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CPLR 3124: Appealability of Rulings Made Upon Objections at an Examination Before Trial

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In *Kennelly v. St. Mary's Hosp.*,[56] plaintiff's intestate, while a patient at the defendant hospital, was severely burned when the oxygen tent he was in burst into flames because of alleged negligence. At an examination before trial, plaintiff sought to have the hospital's administrator and acting administrator answer certain hypothetical questions which required the expression of an expert opinion. The supreme court, Ulster County, held that *McDermott* was applicable not only at trial but also to pretrial discovery, and that these defendants who were treated as experts could be asked opinion questions in their field of expertise.

It should be noted that to bring the case within the *McDermott* rule, the court in *Kennelly* appears to have treated the administrator and acting administrator as defendants. Also, the court did not consider the possible applicability of CPLR 3101(d), which conditionally exempts expert opinion from disclosure. However, this could be due to the fact that 3101(d)(1) applies solely to expert opinions *prepared for litigation.*

CPLR 3124: Appealability of rulings made upon objections at an examination before trial.

Both CPA and CPLR cases uphold the principle that rulings made upon objections on an examination before trial are not appealable as of right.[57] While two recent appellate division cases appear to agree with this principle, they seem to disagree as to whether such rulings or orders are appealable *by permission* pursuant to CPLR 5701(c).

In *Tri-State Pipe Lines Corp. v. Sinclair Ref. Co.*,[58] the defendant appealed from an order denying its motion, pursuant to CPLR 3124, to compel answers to questions asked and production of documents sought at an examination before trial of the plaintiff. The appellate division, first department, held that the order denying defendant's motion was not appealable. The court suggested that the proper procedure was for the defendant to move for an order reopening the examination before trial so as to permit the questions to be answered.[59] However, this

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[56] 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966).

[57] See, *e.g.*, Lee v. Chemway Corp., 20 App. Div. 2d 266, 247 N.Y.S.2d 287 (1st Dep't 1964); Brimberg v. Frielich, 10 App. Div. 2d 850, 199 N.Y.S.2d 128 (2d Dep't 1960); Brown v. Golden, 6 App. Div. 2d 766, 174 N.Y.S.2d 75 (4th Dep't 1958); Hall v. Wood, 5 App. Div. 2d 998, 173 N.Y.S.2d 541 (2d Dep't 1958).

[58] 26 App. Div. 2d 285, 273 N.Y.S.2d 976 (1st Dep't 1966).

[59] See also Kogel v. Trump, 271 App. Div. 890, 66 N.Y.S.2d 899 (2d Dep't 1946), which held that an order at an examination before trial was not appealable but that the proper procedure was to move for an order reopening the examination before trial.

would not appear to offer the defendant much relief since, in all likelihood, the plaintiff would again refuse to answer the questions. Although the court did not discuss whether defendant could have appealed by permission, it would seem that the court would deny such permission, and require the defendant to follow the suggested procedure.[60]

To be compared with *Tri-State* is *Presti v. Schalck*.[61] There the appellate division, fourth department, held that while an appeal from an order under CPLR 3124, compelling plaintiffs to answer certain questions and make full disclosure of all matters pertaining to such questions, was not available as a matter of right, the order was appealable by permission under CPLR 5701(c). The appeal in that case was dismissed, however, because of the appellant's failure to obtain the required permission to appeal.

The practitioner is cautioned to distinguish the practice followed in the different departments, at least until the Court of Appeals resolves the question of whether orders or rulings made upon objections at an examination before trial are appealable by permission.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Summary judgment granted on an unpleaded cause of action.

In *Dampskibsselskabet Torm v. P. L. Thomas Paper Co.*,[62] the appellate division, first department, has granted summary judgment on an unpleaded cause of action. The plaintiff, a common carrier by sea, sued a shipper and its forwarder, ostensibly, for breach of contract. The parties had agreed that the final bill for a series of shipments would reflect a ten per cent discount on the total freight charges. Plaintiff sought to recover the amount of the discount, reflected as "balance due" on the freight due bill. In its motion for summary judgment, plaintiff submitted evidence of a shipping conference, approved by the United States Shipping Board and signed by the shipper, which fixed rates and prohibited discounts to shippers. Also supporting the motion was a "reference" to Section 16 of the Shipping Act of 1916[63] which makes it unlawful for a shipper or forwarder to obtain

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[60] This conclusion would seem warranted by the court's reference to *Lee v. Chemway Corp.*, *supra* note 57, which held that orders made at examinations before trial were not appealable by permission under CPLR 5701(c).

[61] 26 App. Div. 2d 793, 275 N.Y.S.2d 36 (4th Dep't 1966).

[62] 26 App. Div. 2d 347, 274 N.Y.S.2d 601 (1st Dep't 1966).

[63] 46 U.S.C. § 815 (1964).