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by motion under CPLR 3211(a).[39] *Carlson v. Travelers Insurance Co.*[40] involves the consequences emanating from the failure to plead illegality either by motion or in the answer.

In *Carlson* an action was brought to recover under a group accident and health policy for hospital expenses incurred by the insured who had undergone and had died from an illegal abortion. The defendant failed to plead illegality as an affirmative defense. Nonetheless, the court permitted the defendant to adduce proof of the proscribed transaction, reasoning that the plaintiffs were well aware of the decedent's act and there was thus little danger of prejudice.[41]

The *Carlson* outcome is a well-reasoned one. There is, however, an additional mode of attaining the same result. Under CPLR 3211(e), a motion prescribed in paragraph seven of 3211(a) — failure to state a cause of action — is never waived. Inasmuch as an allegation of illegality as to the merits of a claim is tantamount to an assertion that the pleader does not possess a legally cognizable cause of action,[42] one authority advocates the use of a 3211(a)(7) motion in instances such as *Carlson*.[43]

ARTICLE 31 — DISCLOSURE

CPLR 3102(d): Disclosure will not be permitted during trial where the movant had an opportunity to obtain the information by normal pretrial proceedings.

CPLR 3102(d) provides that "during and after trial, disclosure may be obtained only by order of the trial court on notice." In *Schricker v. City of New York*[44] the trial court permitted plaintiffs' expert witness, an orthopedic specialist, to testify out of the presence of the jury because of his phobia of testifying before them. The court then allowed plaintiffs to read the doctor's deposition to the jury. The appellate division viewed this procedure as prejudicial error inasmuch as the notice contemplated by CPLR 3102(d) was not given, and it did not appear that the plaintiffs were previously unaware of the witness' inability to testify before a jury.

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[39] 7B McKINNEY'S CPLR 3018, supp. commentary at 171 (1970). Apparently, all of the defenses except fraud can be safely pleaded under CPLR 3211(a). Because of the intricate factual setting in which the allegation of fraud is likely to arise, it has been posited that this defense is more appropriately considered at the trial. 7B McKINNEY'S CPLR 3211, commentary 36, at 40 (1970).

[40] 35 App. Div. 2d 351, 316 N.Y.S.2d 398 (2d Dep't 1970).

[41] *See also* 3 WK&M ¶ 3018.18.

[42] 7B McKINNEY'S CPLR 3211, commentary 29, at 33 (1970).

[43] *Id.*, commentary 36, at 40.

[44] 35 App. Div. 2d 743, 316 N.Y.S.2d 170 (2d Dep't 1970).

CPLR 3102(d) is reserved for unique situations. Although the court, in its discretion, may order the taking of testimony by deposition after the trial has begun, disclosure ordinarily will not be unavailable to the movant who could have secured the information through normal pretrial proceedings.[45] Hence, the appellate division was certainly justified in over turning the procedure followed in the lower court.

The framers of the CPLR anticipated that extraordinary situations might exist wherein justice required the reading of a deposition into evidence although a witness was available for the trial.[46] Nonetheless, the importance of presenting the testimony of an expert witness orally in court must not be underestimated. Slight inconsistencies in treatises or inadequacies in medical records with respect to time of treatment or nature of observations, which can appear so dramatic in the course of the trial, become quite insignificant when a deposition is read in court. Perhaps, the courts should adopt a rule prohibiting the use of depositions of expert witnesses in circumstances such as *Schricker*. An expert who is afraid to appear before a jury, and refuses to do so, should not be permitted to serve as a witness because of the unfairness to the opposing party.

CPLR 3126: Action dismissed with prejudice where preclusion order encompasses entire claim.

CPLR 3126 authorizes the imposition of penalties upon a party[47] who refuses to disclose information either willfully[48] or in disobedience of a court order. In addition to the express sanctions, the court is empowered to make "any such orders that are just."[49] Undoubtedly, however, the most severe penalty that can be levied is one that is specifically enumerated under this section: the rendition of a default judgment against the recalcitrant defendant[50] or the dismissal with

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[45] 7B McKinney's CPLR 3102, commentary 8, at 267 (1970); 3 WK&M ¶ 3102.19; *see also* Kravetz v. United Artists Corp., 141 N.Y.S.2d 676 (Sup. Ct. N.Y. County 1955). *But cf.* Nardelli v. Stam, 13 App. Div. 2d 698, 213 N.Y.S.2d 806 (2d Dep't 1961); Lopez v. Rich, 33 Misc. 2d 102, 224 N.Y.S.2d 314 (Sup. Ct. Nassau County 1962).

[46] 3 WK&M ¶ 3117.08.

[47] CPLR 3126 pertains to a party or a person under the party's control. Sanctions against a nonparty witness are secured by an application to punish for contempt. 7B McKinney's CPLR 3126, commentary 3, at 642 (1970).

[48] If a party has willfully failed to disclose, a 3126 motion lies, without the necessity of first securing an order compelling disclosure. *See* Goldner v. Lendor Structures, Inc., 29 App. Div. 2d 978, 289 N.Y.S.2d 687 (2d Dep't 1968); Coffey v. Orbachs, Inc., 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964).

[49] *See, e.g.*, Cotteral v. City of New Rochelle, 33 App. Div. 2d 366, 307 N.Y.S.2d 725 (1st Dep't 1969), *discussed in The Quarterly Survey*, 45 St. John's L. Rev. 145, 159 (1970).

[50] *See, e.g.*, James v. Powell, 26 App. Div. 2d 525, 270 N.Y.S.2d 789 (1st Dep't 1966), *rev'd on other grounds*, 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967).