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Designation of Examining Physician

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In addition, the fact that defendant was a smaller corporation than plaintiff and would have liked to avoid the expense of conducting its own tests was not considered a sufficient showing of hardship.

Where the expert's report is designed for purposes of litigation, some protection from disclosure is necessary. An examination into an adversary's case file should be permitted only on special circumstances. The qualified privilege granted by CPLR 3101(d) and applied by the court here is fair to both parties.[180] It would appear that before the court can order disclosure of the report, it must find, first, that the material is no longer duplicable, and second, that injustice or hardship will result if the report is withheld.[181] Once *both* of these conditions are met the material would be obtainable under the statute.[182]

Designation of examining physician.

CPLR 3121 provides: "After commencement of an action in which the mental or physical condition or the blood relationship of a party . . . is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician . . . ." This section governs medical examinations in actions in which they are relevant. In regard to medical examinations in personal injury actions, some of the departments have, additionally, their own rules which will govern to the extent that they are not inconsistent with CPLR 3121.[183]

In *Adamian v. Strandwall,*[184] a personal injury action, plaintiff moved to vacate defendant's notice designating the physician to examine plaintiff on the ground that the physician named was objectionable. The court held that under the second department rule[185] once the party to be examined objects to the physician selected by the examining party, the court must direct an examination by a physician named by it, and it is not necessary that the objecting party set forth reasons for the objection.

Under CPA § 306 the court had a statutory duty to name a disinterested physician where the parties could not agree.[186] CPLR 3121 contains no express language applicable when a physician designated by a party is objected to. In most cases the party to be examined does not object to the examining party's

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[180] See 42 Misc. 2d 770, 248 N.Y.S.2d 1000 (Sup. Ct. 1964).

[181] CPLR 3101(d); CARMODY-FORKOSCH, NEW YORK PRACTICE § 631, at 579 (8th ed. 1963).

[182] CARMODY-FORKOSCH, *op. cit. supra* note 181.

[183] See CPLR 101.

[184] 43 Misc. 2d 856, 252 N.Y.S.2d 509 (Sup. Ct. 1964).

[185] N.Y. APP. DIV. R. I., pt. 4 (2d Dep't 1964).

[186] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121.08 (1964); see Black v. Besgier, 139 Misc. 100, 248 N.Y. Supp. 555 (Sup. Ct. 1931).

physician, but the question remains what procedure governs in such a case.

As stated above, the decision in the instant case was not governed by CPLR 3121 but by the rule of the second department governing medical examinations in personal injury actions. The decision requires the court to appoint an impartial physician whenever the party to be examined objects to the physician named by the examining party, even though the objection to the physician designated is completely arbitrary. The court based its decision on its inability to determine the professional qualifications of a physician on motion papers. However, requiring the court to select an impartial physician merely because a party arbitrarily objects to a physician named by his adversary places an unnecessary burden on the court.[187] It would seem that the party to be examined should at least state reasons for the objection, in which case the examining party could name another physician. The decision in the instant case is in accord with first department practice. In that department, however, the problem is simplified because of the maintenance of an impartial medical panel.[188]

Compelling authorizations to obtain hospital records.

CPLR 3121, in addition to allowing physical and mental examinations, also provides for the execution of authorizations permitting a party to obtain hospital records.[189] The authorizations required to be executed encompass only those hospital records relating to the injuries sustained in the accident—not any and all hospital records.[190] Does 3121 permit one to obtain hospital records of a decedent in a wrongful death action?

Keays v. Vanderheden Hall, Inc.[191] involved a combined wrongful death and personal injuries action. Defendant moved pursuant to CPLR 3121 for an order compelling plaintiff-administrator to furnish written authorizations permitting defendant to obtain hospital records of the decedent. Plaintiff opposed the application on the ground that CPLR 3121 authorizes the pro-

[187] The decision rendered by this court has in effect been overturned by a later decision of the appellate division, second department. The appellate division held that plaintiff's objections to the physician designated by defendant must be stated specifically and at length. Crawford v. Investors Planning Corp., 21 App. Div. 2d 888, 251 N.Y.S.2d 723 (2d Dep't 1964).

[188] N.Y. SUP. CT. R. XI(1), pt. 1 (Bronx & N.Y. Counties 1963).

[189] CPLR 3121(a). The first and second departments have local rules not inconsistent with 3121, which afford greater detail. See N.Y. SUP. CT. R. XI, pt. 1 (Bronx & N.Y. Counties 1963); N.Y. APP. DIV. R. II, pt. 4 (2d Dep't 1964).

[190] Chester v. Zima, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. 1964). See 7B MCKINNEY'S CPLR 3121, Supp. commentary 33 (1964).

[191] 43 Misc. 2d 399, 251 N.Y.S.2d 41 (Sup. Ct. 1964).