St. John's Law Review

Volume 43, January 1969, Number 3 Article 21

CPLR 3025(c): Infant Plaintiff Permitted to Amend Ad Damnum after Verdict

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During trial it was established that the plaintiff had falsified his affidavit. He had not been ill, but rather had been actively seeking to procure a barber's license. Defendant's renewal motion to dismiss was denied by the trial court, but, the appellate division reversed and granted the motion *nunc pro tunc* on the ground that the plaintiff's lie had deprived the defendant of the relief he should have originally received.

The Court of Appeals affirmed the appellate division's conclusion noting that, since an honest man would originally have been thrown out of court, a failure to dismiss would put a premium on perjury.[53]

CPLR 3025(c): Infant plaintiff permitted to amend ad damnum after verdict.

CPLR 3025(c) allows a court to permit amendment of pleadings, before or after judgment, on such terms as may be just, so as to conform them to the evidence. CPLR 3017 allows a court to grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded. It would seem that these sections would permit recovery beyond a complaint's ad damnum clause.[54] However, it has long been established in New York that a plaintiff's recovery is limited to the amount of damages sought in his complaint.[55]

An exception to this rule has been created by *Naujokas v. H. Frank Carey High School.*[56] Infant plaintiff sustained severe injuries in an accident on a school trampoline and demanded $50,000 in damages. After a jury returned a verdict for five times that amount, the court permitted the plaintiff to increase the amount of damages sought in the ad damnum clause. The court based its decision on the fact that defendant would not be prejudiced and that the rights of an infant were involved. Emphasizing that an infant is considered a ward of the court, whose rights cannot be lost through the negligence, mistake or inadvertence of his guardian ad litem or attorney, the court cited previous instances of judicial

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[53] *See* 7B McKINNEY'S CPLR 3012, supp. commentary 72 (1968).

[54] In Riggs, Ferris & Greer v. Lillibridge, 316 F.2d 60, 62 (2d Cir. 1963), the court so construed the then soon to be enacted CPLR. *But see* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3017.06 (1965); FIRST REP. 68.

[55] *See, e.g.*, Michalowski v. Ey, 7 N.Y.2d 71, 163 N.E.2d 863, 195 N.Y.S.2d 633 (1959); Garden Hill Estates, Inc. v. Bernstein, 24 App. Div. 2d 512, 261 N.Y.S.2d 648 (2d Dep't 1965); Silbert v. Silbert, 22 App. Div. 2d 893, 255 N.Y.S.2d 272 (2d Dep't 1964).

[56] 57 Misc. 2d 175, 292 N.Y.S.2d 196 (Sup. Ct. Nassau County 1968).

leniency in an infant's behalf.[57] Thus, an infant has been released from the burden of another's failure to file a timely notice of claim,[58] and courts have directed the settlement of an infant's claim where the guardian ad litem was unreasonable in resisting a settlement offer.[59]

In the absence of prejudice to the defendant there seems to be no reason why an amendment cannot be allowed after the verdict; however, it must be emphasized that the holding of the instant case will probably not be extended beyond infant plaintiffs.

ARTICLE 31 — DISCLOSURE

CPLR 3101(e): Insurer will not be permitted to use medical payments obligation as a means of clandestine discovery.

CPLR 3101(e) provides that a party may obtain a copy of his own statement.[60] In *Juskowitz v. Hahn*,[61] plaintiffs' attorney moved to suppress statements taken from plaintiffs by defendant's insurer and to require defendant to furnish copies of the statements. Defendant's insurer had obtained the information, after commencement of the action, in connection with medical payments made to plaintiffs under defendant's policy. The statements were procured without the knowledge of plaintiffs' counsel.

Defendant's counsel, originally unaware of the insurer's acts, opposed the motion arguing that the insurer had taken the statements in its own behalf and not on behalf of defendant.[62] The

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[57] *See, e.g.*, Glogowski v. Rapson, 20 Misc. 2d 96, 198 N.Y.S.2d 87 (Sup. Ct. Monroe County 1959); Wannemacher v. Tynan, 144 N.Y.S.2d 2 (Sup. Ct. Nassau County 1955). An attorney has no greater authority to compromise, settle or discharge an infant's cause of action than a guardian ad litem. CPLR 1207, 1208; Greenburg v. New York Cent. & Hudson R.R., 210 N.Y. 505, 104 N.E. 931 (1914).

[58] Biancoviso v. City of New York, 285 App. Div. 320, 137 N.Y.S.2d 773 (2d Dep't 1955).

[59] Glogowski v. Rapson, 20 Misc. 2d 96, 198 N.Y.S.2d 87 (Sup. Ct. Monroe County 1959).

[60] Commentators have indicated that it is not necessary to show special circumstances. *See* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.56 (1965), and 7B MCKINNEY'S CPLR 3101, commentary 6 (1963). For further discussion of CPLR 3101(e) see *The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 437-39 (1964), and *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 308 (1966).

[61] 56 Misc. 2d 647, 289 N.Y.S.2d 870 (Sup. Ct. Nassau County 1968).

[62] Defendant's second argument that the motion was untimely since the case was on the Ready Day Calendar was rejected since the insurer took the statement without the knowledge of plaintiff's counsel.