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CPLR 3403: Defendant's Offer of Financial Assistance Used To Block "Destitution" Preference

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In *Quick v. O'Connell*,[159] a case criticized in a recent *Survey*,[160] plaintiff contended that his suit was derivative of his fellow passenger's suit, under *DeWitt*, and moved for summary judgment. The court accepted plaintiff's contention thereby giving reality to the train wreck hypothetical.

Recently, in a case similar to *Quick*, *Cobbs v. Thomas*,[161] the rear seat passenger had recovered damages in a negligence action. Plaintiff, the front seat passenger, moved for summary judgment contending that her fellow passenger's recovery was *res judicata* as to defendant's negligence. The court, in distinguishing this case from *DeWitt*, emphasized that plaintiff, here, did not *derive* her right to recover from her fellow passenger.

In light of the controversy presently existing as to the interpretation of the *DeWitt* requirements, the Court of Appeals might be prompted to shed additional light on them.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Defendant's offer of financial assistance used to block "destitution" preference.

CPLR 3403(a) (3) provides that a preference may be granted in actions "in which the interests of justice will be served by an early trial." Under this section a motion may be granted in cases where waiting for a trial would cause an unusual hardship.[162] Thus, for example, a preference may be granted where a party is in danger of death before trial,[163] or is destitute.[164]

In *Martinkovic v. Chrysler Leasing Corp.*,[165] plaintiff had medical bills outstanding of $25,000 and predicted future medical expenses of from $12,000 to $15,000 as the result of an automobile accident. Plaintiff claimed that she was unable to meet expenses

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[159] 53 Misc. 2d 1091, 281 N.Y.S.2d 120 (Sup. Ct. Jefferson County 1967).

[160] *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 463 (1968).

[161] 55 Misc. 2d 800, 286 N.Y.S.2d 943 (Sup. Ct. Dutchess County 1968).

[162] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.10 (1966).

[163] Rosenbaum v. Dornhage Realty Corp., 22 App. Div. 2d 772, 254 N.Y.S.2d 78 (1st Dep't 1964) (danger of death); Dodumoff v. Lyons, 4 App. Div. 2d 626, 168 N.Y.S.2d 183 (1st Dep't 1957) (danger of death). *But see* Kerry v. American Warm Air Heating Co., 32 Misc. 2d 935, 223 N.Y.S.2d 946 (Sup. Ct. Monroe County 1961) (mere old age is insufficient where there is no danger of death before trial).

[164] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.11 (1965).

[165] 29 App. Div. 2d 636, 286 N.Y.S.2d 195 (1st Dep't 1968).

and asked for a trial preference on the theory of constructive indigency. Defendant offered to advance payment on all medical expenses, and to contribute $30 to $40 monthly towards living expenses. The appellate division, second department, in spite of plaintiff's extensive injuries,[166] reversed an order granting a trial preference stating only that the facts did not merit a preference.

Large hospital bills alone apparently do not constitute a sufficient ground for a preference,[167] and an offer of financial aid from the defendant is a factor to be considered in opposition to a motion for a preference on the ground of destitution.[168] The defense bar should thus note that, in cases involving potential liability, an offer of financial assistance is one method of blocking a "destitution" preference.[169]

CPLR 3403: "Seider" *plaintiff denied "attachment" preference.*

In *Margulies v. Boverman*,[170] plaintiff obtained in rem jurisdiction by attaching the obligations of the defendants' insurer to defend and indemnify pursuant to the controversial procedure authorized in *Seider v. Roth*.[171] Having obtained jurisdiction, plaintiff moved for a preference on the basis of Rule IX (2) of the Bronx and New York County Supreme Court Rules.[172]

The Supreme Court, New York County, in denying the motion, noted that personal injury plaintiffs may be entitled to a preference where there are injuries resulting in permanent or protracted disability or death; or where the interests of justice require an early trial. Although the plaintiff in the instant case did come within the literal meaning of subdivision 2, that is, "[a]ny action on contract, replevin or in conversion or wherein property is held under an attachment which has not been discharged . . .," the court held that he did not come within the spirit of the rule's meaning when read as a whole. To grant a preference in such a situation would be manifestly unfair to other personal injury

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[166] The dissent, in preface to categorizing plantiff's injures, states "[t]o list all of her injuries in detail would be to give a brief lecture in human anatomy as the injuries cover nearly every part of her body, from her head to limbs." *Id.* at 636, 286 N.Y.S.2d at 196.

[167] Balestrero v. Prudential Ins. Co., 285 App. Div. 835, 137 N.Y.S.2d 134 (2d Dep't 1955) (mem.).

[168] Johnson v. Pennsylvania Greyhound Lines, Inc., 282 App. Div. 709, 122 N.Y.S.2d 44 (2d Dep't 1953) (mem.).

[169] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.13 (1965).

[170] 56 Misc. 2d 507, 288 N.Y.S.2d 732 (Sup. Ct. N.Y. County 1968).

[171] 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *But see* Podolsky v. DeVinney, 281 F. Supp. 488 (S.D.N.Y. 1968).

[172] This rule implements CPLR 3403.