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CPLR 3018(b): Amendment Allowed To Insert an Affirmative Defense

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and thus warrant punitive damages. The soundness of the punitive damages policy is now directly in issue since the court, by setting the stage for an actual award of punitive damages, terminated the ambivalence of New York's position.

While this development is significant from the scholar's point of view, it is of lesser import in a practical sense. The scarcity of reported punitive damages cases itself testifies that few such cases have ever reached the courts, probably for practical reasons. Conduct which might possibly be called "gross negligence" unquestionably constitutes ordinary negligence. A defendant guilty of such conduct would probably offer a substantial settlement to avoid potential punitive liability. To a plaintiff, a large immediate settlement would offer an attractive alternative to a recovery, which, though *possibly* larger, would come after years of delay. Furthermore, since most automobile liability insurance policies do not cover punitive damages,[34] such a recovery could be an empty victory. It is doubted, therefore, that the recent case will provide a sufficient incentive to offset these practical considerations and thereby effect a countertrend. However, in the rare case, that does reach court,[35] *Soucy* will provide direct authority for granting punitive damages.

CPLR 3018(b): Amendment allowed to insert an affirmative defense.

CPLR 3018(b) provides that certain matters, "which if not pleaded would be likely to take the adverse party by surprise . . .," must be pleaded as affirmative defenses under penalty of being waived.[36] However, the apparent severity of this section is alleviated by the liberal provisions for amending pleadings in CPLR 3025.

This is illustrated by the recent decision in *Rainone v. France*.[37] There the defendant in a negligence action had failed to include the defense of general release in his original answer because he was unaware that plaintiff had accepted $425 to release defendant's joint tortfeasor. Upon learning of this release four and one-half months later, the defendant applied to the court for permission to amend his answer. Although section 3018(b) specifically applies to the defense of release, the court permitted the amend-

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worn tires, was speeding, had a defective transmission, and had defective windshield wipers.

[34] Logan, *Punitive Damages in Automobile Cases*, 1961 INS. L.J. 27, 30.

[35] *E.g.*, where defendant mistakenly feels he has a debatable affirmative defense such as contributory negligence or assumption of risk.

[36] The section gives several examples of such matters, but expressly provides that those enumerated are not exclusive.

[37] 26 App. Div. 2d 855, 273 N.Y.S.2d 828 (3d Dep't 1966).

ment since "plaintiff . . . could not convincingly claim surprise or prejudice." Thus,

> the waiver rule may be operable only when the failure to plead affirmatively has prejudiced the plaintiff in a manner that cannot be remedied by the court by the award of costs, or a continuance, or some other sanction.[38]

ARTICLE 31 — DISCLOSURE

CPLR Art. 31: Disclosure under court rule.

Kovalenko v. Dilberian[39] is an example of disclosure being sought under court rule rather than under the CPLR.[40] In that action for personal injuries, plaintiff moved, pursuant to Rule III, Part Four, Rules of the Appellate Division, Second Department, for an order directing the defendant to serve a copy of an examination of the plaintiff conducted by the defendant's insurance carrier. The defendant, however, explained that this examination was made in relation to plaintiff's claim under her own medical coverage insurance written by that same company.

The court, in denying the plaintiff's motion, noted that since the carrier did not examine the plaintiff as defendant's representative, there was no report available subject to plaintiff's motion. The court also held that the findings of the examination made by the insurer were unavailable to the defendant.

CPLR 3101(a): Discovery of the amount of insurance not allowed.

In *Gold v. Jacobi*,[41] an automobile negligence action, the plaintiff sought discovery of the amount of defendant's automobile liability insurance. The court, however, held that this information was not subject to discovery since it was not "material and necessary" in the prosecution of the case.

Although the court noted that this was a case of first impression, a case decided under the CPA lends support to this decision.[42] There it was held that information such as the amount of insurance coverage could not be elicited at an examination before trial since it was not related to the issues in the case.

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[38] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3018.18 (1966).

[39] 51 Misc. 2d 625, 273 N.Y.S.2d 642 (Sup. Ct. Suffolk County 1966).

[40] CPLR 3121(b).

[41] 49 Misc. 2d 206, 276 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1966).

[42] Milk Tank Serv., Inc. v. Wood, 200 Misc. 333, 107 N.Y.S.2d 166 (Sup. Ct. Sullivan County 1951).