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Article 20

CPLR 3101(a)(4): Satisfaction of Section 17 of the Court of Claims Act Automatically Satisfies "Special Circumstances" Requirement

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inquiry into the husband's counterclaim inasmuch as he was not competent to testify on that issue.[105]

Dunlap represents a marked shift in judicial attitude toward disclosure in matrimonial actions. Formerly, a demonstration of special circumstances was required in order to obtain disclosure; now, disclosure can be foreclosed only by an avowal of special circumstances. Such a construction is in accord with the general approach to disclosure under the CPLR[106] and is laudably responsive to the Court of Appeals interpretation of article 31.[107]

CPLR 3101(a)(4): Satisfaction of section 17 of Court of Claims Act automatically satisfies "special circumstances" requirement.

In *General Building Supply Corp. v. State*[108] claimant sought leave to examine the state's consultant engineer with regard to flooding on a certain highway project. In support of its motion,[109] claimant averred that the examination was material and necessary to the proper preparation for trial within the meaning of section 17 of the Court of Claims Act.[110] For, the engineer was the only person in charge of the project who had personal knowledge of events underlying its claim. Thus, claimant contended that adequate "special circumstances" as prescribed under CPLR 3101 justified the examination of the non-party witness.

In granting the motion to examine, the Court of Claims was heavily influenced by the admission of the state's own engineer at an earlier examination that he had no personal knowledge of the facts in issue since on the two crucial dates involved the consultant engineer had been in charge of the operations. Pointing out that the phrase "material and necessary" has been equated with a test of usefulness and reason,[111] the court agreed with the observation put forth by one authority that "[i]f a witness holds . . . a key, to any substantial fact involved in the case, how can any lawyer . . . be compelled to go to trial without knowing

105 CPLR 4502.

106 Under article 31, the parties are entitled, in most instances, to proceed without prior court approval. It is only when a party believes that his adversary is abusing his right to disclosure that a court takes cognizance of the proceedings under CPLR 3103's provision for a protective order.

107 *See* Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

108 63 Misc. 2d 520, 312 N.Y.S.2d 215 (Ct. Claims 1970).

109 Disclosure by the state is governed by the same rules applicable to private parties "except that it may be obtained only by order of the court in which the action is pending and except further that it may not include interrogatories or requests for admissions," CPLR 3102(f). *See generally* 7B McKINNEY'S CPLR 3102, commentary 10, at 269-71 (1967).

110 N.Y. CT. CLAIMS ACT § 17 (McKinney 1963).

111 Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968).

intimately what that witness is going to say?"[112] Thus, the court reasoned that the claimant could not properly prepare for trial without examining the consultant engineer. And, the court added that compliance with section 17 of the Court of Claims Act automatically satisfied the "special circumstances" requirement of CPLR 3101(a)(4). Accordingly, the state was ordered to produce the engineer for examination.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Prior judgment establishing freedom from negligence does not ipso facto establish freedom from contributory negligence in second action.

In *Schwartz v. Public Administrator*[113] the Court of Appeals ruled that there remained only two prerequisites to the invocation of the doctrine of collateral estoppel: "an identity of issue which has necessarily been decided in the prior action . . . and . . . a full and fair opportunity to contest the [prior] decision."[114] In *Schwartz*, the defendant, driver D-1, moved to dismiss a personal injuries action brought against him by the plaintiff, driver D-2, on the ground that a prior adjudication of negligence on the part of driver D-2 barred recovery. In a prior action, passengers in the Schwartz car brought a successful personal injuries action against *both* drivers D-1 and D-2 as codefendants.[115] As a result, the defendant D-1 was able to persuade the Court that the prior determination of negligence estopped plaintiff D-2 from demonstrating his freedom from contributory negligence, a necessary element of his prima facie case, in the second action.

Recently, in *Nesbitt v. Nimmich*,[116] the Appellate Division, Second Department, refused to extend the *Schwartz* rationale to a slightly varied situation. Plaintiff, driver D-1, moved for summary judgment in a personal injury action against defendant, driver D-2, on the basis of a prior action against both drivers. In contrast to the facts in *Schwartz*, the jury had returned a verdict against the present defendant alone, acquitting the present plaintiff of negligence vis-à-vis the original plaintiff. Thus, plaintiff argued that by implication the jury had exonerated him on the issue of contributory negligence. The appellate division disagreed, reasoning that "it does not necessarily follow that

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112 7B McKINNEY'S CPLR 3101, commentary 22, at 27 (1970).

113 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969); *see generally* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969); *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144-51 (1969).

114 24 N.Y.2d at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

115 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968).

116 34 App. Div. 2d 958, 312 N.Y.S.2d 766 (2d Dep't 1970).