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CPLR 3101(d): Employee's Accident Report Deemed Material Prepared for Litigation

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The *Szolósi* court considered the above sections and added that if the material was prejudicial before the time period elapsed, it was just as prejudicial after. And, since a "paring" of the complaint would not prejudice the plaintiff, the court decided that untimeliness should not bar the motion to strike.

This case marks a further relaxation of strict rules of pleading: the disposition of such a motion will not depend on arbitrary time limits, but rather on the equities in issue. However, since avoidance of prejudice is the court's object, untimely 3024(c) motions will still be denied if plaintiff would be prejudiced by their being granted.

Article 31 — Disclosure

CPLR 3101(d): Employee's accident report deemed material prepared for litigation.

Subsection (d) of CPLR 3101 conditionally exempts "material prepared for litigation" from the section's general mandate that there shall be full disclosure of all material evidence in civil actions in New York. The issue of whether or not accident reports qualify as "material prepared for litigation" has been a much disputed question, often giving rise to irreconcilable decisions and opinions.

The cases of *Kandel v. Tocher*[68] and *Finegold v. Lewis*[69] were the first major decisions to lend some clarity to this area. Both cases, recognizing that liability insurance companies, in effect, are but substitutes for attorneys, held that statements made by the insured to the liability insurer qualify as "material prepared for litigation" under CPLR 3101(d) unless such information can be "duplicated" elsewhere.[70] In effect, communications between the insured and the liability insurer enjoy a presumption that they are materials prepared for litigation.[71] But, if the recipient of an accident report is not a liability insurer, *e.g.*, a fire insurer, the presumption disappears because the fire insurer does not usually defend the insured. It must be shown in each such instance that the report was in fact prepared for litigation to be entitled to 3101(d) protection.[72]

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[68] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[69] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[70] For further discussion of these cases *see The Biannual Survey of New York Practice*, 40 St. John's L. Rev. 122, 154 (1965).

[71] 7B McKinney's CPLR 3101, supp. commentary 11 (1966).

[72] Brunswick Corp. v. Aetna Cas. & Sur. Co., 27 App. Div. 2d 182, 278 N.Y.S.2d 459 (4th Dep't 1967); Welch v. Globe Indem. Co., 25 App. Div. 2d 70, 267 N.Y.S.2d 48 (3d Dep't 1965).

At the other end of the spectrum, an accident report made out by an employee at the request of his employer is most suspect. Here, even though the accident report is sent by the employer to the employer's attorney, a strong showing that the primary purpose of the report was for litigation purposes must be made to bring such a report under the shelter of CPLR 3101(d).[73] This is because, in such situations, accident reports are most often made for "use in the regular course of business" to permit management to effectively control and supervise the operations of the company.[74]

In *O'Neill v. Manhattan & Bronx Surface Transit Operating Authority*,[75] the appellate division, first department, has shown what will suffice to bring materials at this more suspect end of the spectrum under CPLR 3101(d). There, a bus driver employed by defendant bus company had filled out an accident report and forwarded it directly to defendant's attorneys. Affidavits[76] presented by defendant's attorney showed that the accident report was solely for the professional use of defendant's corporation counsel, and was not for any managerial use whatever.

Thus, it would seem that the evidentiary requirements for qualification as "material prepared for litigation" will be satisfied if it is *affirmatively* shown that the report has no purpose other than for use in litigation.

CPLR 3110: Objection rules out attorney's office for taking deposition.

CPLR 3110 prescribes the geographical locality, *i.e.*, county, where depositions shall be taken within the state. Only subsection (3), which pertains solely to public corporations,[77] designates a

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[73] Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. Sullivan County 1966). For a discussion of this case *see The Quarterly Survey of New York Practice,* 41 St. John's L. Rev. 642, 652 (1967).

[74] 3 Weinstein, Korn & Miller, New York Civil Practice ¶ 3101.50 (1964).

[75] 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967).

[76] For a complete statement of the facts, reference must be made to the lower court opinion, O'Neill v. Manhattan & Bronx Surface Transit Operating Authority, 47 Misc. 2d 765, 263 N.Y.S.2d 187 (N.Y.C. Civ. Ct. 1965).

[77] Allen v. Brower, 21 App. Div. 2d 876, 251 N.Y.S.2d 738 (2d Dep't 1964) (dictum). "Public corporations are the instrumentalities of the state, founded and owned by it in the public interest, supported by public funds and governed by managers deriving their authority from the state." Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554, 555 (4th Dep't 1924). N.Y. Gen. Corp. Law § 3(1) describes a "public corporation" as either a municipal corporation, a district corporation, or a public benefit corporation.