Griffin v Manning
2004 NY Slip Op 30397(U)
February 7, 2004
Supreme Court, New York County
Docket Number: 108083/97
Judge: Carol R. Edmead

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Griffin, Ronae

- v -

Manning, Milton

INDEX NO. 108083/97

MOTION DATE 1/10/05

MOTION SEQ. NO. 012

The following papers, numbered 1 to _____, were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion / Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

ORDERED that the motion by Generali to intervene for purposes of opposing plaintiff's application for the entry of judgment is denied; and it is further

ORDERED that plaintiff's motion for the entry of judgment in the form of the proposed judgment annexed to Exhibit A of her motion papers in sequence #010, is granted to the extent that such judgment shall be modified to reflect as a party defendant I. Steven Krup as Administrator of the Estate of Elizabeth Krup, Deceased, in place of Elizabeth Krup, and Elizabeth Krup, as Administratrix of the Estate of Joshua Krup; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 2/7/05

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RONAE GRIFFIN, an Infant by her Guardian, SANDRA GRIFFIN,

Index No. 108083/97

Plaintiff,

-against-

DECISION/ORDER

MILTON MANNING, STEVEN KRUP, as Administrator of the Estate of ELIZABETH KRUP, and the Estate of JOSHUA KRUP,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Ronae Griffin, an Infant by her Guardian Sandra Griffin ("plaintiff"), seeks damages for injuries Ronae Griffin sustained, resulting from exposure to lead paint and dust, while she was in residence at 79 St. Nicholas Place, Apartment 5C, New York, New York, premises owned by Joshua Krup and Elizabeth Krup (collectively the "Krups") and managed by defendant Milton Manning (the "Premises") (matter hereinafter referred to as the "Tort Action"). Plaintiff obtained a jury verdict in her favor, and now moves (under Sequence #010) for the entry of judgment pursuant to the jury verdict.

Assicuriazioni Generali, United States Branch ("Generali"), is a defendant in a purported related action, *Griffin v Generali, et al.*, Index No. 100009/03, wherein plaintiff in the Tort Action has sued Generali seeking a declaration of her rights under Generali Insurance Policy CL 315172, effective August 25, 1992 to August 25, 1993, issued by the carrier (the "Generali

Policy") (the "Declaratory Judgment Action").[1]

Generali also moves by order to show cause, for an order staying entry of judgment in this Tort Action[2], and permitting Generali to intervene for the limited purpose of objecting to plaintiff's motion for entry of judgment, pursuant to CPLR 1012 affording entities intervention, as a matter of right, where representation by a party to an action may be inadequate to protect the intervenor's interests and the intervenor may be bound by a judgment in the action; or when an entity may be affected by a judgment entered on a claim for personal injury; and pursuant to CPLR 1013, permitting intervention where there are common issues of fact and law in related actions. Generali argues that both CPLR 1012 and 1013 apply.[3]

Background

The Tort Action

In this Tort Action, plaintiff was represented by Fitzgerald & Fitzgerald (the "Fitzgerald Firm"), and the case was tried over three days - January 15th - 17th, 2002. During the early stages of the litigation, Joshua Krup died and his widow, Elizabeth Krup was appointed Administratrix of his estate, and a formal substitution and amendment of the case caption ensued. Elizabeth Krup thereafter appeared in both her personal and representative capacities, represented by

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[1] The Generali Policy provided coverage on an occurrence basis, with a policy limit of $500,000 per occurrence.

[2] This matter is currently stayed, *sua sponte*, by order of this court dated July 20, 2004, pending a determination of this application.

[3] Plaintiff initially moved, by order to show cause, for entry of judgment under Sequence #010. By order, dated July 20, 2004, the Court set forth a motion schedule regarding this issue, which permitted Generali to move by order to show cause to intervene. Therefore, plaintiff's motion (sequence #010) and Generali's motion to intervene (sequence #012) are consolidated for disposition and determined herein.

counsel engaged by the landlord's insurance carrier, Garbarini & Scher.[4] Elizabeth Krup died on November 9, 2001. The trial commenced on January 14, 2002. The plaintiff and her counsel were unaware of the death of Elizabeth Krup some two months earlier. During the course of the trial, it was discovered that Elizabeth Krup had died. Garbarini & Scher, joined by counsel for Manning, the managing agent for the subject property, moved to stay the trial proceedings as a result of the death of Mrs. Krup. The Trial Court[5] denied the request, and permitted the trial to proceed to verdict. The jury awarded plaintiff $2.5 million, consisting of $500,000 for past pain and suffering and $2 million for future pain and suffering. Only the Krups' negligence was found to be a substantial factor in causing injury to Ronae Griffin. Manning was absolved of all liability. The Trial Court denied a motion for a new trial or remittitur.

On June 11, 2002, the Fitzgerald Firm, as plaintiff's counsel, moved pursuant to CPLR 1015 to substitute I. Steven Krup[6], the son of Joshua and Elizabeth Krup, as Administrator of Elizabeth Krup's estate, requesting that said substitution be retroactive, going back prior to the commencement of the trial. At the same time, the Fitzgerald Firm sought entry of a judgment in the amount of $2.5 million. Garbarini & Scher, counsel for the Krups, opposed and challenged the relief on all grounds: (1) challenging the legal basis for any substitution *nunc pro tunc* under

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[4] This firm was assigned to represent the Krups by the State Liquidation Bureau, as liquidators of Transtate Insurance Company and First Central Insurance Company.

[5] The trial judge has since retired from the bench. The parties declined to have the trial judge, now sitting as a JHO, decide this matter.

[6] I. Steven Krup is the personal representative of the Estate of Joshua Krup and of Elizabeth Krup, having been qualified and appointed as fiduciary by the Circuit Court of Broward County, Florida on April 30, 2002 for that purpose. Plaintiff's motion sought an order substituting as a party defendant I. Steven Krup as Administrator of the Estate of Elizabeth Krup, Deceased, in place of the decedent Elizabeth Krup and amending the caption accordingly.

the circumstances present in the instant case; and (2) arguing that the award was excessive.

On October 22, 2002, all counsel, including John M. Daly, counsel for I. Steven Krup[7], appeared for oral argument on the motion. At oral argument Daly advised Garbarini & Scher to withdraw its opposition to I. Steven Krup's appointment *nunc pro tunc* because there was an agreement between I. Steven Krup and the Fitzgerald Firm dated March 24, 2002 (the "Krup/Fitzgerald Agreement"), which provided *inter alia,* that plaintiff would seek recovery only from funds provided by insurance carriers, and that in exchange for holding I. Steven Krup and the Estates of Joshua and Elizabeth Krup harmless (thereby releasing them of any obligation to pay on any judgment against them), I. Steven Krup agreed to be substituted as administrator.

As a consequence of this Krup/Fitzgerald Agreement, and I. Steven Krups' instructions not to oppose plaintiff's motion, Garbarini & Scher withdrew its opposition to the plaintiff's motion.

It is noted that during the October 22, 2002 proceedings, the Trial Court first questioned Garbarini & Scher as to whether the firm still represented I. Steven Krup. Thereafter, the Trial Court questioned Garbarini & Scher as to whether they had authority from their client to pursue the opposition to the Fitzgerald Firm's motion. The Trial Court stated that Mr. Daly represented Mr. Krup in the substitution, and that Garbarini & Scher represented Krup in the lawsuit. In light of the fact that I. Steven Krup wanted Garbarini & Scher to withdraw the motion, and he had new counsel who did not oppose the Fitzgerald Firm's motion, Garbarini & Scher withdrew its opposition. Consequently, the Trial Court indicated that as there was no opposition to the

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[7] At that point, I. Steven Krup was not a party to the action.

Fitzgerald Firm's motion, and granted said motion, without opposition. I. Steven Krup was substituted into the case in place of Elizabeth Krup *nunc pro tunc* to the date January 2, 2002 - prior to the commencement of the trial. Thereafter, the Trial Court ruled that since there was an agreement absolving I. Steven Krup and the Estates of personal liability, the Court would only enter a judgment in the amount of available insurance, an amount then unknown. The Trial Court adjourned that aspect of the motion in which plaintiff sought the entry of judgment until a determination could be made as to what insurance coverage there was. The Trial Court indicated its intention to only direct entry of judgment in the amount of the identified insurance policy.

The Declaratory Judgment Action

After investigation by the Fitzgerald Firm, the Fitzgerald Firm, on behalf of plaintiff, commenced a special proceeding against Generali and the two carriers in liquidation believed to afford coverage. After it was determined that plaintiff had no jurisdiction over the carriers in liquidation in New York County, and that the actions had to be brought in Nassau and Suffolk Counties, the Fitzgerald Firm recommenced the action in the form of a declaratory judgment suit against Generali.

It was during the trial of the Declaratory Judgment Action that John Daly testified to his relationship with the Fitzgerald Firm, how he was retained and how he came to negotiate the terms of the Krup/Fitzgerald Agreement.

According to Witchel, nothing better illustrates the nature of the cooperation between plaintiff and defendant than the relationship between I. Steven Krup's counsel and plaintiff's counsel. At the trial of the Declaratory Judgment Action, brought by the Fitzgerald Firm, John M. Daly, I. Steven Krup's attorney who told the Garbarini & Scher firm to withdraw its

opposition to plaintiff's motion, testified that he was "of counsel" to Fitzgerald & Fitzgerald. He testified that his income derived almost exclusively from Fitzgerald & Fitzgerald. His offices were the Fitzgerald Firm's offices. Indeed, Mr. Daly admitted during the trial that his year-end bonus depended on the amount of money his labors for the Fitzgerald Firm generated. As it was agreed that the issues were legal in nature and there were no significant issues of fact, the court ordered that these issues be briefed and it be provided with all relevant exhibits and transcripts.

In summary, Generali argued, *inter alia*: (1) that notice was untimely; and (2) Generali had no obligation to indemnify as any judgment that might be entered would be the by-product of a party which represented the insureds' interest engaging in fraud and collusion with the insurer and insured's adversary. Such fraud and collusion violates an insured's obligation of cooperation as set forth expressly in the insurance contract and the implied obligation of good faith imposed on all parties to insurance contracts. That conduct vitiates all obligations to indemnify by Generali.

Generali herein argues that the history of the Tort and Declaratory Judgment Actions recounted above makes plain the interrelatedness of both actions. The conduct which negates coverage under the Generali Policy to the Krups is the same conduct which demonstrates that the judgment the Fitzgerald Firm seeks to have entered by this court is the by-product of improper fraud and collusion.

According to the moving affidavit of Milton M. Witchel ("Witchel"), in support of the instant intervention application, Witchel argues that the papers submitted by Garbarini & Scher represented significant legal impediments to the entry of a judgment based on the verdict which, if entered, could only be viewed as a highly favorable outcome for the plaintiff and an

unfavorable outcome to the Krups and any insurers legally obligated to pay under that judgment. Witchel continues that intervention by Generali in the instant suit is required so that the issue of fraud and collusion can be fully briefed before the court decides whether entry of judgment is appropriate. As arguing I. Steven Krup's position constitutes fraud or collusion and could eviscerate coverage as well as negate the agreement whereby the insured and the estates obtained a release of their legal obligations under any judgment, counsel for the estates may be precluded from making these contentions. Hence, it is critical that Generali be permitted to intervene and argue those reasons why plaintiff's application for the entry of a judgment of the verdict must be rejected.

Analysis

The Court first addresses Generali's application to intervene for the purpose of allowing Generali to assert an opposition to plaintiff's application for the entry of judgment.

Neither provisions of CPLR 1012 and 1013 and relevant case law support Generali's application to intervene.

The instant motion to intervene is premised in part upon CPLR 1012(a)(2) which provides for intervention by a third party as of right when the representation of that person's interest by the parties is inadequate and that person is or may be bound by the judgment, and CPLR 1012(a)(3), which provides for intervention by a third party as of right, *inter alia*, in an action involving the disposition of or title or a claim for damages for injury to property where that person may be adversely affected by the judgment. However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance (*see, Matter of*

Norstar Apts. v Town of Clay, 112 AD2d 750, 492 NYS2d 248 [4th Dept 1985]; *Plantech Housing v Conlan*, 74 AD2d 920, 921, 426 NYS2d 81 [2d Dept], *appeal dismissed* 51 NY2d 862, 433 NYS2d 1018 [1980]). Thus, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings (*see, Guma v Guma*, 132 AD2d 645, 518 NYS2d 19 [2d Dept 1987]; *Vantage Petroleum v Board of Assessment Review of Town of Babylon*, 91 AD2d 1037, 458 NYS2d 632 [2d Dept 1983], *affd.* 61 NY2d 695, 472 NYS2d 603 [1984]; *Plantech Housing v Conlan, supra*).

Generali possesses a real and substantial interest in the outcome of the Tort Action (*see*, CPLR 1012 and 1013; *see also, Matter of Norstar Apts., Inc. v Town of Clay*, 112 AD2d 750, 492 NYS2d 248 [4th Dept 1985]). And, counsel for plaintiff concedes that the insurance carriers are the real party in interest (*see* Exh. D, p. 5, ¶16 accompanying the instant motion; *Frost v Monter*, 609 NYS2d 308 [2d Dept 1994] ["Since the proposed amendment of the complaint would prejudice [the insurer], and the defendants had no interest in opposing the motion to amend [the insurer] was the real party in interest and clearly was aggrieved by the amendment....The Supreme Court should have permitted [the insurer] to intervene in the action and should have considered its affirmation in opposition to the plaintiff's motion to amend the complaint"]).

Teichman v Community Hospital of Western Suffolk (87 NY2d 514, 640 NYS2d 472, 476 [1996]) is instructive herein. In *Teichman*, the Court of Appeals found that intervention by the insurer was appropriate, after a stipulated settlement was entered, where the insurer sought to recoup, out of the settlement proceeds, medical expenses it paid and would pay on behalf of its insured, in a personal injury action, could have been adversely affected if intervention were not

allowed, as the settlement may have included medical expenses. Further, there were common questions of law and fact, and that no prejudice was shown in allowing intervention. In the instant case, intervention is proper to permit Generali to challenge the entry of judgment. Were Generali precluded from intervening, the onus of the full payment of the entered judgment would rest on Generali. Likewise, there is no prejudice to plaintiff or I. Steven Krup.

Although dated, the case of *Quentin v Henderson* (110 NYS2d 561 [2d Dept 1951]) is theoretically instructive. In *Quentin*, plaintiffs brought action against defendant to recover for injuries sustained in Pennsylvania. One of the plaintiffs is the sister of the defendant. The insurer, which had issued a liability policy to defendant, moved to intervene and to have plaintiffs stayed from proceeding in the personal injury action pending a determination of the declaratory judgment action instituted by the insurer against the defendant. The insurer argued that the service of the summons by the plaintiffs upon the defendant in the State of New York was accomplished as a result of a deliberate design and collusion upon the part of the plaintiffs and the defendant to circumvent the two year statute of limitations in the State of Pennsylvania and to give the plaintiffs the benefit of the three year statute in the State of New York. The *Quentin* court granted intervention stayed the proceedings pending the determination of the declaratory judgment action. Likewise, in the instant case, where the rights, reputation or other important interests of the insurer may be injuriously affected by what there may be reason to believe was a "friendly resolution" of the Tort Action herein between plaintiff and I. Steven Krup, justice requires that the insurer should be allowed to intervene so far as that may be necessary for its own protection (*Id.* at 563).

However, with respect to the second prong of CPLR 1012 (a)(2), the Court of Appeals

has held that whether a movant for intervention "will be bound by the judgment within the meaning of [CPLR 1012(a)(2)] is determined by its *res judicata* effect. . . ." (*Vantage Petroleum v Board of Assessment Review of Town of Babylon*, 61 NY2d 695, 698 [1984] (citations omitted); *see also Tyrone G. v Fifi N.*, 189 AD2d 8 [1st Dept 1993]). Only a party to an action, or one in privity with a party, may be bound by the *res judicata* effect of a judgment in that action (*see Green v Santa Fe Ind., Inc.*, 70 NY2d 244 [1987], and in this regard, it is the possibility rather than the certainty that governs (Seigal, New York Practice § 180 3d Ed.). The potentially binding nature of the judgment on the proposed intervenor is the factor that invokes this provision (Seigal, New York Practice, *id.*).

With respect to the defenses available to Generali in a direct action by plaintiff under Insurance Law 3420 for payment on the judgment against Generali's insureds, the Court of Appeals in *Lang* noted that

> "an insurance company that disclaims in a situation where coverage may be arguable is well advised to seek a declaratory judgment concerning the duty to defend or indemnify the purported insured. If it disclaims and declines to defend in the underlying lawsuit without doing so, it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420. Under those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate *only the validity of its disclaimer and cannot challenge the liability or damages determination underlying the judgment.*" (Emphasis supplied)
> (*Lang*, at 356)

The *res judicata* effect of the judgment concerns the liability and damage findings by the jury, and as such, Generali may be precluded from challenging the liability and damage determination by the jury. However, it is noted that Generali is not seeking to challenge the merits of the such jury's findings, but instead, contests the entry of judgment based on the post-trial Agreement between plaintiff's counsel and defendant Steven Krup.

It has been held that where the proposed intervenor has other adequate remedies, the intervention as of right is properly denied (*see Hanover Ins. Co. v Northwest Assocs.*, 248 AD2d 672 [2d Dept 1998]). In a direct action by plaintiff against Generali pursuant to Insurance Law §3420, Generali's "remedy" in the form of a defense based on fraud and collusion by the representative of its insureds is available. Thus, it cannot be said that the judgment in the Tort Action would have *res judicata* effect on the arguments Generali seeks to assert herein. Further, while arguing that until a verdict is rendered by the Court in the Declaratory Judgment Action Generali may be bound by the judgment, Generali also states that "entry of judgment in the instant action will not bind any court addressing the separate question of whether the insured, through its representative, acted collusively in violation of its contract with [Generali]" (Aff. of Milton Witchell in support, ¶16).

As to Generali's application pursuant to CPLR 1012(a)(3), such section provides for intervention as of right, "when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." This personal injury action does not involve the disposition, distribution, title or claim for damages for injury to property. Therefore, CPLR 1012(a)(3) is inapplicable.

With regard to Generali's motion to intervene by permission pursuant to CPLR 1013, such section provides:

> Upon timely motion, any person may be permitted to intervene in any action when . . .the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

The plaintiff in the Tort Action claimed that defendants' negligence caused her to sustain

injuries, and the Krups and managing agent raised certain defenses. The plaintiff in the Declaratory Judgment action herein claims, or would claim in any direct action against Generali under Insurance Law §3420, that Generali issued an insurance policy to the Krups, which affords coverage for her damages. In such action against Generali, Generali may raise defenses relating to its disclaimer and any breach of duty by the Krups, through its representative, under the Policy. Thus, there are no claims or defenses common to this action and the declaratory or direct action by plaintiff against Generali.

Contrary to Generali's contention, *Frost v Monter* (202 AD2d 632 [2d Dept 1994]) does not warrant a different result. *Frost v Monter* involved a wrongful death action in which the plaintiffs sought to amend the complaint in a manner that would have caused prejudice to defendant's insurance carrier, but not to defendant. Citing to *Agway Ins. Co. v Williamson* (162 AD2d 968 [4th Dept 1990]) as well as the Commentary to CPLR 1013(2), the Second Department held that the insurance carrier should have been permitted to intervene and its affirmation in opposition to a motion to amend complaint should have been considered by court because the insurance carrier was "the real party in interest and clearly was aggrieved by the amendment within the meaning of CPLR 5511." However, although *Frost* cites to the Commentary CPLR C1013:2, the case, *Agway*, to which the Second Department relied, did not involve CPLR 1013. In *Agway*, a couple suffered a fire loss on their farm. Their insurer, Agway Insurance Companies ("Agway"), voluntarily paid them $ 42,000 in extra coverage they had requested but did not receive because of the alleged failure of one or more of the defendant brokers to secure it. Agway made the payment on the condition that the couple assign to Agway their right of recovery against defendants for breach of contract and negligence. The Fourth Department held that the

motion by one of the defendant brokers to substitute Agway as a party plaintiff was proper on the grounds that since Agway has completely reimbursed the couple for their loss, Agway was the real party in interest in this lawsuit. Accordingly, *Frost v Monter*, is not dispositive on the issue of permissive intervention under CPLR 1013 herein.

As such, Generali's motion to intervene pursuant to CPLR 1012 and 1013 is denied.

Plaintiff's Application for Entry of Judgment

Even if this Court were to grant intervention, the arguments raised by Generali are insufficient to deny the entry of judgment sought by plaintiff.

The Court is of the opinion that once it was discovered that Ms. Krup died, the trial should not have proceeded until a representative was appointed in her individual and representative capacities. Appointing a representative *nunc pro tunc*, may have been imprudent and insufficient to overcome the procedural infirmity created upon Mr. Krup's death or discovery of her death. However, the Trial Court's purported cure of this procedural defect by ordering that Ms. Krup be substituted by her son, I. Steven Krup, *nunc pro tunc*, cannot be disturbed by this Court of coordinate jurisdiction. Under the law of the case doctrine, once an issue has been judicially determined in an action, that determination binds the parties, and other judges of coordinate jurisdiction, for remainder of that action (28 N.Y.Jur.2d Courts and Judges § 236 [1997]; *Wright v County of Monroe,* 45 AD2d 932 [4th Dept 1974]; *see Sommer v Lenoir/Hickory Knitting Mills, Inc.*, 126 Misc 2d 255, 258 [N.Y. Hous. Ct .1984]). For practical purposes, it can be considered as a kind of intra-action *res judicata* (Siegel, New York Practice § 448, at 723 (3d ed.)). Since this Court is bound by the law of the case, it is constrained to accept the substitution *nunc pro tunc*.

Thus, Generali's opposition to the motion must be viewed in light of the Trial Court's order on substitution. Generali opposes the entry of judgment, arguing that the Agreement for substitution, upon which the entry of judgment is based, was the result of fraud and collusion. However, the judgment itself, to wit: the jury verdict in favor of plaintiff and against the Krups Estates, is not affected by the Agreement entered into thereafter. And, since this Court is without authority to overrule the Trial Court's order, which is now, law of the case, the merits of the Trial Court's order permitting I. Steven Krup to be appointed *nunc pro tunc* is an issue to be resolved on appellate review, if at all. Other than Generali's claim of fraud and collusion to effectuate the entry of judgment, there are no legal barriers to the entry of judgment at this juncture.

Turning to plaintiff's motion, plaintiff originally sought a judgment in accordance with the jury verdict. Although the Trial Court expressed an intent to enter judgment in the amount of available insurance, as it stands, the Trial Court did not make any ruling or order to this effect. The Trial Court's mere intent does not rise to the level of an order.[8] Moreover, during oral argument on the motion, the Trial Court indicated that "the only issue is what type of judgment should be entered based on the agreement that's been entered into between the now *nunc pro tunc* defendant the attorneys representing the plaintiff." (Transcript, October 22, 2002, p 12). Thus, as this Court is not bound by the Trials Court's expression of intent as to the amount and type of judgment to be entered, such issues are open for resolution by this Court.

The jury returned a verdict in favor of the plaintiff and against the Krups in the amount of $2.5 million. Generali claims that facilitation of the entry of judgment was committed by fraud

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[8] On this issue, the Court referred this issue to the Trial Judge, now J.H.O., who declined to address it.

due to the Krup/Fitzgerald Agreement between Steven and plaintiff. However, the Krup/Fitzgerald Agreement had no part in the receipt of evidence by the jury, upon which the jury verdict was based. Thus, it cannot be said that the *jury verdict* was based on fraud between Steven Krup and plaintiff's counsel. Although this Court declines to enter judgment in conformity with the provisions of the Krup/Fitzgerald Agreement holding I. Steven Krup harmless, judgment shall be entered in conformity with the jury verdict and the substitution ordered by the Trial Court.

Accordingly, it is hereby

ORDERED that the motion by Generali to intervene for purposes of opposing plaintiff's application for the entry of judgment is denied; and it is further

ORDERED that plaintiff's motion for the entry of judgment in the form of the proposed judgment annexed to Exhibit A of her motion papers in sequence #010, is granted to the extent that such judgment shall be modified to reflect the as a party defendant I. Steven Krup as Administrator of the Estate of Elizabeth Krup, Deceased, in place of Elizabeth Krup, and Elizabeth Krup, as Administratrix of the Estate of Joshua Krup.

This constitutes the decision and order of the Court.

Dated: February 7, 2004

Hon. Carol Edmead, J.S.C.