

CPLR 3101(e): Insurer Will Not Be Permitted to Use Medical Payments Obligation as a Means of Clandestine Discovery

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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

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.

court refuted this argument by asserting that the insurer was the real party in interest at least to the extent of its coverage,⁶³ and that defendant could claim any medical payments made as an offset against damages.⁶⁴

In disposing of the case the court issued a strong warning:

the carrier will not be permitted to use its medical payments obligation as a means of clandestine discovery. . . . [W]hen a matter is in suit the carrier's representative has an obligation to deal with an adverse litigant only through his attorneys even though the subject be medical payments and nothing more.⁶⁵

To do otherwise would be a violation of Canon 9 of the Canons of Professional Ethics.⁶⁶

CPLR 3121: Section supersedes appellate division rules.

In *Pipers v. Rosenow*,⁶⁷ a medical malpractice action, the appellate division, second department, affirmed an order directing plaintiff to submit to a physical examination pursuant to CPLR 3121.⁶⁸ In so doing, the court concluded that the introductory paragraph and Part Four of its Rules which purports to preclude physical examinations and the exchange of medical reports in dental or medical malpractice actions has been superseded by CPLR 3121, which does not exclude such actions from the scope of its application.⁶⁹

The second department's holding was foreshadowed by several lower court decisions⁷⁰ which correctly reasoned that, in the face of

⁶³ See *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 225 N.E.2d 503, 278 N.Y.S.2d 793 (1967).

⁶⁴ See *Moore v. Leggette*, 24 App. Div. 2d 891, 264 N.Y.S.2d 765 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 864, 222 N.E.2d 737, 276 N.Y.S.2d 118 (1966).

⁶⁵ 56 Misc. 2d at 648, 289 N.Y.S.2d at 871.

⁶⁶ Canon 9 provides that a lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel.

⁶⁷ 30 App. Div. 2d 690, 292 N.Y.S.2d 63 (2d Dep't 1968).

⁶⁸ For a discussion of the scope of CPLR 3121 see *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 161 (1965).

⁶⁹ See 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121 (1965).

⁷⁰ *DeCastro v. City of New York*, 54 Misc. 2d 1007, 284 N.Y.S.2d 281 (Sup. Ct. Kings County 1967); *Mackey v. Holy Family Hosp.*, 52 Misc. 2d 770, 276 N.Y.S.2d 893 (Sup. Ct. Kings County 1967); *Fiori v. Bay Ridge Sanatorium, Inc.*, 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup. Ct. Kings County 1965). The first department courts have reached a similar conclusion. *Sommers v. Federation of Jewish Philanthropies*, 56 Misc. 2d 529, 289 N.Y.S.2d 96 (Sup. Ct. N.Y. County 1968).