3/18/83

To be argued by:
GEORGE SASSOWER
Time: 30 minutes

Supreme Court of the State of New York
Appellate Division—Second Department

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

NEW YORK NEWS, INC., ANTHONY MASTROIANNI, JOHN P. FINNERTY, ALAN CROCE and ANTHONY GRYMALSKI,

Defendants-Respondents,

-and-

ERNEST L. SIGNORELLI, VINCENT G. BERGER, JR., CHARLES BROWN, HARRY E. SEIDELL, and VIRGINIA MATHIAS,

Defendants.

Appellant's Brief and Appendix

PATTERSON, BELKNAP, WEBB & TYLER
Attorneys for Respondent News
30 Rockefeller Plaza
New York, N.Y. 10020
(212) 541-4000

GEORGE SASSOWER
Attorney for Appellant
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 328-0440

ROBERT ABRAMS
Attorney for Defendants
2 World Trade Center
New York, N.Y. 10047
(212) 488-4141

DAVID J. GILMARTIN
Attorney for Defendants-Respondents Mastroianni, Finnerty, Croce and Grymalski
Veterans Memorial Highway
Hauppauge, N.Y. 11787
(516) 360-4049

VINCENT G. BERGER
Attorney for Defendant
6351 Jericho Turnpike
Commack, N.Y. 11725
(516) 864-6443

SUFFOLK COUNTY CLERK'S INDEX NO. 78-17671

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

3/18/83

I N D E X

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

----------x

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

NEW YORK NEWS, INC., ANTHONY MASTROIANNI, JOHN P. FINNERTY, ALAN CROCE, and ANTHONY GRYMALSKI

Defendants-Respondents,

and

ERNEST L. SIGNORELLI, VINCENT G. BERGER, JR. CHARLES BROWN, HARRY E. SEIDELL, and VIRGINIA MATHIAS,

Defendants.

----------x

STATEMENT

This is an appeal from Orders of Hon. FRANK P. DeLUCA (based on his decision dated November 5, 1982 [A6-A12] -- thereafter converted to an Order [A12]), insofar as they denied appellant's motion to strike the "First", "Second", and "Fourth" Affirmative Defenses of respondent, New York News, Inc. (hereinafter called respondent), and denied as "moot" appellant's motion for

sanctions against respondents, Mastroianni, Finnerty, Croce, and Grymalski -- hereinafter called "County"); and from the Order dated February 23, 1983 [A5].

"County" clearly lacks standing on its Cross-Appeal, since it is not "aggrieved" (CPLR §5511).

The Order of February 23, 1983 is substantially similar to the prior Decision/Order of November 5, 1982, except that it omits the provision that appellant may obtain disclosure from Art Penny, the former "stringer" for respondent. Both parties agree appellant may have such disclosure.

Appellant's motion for leave to reargue was denied [A13].

QUESTIONS PRESENTED

1. Does respondent's Fourth Affirmative Defense, merely alleging:

> "The publication complained of dealt with matters arguably within the sphere of public concern, and reasonably related to matters warranting public exposition, and is therefore privileged",

comply with CPLR §3013?

Special Term did not answer this question.

2. Is there any merit to the respondent's Fourth Affirmative Defense?

The Court below held the underlying issues not "to be public issues" [A10], and that appellant was not "a public figure" [A9], but, nevertheless, held a corrupted version of Chapadeau v. Utica Observer-Dispatch (38 N.Y.2d 196, 379 N.Y.S.2d 61) available as a pleaded defense.

3. Does respondent's Second Affirmative Defense, merely alleging:

> "The articles complained of were fair and true reports of judicial proceedings and were therefore privileged",

comply with CPLR §3013?

Special Term did not answer this question.

4. Is there any merit to respondent's Second Affirmative Defense?

From sources unknown, there was "submitted" to Special Term, a copy of the discredited Signorelli sua sponte diatribe, "as published in the New York Law Journal of March 3, 1978" [A10]. From this, Special Term concluded that the articles published by the respondent

six and eight months before i.e., June and August 1977, the Signorelli sua sponte ad hominem attack on appellant (and his wife), were "fair and true" reports of the subsequent publication.

5. Does respondent's First Affirmative Defense, merely alleging:

> "Plaintiff was ordered to appear in Supreme Court, Suffolk County on June 27, 1977, to explain why he should not be jailed for contempt of court.
>
> The article of June 27, 1977 was true in substance and in fact.
>
> Plaintiff was accused of contempt of court in proceedings before Judge Oscar Murov in Suffolk County Surrogate's Court.
>
> The article of August 17, 1977 was true in substance and in fact",

comply with CPLR §3013?

Special Term did not answer this question.

6. Is there any merit to respondent's First Affirmative Defense?

Inferentially, Special Term held in the affirmative [A11].

7. Where respondent made no motion nor ever complained about the sufficiency or propriety of the complaint, should Special Term have sua sponte analyzed and rejected a substantial portion thereof as improperly pleaded, without giving appellant his right to replead pursuant to CPLR 3211(e)?

Inferentially, Special Term held in the affirmative.

8. Does incorporation by reference of the two published articles annexed as part of the complaint, pursuant to CPLR 3014, satisfy the requirements of CPLR 3016(a) and CPLR §3013?

Inferentially, Special Term held in the negative.

9. Should Special Term have denied as "moot", appellant's motion for sanctions against "County", when "County" failed to answer appellant's "First Set of Interrogatories", failed to make any motion with respect to them, and failed to raise any question of privilege?

Special Term clearly erred when it held that "County" had answered appellant's interrogatories.

10. Should this Court constitutionally and/or properly adjudicate this appeal?

This issue was not presented to Special Term?

THE FACTS

A clear, chronologically factual statement is essential for proper recognition of the serious errors made by Special Term and the just disposition of this appeal.

BACKGROUND:

Wednesday, June 22, 1977:

A "mock" trial took place in Surrogate's Court, Suffolk County, wherein (1) without any accusatory instrument, (2) without appellant being informed that a criminal contempt proceeding was to take place on that day, appellant was (3) tried, (4) convicted, and (5) sentenced to be incarcerated, all in absentia [A21].

Thursday, June 23, 1977:

Appellant was unaware of the aforesaid events of the prior day. Early in the morning, Deputy Sheriffs of Suffolk County (6) transgressed their bailiwick and arrested appellant in his home in Westchester County and removed him to Suffolk County Surrogate's Court.

Appellant's (7) right to petition for habeas corpus relief was repeatedly denied; (8) his pleas of Fifth Amendment rights were ignored and denied; (9) other fundamental and constitutional rights were also denied [A21].

Eventually, after appellant's incarceration, a Writ of Habeas Corpus ad subjiciendum was issued returnable in Supreme Court, Suffolk County on Monday, June 27, 1977, calling upon appellant's custodians to justify the legality of his incarceration, not to adjudicate "whether he is guilty or innocent" (Black's Law Dictionary [5th Ed.] p. 638) [A21].

Monday, June 27, 1977:

In respondent's early news edition, before appellant's first court appearance, respondent published and distributed its first of two libelous articles concerning appellant, written by respondent's "stringer", Art Penny [A34].

This article contained a number of false and libelous statements, including the out-of-court remark:

> "the judge (Signorelli) explained that he allowed Sassower to purge himself of the contempt charges by giving Mastroianni [his alleged successor] a complete accounting of the estate. Mastroianni never received the accounting and finally Judge Signorelli ordered Sassower jailed."

There is no question that the aforesaid statement is false.

July 28, 1977:

Appellant's Writ of Habeas Corpus was sustained. The habeas corpus hearings were terminated in their midst by a verbal "gun to the head" message of a Federal Judge and to avoid the prospect of Ernest L. Signorelli testifying.

August 10, 1977:

Appellant was served with an Order to Show Cause requiring him to state why he should not be held in contempt of court, returnable six days later in Surrogate's Court.

Appellant executes and mails his Cross-Motion to said Order to Show Cause on the very day of its receipt. Appellant's Cross-Motion seeking the dismissal of the Order to Show Cause is eventually sustained.

August 17, 1977:

Respondent publishes its second libelous article [A35]. Once again, it contains false, defamatory, and out-of-court statements, including:

> "He was ordered to make a complete accounting ... . Mastroianni said he has never received the accounting ..."

October 3, 1977:

Ernest L. Signorelli, employing the prestige and influence of his office, compelled the Attorney General to file a Notice of Appeal from the Order based on the July 28, 1977 decision, notwithstanding the knowledge by the Attorney General's office that the appeal was clearly meritless.

February 3, 1978:

Appellant again requests relief in the Federal Court from Ernest L. Signorelli's egregious course of conduct.

February 24, 1978:

Notwithstanding there was no motion pending before Ernest L. Signorelli, he issued his sua sponte diatribe against appellant and his wife, DORIS L. SASSOWER (who was at that time neither a party nor an attorney in the proceeding) published in haec verba in the New York Law Journal on March 3, 1978.

June 10, 1978

Appellant was again incarcerated in Suffolk County Jail after he had, for the second time, been tried, adjudicated, and sentenced in absentia. Again, Suffolk County Deputies transgressed their bailiwick, seized appellant in Westchester County, abducted him to Suffolk County, assaulting him in the process, and again denying appellant his basic constitutional and legal rights.

Also incarcerated on this occasion were appellant's wife and daughter when they presented a Writ of Habeas Corpus mandating appellant's immediate release. The pretext for this incarceration, as announced by the Assistant Suffolk County Attorney at the Appellate Division on June 24, 1982, was that the presented Writ was executed by an "illiterate" Judge!

THE PLEADINGS:

1. Annexed to appellant's nine (9) cause of action verified complaint [only the second cause relates to respondent] are copies of the two libelous articles published by respondent [A34-A35]:

" AS AND FOR A SECOND CAUSE OF ACTION AGAINST ALL OF THE DEFENDANTS

18. Plaintiff repeats ... .

19. On or about the 27th day of June, 1977 and the 17th day of August, 1977, the NEW YORK NEWS, INC., publishing and distributing a newspapers of general circulation in the City of New York and surrounding areas, published defamatory material concerning the plaintiff who was not a public figure, not involved with public matters, and on subject matters he did not voluntarily desire to become engaged in a public manner.

20. That such publications accused plaintiff of criminal activity, and moral turpitude, exposed him opprobrium, contempt, aversion, and induced ill and unsavory opinion of him privately and in his profession in which he was then engaged, to wit, an attorney.

21. That such published material is annexed hereto and marked "Exhibit 1" and "Exhibit 2" (emphasis supplied).

22. That such allegations were knowingly false and misleading, maliciously published and/or published in a wanton and grossly irresponsible manner without the due consideration for standards of information-gathering and dissemination followed by responsible parties.

23. That the defendant, NEW YORK NEWS, INC., published that plaintiff was jailed on June 23, 1977, setting forth numerous untruths in connection therewith: (1) falsely stating that the reason therefor was his failure "to provide a complete accounting"; (2) falsely stating that "state inheritance taxes have never been paid"; (3) falsely stating that plaintiff had been removed from office as executor of an estate in March of 1976; (4) falsely implying that he was immediately substituted by another; (5) falsely stating that plaintiff could "purge himself by giving [his successor] a complete accounting; (6) falsely stating that plaintiff's successor was due but "never received the accounting" (7) falsely stating that plaintiff tried to sell

estate property without authorization; (8) falsely implying that plaintiff knew he had no authorization to sell; (9) falsely stating that after June 23, 1977 additional criminal charges had been placed against the plaintiff; (10) falsely stating that after June 23, 1977 additional criminal charges had been placed against the plaintiff; (11) falsely implying that plaintiff had given estate monies to an insurance company and a bank; (12) falsely implying that plaintiff was obligated to "personally" appear in court but had failed to do so; (13) and other deliberate or reckless, false, misleading, and improper statements.

24. That such false and misleading statements and material were given out-of-court and were disseminated as thereafter printed, to the NEW YORK NEWS, INC., by the defendants, ERNEST L. SIGNORELLI, ANTHONY MASTROIANNI, and VINCENT G. BERGER, JR., or their authorized representatives, in their joint efforts to defame plaintiff, cause him harm and injuries. That other defamatory statements were made by these defendants, or their authorized representatives, which are not presently in the possession of the plaintiff.

25. That such false statements and material were also imparted with the intent to deprive plaintiff of a fair and constitutional trial, which it did.

26. That as a result thereof plaintiff sustained special damages in his profession and other injuries, for which plaintiff demands compensatory, general, and punitive damages."

Respondent, represented initially by the prestigious firm of TOWNLEY & UPDIKE, Esqs., and since April 26, 1979, by the equally prestigious firm of PATTERSON, BELKNAP, WEBB, & TYLER, Esqs. Both firms, acknowledged experts in the field of defamation, never moved or complained about the legal sufficiency of appellant's present complaint, although more than four (4) years had elapsed since the service of same. Nor was there any complaint about appellant's verified complaint on the motions leading to the Orders appealed from.

In addition to the pro forma denials, respondent's attorneys alleged affirmative defenses are as hereinabove set forth.

2. "County", having failed to answer appellant's "First Set of Interrogatories" or to move with respect to them, appellant moved for sanctions.

Clearly erroneous was Special Term's finding that "County" having served its answers prior to the submission of the motion, thereby mooted the relief requested. "County" has never answered appellant's Interrogatories, before or since. Appellant's request for reargument, seeking review of Special Term's error in this and other respects, was denied [A13].

FACTUAL ERRORS OF NISI PRIUS:

The more serious factual errors committed by Special Term are as follows:

1. Respondent's libelous articles were published six (6) and eight (8) months before the Signorelli diatribe. Consequently, respondent's articles could not possibly be "fair and true" reports of something thereafter published.

2. Special Term, in examining appellant's verified complaint for sufficiency, omitted any mention of or reference to the fact that copies of the libelous articles were referred to in and annexed to the complaint (CPLR 3014).

Nevertheless, in thereafter examining respondent's published articles and holding that they were "fair and true" reports of the thereafter rendered Signorelli diatribe, it is plain that Special Term itself was amply informed of such annexed libelous articles, making its own use thereof.

3. In mentioning as part of its holding that appellant was twice cited for contempt, "the second time sentenced to serve a jail term", thus "warranting public exposition" [A11], Special Term apparently was oblivious of the fact that such events took place almost one year after respondent's libelous publications.

Assuming, arguendo, the events of almost one year later "warranted public exposition" of appellant, such subsequent events cannot logically serve to immunize prior libelous publications!

4 Appellant's motion called for examination as to the sufficiency of the form and substance of respondent's pleading [which the Court did not do]; instead, the Court examined appellant's pleading [which respondent did not request].

5. Contrary to the holding of the Court, "County" served no answers to appellant's "First Set of Interrogatories". Therefore, the matter was clearly not "moot" notwithstanding Special Term so asserted, without any supporting evidence, that they had been served.

POINT I

APPELLANT'S COMPLAINT WAS ENTIRELY LEGALLY SUFFICIENT

1. CPLR 3014 provides:

> "A copy of any writing which is attached to a pleading is a part thereof for all purposes."

Appellant's complaint specifically states [A32]:

> "21. That such published material is annexed hereto and marked 'Exhibit 1' and 'Exhibit 2' ".

2. Respondent's highly specialized and knowledgeable attorneys never made any CPLR 3016(a) objection to this complaint. They obviously recognized that all pleading requirements had been satisfied (CPLR §3013).

Respondent was initially represented by the firm of TOWNLEY & UPDIKE, Esqs. Neither they nor its present attorneys, PATTERSON, BELKNAP, WEBB & TYLER, Esqs., [both firms being acknowledged authorities in the field of defamation] have ever asserted or objected that appellant's present complaint did not comply with CPLR 3016(a) or CPLR 3013.

The reason both such leading firms raised no objection is understandable! The cases cited by Special Term (infra) simply do not support Special Term's sua sponte holding.

Another reason, inter alia, that respondent's failure to move or assert any such objection precluded Special Term from deciding such issue, sua sponte, is that appellant is thereby prevented from repleading or even requesting permission to replead (CPLR 3211[e].

3. In Ostrer v. Reader's Digest, 48 A.D.2d 856, 857, 368 N.Y.S.2d 575, 576 (2d Dept.) [cited by Special Term], this Court stated:

> "[T]he present case ... which contains an excerpt of the alleged libelous article, meets this requirement (CPLR 3016[a])".

In Ostrer v. Reader's Digest (supra), as here, the entire article, as defendant published it, in August 1974, was annexed to the complaint [Record on Appeal, pp. 21-25]. Furthermore, in the Ostrer case, unlike the case at bar, the defendant made a CPLR 3211(a)[7] motion because of this alleged deficiency.

On the contrary, nowhere and at no time, was the form of plaintiff's complaint objected to by this or any other respondent. Nonetheless, strangely enough, Special Term, sua sponte, chose to closely examine and reject most of it [A7].

In Suozzi v. Pante (NYLJ, 10/25/82, p. 7, col 4, Sup. N.Y.) [also cited by Special Term], Mr. Justice Wolin stated:

> "Pursuant to CPLR 3016(a) in an action for libel, the particular words complained of must be pleaded in the complaint. To this end, plaintiff has annexed a copy of the 'Glen Cove Eagle' to the complaint and has specified in his pleading, which portions of the article he deems to be actionable. This procedure affords the defendants adequate notice of the statements complained of and thus satisfies the pleading requirement of CPLR 3016(a). (Cabin v. Community Newspapers, Inc., 50 Misc.2d 574, 270 N.Y.S.2d 913, aff'd 27 A.D.2d 543, 275 N.Y.S.2d 396 [2d Dept.]; Ostrer v. Reader's Digest Association, Inc., 48 A.D.2d 856 [2d Dept.])".

Here again, unlike the case at bar, the decision of the Court was pursuant to defendant's motion to dismiss.

Nothing in the other cases cited by Special Term, to wit, Brandt v. Winchell, 3 N.Y.2d 628, 170 N.Y.S.2d 828; Schwartz v. Andrews, 50 A.D.2d 1057, 376 N.Y.S.2d 722 [4th Dept.]; Randaccio v. Retail, 43 A.D.2d

798, 350 N.Y.S.2d 255 [4th Dept.]; Gardner v. Scalamandre, 9 A.D.2d 647, 191 N.Y.S.2d 389 [1st Dept.]; Garner v. Alexander, 28 A.D.2d 595, 280 N.Y.S.2d 667 [1st Dept.]) supports a holding that annexing the short, defamatory articles does not give sufficient notice pursuant to CPLR §3013, or that it is not in compliance with CPLR 3016(a).

In Edison v. Viva International (70 A.D.2d 379, 385-386, 421 N.Y.S.2d 203, 207 [1st Dept.]), the Court, in permitting plaintiff to replead, merely held that when a long article is the basis of the defamation, and a "perusal ... does not reveal which, if any, of the passages cast plaintiff into opprobrium", the plaintiff should specify those passages.

In Cabin v. Community Newspapers (50 Misc.2d 574, 579, 270 N.Y.S.2d 913, 918, aff'd 27 A.D.2d 543, 275 N.Y.S.2d 396 [2d Dept.]), Hon. BERNARD S. MEYER stated:

> "The articles involved are attached to the complaint so CPLR 3016(a) has been complied with, and the above quoted portions of the complaint sufficiently apprises defendant what plaintiff contends is libelous ...".

In Hogan v. Herald (84 A.D.2d 470, 474, 446 N.Y.S.2d 836, 839 [4th Dept.], aff'd 58 N.Y.2d 630, 458 N.Y.S.2d 538), the Court stated:

> "The libel is described generally in the complaint and the relatively short offending article has been annexed to it, thereby satisfying reasonable notice pleading requirements and the provisions of section 3016, subd. (a) of the CPLR (see CPLR 3014; Cabin v. Community Newspapers, 50 Misc.2d 574, 579, 270 N.Y.S.2d 913 [Meyer, J.])."

In Hogan v. Herald (supra), the Record on Appeal, p. 11, reveals that the entire article was annexed to the complaint. Special Term, in denying defendant's motion, stated:

> "The third cause of action is against all Defendants and alleges libel. The Defendants have moved to dismiss this cause of action for failure to state a claim in that the allegedly libelous words have not been separately set forth. Instead the Plaintiff has attached a photocopy of the entire newspaper article which Plaintiff finds offensive. This procedure is in compliance with CPLR 3016(a) and the motion must be denied. See Cabin v. Community Newspapers, Inc., 50 Misc.2d 574, affd. 27 A.D.2d 545."

In Application of Dack (101 Misc.2d 490, 495, 421 N.Y.S.2d 775, 779 [Sup. Monroe]), the Court stated:

> "In fact, in Cabin v. Community Newspapers (supra), ... the court stated that CPLR 3016(a) is complied with by attaching copies of the published articles to the complaint."

In Rinaldi v. Village Voice (79 Misc.2d 57, 61, 359 N.Y.S.2d 176, 182 [Sup. N.Y.], modified on other grounds 47 A.D.2d 180, 365 N.Y.S.2d 199 [1st Dept.], cert. den. 423 U.S. 883, 96 S.Ct. 153, 46 L.Ed.2d 112), the Court held:

> "The contention by defendants that the complaint fails to particularize the libel is without merit since a complete copy of the allegedly libelous material is attached to the complaint as an exhibit."

4. Ironically, when it came to the respondent's pleading, the very subject of the motion before this Court, no examination of same was made!

5. Special Term could not have overlooked the annexed exhibits, since the Court itself stated [A10]:

> "A comparison of the opinion of the Surrogate, the newspaper articles in question and the allegedly libelous words pleaded in paragraph 23 subdivisions (1), (2), (5), and (6) leads the Court to conclude ... ."

6. On appellant's application for leave to reargue, emphasizing this and other manifest errors by Special Term, leave was denied [A13].

POINT II

RESPONDENT'S AFFIRMATIVE DEFENSES DO NOT COMPLY WITH CPLR §3013

1. In addition to notice, CPLR §3013, mandates that respondent's pleading must contain:

> "the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each ... defense." (see Jerry v. Borden, 45 A.D.2d 344, 346-347, 358 N.Y.S.2d 426, 430 [2d Dept.]).

Compelling respondent to properly plead will unquestionably cause it to abandon these spurious defenses, as will hereinafter be shown (Points III, IV, and V, infra).

a. Even a correct in haec verba excerpt from Chapadeau v. Utica Observer-Dispatch, supra, would be clearly insufficient for a (Fourth) Affirmative Defense, under CPLR §3013.

The matters published must be "arguably within the sphere of legitimate public concern". Respondent's knowledgeable attorneys deliberately omitted the qualifying word "legitimate" from its asserted defense [A49].

In Greenberg v. CBS (69 A.D.2d 693, 419 N.Y.S.2d 988 [2nd Dept.]), this Court stated:

> "In the absence of an allegation that the plaintiff's actions have generated the dispute, a find that a public controversy exists is a prerequisite to a finding that the plaintiff has voluntarily acted to induce a specific outcome." (emphasis supplied) [at 704, 944]

b. A conclusory, non-informative statement that the published articles were "fair and true reports of (undisclosed) judicial proceedings", as respondent asserts in its Second Affirmative Defense, is patently insufficient (Kelly v. Hearst, 2 A.D.2d 480, 157 N.Y.S.2d 498 [3d Dept.]; Ramos v. E. Diario, 16 A.D.2d 915, 916, 229 N.Y.S.2d 652, 653 [1st Dept.]; Association for the Preservation of Freedom of Choice v. Nation Associates, 14 A.D.2d 750, 220 N.Y.S.2d 391 [1st Dept.]; Szalay v. N.Y. American, 254 A.D.2d 249, 4 N.Y.S.2d 620 [1st Dept.]; Schneph v. N.Y. Times, 32 Misc.2d 237, 223 N.Y.S.2d 90 [Sup. Bx.], cf. Mollis v. Brooklyn Weekly, 22 A.D.2d 812, 254 N.Y.S.2d 1003 [2d Dept.]).

Respondent does not inform anyone when and where these alleged judicial proceedings took place, the statements made, and the actions taken, so that a court could determine whether the defamatory publications were "fair and true" reports.

c. Respondent's attempt to plead "truth", in its First Affirmative Defense, is likewise insufficient (Crane v. NY World Telegram, 308 N.Y. 470; Fleckenstein v. Friedman, 266 N.Y.19, 23; Bingham v. Gaynor, 203 N.Y. 27; Wachter v. Quenzer, 29 N.Y. 549, 552; Ostrer v. Reader's Digest, supra, at 857, 576; Russo v. Padovano, 84 A.D.2d 925, 926, 446 N.Y.S.2d 645, 647, 647 [4th Dept.]; Meyers v. Huschle Bros., 273 App. Div. 107, 75 N.Y.S.2d 354 [1st Dept.]; 5 Carmody-Waite 2d §30.68, p. 669). The pleaded defense must be as broad as the libel.

If respondent desires to rely on justification and there is a failure of proof, it assumes the legal consequences of increased damages (Kaminsky v. American Newspapers, 258 App. Div.1078, 18 N.Y.S.2d 53, 54 [2d Dept.], aff'd 283 N.Y. 748; PJI §3:38, p. 109 [1982 Supplement]).

If, by this ambiguous and nebulous plea, respondent intends to rely on "neutral reportage" that defense is clearly inapplicable to this action since respondent has conceded that appellant is not a "public figure" (Cianci v. New Times, 639 F.2d 54, 67 [2d Cir.]; Dixson v. Newsweek, 562 F.2d 626, 630-631 [10th Cir.]).

POINT III

RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE IS MERITLESS

Defendant's sole allegation in support of its Fourth Affirmative Defense is:

> " The publication complained of dealt with matters arguably within the sphere of public concern, and reasonably related to matters warranting public exposition, and is therefore privileged."

1. Plaintiff, a private practicing attorney, is for constitutional defamation purposes, a private person (Gertz v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 [June 25, 1974]). Defendant does not contend otherwise, as Special Term noted [A9].

2. In its opinion regarding respondent's Third Affirmative Defense, which it struck, Special Term stated [A9-A10]:

> "It is the media defendant's burden to establish the status of plaintiff. See Waldbaum v. Fairchild Pubs., 627 F.2d 1287 [D.C. Cir.], cert. den. 449 U.S. 898 [101 S.Ct. 266, 66 L.Ed.2d 8]; Fairley v. Peekskill Star Corporation, 84 A.D.2d 294, 298 [445 N.Y.S.2d 156, 159 - 2d Dept.]. ... The burden of proof with respect to the status of plaintiff is on the media defendant (cases cited). The 'News' [respondent] does not contest plaintiff's [appellant's] assertion that he is a private person. On the record before the court, it cannot be concluded that [appellant] assumed a role of especial prominence in the affairs of society or that he thrust himself to the forefront of a particular controversy in order to influence

> the resolution of the issues involved. The [appellant] is involved in a controversy with the Surrogate of Suffolk County over the former's handling of a decedent's estate. [Appellant's] allegedly contemptible conduct or mishandling of estate affairs and his personal confrontations, or lack thereof, with the Surrogate are all involved in an attempt to have estate issues resolved. The Court does not perceive these to be public issues. The Court holds that the 'News' has failed to meet its burden as a media defendant of showing that plaintiff is a public figure." (emphasis supplied)

3. Resulting from the Gertz opinion was Chapadeau v. Utica Observer, supra, [Dec. 4, 1975]).

Thereafter rendered were the pertinent opinions in Time v. Firestone (424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 [March 2, 1976]); Hutchinson v. Proxmire (443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 [June 26, 1979]); and Wolston v Reader's Digest (443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 [June 26, 1979]).

4. As Special Term noted, defendant has the burden of pleading any privilege it wishes to assert (Gomez v. Toledo, 446 U.S.635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 [May 27, 1980]; Dennis v. Sparks, 449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190 [Nov. 11, 1980]; Boyd v. Carroll, 624 F.2d 730, 732-733 [5th Cir.]; Ostrowe v. Lee, 256 N.Y. 36, 41 [Cardozo, Ch. J]).

This is not to say that where the situation was clearly one of immunity, the courts have not foreshortened the proceeding and made summary dispositions without much concern for procedural requirements (e.g. Moore v. (Chief Justice Warren) Burger, 655 F.2d 1265, 1266 [D.C. Cir.]; Mason v. Melendez, 525 F. Supp. 270, 280 [Wisc.]; Park-Knoll v. Schmidt, 89 A.D.2d 164, 168-169, 454 N.Y.S.2d 901, 904 [2d Dept.]). Except for these unusual and clearly meritless situations, defendant's pleading must contain the material elements of the defense and give notice (CPLR §3013).

5. Historical precedents and statutory law mandate secrecy and confidentiality in connection with any charge of professional misconduct (Crowley v. Pulsifer, 137 Mass 392, 50 Am. Rep. 318 [per. O.W. Holmes, J.]; People ex rel. Karlin v. Culkin, 248 N.Y. 465; Wiener v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667; McCurdy v. Hughes, 63 ND 435, 248 NW 512, 87 ALR 683; Judiciary Law §90[10]).

In People ex rel. Karlin v. Culkin (supra), Mr. Chief Justice Cardozo, speaking for the Court, stated:

> "The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation is such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. ... Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages. ... The closest analogue is an inquisition by the grand jury for the discovery of crime. There secrecy of counsel is enjoined upon the jurors by an oath of ancient lineage. It would be strange if disclosure were a duty upon an inquisition by the court. There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous. The need of secrecy is the greater when the proceeding is in the stage of preliminary investigation." (at 478-479)

In a constitutionally more compelling situation, since it involved a public official [a judge], the Court of Appeals, in Nichols v. Gamso (35 N.Y.2d 35, 358 N.Y.S.2d 712), stated:

> "... judicial investigations of charges or complaints against judicial officers are confidential, and no authority, decisional or statutory, suggest otherwise. ... Certainly, so much of the record and proceedings which do not relate to the charges sustained need not be disclosed." (at 38-39, 713-714)

In Nixon v. Warner (435 U.S. 589, 598, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 580), the Court stated:

> "... the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of the 'painful and sometimes disgusting details of a divorce case (cases cited). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption (cases cited, including Cowley v. Pulsifer, 137 Mass. 392 and Munzer v. Blaisdell, 268 App. Div.9, 11, 48 N.Y.S.2d 355, 356 [1st Dept.]), or as sources of business information that might harm a litigant's competitive standing ...".

Certainly, where all precedent and existing statute mandate secrecy, it cannot simultaneously be held to be of "legitimate public concern" or "warranting public exposition".

The courts have never denied its inherent power to prohibit publication of certain judicial or governmental proceedings (Branzburg v. Hayes, 408 U.S. 665, 685, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626, 641-642). They have only refused to prohibit publication of material when "lawfully obtained" or in the public domain (Smith v. Daily Mail, 443 U.S. 97, 104, 99 S.Ct.

2667, 2671, 61 L.Ed.2d 399, 405; Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1). Even then, when the confidential information is received from one of the participants, there is liability (Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert. den. 400 U.S. 999, 91 S.Ct. 454, 27 L.Ed.2d 450).

Since Special Term found that the published defamations were not "public issues" [A10], respondent's defense must be that the matter is "arguably" so.

But significantly, neither respondent nor its attorneys make any attempt to "argue" that the publications were of "legitimate public concern and reasonably related to matters warranting public exposition" [A43-A46].

Time v. Firestone, supra, is decisive on the subject. In that post-Chapadeau decision, the Court stated:

> "Petitioner [Time] contends that because the Firestone divorce was characterized by the Florida Supreme Court as a 'cause celebre,' it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in Rosenbloom v. Metromedia, Inc. 403 U.S. 29, 91 S.Ct 1811, 29 L.Ed.2d 296, which concluded that the New York Times privilege should be

extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that 'extension of the New York Times test proposed by the Rosenbloom plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 U.S., at 346.

Dissolution of a marriage through judicial proceedings is not the sort of 'judicial proceedings is not the sort of 'public controversy' referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process * * * is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' Boddie v. Connecticut, 401 U.S. 371, 376-377).
...

For similar reasons we likewise reject petitioner's claim for automatic extension of the New York Times privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this argument by holding the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469).

Petitioner would have us extend the reasoning of Cox Broadcasting to safeguard even inaccurate and false statements, at least where 'actual malice' has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the First Amendment, but recognizing this is little different from labeling all judicial proceedings matters of 'public or general interest', as that phrase was used by the plurality in Rosenbloom. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded to defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the Rosenbloom test which led us in Gertz to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff. ...

Presumptively erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the First Amendment. And in some instances such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended. Indeed, the article upon which the Gertz libel action was based purported to be a report on the murder trial of a Chicago police officer. See 418 U.S., at 325-326. Our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution.

It may be argued that there is still room for application of the New York Times protections to more narrowly focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by New York Times cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support of the decision in New York Times. See 376 U.S., at 270; cf. Rosenblatt v. Baer, 383 U.S. 75, 86. And while participants in some litigation may be legitimate 'public figures' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into the public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into the courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by Cox Broadcasting Co., supra. as to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection, see 418 U.S., at 340, we think Gertz provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault." (at 454-457, 965-967, 163-165)

An similar interpretation was made of official proceedings in Wolston v. Reader's Digest, supra, at 166 n. 8, 2707, 459.

In People v. Stewart, A.D.2d , N.Y.S.2d [2d Dept. - 3/14/83], this Court, sub silentio, gave recognition to the confidential nature of alleged judicial misconduct by an attorney, albeit not in private practice and dependent on reputation for livelihood, by not disclosing the identity of the public prosecutor.

6. Liability also exists when the published material is contemptuous by attempting to inflame and influence a judicial tribunal (Crowley v. Pulsifer [supra]; Sheppard v. Maxwell, 384 U.S. 333, 350-351, 86 S.Ct. 1507, 1516- 1517, 16 L.Ed.2d 600, 613; Taylor v. Kavanagh, 640 F.2d 450, 452 [2d Cir.]; Martin v. Merola, 532 F.2d 191, 198 [2d Cir.]; People v. Marino, 87 Misc.2d 427, 435, 383 N.Y.S.2d 147, 153 [Sup. Monroe]). The proceedings, then and since, reveal that the publications by respondent and The Law Journal have engendered a highly prejudicial environment.

7. With respect to Special Term's discussion of respondent's Fourth Affirmative Defense, it must be remembered that respondent's two published defamatory articles preceded the Signorelli diatribe, and that not until after the Signorelli diatribe, was there second incarceration of appellant.

As a matter of law and logic, subsequent events may not be considered for the purpose of determining the status of a person, public or private, or whether it warrants legitimate public concern (Hutchinson v. Proxmire, supra, at 135, 2688, 431; Fairley v. Peekskill, supra, at 302-303, 161).

Consequently, assuming, arguendo, that appellant's second incarceration was "arguably within the sphere of legitimate public concern and reasonably related to matters warranting public exposition", this event did not exist at the time of the publication of the respondent's defamatory articles.

In discussing the Fourth Affirmative Defense, the Court stated [A11]:

> "The [respondent's] fourth affirmative defense is based upon the holding in Chapadeau v. Utica Observer-Dispatch, supra. If the content of the articles is arguably within the sphere of legitimate public concern which is reasonably related to matters warranting public exposition, then the articles are entitled to a privilege in that [appellant] bears the burden of proving by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by reasonable parties.

> Whether the articles in question fall within the ambit of the Chapadeau, supra, holding, is a question for the court to determine based upon the facts of each individual case. See e.g. Greenberg v. CBS, supra, at 69 A.D.2d 706-709 [419 N.Y.S.2d 988, 997 - 2d Dept.]; Wehringer v. Newman 60 A.D.2d 385, 389-392 [400 N.Y.S.2d 533, 535-538 - 1st Dept.]. See also Karaduman v. Newsday, 71 A.D.2d 411, 414 [422 N.Y.S.2d 426, 428-429 -1st Dept. mod. 51 N.Y.2d 53, 435 N.Y.S.2d 556]."

Then, in applying the facts to the law, Special Term received from some unknown source the discredited sua sponte Signorelli diatribe, published six and eight months after respondent's articles, and stated [A11]:

> "In this case [appellant] was twice cited for contempt; the second time sentenced to serve a jail term for refusal to obey court mandates. In addition he has been removed as executor from the Kelly estate for failure to file a court-ordered accounting, and directed to turn over estate property in his possession to the Public Administrator. It further appears that [appellant] has delayed resolution of issues raised with respect to the accounting he filed as well as the turnover of estate property pursuant to court. order. Indeed the [appellant's] reasons for so acting may rest on good and sound reasons. That, however, does not change the nature of the dispute between [appellant] and the Surrogate.
>
> The Court holds that the [respondent's] articles in question are arguably within the sphere of legitimate public concern and reasonably relate to matters warranting public exposition. The motion to dismiss the [respondent's] fourth affirmative defense is denied."

8. As Greenberg v. CBS (supra, at 704, 994) recognized, Wolston held that only the defamed party's own actions could catapult him into a less protective orbit. In order for a private person to be "arguably within the sphere of legitimate public exposition", he must commit some act warranting exposition. Consequently, for Chapadeau to be applicable, it must be alleged and shown that plaintiff did something "warranting public exposition". Charges of misconduct by Senator Proxmire, Reader's Digest, Time Magazine, or Surrogate Signorelli will not trigger the transformation of a private person into a public figure or a private event into a public issue.

Were the rule otherwise, "neutral reportage" (rejected thus far in this jurisdiction, even for public persons - [Hogan v. Herald, supra]) would immunize libels against even private persons by the mere happenstance that a public official falsely labeled such private person a pariah. It would reincarnate the rejected Rosenbloom v. Metromedia (403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296) public or general interest test.

Signorelli's conviction of appellant was unquestionably false, contrived, and unconstitutional. There was never any accusatory instrument; appellant was never advised that a criminal contempt proceeding was going to take place; appellant was tried, convicted, and sentenced in absentia. Appellant was thereafter denied almost every basic constitutional and civilized right. Signorelli could not, solely by his own manifest misconduct and false accusations, bootstrap appellant into a status "warranting public exposition". Only by appellant's own conduct could he be placed in such category.

Obviously, appellant totally unaware of these "mock" contempt proceedings, did nothing warranting public exposition. Appellant's constitutional rights may not be indirectly diluted (Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106) by a judicial holding that assertion of constitutional rights transforms a private into a public person or makes a confidential matter into one legitimately warranting public exposition (Walston v. Reader's Digest [supra]).

Certainly, the price for securing a Writ of Habeas Corpus from the judicial forum -- the only place where such writ is available (Time v. Firestone [supra]; Boddie v. Conn., 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113) is not be the forfeiture of private status and statutory right of confidentiality.

The Appellate Division has been given the exclusive power and authority to discipline (Erie v. Western, 304 N.Y. 342, 346, cert. den. 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690) and disclose (Judiciary Law §90[10]. Respondent and Signorelli were flagrant and contemptuous usurpers.

In the present setting, it is the Star Chamber practices of the Signorelli Court that are matters "warranting public exposition", not the defamation of the Surrogate's hapless victims. The raven should not be rewarded and the dove condemned!

In short, appellant, as distinct from Signorelli, at the time of respondent's first publication, had done nothing "within the sphere of legitimate public concern reasonably related to matters warranting public exposition".

The only additional events that occurred at the time of respondent's second publication was the securing of an Order to Show Cause by Mastroianni why appellant should not be held in contempt. Appellant successfully cross-moved to vacate petitioner's application for failure to comply with Judiciary Law §756.

9. The standard of fault applicable applicable to private persons not within the Chapadeau doctrine remains to be settled by an appellate tribunal (Fitzpatrick v. Milky Way, 537 F. Supp. 165, 170; Gaeta v. New York News, 115 Misc.2d 483, 485, 454 N.Y.S.2d, 179, 181 [Sup. N.Y]), and is not an issue at this point.

POINT IV

RESPONDENT'S SECOND AFFIRMATIVE DEFENSE IS MERITLESS

1. Special Term noted that a transcript of the proceedings in Surrogate's Court had not been submitted [A10] so that it could determine whether the articles are "fair and true" reports of a judicial proceeding. Instead, Special Term compared respondent's two published articles with the thereafter composed Signorelli diatribe and found them to be "fair and true" reports.

Special Term's comparison would have legal and logical value if respondent could properly claim "judicial immunity" and Signorelli could claim a "fair and true" report privilege. Obviously, even judicial legerdemain cannot justify that interchange!

The logical and ludicrous result of Special Term's finding is that Signorelli's subsequently published diatribe is a "fair and true" report of respondent's defamatory articles!

2. Respondent's attorney in opposing appellant's CPLR 3211(b)(c) motion [A15] states the basis of her client's "fair and true" defense is:

> "the ... judicial proceedings held in Surrogate's Court, Suffolk County during the week of June 2, 1977 and on August 16, 1977 and upon judicial papers filed with the Surrogate's Court, Suffolk County under the case entitled In the matter of the accounting George Sassower as preliminary executor of the estate of Eugene Paul Kelly, deceased, File #736 P 1972 ...". [A45] (emphasis in original).

Nevertheless, respondent failed to produce any transcript or filed document to substantiate its published articles.

Significantly, respondent did not claim the thereafter contrived Signorelli diatribe was the source of its defamatory articles.

Under such circumstances, this Court need not consider whether the Signorelli diatribe, deciding nothing nor intending to decide anything, has any judicial value under Civil Rights Law §74 (see 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.

3. Obviously made out-of-court was respondent's published libel:

> "... the judge (Signorelli) explained that he allowed Sassower to purge himself of the contempt charges by giving Mastroianni a complete accounting of the estate. Mastroianni never received the accounting and finally Judge Signorelli ordered Sassower jailed." [A34]

Press conferences with the Daily News are not within the parameter of Signorelli's judicial duties, particularly when a Habeas Corpus proceeding was pending before Signorelli's judicial colleague. Signorelli's out-of-court statements to the press are not protected by Civil Rights Act §74, judicial immunity, or any other privilege!

Explicitly, Civil Rights Law §74, provides:

> "This section does not apply to a libel contained in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

In Clarke v. McGee (49 N.Y.2d 613, 618-619, 427 N.Y.S.2d 740, 744), the Court stated:

> "Thus, even a public official who is otherwise entitled to immunity 'may still be sued if the subject of the communication is unrelated to any matters within his competence * * * or if the form of the communication -e.g., a public statement - is totally unwarranted' ".

An emolument of elective office is not a universal arcana of privilege and prerogative immunizing all conduct, whenever, however, and wherever made (Hutchinson v. Proxmire, supra, at 125, 2683, 425). The right to inform with impunity through the media, is not as broad as the obligation to decide issues presented (Hutchinson v. Proxmire, supra, at 133, 2687, 430).

In Hutchinson v. Proxmire, supra, adopting the language of Story, the Court said:

> " 'No man ought to have a right to defame others under colour of a performance of the duties of his office. ... [H]e should [not] be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens.' " (at 128, 2684-2685, 427).

4. Respondent had the burden of submitting to Special Term the transcripts and documents which it contended supported its alleged defense so that the Court could determine whether the defense had any merit. Respondent made no attempt to submit such proof, because it knew such evidence did not exist.

5. The judicial record is clear that Mastroianni never complained about not having received an accounting in a judicial forum.

POINT V

RESPONDENT'S FIRST AFFIRMATIVE DEFENSE IS MERITLESS

1. The evidence reveals that respondent's published articles proliferate with false and defamatory statements. Whether third persons to whom such statements are attributed to did in fact made such statements is irrelevant in the absence of a Civil Rights Law §78 plea. Excepting those jurisdictions where neutral reportage has been adopted, and where it is applicable, the talebearer bears the same liability as the talemaker.

The republication of a libel is itself a libel!

2. The evidence in this Court, as well as in the Appellate Division, First Department, is that appellant turned over the estate papers and documents before he was adjudicated in contempt in this "mock" judicial proceeding; before respondent's first published article, and by none other than Mastroianni's own sworn testimony!

3. Since appellant alleged and showed that the published material contained in respondent's published articles was contrived, distorted, and misleading, it became respondent's burden to produce the material supporting asserted defense of justification. Respondent did not, obviously cannot, and this defense should be stricken as meritless.

POINT VI

"COUNTY" SHOULD BE COMPELLED TO ANSWER APPELLANT'S INTERROGATORIES

1. "County" failed to move with respect to appellant's "First Set of Interrogatories" and failed to assert any privilege on appellant's motion for sanctions. Consequently, the denial of relief by Special Term was manifestly erroneous.

2. "County", having failed to move for a protective order, foreclosed itself from later questioning (except via a privilege claim -- which it does not assert) the propriety of plaintiff's interrogatories (Blessin v. Greenberg, 89 A.D.2d 862, 453 N.Y.S.2d 249 [2d Dept.]; 9H v. Zurich, 89 A.D.2d 584, 452 N.Y.S.2d 245; Mangiaracina v. Abatemarco, 87 A.D.2d 585, 447 N.Y.S.2d 770 [2d Dept.]; Silva v. County of Nassau, 86 A.D.2d 864, 447 N.Y.S.2d 314 [2d Dept.]; Hassell v. Nassau County, 86 A.D.2d 859, 447 N.Y.S.2d 322 [2d Dept.]; Galvan v. County of Nassau, 85 A.D.2d 620, 449 N.Y.S.2d 638 [2d Dept.]; Caveney v. Sorrano, 84 A.D.2d 557, 443 N.Y.S.2d 275 [2d Dept.]; Leissner v. Ford, 79 A.D.2d 700, 434 N.Y.S.2d 268 [2d Dept.]; Lane v. Ziv, 76 A.D.2d 902, 429 N.Y.S.2d 246 [2d Dept.]).

3. The finding by Special Term that such answers had been served by "County" lacks even a scintilla of support. "County" itself admits the contrary i.e., that it has not answered appellant's interrogatories [A54].

POINT VII

THIS COURT SHOULD RECUSE ITSELF

1. Appellant is aware of prior dispositions of this Court with respect to similar applications (e.g. Order #1409). Nevertheless, to preserve his rights, he asserts the following:

2. Basic to the constitutional right of "due process", is the right to be judged by a detached tribunal, trial or appellate (Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749; Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532; Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267). Where alternatives are available there is no "duty to sit" (Laird v. Tatum, 409 U.S. 824, 837, 93 S.Ct. 7, 15, 34 L.Ed.2d 50, 60).

2. Members of this Court have personally become involved in some of the events upon which these various lawsuits are based. That such involvement has been voluntary or involuntary is of no legal consequence. Nor is good faith involvement determinative. This Court sits and adjudicates according to a Record on Appeal and matters subject to judicial notice -- nothing more!

The personal involvement as to significant events mandates disqualification. Whether those personal involvements came through events, consciously or subconsciously, inuring to the benefit of appellant, respondent, or defendants, is irrelevant. All parties are entitled to an adjudication, not only fair and impartial, but which appear fair and impartial, to the public, as well as the parties.

The "constant cross-pollination" and "cross current of discussion and ideas" (Cardinale v. Golinello, 43 N.Y.2d 288, 292, 401 N.Y.S.2d 191, 193) that obviously exists between members of this Court is sufficient to disqualify the entire bench.

3. By improperly adopting significant portions of the Signorelli diatribe, albeit not officially before this Court, this Court, by implication, has previously concluded that it believes appellant should have succumbed to the Signorelli Star Chamber Procedures of June 22-23, 1978 (Sassower v. Signorelli, 65 A.D.2d 756, 409 N.Y.S.2d 762 [2d Dept.]. On the contrary, appellant's firm belief is that there is a right, if not a duty, to resist such intrusions on basic constitutional and civilized values.

Appellant does not believe disqualification is warranted based upon differing philosophical opinions. But when this Court ignores a Record on Appeal and the presented issues, and adopts the ex cathedra, sua sponte diatribe of Signorelli, thereby placing a "badge of infamy" upon appellant, this tribunal has forfeited its right to sit in legal or moral judgment. The resistance by this Court, through the Attorney General, to retract, rectify and correct manifest factual error in such published opinion is unpardonable.

In Gertz v. Welch (supra), the Court stated:

> "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wideopen' debate on public issues. New York Times Co. v. Sullivan, 376 U.S. [254], at 270). They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031."

There can be no distinction between fabrications emanating from printer's ink of the New York Daily News, the pen of Signorelli, or the opinion of this Court, except that, if anything, the more prestigious the forum, the greater the culpability because of the greater harm.

There must be justice and the appearance of justice, particularly from an appellate court of justice, or out vaunted standard become empty shibboleths.

CONCLUSION

THE ORDERS APPEALED FROM SHOULD BE MODIFIED, WITH COSTS

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for appellant

Dated: March 18, 1983