Committee recommended further study in light of court reorganization, the efficacy of the rule, and an analysis of the administrative needs of each court. FOURTH REP. 304. Hence, legislative action should be forthcoming.