

CPLR 3121: Limited by CPLR 3101(b)

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party's expenses temporarily and permanently disallowed his attorney's fees. The court reasoned that the non-party's expenses would not be known until after the non-party had made disclosure and thus ruled that after the disclosure the non-party could make an application to the court for reimbursement of money *actually paid out*. However, because of the close relationship of the non-party and one of the litigants, the court permanently disallowed attorney's fees.

While the court's reasoning was sound, a problem is implicit in its ruling as illustrated by the following hypothetical. A non-party is ordered to make disclosure at a cost of \$300. He is not able to obtain an order for the payment of costs before advancing the money. Then, he must hire a lawyer to make an application to the court for reimbursement. Thus, his reimbursement will be \$300 minus his attorney's fee. Perhaps a better solution would be for the court, on its own motion, to order reimbursement of costs as soon as the non-party sends an itemized bill to the court and to the party who originally sought disclosure.¹⁰⁸

CPLR 3121: Limited by CPLR 3101 (b).

CPLR 3121 provides for the exchange and inspection of medical reports along with the inspection of litigants and hospital records where the mental or physical condition of a party is in issue. However, CPLR 3101(b), limiting the provisions of 3121, states that "[u]pon objection by a party privileged matter shall not be obtainable." In *Koump v. Smith*,¹⁰⁹ the physical condition of the defendant, allegedly intoxicated, at the time of an automobile accident, was in controversy. The question was whether the defendant had waived his right to object under 3101(b) to the disclosure of his medical records. Defendant neither counterclaimed nor offered an affirmative defense.

In a 3-2 decision, the appellate division, second department, held that since the plaintiff failed to show either that the medical records were not privileged or waiver of the right to object to examination of the records on the grounds of privilege, he was not entitled to disclosure. The dissent did not concentrate on the "privilege" factor and felt that defendant's condition at the time of the accident was sufficiently in controversy to entitle plaintiff to obtain that portion of the hospital record relating to defendant's physical condition.

¹⁰⁸ 7B MCKINNEY'S CPLR 3120, supp. commentary 97-98 (1967).

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