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CPLR 3117(a)(3): Use of Party's Own Deposition Denied

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when the insured assigned his rights under the policy. Thus, it is still unsettled in New York whether any such absolute "insurer-insured" privilege does in fact exist.[100]

The court then considered the availability of a conditional privilege under CPLR 3101(d). The court found none, stating that "an investigation conducted to defend an insured against a possible legal action is not material prepared for legal action *as against the insurer*."[101]

The third department's interpretation is not without basis. In *Bennett v. Troy Record Co.*,[102] the court required an insurer to disclose materials prepared for prior litigations which involved accidents similar in nature to that in which the plaintiff was injured.[103] And in *Colbert v. Home Indemnity Co.*,[104] the supreme court held that a defendant-insurer could not prevent disclosure of materials which it had gathered for a separate action against its plaintiff-insured.

The holding in the instant case is particularly sound because the insurer disclaimed coverage in the action against its insured. How could the insurer thereafter logically assert that the materials it possessed were prepared for the defense of that litigation?

CPLR 3117(a)(3): Use of party's own deposition denied.

A party may not put his own deposition in evidence unless the conditions of CPLR 3117(a)(3) are fulfilled.[105] In *Jobse v. Connolly*,[106] the court did not allow the plaintiff's deposition to be put in evidence where he had been missing for six years and his attorney had not been able to locate him. Judge Younger remarked that there is an implied condition in CPLR 3117(a)(3) that the deponent's absence must not be due to the act or neglect of the party offering the deposition. Since the plaintiff's unavailability was a consequence of his own actions, a

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100 The question of whether an absolute privilege should attach to an insured-insurer relationship was raised in Kandel v. Tocher, 22 App. Div. 2d 513, 515, 256 N.Y.S.2d 898, 901-02 (1st Dep't 1965). 3 WK&M ¶ 3101.50b (1969) suggests that an absolute privilege should not be extended to an insurer-insured relationship and that adequate protection is afforded to the insurer by the conditional privilege.

101 32 App. Div. 2d 725-26, 300 N.Y.S.2d 392 (3d Dep't 1969) (emphasis added).

102 25 App. Div. 2d 799, 269 N.Y.S.2d 213 (3d Dep't 1966); *see also* 3 WK&M ¶ 3101.51 (1969):

> [I]n a suit by the insured against his insurer for failure to settle a case, material prepared for related litigation is treated as if not prepared for the case at bar. [Footnotes omitted.]

103 *Cf.* Linton v. Lehigh Valley R.R., 25 App. Div. 2d 334, 269 N.Y.S.2d 490 (3d Dep't 1966) (construing N.Y. Pub. Serv. Law § 47 (McKinney 1965)).

104 45 Misc. 2d 1093, 259 N.Y.S.2d 36 (Sup. Ct. Monroe County 1965), *aff'd mem.*, 25 App. Div. 2d 1080, 265 N.Y.S.2d 893 (4th Dep't 1965).

105 3 WK&M ¶ 3117.04 (1969). *See also* 7B McKINNEY'S CPLR 3117, supp. commentary 119, 120 (1965).

106 60 Misc. 2d 69, 302 N.Y.S.2d 35 (N.Y.C. Civ. Ct. Bronx County 1969).

contrary result would have been unjust and would have contravened both the express purpose of CPLR 104 and the general rule that a party may not benefit from his own misconduct. Had the party-deponent been too ill to attend trial[107] or had he died prior to the trial,[108] his deposition could of course have been accepted as evidence.

The *Jobse* rationale therefore suggests that the "absence of the witness due to a party's wrongdoing" principle in CPLR 3117(a)(3)(ii) is applicable to all the provisions in CPLR 3117(a)(3) which permit the use of depositions. That is, depositions of an absent witness will not be admissible by a party who has purposefully created the conditions causing his absence.

CPLR 3121: Doctor-patient privilege is waived if party's physical condition is in controversy.

Ordinarily, when a plaintiff seeks to recover damages for personal injuries, he waives the doctor-patient privilege and is required to disclose medical information under CPLR 3121.[109] Similarly, a defendant who counterclaims for personal injuries or who affirmatively defends on the basis of his physical condition must disclose pertinent medical materials.[110] For example, in *Fisher v. Fossett*,[111] the defendant waived the doctor-patient privilege when she stated in both a report and an examination before trial that she had blacked out at the wheel of her car because of a coronary condition.

The doctor-patient privilege and disclosure under CPLR 3121 were recently examined by the appellate division in *Koump v. Smith*.[112] In *Koump*, the plaintiff was injured when the defendant drove across a highway divider and crashed head-on into the plaintiff's car. The complaint alleged that at the time of the accident the defendant was intoxicated and this circumstance caused the collision; the answer denied these allegations. Pursuant to CPLR 3121, the plaintiff served

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107 *See* Wojtas v. Fifth Ave. Coach Corp., 23 App. Div. 2d 685, 257 N.Y.S.2d 404 (2d Dep't 1965) (court accepted deposition of defendant who had suffered coronary thrombosis).

108 *See* Wank v. Herman, 2 App. Div. 2d 867, 156 N.Y.S.2d 161 (2d Dep't 1956) (administrator permitted to read deceased plaintiff's deposition).

109 De Castro v. City of New York, 54 Misc. 2d 1007, 284 N.Y.S.2d 281 (Sup. Ct. Kings County 1967); Chester v. Zima, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. Erie County 1964) (plaintiff required to disclose hospital records when claiming physical injury).

110 *See* O'Leary v. Sealy, 50 Misc. 2d 658, 271 N.Y.S.2d 55 (Dist. Ct. Nassau County 1966) where the court stated in dictum that where the complaint alleged that the defendant was subject to epileptic fits and the defendant testified that she blacked out, the plaintiff could obtain the defendant's hospital records.

111 45 Misc. 2d 757, 257 N.Y.S.2d 821 (Sup. Ct. Erie County 1965).

112 29 App. Div. 2d 981, 289 N.Y.S.2d 667 (2d Dep't 1968).