SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

GEORGE SASSOWER,

Petitioner-Appellant,

-against-

JOHN P. FINNERTY, Sheriff of Suffolk County,

Respondent-Respondent.

PEOPLE OF THE STATE OF NEW YORK, ex rel.,
GEORGE SASSOWER,

Petitioner-Appellant,

-against-

SHERIFF OF SUFFOLK COUNTY,

Respondent-Respondent.

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTRTOIANNI,
VINCENT G. BERGER, JR., JOHN P. FINNERTY,
ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN,
HARRY E. SEIDEL, NEW YORK NEWS, INC., and
VIRGINIA MATHIAS,

Defendants-Respondent.

STATE OF NEW YORK)
CITY OF NEW YORK)ss.:
COUNTY OF KINGS)

GEORGE SASSOWER, first being duly sworn, deposes, and says.

I. This affidavit is in support of petitioner's/plaintiff's motion to renew (as of right), reargue (by leave) the determination of this Court (final and/or non-final) dated July 25, 1983 (Exhibits "A" and "B"); alternatively, for leave to appeal to the Court of Appeals (without prejudice to petitioner's/plaintiff's right to appeal, as of right), and/or on certified questions, or to proceed collaterally together with any other, further, and/or different relief as to this Court may seem just and proper in the premises.

II. Despite every effort of defendants and/or respondents (hereinafter defendants), to preserve their "Code of Silence", in order to prevent testimonial evidence from becoming available to plaintiff, the "iron curtain" has been partially breached.

To repeat, such examination before trial reveals, as hereinafter shown, that at a date and time when nothing was judicially taking place, Art Penny received four telephone calls -- some from persons well known to him (whose names he refused to disclose) -- to go to Surrogate's Court, wherein in a private interview with respondent (Signorelli), in his chambers and/or outer office, he was given by Signorelli a statement containing the defamatory information thereafter published in the News, in addition to other defamatory information which was not published.

Thus, sworn to by the reporter himself, is the "smoking gun", which meets the newly established, and legally unsupportable (infra), doctrine set by this Court, that it is necessary for plaintiff to plead affirmatively that the talemaker procured the republication by the talebearer.

Ignored by this Court was the fact that the private slanderous remarks by respondent (Signorelli) to the reporter, was an independent slander, which plaintiff pleaded, in addition to causing republication in the Daily News.

In defendants' efforts to effect such imposed silence, they have even deliberately and intentionally disobeyed various court orders, directing them to submit to examinations before trial, produce documents, and respond to related pre-trial procedures.

An examination before trial of Art Penny of the New York News has revealed that Penny was requested to come to Surrogate's Court for a "good story", which was given to him in the Chambers and/or outer office of Surrogate Signorelli, on a day when nothing judicial was taking place either in Supreme or Surrogate's Court involving plaintiff, nor was plaintiff present at this private news conference, and there given a story by Surrogate Signorelli and his appointed sychophants (all of whom Art Penny knew for many years), which has been established, was false and defamatory, and such stories were partially published in the Daily News a few days later (on the return date of plaintiff's Writ of Habeas Corpus in Supreme Court, Suffolk County).

In short, Surrogate Signorelli, clearly and affirmatively, published and caused the republication of his remarks in the Daily News (which is the basis of plaintiff's second cause of action).

Consequently, in order not to jeopardize the disclosures, yet to be obtained on future pre-trial proceedings, leave is requested, if necessary, to renew this application, on some of the other causes of action.

* * *

Double Jeopardy, Venue, and People v. Parker:

Double Jeopardy:

This Court remitted to Special Term, to hear and report, whether petitioner's:

> "failure to appear ... constituted a voluntary waiver" (Exhibit "B", pg. 2).

1. This Court was advised (App. Reply Brief, p. 11-12), and shown (Reply Appendix, A62-A63), that on the charge underlying this contempt proceeding (turning over papers), there was compliance before such proceedings were undertaken.

2. The Grievance Committee (an arm of this Court), itself, moved to confirm the Report of the Referee on such charge, settings forth the compelling and decisive reasons therefore.

The Appellate Division, First Department (to whom this Court referred the disciplinary proceeding), confirmed the dismissal of this and every other charge that was not withdrawn by the Grievance Committee.

3. Thus, petitioner respectfully contends, issue preclusion, legally included under the "double jeopardy" clauses of the federal and state constitutions (Menna v. State of New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195; Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469), prevents relitigation of this essential issue to a criminal or civil contempt conviction.

4. Since the Report of the Referee in the disciplinary proceeding had not been rendered when Appellant's Brief was filed, nor had it been confirmed by the Appellate Division when this matter was argued, on this issue, renewal is made as of right.

The disciplinary proceeding was not a cursory and summary undertaking by the Grievance Committee (cf. Gilberg v. Barbieri, 53 N.Y.2d 285, 441 N.Y.S.2d 49; Hunt v. OSR 85 A.D.2d 681, 682-683, 445 N.Y.S.2d 499, 501-502 [2d Dept.]).

The complaint was initially made by Vincent Berger, Jr., the campaign manager for Ernest L. Signorelli, and attorney for the Public Administrator, Anthony Mastroianni. The charges in this complaint were completely and satisfactorily answered by petitioner and were going nowhere -- except straight down. In fact, petitioner's answer to the Grievance Committee, placed a moral and legal obligation for reply by the Signorelli entourage, which they obviously could not do.

Then, retaliating to the edict of the federal court, Signorelli (over)published his infamous "diatribe" of February 24, 1978, and revivified his Grievance Committee complaint initiated by his lackey, Berger.

This "diatribe", sent, inter alia, to the Presiding Justice of this Court, who individually was without disciplinary jurisdiction, and clearly without jurisdiction to personally take "disciplinary action" against appellant and his wife. Therefore, Signorelli had no judicial absolute privilege (immunity), nor any other absolute privilege (Lincoln v. Daniels, 1 Q.B. 237, 3 All E.R. 740 [1961]).

As received by the Presiding Justice from Signorelli, the "diatribe" (with a letter of thanks) was forwarded to the Grievance Committee by Presiding Justice Milton Mollen, with His Honor's covering letter, and thus became, as received, a "burning bush", a mandate from the citadel to the Grievance Committee to prosecute and persecute. Understandably, receiving the imprimatur of the Presiding Justice, it was to be nothing less than a jihab for the Grievance Committee.

Thus, originated one of the most extensive, intensive, and expensive investigation and prosecution ever undertaken by the Grievance Committee for the Ninth Judicial District.

Nevertheless, despite its intensity, at the hearings, the Signorelli instigated charges and his published lies, went down like the Titanic. Even Signorelli's perjured testimony and his destruction and/or suppression of judicially filed exculpatory papers could not alter his inevitable disaster.

Signorelli's, Admiral Farragut style, demands to the Grievance Committee, "damn the torpedoes, full speed ahead", resulted in him and his spurious charges going, not "ahead", but "straight down".

5. The point is that it was the Signorelli and his entourage which attempted to, and did exert control, over the Grievance Committee so that there was an identity of persons, subject matter, and purpose (People v. Berkowitz, 50 N.Y.2d 333, 345, 428 N.Y.S.2d 927, 933; People ex rel Dowdy v. Smith, 48 N.Y.2d 477, 482, 423 N.Y.S.2d 862, 863-864).

Under these circumstances, the issues determined in this vigorously fought disciplinary proceeding are constitutionally binding in a criminal and/or civil contempt proceeding (Bernstein v. Birch, 71 A.D.2d 129, 132-135, 421 N.Y.S.2d 574, 575-578 [1st Dept.], aff'd 51 N.Y.2d 932, 434 N.Y.S.2d 994; cf. CPL § 40.20).

6. An, Alice in Wonderland, "upside down", situation exists at bar, which particularly mandates the invocation of collateral estoppel.

While the thoroughly discredited, and proven false, disciplinary complaint of Signorelli, may and is constantly and repeatedly republished, albeit prohibited by Judiciary Law §90[10], appellant is prohibited from publishing the vindicating material, even in a judicial forum (Exhibits "C", "D", and "E").

I repeat, what presently exists is the epitome of irrationality. The defendants and their attorneys, republish with impunity, Signorelli's disciplinary complaints, as contained in the "diatribe", while plaintiff is prohibited from publishing the vindicating material, if not the vindication itself.

Even the Chairman of the Grievance Committee acknowledged in writing (Exhibit "D") that he is "not unsympathetic to the predicament in which plaintiff find[s himself]" as a result of this "bizarre situation" (Exhibit "C"), on which the Counsel for the Grievance Committee has no solution (Exhibit "E").

Venue:

The venue issue, which transferred this matter from the constitutionally and otherwise legally infirm Suffolk County venue to New York County, was also determined while this matter was sub judice. Thus, this issue, has also become the subject of collateral estoppel (cf. Kossover v. Trattler, 82 A.D.2d 610, 442 N.Y.S.2d 554 [2d Dept.]).

Particularly when the claim is that petitioner cannot obtain a fair, or constitutional, trial or hearing in the removed county (Exhibit "F" - cf. Sassower v. Finnerty, 68 A.D.2d 587, 414 N.Y.S.2d 587 [2d Dept.]), the Order be obeyed.

This unappealed, manifestly correct, order, must be obeyed, even by this Court. The "law of the case" doctrine is not involved, since this Court has not been requested, nor did it have to review any issue on which such venue Order of nisi prius was involved.

People v. Parker:

1. On March 7, 1978 (the first time this contempt proceeding had been scheduled for a hearing), petitioner had intended to try Madison Heat v. Perez [Civil: Kings], which had been marked peremptorily against all sides. Thus, petitioner prepared an affidavit of actual engagement, which included various jurisdictional objections to the contempt proceedings, as well [RA150-RA152].

2. The previous day, March 6, 1978, petitioner was actually trying Green v. Green in Supreme Court, Bronx County, before Hon. Joseph A. DiFede. This case did not conclude on that day, as expected, and the Court held it over for the following day.

Consequently, petitioner merely endorsed his aforementioned pre-prepared affidavit to note at "4:30 p.m." petitioner's "Trial [in] Sup. Bx." on "3/6/78" was "continued" therein [RA152, foot].

Obviously, since petitioner was in Court at the time, he had neither time nor facilities to redraw said affidavit, and consequently the addendum was handwritten [RA152, foot].

3. These facts, petitioner's trial engagement, were never disputed by the defendants, their attorneys, the Grievance Committee, or their attorneys, at any time or any place.

Since this Court may and should take judicial notice of court records, a simple telephone call or letter to the Supreme Court, Bronx County (Fisch on Evidence [2d Ed.], §§ 1048, 1049, pp. 591-594; Richardson on Evidence [10th Ed.], §14, p. 9), would have confirmed what no one has ever disputed.

To prolong this judicial harassment -- now in its eighth year -- by still further hearings, to establish what is undisputed, is but another "tile in the mosaic" (Matter of Edge Ho Holding, 256 N.Y. 374, 381) of judicial harassment, self- evident even to those who still believe in the "tooth fairy".

4. Petitioner does not concede, particularly since the circumstantial evidence is to the contrary, that such affidavit was received on March 8, 1978, as recited by this Court (Exhibit "B", p. 2), rather than March 7, 1978.

5. Nevertheless, assuming, arguendo, the aforementioned was not the situation, petitioner respectfully submits that People v. Parker (57 N.Y.2d 136, 454 N.Y.S.2d 967) mandates the granting of his Writ of Habeas Corpus, as a matter of law.

Petitioner was not constitutionally advised, nor could he reasonably anticipate, that his non-appearance would result in a trial, verdict, and sentence in absentia, particularly when such "star chamber" proceeding shortly followed the decision of Mr. Justice McInerney, which had been reluctantly rendered after a "gun-to-the-head" edict by a federal judge, of which the Acting Surrogate had, then and there, actual notice.

6. Whether of constitutional dimension was the failure of Acting Surrogate to consider alternatives, resulting from petitioner's non-appearance (People v. Parker, supra, at 142, 970), or he was required to sua sponte revoke the Contempt Order and Warrant of Commitment, when he definitely learned of petitioner's actual engagement in another (and higher) court, rather than causing the Sheriff to make numerous harassing and embarrassing forays into Manhattan and Westchester, over a period of three and one-half months, I reserve more complete discussion for another day, but do not now waive.

7. Neither do I now waive the constitutional infirmity of the moving application, labeled "criminal contempt", but having all the characteristics of "civil contempt", particularly since there was prior compliance - the death-knell to civil, if not criminal, contempt.

The protean nature of contempt may not evade the constitutional mandate that one facing incarceration be given clear and specific notice of the charge involved, particularly when the law and consequences are disparate (Vail v. Quinlan, 406 F. Supp. 951, reversed on other grounds, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376).

8. This Court's remand to determine "voluntary waiver" is enigmatical, since "waiver", by legal definition includes only voluntary action (Glenesk v. Guidance, 36 A.D.2d 852, 853, 321 N.Y.S.2d 685, 687 [2d Dept.]; 21 NY Jur, Estoppel and Waiver, §§95, 96, pp. 133-136). Respectfully, the question is not whether petitioner, in the literal sense "voluntarily waived" his right to be present, but rather whether circumstances beyond his control compelled a choice, which albeit voluntary, was rational. As stated in petitioner's brief to this Court:

> "Was appellant supposed to risk contempt in Supreme Court, Bronx County by abandoning a pending trial in its midst and prejudice his client's cause in order to appear in Surrogate's Court?" (App. Br. p. 1)

Conclusion:

Irrespective of any outcome of the hearing directed by this Court, petitioner's Writ of Habeas Corpus, for the above constitutional (federal and state) reasons, must be granted. Consequently, the hearing directed by this Court is an exercise in futility and a continued harassment [one of the societal values sought to be prevented by the prohibition of "double jeopardy"].

In short, more than seven (7) years of this judicial charade, is constitutionally too long (cf. People v. Colombo, 31 N.Y.2d 947, 341 N.Y.S.2d 97)!

* * *

CPLR 3211(a) - Omnibus and Unconverted:

1. On Signorelli's omnibus and unconverted CPLR 3211(a) motion, this Court, sub silentio, recognized it was all or nothing -- (Advance Music v. American Tobacco Co., 296 N.Y. 79, 84; McInerney v. Village, 87 A.D.2d 861, 862, 449 N.Y.S.2d 299, 300 [2d Dept.]).

Appellant's Publication and Affirmative Acts in Republication:

1. While this appeal was sub judice, and on April 8, 1983, Art Penny, the reporter (stringer) for the Daily News testified at a Court ordered examination before trial (on notice to all attorneys), that:

" '[He presently] is Assistant to the District Attorney, Suffolk County' (SM7), '[and starting] in 1971 ... wrote all sorts of stories, criminal stories, court stories, investigative stories, indictments, convictions, homicides, plus [did] some investigative work' (SM10).

'[S]ome of [the] people who gave me this education on libel [were] judges ... they gave me some advice .. be careful, be accurate. That was basically it' (SM-21), 'be accurate ... be accurate' (SM22). '[I knew] all the judges in Riverhead on a pretty personal basis. Four or five were very close friends, golfing, husbands and wives dating, going out together, boating ... Appellate Division Justice Lawrence Bracken, Appellate Division Justice Leon Lazer ... I can go on and on' (SM101). '[I] strived for accuracy .. [to be] very careful ... strive for honesty' (SM48), '[in libel law] the best defense [is] being accurate' (SM120), 'I would say fair and accurate reporting were the best defenses' (SM124).

' [I know Judge Signorelli] eighteen, twenty years' (SM46), 'I knew him [Signorelli] as Assistant District Attorney' (SM47), 'I knew him [Signorelli] when he was a County Judge. I watched him in court, I covered his court' (SM48). 'I know Vincent G. Berger, Esq. [Signorelli's campaign manager and attorney for Public Administrator Mastroianni, a Signorelli appointee] for fifteen years ... [we are] on friendly terms' (SM95). [I know] Anthony Mastroianni ... [for] ten, twelve, fifteen years' (SM100], '[on a] first name basis' (SM101). '[I was] certainly on on a friendly basis [with Mervin Woodward, Chief Clerk of Surrogate's Court] ... we were good friends for many years' (SM106).

'[My] office [is] in the Court Building ... Suffolk County paid for the phones. It was a courtesy ... the phone bill used to be picked up by the County [of

Suffolk]' (SM17-18), '[I got the story] from somebody [I] knew ... I had three or four calls on this story, I think some of the people had given me leads before ... [the telephone calls were] made to my office ... [to] the press room in the Criminal Courts Building ... my best estimate is I got the calls the Friday [June 24], probably in the morning' (SM37-SM38], 'I believe several of the calls came from friends that I had dealt with before. I think one of the calls came from a complete stranger who I never met before' (SM39), '[the messages were] get over here to the Surrogate's Court, we have a great story for you (SM40), 'they said we got a good one [story] for you ... we have got a good story for you" (SM50) 'I undoubtedly [went to Surrogate's Court], very obvious [I] spoke to certain people' (SM41), 'I remember two of [the people who I got calls from (but the witness invoked the shield law, which is now subject to judicial review)]' (SM42), 'I believe I met ... the people that made the calls to [me] at Surrogate's Court' (SM42), 'I don't think I was in the courtroom at all ... I might have been in chambers ... or outer office' (SM43), 'I don't remember ... who was present when Judge Signorelli gave that explanation ['The Judge explained that he allowed Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate'] ... I think it was an indication that $90,000 was never accounted for' (SM51), 'it should have been he would allow or is allowing Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate' (SM54), [my understanding was plaintiff] was held in contempt of court because [he] failed to give a complete accounting as directed by [Signorelli]' (SM57), 'I don't believe ... [I got] any photostatic copies of any of the documents from Surrogate's Court or any other court before [I] wrote the story' (SM31).

'I was the author of that story [Exhibit "1" to the complaint]' (SM13), 'I doubt very much that it [the published story] was changed' (SM-15), 'I may have called them [the News] on a Friday [June 25, 1977]'.

'In my own mind I am sure I did [speak to Judge Signorelli about this case after June 25, 1977]' (SM104), 'during the following two months after publication ... no one ... advise[d] [me] that there were errors in [the] published article' "(SM27).

Thus, even under this Court's totally unsupportable higher criteria for the talemaker's (Signorelli's) liability for the talebearer's (News') republication, Penny's presently uncontradicted testimony establishes Signorelli's liability for the News' republication, as a matter of law.

Such republication liability by appellant is in addition to his liability for the initial slander that he published to the reporter.

Liability for Republication:

a. Plaintiff's complaint alleged (1) a defamation by Signorelli to the New York News (Penny), and (2) Signorelli's liability for the republication of part by the News (A28, ¶24).

b. Insofar as Signorelli's out-of-court remarks to Penny of the News, (1) part was published, and (2) part was unpublished (A28, ¶24).

c. The statements, published and unpublished, were (1) defamatory, and (2) intended and did deprive plaintiff of a "fair and constitutional trial" (A28, ¶25).

d. Consequently, Signorelli (1) not only defamed plaintiff, but (2) intended to and did violate plaintiff's federal and state constitutional right to a fair trial before his judicial colleagues.

Nisi Prius:

1a. Nisi prius apparently only considered the alleged slander of Signorelli to the Daily News (Penny). Expressly and impliedly, Special Term held that plaintiff had to set forth "the actual words" of Signorelli to Penny and that Signorelli's words as published by the News was insufficient (App. Appendix, A47).

Thus, Special Term did not reach the question regarding Signorelli's "spoken [out of] office" remarks to Penny (Andrews v. Gardiner, 224 N.Y. 440, 446).

Uniformly, related situations do not support absolute privilege in such a situation (Petrus v. Smith, 91 A.D.2d 1190, 459 N.Y.S.2d 173 [4th Dept.]; Uni-Service v. NYS Assn., 62 A.D.2d 1093, 403 N.Y.S.2d 592 [3rd Dept.]).

b. Hon. John C. Marbach, in Park Knoll v. Schmidt (89 A.D.2d 164, 454 N.Y.S.2d 901 [2d Dept.], reversed on other grounds 59 N.Y.2d 205, N.Y.S.2d), followed the same approach [Rec. on Appeal, p. 71 - Exhibit "G"), and His Honor, in this respect, was unquestionably correct.

Mr. Justice Marbach, in Park Knoll (supra), correctly considered the republication as a separate defamation, subject to its own distinct claims of privilege.

c. Technically, a claim against the talemaker for the republication by the talebearer, should be set forth as two distinct causes of action (Union Associated Press v. Heath, 49 App. Div. 247, 249, 63 N.Y. Supp. 96, 97 [1st Dept.]; Spriggs v. Associated Press, 55 F. Supp. 385, 386 [Wyo]), although where there is no statute of limitation problem, it is almost invariably set forth as a single cause of action (Billingsley v. Triangle, 194 F. Supp. 330 [SDNY]).

d. At bar, Special Term erred by not considering the republication by the News as imposing any further or additional liability upon Signorelli, although the complaint clearly sets forth such claim of liability for republication.

e. Thus, at the examination before trial of Art Penny, plaintiff made certain that Penny confirmed Signorelli's statement to him was as he reported same in his defamatory article published in the News, and further that Signorelli never objected to such quote as was attributed to him after republication by the News.

The Appellate Division:

A1. This Court, on the other hand, ignored the alleged slander by Signorelli to Penny (News), contrary to that portion of the complaint which reads as follows (A28, ¶24):

> "24. That such false and misleading statements and material were given out-of-court ... to the New York News, Inc. ...".

2. This Court, likewise, ignored the initial defamation by Schmidt in Park Knoll (supra), as did the Court of Appeals, although in the Court of Appeals, the distinction properly recognized by Mr. Justice Marbach was not decisive in view of their holding in the case.

Thus, presently extant in Park Knoll, are the defamations of Schmidt to each of the tenants and the republication of such defamation in the filed papers, as one cause of action for each tenant, precisely as pleaded by plaintiff in the present action.

3. It is painfully clear that this Court, as well as nisi prius completely ignored, (1) the explicit words in plaintiff's complaint herein; (2) the liberal construction of the complaint mandated in a CPLR 3211(a) motion; and (3) CPLR §3026 itself, which states:

> "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

4. Plaintiff is unaware of any decision which holds, that under the aforementioned circumstances, Signorelli would not be liable for the damage done by the republication in the Daily News, on June 27, 1977, in addition to the the slanderous remarks he made to Art Penny on June 24, 1977, and so plaintiff complaint alleges.

On the contrary, all decisions and authorities would deny any motion for summary relief based on the aforementioned pleaded causes of action. Furthermore, if the testimony of Penny (the friend of the Suffolk County judiciary) is not impeached or contradicted, under the circumstances at bar, Signorelli's liability seems assured, as a matter of law for the republication in the News.

B. This Court in dismissing plaintiff's second (defamation) cause of action held:

> "absent an allegation that Surrogate SIGNORELLI procured the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against him." (emphasis supplied)

1. SIGNORELLI clearly has the burden of pleading and showing "his entitlement" to absolute privilege. The complaint need not negate immunity. It is for the defendant to plead his entitlement to either the immunity or privilege, absolute or qualified, and failure to allege or assert same in his answer or on motion constitutes a waiver thereof. Memory Gardens v. D'Amico (91 A.D.2d 1160, 1160-1161, 458 N.Y.S.2d 958, 960 [3d Dept.]; Boyd v. Carroll, 624 F.2d 730, 732-733 [5th Cir.]) are directly in point.

Numerous cases, with only one unsupportable exception, are in accord (Harlow v. Fitzgerald, 457 U.S. , , 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 408; Gomez v. Toledo, 446 U.S.635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578; Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 183, 190; Dellums v. Powell, 660 F.2d 802, 807 [D.C. Cir]; LaBelle v. County, 85 A.D.2d 759, 761, 445 N.Y.S.2d 275, 278 [3d Dept.]; Pitt v City, 111 Misc.2d 569, 571, 444 N.Y.S.2d 522, 524 [Sup. N.Y.]).

In the Boyd case (supra), the complaint was against one Judge Ross Carlton, but the answer did not plead judicial immunity. A jury verdict was rendered against the defendant-judge, but the Trial Court set this aside and entered judgment in his favor. The Circuit Court of Appeals, in reversing, stated:

> "The failure to plead judicial immunity waived the affirmative defense. This waiver renders irrelevant (Judge) Carlton's contentions that (plaintiff) Boyd is estopped by her pleadings to assert that he was not acting as a judge." (732-733)

Plaintiffs, in order to vindicate their federal rights, need only plead that they have been denied their federal rights "under color of state law" (Gomez v. Toledo, supra).

Under state law, the unquestionable obligation to plead or move under a claim of immunity is also upon the party claiming its benefit (Valesh v. Prince, 224 N.Y. 613, 614; Magnus v. New, 212 App. Div. 123, 208 N.Y. Supp. 207, 208 [2d Dept.]; Chapman v. Dick, 197 App. Div. 551, 554, 188 N.Y. Supp. 861, 862-863 [2d Dept.]; Corwin v. Berkowitz, 190 App. Div. 952, 179 N.Y. Supp. 915 [2d Dept.]; Tierney v. Ruppert 150 App. Div. 863, 866-867, 135 N.Y. Supp. 365, 368-369 [2d Dept.]; Salomon v. Mahoney, 271 App. Div. 478, 479, 481, 66 N.Y.S.2d 598, 598-599, 601 [1st Dept.]; Cassidy v. Gannett, 173 Misc. Rep. 634, 639, 18 N.Y.S.2d 729, 734 [Sup. Monroe, per Van Voorhies, J.]; Douglas v. Collins, 152 Misc. Rep. 839, 842, 273 N.Y. Supp. 663, 667 [Sup. Kings], reversed on other grounds, 243 App. Div. 546, 276 N.Y. Supp. 87 [2d Dept.], aff'd 267 N.Y. 557; Toper v. Rotach, 62 Misc.2d 290, 290-291, 307 N.Y.S.2d 805, 807 [Sup. Oneida, per Simons, J.]; 61A Am Jur2d, Pleading, §78, p. 86; 71 CJS, Pleading, §84, p. 198-201; 2 Carmody-Wait 2d, §13:20, p. 332; 8 Bender's Forms of Pleading, p. 383-3/4, Dec. 82 Supp. Form No. 383.44 -45, p. 26-28).

This is particularly true where knowledge of the facts are within knowledge of the adverse party (61A Am Jur. 2d, supra, §80, p. 87; 71 CJS, supra, §85, p. 201).

An apparent, but not real, exception exists when it is the complaint which sets for the material or allegations which reveals the unquestionable existence of an absolute privilege.

This is true in all cases, not only where absolute privilege is involved (805 Third Avenue v. M.W. Realty, 58 N.Y.2d 447, 451, 461 N.Y.S.2d 778, 780; 22 NY Jur 2d, Contracts, §385, p. 291), under federal, as well as state, law (Federal Rules of Civil Procedure, 10[c]; CPLR 3014).

Some erroneous and unfortunate dicta by this Court in Park Knoll v. Schmidt (supra, at 168-169, 904), gave respectability to to an unsupportable, incomplete, and erroneous statement in 5 Carmody-Wait 2d, §30.67, p. 667.

The statement in Carmody-Wait 2d which this Court adopted in Park Knoll (168-169, 904) is:

> "where the statements are absolutely privileged, the defense of privilege need not be alleged."

Carmody-Wait supports such incomplete and misleading proposition by Salomon v. Mahoney (271 App. Div. 478, 479, 481, 66 N.Y.S.2d 598, 598-599, 601 [1st Dept.], aff'd 297 N.Y. 643); Cassidy v. Gannett (173 Misc. Rep. 634, 639, 18 N.Y.S.2d 729, 734 [Sup. Monroe, per Van Voorhies, J.]); Brown v. Mack (185 Misc. Rep. 386, 56 N.Y.S.2d 910 [Sup: Kings]), and Wallach v. Schmer, 82 N.Y.S.2d 202 [Sup. Kings].

None of the aforementioned cases support the Carmody-Wait statement, instead all are cases, like Park Knoll, where the claimed absolute privileged material appears on the face of the complaint, and thus may be employed in defendant's dismissal motion.

2. Procedurally, Park Knoll, as treated by this Court and the Court of Appeals, is unfortunate, serving only to confuse and serves those interested in dilatory tactics, by permitting absolute privilege to be treated under CPLR 3211(a)[7], instead of where it properly belongs, under CPLR 3211(a)[5].

The confusion arose during the Code of Civil Procedure era, where even failure to separately state causes of action were "demurrable" (e.g. Green v. Davis, 182 N.Y. 499). Similarly, where the needlessly pleaded material in the complaint revealed the existence of absolute privilege the motion was unfortunately called a "demurrer", (Corwin v. Berkowitz [supra]; Chapman v. Dick [supra]).

The statement that absolute privilege need not be pleaded is inconsistent with the recent holding by the Third Department in Memory Gardens v. D'Amico (supra, at 1160-1161, 960), and other cases wherein it has been held that the failure to plead or move constitutes a waiver thereof and the many cases which hold that defendant must show "entitlement".

This Court should make it crystal clear that privilege must be affirmatively raised by defendant, unless it appears on the face of the complaint, in which case a motion may be made under CPLR 3211(a)[5], not [7], in order to (1) conform to federal decisions on the subject (e.g. Gomez v. Toledo, supra); (2) conform practice to substantive rights which hold that even an

absolute privilege is waivable (Memory Gardens v. D'Amico [supra]; Boyd v. Carroll [supra]); (3) conform pleadings in judicial absolute privilege cases to cases where similar absolute privileges exist, wherein the plea of privilege must be interposed; and (4) prevent confusion when the pleader is in doubt as to whether an absolute or qualified privilege exists, since this Court in Park Knoll stated that "absolute privilege ... need not be interposed" [68-69, 904], while the Court of Appeals stated Schmidt, "may [if she desires] plead the [qualified] privilege" (at 210,).

Furthermore, recognition of absolute privilege as a CPLR 3211(a)[5] plea, prevents the dilatory and illogic of a CPLR 3211(a)[7] motion, with its automatic stay under CPLR 3214(b), after a CPLR 3212 motion, which seems to have the strategm and purpose in Park Knoll (67, 904), while if treated under CPLR 3211(a)[5], the motion must be made before the responsive pleading (CPLR 3211[e]).

Thus, it is respectfully submitted that this Court was in error when, in the case at bar, it treated the case entirely under CPLR 3211(a)[7], when, insofar as judicial absolute privilege was concerned, it could only be treated under subdivision 5, if the absolute privilege appeared on its face, which it did not.

In any event, appellant's motion herein under CPLR 3211(a)[5] or [7] must be denied since the absolute judicial immunity does not appear on the face of the complaint. On the contrary, the complaint specifically negates any such claim.

3. Every reported case in New York, and as far as could be ascertained, elsewhere, wherein the talemaker spoke to a reporter privately and his tale is published shortly thereafter, the courts have uniformly held, expressly or sub silentio, that the talemaker was liable for the published defamation (Cheatum v. Wehle, 5 N.Y.2d 585, 186 N.Y.S.2d 606; Goodyear v. State, 12 A.D.2d 692, 693, 207 N.Y.S.2d 904, 905-906 [3d Dept.]; Thomas v. Smith, 75 Hun 573, 575, 27 Misc. Rep. 589, 590-591 [2d Dept.]; Rand v. New York Times, 75 A.D.2d 417, 430 N.Y.S.2d 271 [1st Dept.]; Mason v. Sullivan, 26 A.D.2d

115, 116, 271 N.Y.S.2d 314, 315 [1st Dept.]; Campo v. Parr, 18 A.D.2d 364, 239 N.Y.S.2d 494 [1st Dept.]; Valentine v. Gomez, 190 App. Div. 490, 179 N.Y. Supp. 711 [1st Dept.]; Kraft v. Araujo, 238 App. Div. 324, 264 N.Y. Supp. 271, 272 [1st Dept.]; Robinson v. Battle, 148 App. Div. 230, 133 N.Y. Supp. 58 [1st Dept.]; Slayton v. Hemken, 91 Hun 582, 586, 36 N.Y. Supp. 249, 250 [1st Dept.]; Weston v. Weston, 83 App. Div. 520, 82 N.Y. Supp. 351 [4th Dept.]; Roberts v. Breckon, 31 App. Div. 431, 433, 52 N.Y. Supp. 639-640 [4th Dept.]; Assn. For the Preservation etc. v. State, 30 Misc.2d 808, 810, 222 N.Y.S.2d 189, 191-192 [Ct. Claims]; Goodyear v. State, 21 Misc. Rep. 725, 728-729, 203 N.Y.S.2d 256, 259-260 [Ct. Claims]; Brown v. Mack, 185 Misc. Rep. 368, 373, 56 N.Y.S.2d 910, 916 [Sup. Kings]; Aronivici v. Salant, 83 Misc. Rep. 621, 622, 146 N.Y. Supp. 527, 528 [Sup. N.Y.]).

4. There are no cases in New York, that deponent can find, wherein the talemaker spoke to a reporter and his tale published shortly thereafter wherein the talemaker was not also held liable for the published story on that basis.

5. New York Pattern Jury Instructions, Text (§3:26, p. 716-717; §3:36, p. 760) and Sept. 1982 Supplement -- Hon. LEON D. LAZER, Chairman and Hon. LAWRENCE J. BRACKEN, member -- (pp. 40, 100) does not support this Court's rule in this regard.

6. New York Jurisprudence (35 NY Jur, Libel and Slander, §158, p. 67-68), American Jurisprudence 2d (50 Am Jur 2d, Libel and Slander, §171, 674, 675-676), and Corpus Juris Secundum (53 CJS, Libel and Slander, §85, p. 137) do not support this Court's rule of law in this regard.

7. Prosser (on Torts, 4th Ed. §112, p. 762), Gatley (Libel and Slander [6th Ed.], ¶266, p. 132; Form 34, p. 682), Seelman (The Law of Libel and Slander in New York, ¶147, p. 130), and Sack (Libel, Slander, and Related Problems, II.6.5, p. 92-93), do not support this Court's rule of law in this matter.

8. 3 Restatement (Torts, Second §576, p. 200 [cited by PJI]), does not support this Court's rule of law in this regard.

9. American Law Reports does not support this Court's rule of law in this matter (50 ALR3d 1311, 1354; 96 ALR2d 373).

B1. Additionally, to the extent that plaintiff's right to a fair trial trial was prejudiced by a publication in the media by those acting "under color of law", a federal and state claim for damages arose Taylor v. Kavanagh, 640 F.2d 450, 453 [2d Cir.]; Martin v. Merola, 532 F.2d 191, 195-198 [2d Cir.]; Helstoski v. Goldstein, 552 F.2d 564 [3rd Cir.]; People v. Marino, 87 Misc.2d 427, 435, 383 N.Y.S.2d 147, 153 [Sup. Monroe]; Canons of Judicial Ethics §3[6]..

2. Transactions in a criminal courtroom may be public property (Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546, 1551), but plaintiff was entitled to a trial [before a judge], based upon evidence and argument in open court (Patterson v. Colorado, 205 U.S. 454, 462-463, 27 S.Ct. 556, 558, 51 L.Ed. 879, 881, per Holmes, J.), uninfluenced by inflammatory statements made by the trial judges colleague (Signorelli) and his sychophants in the public press.

3. Bradford v. Pette (204 Misc. Rep. 308 [Sup. Queens], app. dism. 285 App. Div. 960); Schoepflin v. Coffey, (162 N.Y. 12); and Lewis v. Chemical Foundation, 233 App. Div. 287, 251 N.Y. Supp. 296 [4th Dept.]), patently and clearly do not support this Court's position in this action.

Initially noted is that none of the cases or authorities citing these cases, cite them for the proposition set forth by this Court. Secondly, a full reading of such cases reveal them to be inappropriate.

This Court did nothing less than castrate a portion of the opinion in Bradford to support its position.

Clearly, Bradford was (1) a situation after an evidentiary summary judgement; (2) factually inapposite; (3) the "affirmative acts" mentioned by nisi prius is generally descriptive of the words [which this Court omitted] "procured, commanded, instigated or requested" [1 McKinney's Statutes, §§97, 98].

A Needless Procedural Dance:

Nisi prius, spent more than one year trying to eliminate plaintiff and his second cause of action.

This court spent another year to the same purpose.

Now, two years later, plaintiff is in other departments and merely has to seek CPLR 3025(b) relief (McCaskey v. N.Y.C. Health & Hosp. Corp. [59 N.Y.2d 755]), since this Court's pleading disposition determines nothing (175 East v. Hartford, 51 N.Y.2d 585, 590 n.1, 435 N.Y.S.2d 584, 586; DeRonda v. Greater Amsterdam, 91 A.D.2d 1088, 1089, 458 N.Y.S.2d 310, 311 [3d Dept.]).

Nothing has been substantively accomplished except embroiled this litigation into a "procedural dance".

"DLS" et ano. v Signorelli:

Incorporated by reference into this motion, is respondents' brief in the appeal by Signorelli, noticed for the September 1983 Term of this Court.

Thus review by the Court of Appeals of many of the issues determined herein seems assured.

Nevertheless, despite the fact that many of the arguments applicable herein are contained in respondent's brief in Doris L. Sassower v. Signorelli, several observations and comments should be specifically set forth herein:

Alice in Wonderland:

1. The bottom line of this Court's decision is that Signorelli's contrived disciplinary complaints may be publicized while the vindication is to be kept secret and confidential. Only in the "upside down" world of Alice in Wonderland could such result be reached -- or so deponent thought.

2. This Court gave no effect to the words of the statute itself (Judiciary Law §90[10]), which states "[a]ny statute or rule to the contrary notwithstanding...", and held it eliminated by a statute simultaneously enacted (Judiciary Law §91).

3. Any and all rules regarding overpublication were ignored by this Court.

Signorelli's Evasion:

1. Attempts to secure the protection of judicial absolute privilege, for personal purposes have been rejected. Thus, under the "guise" of rendering a judicial opinion, the judicial spleen may not be vented (Matter of Haas, 33 A.D.2d 1, 304 N.Y.S.2d 930 [4th Dept.], app. dis. 26 N.Y.2d 646, 307 N.Y.S.2d 671); lawsuits may not be commenced so that the allegations

may be publicized with impunity (Williams v. Williams, 23 N.Y.2d 592, 298 N.Y.S.2d 473); posthumous defamation, with judicial immunity, will not be sanctioned (Brown v. Mack, supra); and any similar subterfuge will not be permitted (Lewis v. Chemical, 262 N.Y. 489).

Signorelli's tactics, continued even after recusal, enjoying the absolute privilege and immunity of this Court, is revealing will not be permitted.

There is a point of beginning to judicial absolute privilege (Rosen v. Brandes, 105 Misc.2d 506, 432 N.Y.S.2d 597 [Sup. Nassau]), and after recusal it is at an end (Spires v. Bottorff, 317 F.2d 273, 274 [7th Cir.], after remand at 332 F.2d 179 [7th Cir.], cert den 379 U.S. 938, 85 S.Ct. 343, 13 L.Ed.2d 349).

2. The result reached by this Court was obtained by eviscerating the plain allegations of the complaint on Signorelli's CPLR 3211 motion.

Lack of Jurisdiction:

1. The issue is no longer whether this Court properly disposed of its discretionary authority to recuse itself, but whether under the circumstances this Court had any discretion to exercise in the matter (In re International Business Machines, 618 F.2d 923, 926 [2d Cir.]).

2. It would serve no purpose at this juncture to again recite the history of this litigation and the involvement of this Court in same. It will be set forth in plaintiff's proposed motion for leave to amend his complaint, and for other relief, intended for Supreme Court, New York County, a copy of which will be filed with this Court by the return date of this motion. The short lived judicial philosophy set forth in Pierce v. Delamater (1 N.Y. 17) properly exists no longer (U.S. v. United Mine Workers, 330 U.S. 258, 308-309, 67 S.Ct. 677, 703, 91 L.Ed. 884, 921 [per Frankfurter, J.]; Oakley v. Aspinwall (3 N.Y. 547).

3. Plaintiff contends that under the circumstances, this Court had no subject matter jurisdiction (U.S. v. American - Foreign, 363 U.S. 685, 691, 80 S.Ct. 1336, 1340,, 4 L.Ed.2d 1491, 1496; Wilcox v. Supreme, 210 N.Y. 370, 377-380; Casterella v. Casterella, 65 A.D.2d 614, 409 N.Y.S.2d 548 [2d Dept.]; cf.Ellentuck v. Klein, 570 F.2d 414, 424 [2nd Cir.]).

4. Plaintiff recognizes, as Mr. Justice Cardozo noted in Berizzi v. Krause, 239 N.Y. 315, 318) that:

> "Misbehavior though without taint of corruption or fraud may be born of indiscretion."

5. Nevertheless, as matters progressed, including the decision of this Court it appeared that the judicial process became more of a game of chess where rank and position were the determinative factors. The entire opinion of nisi prius and this Court was of Signorelli's title, not function (Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641).

6. The fundamental deficiency of due process, existed not only at nisi prius (Ward v. Monroeville, 409 U.S. 57, 62, 93 S.Ct. 80, 84, 34 L.Ed.2d 267, 272).

7. This entire application is made without prejudice, and subject to such contention.

WHEREFORE, it is respectfully prayed that plaintiff's motion be granted in all respects.

GEORGE SASSOWER

Sworn to before me this
24th day of August, 1983

Barbara Tatesure

BARBARA TATESURE
Notary Public State of New York
No. 24-4760746
Qualified in Kings County
Commission Expires March 30, 19 84

At a Term of the Appellate [illegible]
of the State of New York, Second Judicial Department,
held in Kings County on July 25, 1983

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. MOSES M. WEINSTEIN,
HON. ISAAC RUBIN,
HON. SEYMOUR BOYERS. } *Associate Justices*

George Sassower,

Petitioner,

v.

John P. Finnerty, Sheriff of Suffolk County,

Respondent.

(Action No. 1)

Order

People of the State of New York ex rel. George Sassower,

Appellant,

v.

Sheriff of Suffolk County,

Respondent.

(Action No. 2)

George Sassower,

Appellant,

v.

Ernest L. Signorelli et al.,

Respondents,

et al.,

Defendants.

(Action No. 3)

In the above entitled actions, the above named George Sassower, petitioner in Action No. 2 and plaintiff in Action No. 3, having appealed to this court from stated portions of a judgment and order (one paper) of the Supreme Court, Suffolk County, dated February 10, 1981, which (1) in Action No. 2, inter alia, denied his motion for summary judgment and thereupon dismissed a writ of habeas corpus and (2) in Action No. 3 granted the motion of the respondents Signorelli and Seidell pursuant to CPLR 3211 (subd [a],par 7) to dismiss appellant's amended complsint in said action as against them; and the said appeal having been argued by George Sassower, Esq., appellant pro se, argued by Erick F. Larsen, Esq., of counsel for respondent in Action No. 2 and submitted by Robert S. Hammer, Esq., of counsel for respondents in Action No. 3, due deliberation having

Exhibit "A"

been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment and order appealed from is hereby unanimously affirmed insofar as it granted the motion of the respondents in Action N. 1 to dismiss appellant's amended complaint in said action as against them, without costs or disbursements, and the appeal held in abeyance insofar as it pertains to Action No. 2 and the matter is hereby remitted to Supreme Court, Suffolk County, for further proceedings in accordance with the said opinion and decision slip of the court herein dated July 25, 1983.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

P/bh

VINCENT D. DAMIANI, J.P.
MOSES M. WEINSTEIN
ISAAC RUBIN
SEYMOUR BOYERS, JJ.

A - June 24, 1982

____ AD2d ____

945 E

George Sassower, petitioner,
v John P. Finnerty, Sheriff
of Suffolk County, respondent.
(Action No. 1)

People of the State of New York,
ex rel. George Sassower, appellant,
v Sheriff of Suffolk County,
respondent.
(Action No. 2)

George Sassower, appellant,
v Ernest L. Signorelli et al.,
respondents, et al., defendants.
(Action No. 3)

George Sassower, White Plains, N.Y., appellant
pro se.

David J. Gilmartin, County Attorney, Hauppauge, N.Y.
(Erick F. Larsen of counsel), for respondent in Action No. 2.

Robert Abrams, Attorney-General, New York, N.Y.
(George D. Zuckerman and Robert S. Hammer of counsel),
for respondents in Action No. 3.

Appeal, as limited by the appellant's notice of appeal and brief, from stated portions of a judgment and order (one paper) of the Supreme Court, Suffolk County (GOWAN, J.), dated February 10, 1981, which (1) in Action No. 2, inter alia, denied his motion for summary judgment and thereupon dismissed a writ of habeas corpus and (2) in Action No. 3 granted the motion of the respondents Signorelli and Seidell pursuant to CPLR 3211 (subd [a], par 7) to dismiss appellant's amended complaint in said action as against them.

Judgment and order affirmed insofar as it grants the motion of the respondents in Action No. 3 to dismiss appellant's amended complaint in said action as against them, without costs or disbursements, and appeal held in abeyance insofar as it pertains to Action No. 2 and matter remitted to the Supreme Court, Suffolk County, for further proceedings in accordance herewith.

Appellant had served as executor of the estate of Eugene Paul Kelly pursuant to the terms of the decedent's will. In the probate proceeding, by order dated April 28, 1977, appellant was directed to turn over his records pertaining to the estate in order that an accounting could be conducted. Thereafter, appellant was given until June 22, 1977, to comply. On said date, appellant failed to appear in court as he had been directed. The Surrogate adjudged appellant in contempt of court for failure to comply with the turnover order and sentenced him to 30 days in the County Jail. On the following day, appellant was apprehended. He obtained a writ of habeas corpus and was released on bail pending the hearing. After a hearing on the writ in Supreme Court, Suffolk County, Special Term found that appellant

cont.

Exhibit "B"

was not present in court before the Surrogate when he was adjudged in contempt, and annulled the adjudication of contempt without prejudice to a renewal of the contempt proceeding. This court affirmed a resettled judgment of the Supreme Court, Suffolk County, entered upon that decision of Special Term, noting that a summary adjudication of contempt is only permitted if the contemnor is within the court's presence (Sassower v Signorelli, 65 AD2d 756).

By order to show cause served personally upon appellant, further criminal contempt proceedings were commenced on behalf of the Public Administrator of Suffolk County, defendant in Action No. 3 Anthony Mastroianni, based upon appellant's alleged continued failure to comply with the April 28, 1977, turnover order. The matter was set down for a hearing on March 7, 1978 and appellant was notified of the charges and hearing date. Although appellant failed to appear, a hearing was held on that date in his absence and appellant was again held in criminal contempt. By order dated March 8, 1978, respondent Acting Surrogate SEIDELL determined that appellant was guilty of criminal contempt of court for failure to comply with the turnover order and that appellant was to be punished by 30 days imprisonment in the County Jail. On the same day, Acting Surrogate SEIDELL also issued a warrant of commitment directed to the Sheriff of the County of Suffolk, respondent John P. Finnerty, commanding him to take appellant into custody and "detain him until the judgment and sentence of the [Surrogate's Court] is satisfied unless sooner released by further order of [the Surrogate's Court]".

By affidavit dated March 6, 1978, and received by the Surrogate's Court on March 8, 1978, appellant had informed that court that on March 7, 1978, the date for the hearing, he would be actually engaged in another court in Brooklyn and therefore requested an adjournment.

Appellant was taken into custody on June 19, 1978. He then commenced a habeas corpus proceeding (Action No. 2) and moved for "summary judgment" sustaining the writ. Appellant also commenced a separate action (Action No. 3) against a number of individuals including Surrogate SIGNORELLI, Acting Surrogate SEIDELL, Sheriff Finnerty, Public Administrator Mastroianni and the New York News. The complaint in Action No. 3 asserts nine causes of action based on alleged tortious conduct. The respondents in Action No. 3 moved pursuant to CPLR 3211 (subd [a], par 7), to, inter alia, dismiss the amended complaint as against them for failure to state a cause of action.

Special Term consolidated, inter alia, for the purpose of its decision only, appellant's application in the habeas corpus proceedding and the motion of the respondents in Action No. 3. After a "summary hearing", Special Term denied appellant's application in the habeas corpus proceeding and dismissed the writ. Special Term granted the application of the respondents in Action No. 3 and dismissed that action as against them, inter alia, on the ground of judicial immunity.

With respect to the habeas corpus proceeding, we cannot determine on this record whether appellant's failure to appear on the date set for the contempt hearing constituted a voluntary waiver of his right to be present and proffer evidence in his defense. An evidentiary hearing should be conducted on this issue. Accordingly, so much of the appeal as pertains to Action No. 2 is held in abeyance and that case is remitted to Special Term to hear and report on that issue.

Regarding the amended complaint in Action No. 3, we concur with Special Term's conclusion that it fails to state a cause of action against the respondents in that action.

To the extent the first, fourth and fifth causes of action asserted in the amended complaint in Action No. 3 purport to assert a claim for false arrest and malicious prosecution, the claims cannot withstand a

motion to dismiss predicated on judicial immunity. Judicial immunity extends to all judges and encompasses all judicial acts, even if such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly (Stump v Sparkman, 435 US 349; Murray v Brancato, 290 NY 52; Virtu Boutique v Job's Lane Candle Shop, 51 AD2d 813). There is a distinction between acts performed in excess of jurisdiction and acts performed in the clear absence of any jurisdiction over the subject matter. The former is privileged, the latter is not (Murray v Brancato, supra). Although the pleadings allege that Surrogate SIGNORELLI and Acting Surrogate SEIDELL knew that they lacked any jurisdiction, it is also alleged that said knowledge was acquired from a prior unreported decision and resettled judgment of Special Term (McINERNEY, J.), which was affirmed by this court (see Sassower v Signorelli, 65 AD2d 756, supra). However, that decision in favor of appellant was predicated on judicial acts in excess of jurisdiction. The acts complained of in the amended complaint were performed by the respondents SIGNORELLI and SEIDELL while in the exercise of their judicial roles. Although said acts may have been in excess of their jurisdiction, they were not performed in the complete absence of jurisdiction. Consequently, the moving defendants, as Surrogates, are absolutely immune from suit for the judicial acts alleged in the amended complaint.

Neither does the allegation that the judicial defendants refused to timely comply with a writ of habeas corpus, directing appellant's release from incarceration, save the dismissal of the first and fourth causes of action. Although the refusal to comply with an order is a ministerial act (Prosser, Torts [4th ed], § 132, p 988) and immunity is not accorded to a judicial officer who performs a ministerial act so as to injure another (Scott v City of Niagara Falls, 95 Misc 2d 353; see, generally, 28 NY Jur 2d, Courts & Judges, § 91, p 166), we take judicial notice of the fact the writ was addressed to the Sheriff of Suffolk County, and not to the respondents.

The second, sixth and seventh causes of action sound in defamation. The second cause of action alleges that on June 27, 1977, and August 17, 1977, the New York Times published two articles by Art Penny, containing defamatory material about appellant which was acquired, from among other sources, defendant Surrogate SIGNORELLI's out-of-court statements.

Initially we note that attaching the articles containing the allegedly defamatory material to the amended complaint as an exhibit is sufficient to satisfy the pleading with particularity requirement of subdivision (a) of CPLR 3016 (see Cabin v Community Newspapers, 50 Misc 2d 574, affd 27 AD2d 543; accord Rinaldi v Village Voice, 79 Misc 2d 57, mod on other grounds 47 AD2d 180). "[I]n the absence of proof of affirmative acts causing a publication to be made, a slanderous statement uttered in the presence of third persons is not the proximate cause of an injury alleged to have been sustained by its subsequent publication in newspapers by such persons (Schoepflin v Coffey, 162 N.Y. 12), even though made with intent that such slanderous statement should be widely circulated (Lewis v Chemical Foundation, 233 App Div 287.)" (Bradford v Pette, 204 Misc 308, 318, mot to dismiss app granted 285 App Div 960.) Although appellant does not have to proffer proof of affirmative acts to defeat a motion under paragraph 7 of subdivision (a) of CPLR 3211, absent an allegation that Surrogate SIGNORELLI procured the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against him.

The sixth and seventh causes of action allege that respondent Surrogate SIGNORELLI caused to be published in the New York Law Journal a memorandum decision containing defamatory material. The decision which appellant claims contains false and defamatory statements was written and filed

in a matter upon which that respondent was called to rule. Even if the decision had been written with knowledge of its falsity and with actual intent to injure the appellant, the respondent SIGNORELLI, as a matter of public policy, would be exempt from liability for composing it (Murray v Brancato, 290 NY 52, supra).

Moreover, the law of this State places upon each judge an official duty to facilitate the publication of his opinion or decision in the official reports, all acts done in connection with the statutory duty fall within the scope of judicial immunity, though done maliciously or corruptly. However, a judge is not immune from liability if he acts to procure the publication of his opinion in unofficial reports (see Murray v Brancato, supra, p 57).

The execution of an annual contract with the publisher of the New York Law Journal pursuant to subdivision 2 of section 91 of the Judiciary Law imposes an implied duty upon the Surrogate to make copies of opinions and decisions available to the New York Law Journal for publication (see Bradford v Pette, supra). Consequently, an act to procure the publication of a judicial decision or opinion in the New York Law Journal is now a judicial act entitled to absolute immunity (Bradford v Pette, supra, see, also Hanft v Heller, 64 Misc 2d 947; Sheridan v Crisona, 12 NY2d 108).

Furthermore, the fact that the allegedly defamatory statement in the opinion may not have been relevant or pertinent to the question the judge was called upon to decide does not mandate a contrary conclusion. The "doctrine of absolute privilege in respect to the acts of a judge in the course of judicial proceedings is not limited, as in the case of suitors and counsel, to matters that are pertinent or relevant" (Bradford v Pette, supra, p 317).

To the extent the eighth and ninth causes of action sound in prima facie tort, those causes of action must be dismissed for appellant's failure to allege the essential element of special damages with sufficient particularity (Morrison v National Broadcasting Co., 19 NY2d 453, 458; Motif Constr. Corp. v Buffalo Sav. Bank, 50 AD2d 718, 719).

The third cause of action, insofar as it pertains to the respondents in Action No. 3, seeks reimbursement for the amount of money paid for stenographic minutes, which appellant allegedly did not accept because his need for said minutes was rendered moot by unspecified acts of the judicial defendants. Reimbursement for the costs of procurement of a transcript are not assessable against the judicial defendants (see Segal v Jackson, 183 Misc 460).

Accordingly, the amended complaint as to the respondents in Action No. 3 was properly dismissed.

DAMIANI, J.P., WEINSTEIN, RUBIN and BOYERS, JJ., concur.

GEORGE SASSOWER

ATTORNEY AT LAW

914/328-0440

283 SOUNDVIEW AVENUE
WHITE PLAINS, N. Y. 10606

November 10, 1982

Frank H. Connelly, Jr., Esq.
Chairman, Grievance Committee
249 Huguenot Aveue,
New Rochelle, N.Y. 10802

Dear Mr. Connelly,

Yesterday, not unexpectedly, an Assitant Attorney General, presented to Hon. Henry W. Lengyel, Judge of the Court of Claims in White Plains, a copy of the Signorelli disciplinary complaint against me and my wife, although manifestly incompetent, irrelevant, and impertinent under his CPLR 3211(a) motion.

As a result of the oral arguments before His Honor, I was "ordered and directed" to submit the Report of Hon. Aloysius J. Melia, despite the fact that I advised the Court that it was your Committee's position, that it is improper for me to publish or disclose the result or any evidence therefrom, even in a judicial tribunal.

I advised His Honor, that when I made a prior exculpatory disclosure in two pertinent judicial proceedings, your Committee sua sponte made complaint against me for such action.

I further advised His Honor that I could indirectly comply with His Honor's request by serving a Subpoena upon your Committee directing it to produce such report, but that from a recent experience with Hon. George Beisheim, Jr., it would be your position that no one, except the Appellate Division, had jurisdiction to make such direction, and such direction, if made, would not be obeyed unless also authorized by the Appellate Division.

Obviously, His Honor, feels uncomfortable and does not understand the bizarre situation wherein the Signorelli diatribe was published and constantly republished and distributed by the Attorney General's Office and others, while I am restrained from publishing any vindicating evidence or results, which emanates from the disciplinary proceedings.

8th JUDICIAL DISTRICT

NOV 12 1982

Exhibit "C"

I cannot explain this absurd situation to His Honor or anyone else, because I do not understand it myself.

Clearly, the remedy, in face of the unambiguous wording of Judiciary Law §90[10], would be some long overdue action by your Committee against those who persist in violating the law by this publication and constant republication, which thus far, you have not taken.

To exacerbate the situation, His Honor, has, sua sponte, opted to convert the State's motion pursuant to CPLR 3211(c), compeling me to produce material which would clearly violate your Committee's interpretation of the statute.

We both know, as well as all those familiar with the situation, that I could literally "bury" Signorelli, the Committee, the Attorney General's Office, and others if there were a full disclosure of the events in this matter.

His Honor requested me to communicate with your office so that you could possibly explain and advise the Court of your Committee's position on the subject.

Since the Attorney General represents your Committee, as well as Judge Signorelli (without my consent), I expect that a realistic Chinese Wall be established in the Committee's Office, as well as in the Attorney General's Office, to diminish this clearly unethical situation of conflicting interests.

Very truly yours,

GEORGE SASSOWER

GS/bh

cc: Hon. Henry W. Lengyel

Hon. Mary Johnson Lowe
U.S.D.J. (82 Civ.4970)

Hon. Milton Mollen

Presiding Justice.

Hon. Theodore R. Kupferman
Justice Presiding

Hon. Matthew F. Coppola

Robert Abrams, Esq.

David J. Gilmartin, Esq.

Abrams & Sheidlower, Esqs.

Gary L. Casella, Esq.

State of New York
Grievance Committee for the
Ninth Judicial District
200 BLOOMINGDALE ROAD
WHITE PLAINS, N. Y. 10605
914-949-4540

FRANK H. CONNELLY, JR.
CHAIRMAN

GARY L. CASELLA
CHIEF COUNSEL

RICHARD E. GRAYSON
TIMOTHY J. BRENNAN
ASSISTANT COUNSEL

SYLVIA L. FABRIANI
INVESTIGATOR

November 15, 1982

George Sassower, Esq.
283 Soundview Avenue
White Plains, New York 10606

Dear Mr. Sassower:

I write in response to your letter of November 10 which was addressed to me at my law office in New Rochelle.

While I do not agree with everything said in that letter, I am not unsympathetic to the predicament in which you find yourself. I have asked Mr. Casella to investigate what may be done consistent with the Judiciary Law and the Rules of the Court.

Very truly yours,

Frank H. Connelly, Jr.

FHCjr/s

Exhibit "D"

State of New York
Grievance Committee for the
Ninth Judicial District
200 BLOOMINGDALE ROAD
WHITE PLAINS, N. Y. 10605
914-949-4540

FRANK H. CONNELLY, JR.
CHAIRMAN

GARY L. CASELLA
CHIEF COUNSEL
RICHARD E. GRAYSON
TIMOTHY J. BRENNAN
ASSISTANT COUNSEL
SYLVIA L. FABRIANI
INVESTIGATOR

November 23, 1982

CONFIDENTIAL

Honorable Henry W. Lengyl
Judge of the Court of Claims
15th Floor
44 South Broadway
White Plains, NY 10601

Dear Judge Lengyl:

This is to confirm our telephone conversation of today regarding the letter (copy enclosed) of George Sassower, Esq., dated November 10, 1982.

Mr. Sassower inquired therein inter alia, as to his rights of disclosure concerning matters that have been considered by the Grievance Committee.

The position of this Committee is that in view of the requirements of §90(10) of the Judiciary Law, it is the sole province of the Appellate Division as to whether or not to permit any such items to be divulged.

Section 90(10) provides as follows:

> Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division,

EXHIBIT "E"

such order may be made either without notice to the person or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

If there are any further questions in this matter, I would be pleased to be of whatever assistance is possible.

Respectfully submitted,

Gary L. Casella
Chief Counsel

GLC/jfc
Enclosure

cc: Frank H. Connelly Jr., Esq.
George Sassower, Esq.

SHORT FORM ORDER

INDEX NO. 17671 19 78

SUPREME COURT – STATE OF NEW YORK

~~TRIAL~~/SPECIAL TERM, PART I SUFFOLK COUNTY

Present:

Hon JAMES J. BRUCIA
Justice

MOTION DATE January 31 19 83

MOTION NO. 20,829

GEORGE SASSOWER,

Plaintiff

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, HARRY E. SEIDELL, NEW YORK NEWS, INC., and VIRGINIA MATHIAS,

Defendants.

PLTF'S/PET'S ATTY:
GEORGE SASSOWER, ESQ.
Attorney for Plaintiff
283 Soundview Avenue
White Plains, New York 10606

DEFT'S/RESP'S ATTY:
ROBERT ABRAMS, ESQ.
Attorney for SIGNORELLI & SEI
2 World Trade Center
New York, New York 10047

Upon the following papers numbered 1 to 5 read on this motion to change venue

Notice of Motion/~~Order to Show Cause~~ and supporting papers 1 to 5 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers _____ ; Replying Affidavits and supporting papers _____ ; Other _____ ; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff to change the venue of this action from the County of Suffolk to a County outside the 10th Judicial District is granted.

Plaintiff having brought this action against two judges in Suffolk County and the Public Administrator of Suffolk County claims that his suit would not get an impartial hearing.

Because there has been no objection by any defendant in this action to plaintiff's request for a change of venue, the Court, pursuant to CPLR 510, in its discretion, is changing the venue of this action to New York County.

The Clerk of this Court is directed to deliver to the Clerk of New York County all papers filed in this action and certified copies of all minutes and entries which the Clerk of New York County is to file, enter, or record as the case requires.

Plaintiff is directed to serve a copy of this order on both Clerks and all parties. Any fees required by the Clerk to be paid as a result of this transfer are to be paid by plaintiff.

Dated: 2 3 83

James J. Brucia
J. S. C.

Exhibit "F"

SHORT FORM ORDER

71 EXHIBIT B TO DEFENDANT'S AFFIDAVIT - ORDER OF MARBACH, J. DENYING MOTION FOR SUMMARY JUDGMENT [71-72]

SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART WESTCHESTER COUNTY

Present:
HON. JOHN C. MARBACH Justice.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PARK KNOLL ASSOCIATES, a Limited Partnership,

Plaintiff,

- against -

APHRODITE SCHMIDT,

Defendant.

INDEX NUMBER 20040, 19 80

MOTION DATE 11/26, 19 80

MOTION CAL. NUMBER 10

TRIAL CAL. NUMBER

The following papers numbered 1 to 22 read on this motion for summary judgment dismissing the complaint and additional motion for a protective order.

	PAPERS NUMBERED
Notice of Motion/~~Order to Show Cause~~ — Affidavits	1, 2, 20, 21
Answering Affidavits	13
Replying Affidavits	
Affidavits	
Filed Papers	
Memoranda of Law	17-19, 22
Pleadings - Exhibits - Stipulations - Minutes	3-12, 14-16

Upon the foregoing papers it is ordered that this motion for summary judgment is denied.

The thrust of defendant's argument on this motion is that the allegedly defamatory statements were incorporated in a complaint form transmitted to the State Division of Housing and Community Renewal and thus were made in the guise of a quasi-judicial proceeding such that an absolute privilege attaches to the statements. This argument would have merit if it were the complaining tenants who were sued here and the statements contained in the various complaints were the basis for the action (Studley, Inc. v. Lefrak, 50 A.D. 2d 162, aff'd 41 N.Y. 2d 881) What plaintiff sues on, however, are the allegedly defamatory statements made by defendant to the various complaining tenants which statements were later incorporated in the complaints. It is the communications between defendant and the tenants and not between the tenants and the Division of Housing which are the basis of the lawsuit.

Dated _____ Entered _____

J. S. C.

Briefs: Plaintiffs - Defendants - Petitioners - Respondents -

Exhibit "G"