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CPLR 3024(b): Motion to Strike Unavailable Where Material in Complaint Is Relevant at Trial

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the elimination of 3015(d), thus posing a question as to how far this requirement was to go.

The second department answered the question recently in *Von Ludwig v. Schiano,*[155] where it held that the "itemization of special damages may be obtained by a bill of particulars." The omission from the complaint would only render a cause of action insufficient where special damages are an integral part of the cause of action itself, *e.g.,* a prima facie tort.[156]

CPLR 3017: Fiduciary relationship not necessary for an accounting?

An accounting has traditionally been a creature of equity. Lacking the appropriate equitable grounds, *i.e.,* a fiduciary relationship between the plaintiff and the defendant, this remedy was unavailable to plaintiff.

The appellate division has recently taken a more liberal approach to this problem. In *Kamisky v. Kahn,*[157] the court observed that it might grant a legal *or* an equitable remedy to afford complete relief to a party. It appears, therefore, that the lack of a fiduciary relationship will not impede the availability of an accounting. Although there is no direct holding in *Kaminsky* that an accounting may be granted in a law action, the case indicates a trend toward such a determination.[158]

CPLR 3024(b): Motion to strike unavailable where material in complaint is relevant at trial.

In *Guiliana v. Chiropractic Institute,*[159] manipulation of the plaintiff's spine by a student of the defendant Institute resulted in severe injury. In the complaint, the plaintiff sought, *inter alia,* to place in issue the lack of chiropractic skill and knowledge of the student body of defendant Institute. In granting the defendant's motion to strike those paragraphs under CPLR 3024(b), the court quoted with approval the statement of a pre-CPLR case that "matter, though possibly pertinent as proof, has no place in a pleading if it is unnecessary to a statement of a cause of action." [160]

However, under CPLR 3024(b) a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a

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[155] 23 App. Div. 2d 789, 258 N.Y.S.2d 661 (2d Dep't 1965).

[156] For a thorough discussion of this problem, see 7B McKINNEY'S CPLR 3015, supp. commentary 82 (1965).

[157] 23 App. Div. 2d 231, 259 N.Y.S.2d 716 (1st Dep't 1965).

[158] For a further study of *Kaminsky* and its implication, see 7B McKINNEY'S CPLR 3017, supp. commentary 92 (1965).

[159] 45 Misc. 2d 429, 256 N.Y.S.2d 967 (Sup. Ct. Kings County 1965).

[160] Newton v. Livingston County Trust Co., 231 App. Div. 355, 362 N.Y. Supp. 121 (4th Dep't 1931).

pleading. Whether any matter is unnecessarily inserted is determined by the relevancy of the proof at trial. If the matter would be admissible at the trial, it is not unnecessarily inserted, even though it is scandalous or prejudicial. If plaintiff's assertions in the complaint would be admissible at trial, they would be relevant and therefore not subject to a motion to strike under CPLR 3024(b).

ARTICLE 31 — DISCLOSURE

CPLR 3101(c) and (d): "Material prepared for litigation" and "attorney's work product."

Subdivisions (c) and (d) of CPLR 3101 have provided the bar with an abundance of case law. Since the *Survey's* last installment,[161] there have been significant developments in the area governed by these two subdivisions.

The ground work for judicial action

Prior to *Finegold v. Lewis* [162] and *Kandel v. Tocher,*[163] there had been a decided lack of uniformity in the judicial interpretation of subdivisions (c) and (d).[164] Under these exclusionary provisions two questions of interpretation had frequently arisen before the courts, viz., whether accident reports made by an employee to his employer, and whether those made by an insured to his insurer are proper subjects for disclosure. Prior to *Finegold* and *Kandel,* the first department lower courts held statements by an insured to his insurer to be proper material for disclosure, whereas the lower courts of the second department reached conflicting decisions on the question of the discoverability of such statements.

Speight v. Allen [165] followed the holdings of prior first department cases and held these statements to be outside the purview of CPLR 3101(d). It relied heavily on the language employed by the court in *Rios v. Donovan* [166] concerning the liberality to be applied in interpreting the CPLR and more specifically Article 31.

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[161] *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 406 (1965).

[162] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[163] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[164] Speight v. Allen, 44 Misc. 2d 1072, 255 N.Y.S.2d 918 (Sup. Ct. Bronx County 1965), discusses this conflict.

[165] *Ibid.*

[166] 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); discussed in *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 178, 210 (1964), and 7B MCKINNEY'S CPLR 3120, supp. commentary 58 (1965). *Rios* is a leading case delineating the scope of disclosure with which the practitioner should be well acquainted by now.