To be argued by:
GEORGE SASSOWER
Time: 30 minutes

Supreme Court of the State of New York

Appellate Division — Second Department

GEORGE SASSOWER and DORIS L. SASSOWER,
Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,
Defendant-Respondent.

DORIS L. SASSOWER and CAREY A. SASSOWER,
Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,
Defendant-Respondent,

JOHN P. FINNERTY, WARDEN REGULA, ANTHONY MASTROIANNI, and THE NEW YORK LAW JOURNAL PUBLISHING COMPANY,
Defendants.

APPELLANTS' BRIEF AND APPENDIX

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

DAVID J. GILMARTIN
Attorney for Defendants
Veterans Memorial Highway
Hauppauge, N.Y. 11787
(516) 360-4049

GEORGE SASSOWER
DORIS L. SASSOWER
Attorneys for Appellants
283 Soundview Avenue
White Plains, N.Y. 10606
(914) 328-0440

ABRAM & SHEIDLOWER
Attorneys for Defendant
598 Madison Avenue
New York, N.Y. 10022
(212) 688-4200

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I N D E X

BRIEF

APPENDIX A-

A1

STATEMENT PURSUANT TO CPLR 5531

[A1-A2]

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

GEORGE SASSOWER and DORIS L. SASSOWER,

Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,

Defendant-Respondent.

Action "A"

DORIS L. SASSOWER and CAREY A. SASSOWER

Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,

Defendant-Respondent,

JOHN P. FINNERTY, WARDEN REGULA, ANTHONY MASTROIANNI, and THE NEW YORK LAW JOURNAL PUBLISHING COMPANY,

Defendants.

Action "B"

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1. The Index No. of Action "A" is 14373-1982 and the Index No. of Action "B" is 3607-1979.

2. The full names of the parties appear in the caption and there has been no change.

3. Both actions were commenced in Supreme Court, Westchester County.

4. Action "A" was commenced by the service of a summons on July 30, 1982, a Notice of Appearance was served on or about August 27, 1982, and a complaint was served on or about September 20, 1982. No Answer has been served. Action "B" was commenced by the service of a summons on February 21, 1979, the complaint was served on April 24, 1979, the answer by respondent was served on or about June 14, 1979.

5. The object of both actions are for damages for tortious conduct.

6. Plaintiffs appeal from Orders dated January 19, 1983, entered on January 21, 1983, and February 1, 1983 (per Hon. MATTHEW F. COPPOLA).

7. The appeal is on the appendix method.

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

GEORGE SASSOWER and DORIS L. SASSOWER,

Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,

Defendant-Respondent.

Action "A"

DORIS L. SASSOWER and CAREY A. SASSOWER

Plaintiffs-Appellants,

-against-

ERNEST L. SIGNORELLI,

Defendant-Respondent,

JOHN P. FINNERTY, WARDEN REGULA, ANTHONY MASTROIANNI, and THE NEW YORK LAW JOURNAL PUBLISHING COMPANY,

Defendants.

Action "B"

QUESTIONS PRESENTED

1. Where no prior action was ever commenced by appellant, DORIS L. SASSOWER, Esq. against respondent, ERNEST L. SIGNORELLI, terminating in a judgment, was it proper for Special Term to have dismissed her three causes of action pursuant to CPLR 3211(a)[5]?

2. Where no action was commenced by appellant, DORIS L. SASSOWER, Esq. against respondent, ERNEST L. SIGNORELLI, other than one still pending action commenced in February 1979 (Action "B"), was it proper for Special Term to dismiss her subsequently arising three causes of action, pursuant to CPLR 3211(a)[4]?

3. After dismissal of the complaint of DORIS L. SASSOWER, Esq. in the 1982 action (Action "A"), did Special Term properly deny DORIS L. SASSOWER's motion to amend her complaint in the 1979 action (Action "B") so as to include her causes of action in Action "A"?

4. Did Special Term have the constitutional or legal right to bar DORIS L. SASSOWER, Esq., from bringing any further "actions or proceedings in any New York State Courts based upon incidents relating to the Matter of Eugene Paul Kelly", when the only actions commenced by her was one in 1979 and one in 1982, the latter action based upon events and causes subsequently arising?

5. Where there was no pending action by appellant, GEORGE SASSOWER, Esq. against respondent, ERNEST L. SIGNORELLI, nor any judgment or order applicable to appellant's subsequently arising three causes of action, was it proper for Special Term to dismiss his causes of action pursuant to CPLR 3211 (a)[4][5]?

6. Did Special Term have the constitutional or legal right to bar GEORGE SASSOWER, Esq., from bringing any further "actions or proceedings in any New York State Courts based upon incidents relating to the Matter of Eugene Paul Kelly", under the facts herein?

7. Should appellants' unopposed motion to disqualify ROBERT ABRAMS, Esq., nave been granted under the facts at bar?

PRELIMINARY STATEMENT

This is an appeal from Orders of Hon. MATTHEW F. COPPOLA entered on January 21 and February 1, 1983 (1) dismissing appellants' complaint pursuant to CPLR 3211(a)[4][5]· (2) enjoining them from "instituting any further proceedings in any New York State Courts based upon incidents relating to the Matter of Eugene Paul

Kelly"; (3) refusing to disqualify ROBERT ABRAMS, Esq., as respondent's attorney; and (4) refusing to permit appellant, DORIS L. SASSOWER, Esq. to amend her 1979 action (Action "B") so as to include her causes of action contained in her 1982 action (Action "A").

THE FACTS

1. On February 3, 1978, there was pending in the United States District Court GEORGE SASSOWER's Order to Show Cause requesting that respondent be restrained:

> "from harassing [him] and those with whom he has business, professional and social engagements" (Exhibit "I", p. 2).

To induce the Federal Court to deny interim relief, respondent, through his attorney, an Assistant Attorney General, represented that all proceedings involving GEORGE SASSOWER had been completed.

2. On February 8, 1978, the Federal Court issued another Order to Show Cause wherein GEORGE SASSOWER requested that respondent be restrained:

> "from hearing or adjudicating any matter wherein [GEORGE SASSOWER] is a party or an attorney." (Exhibit "I", p. 3).

3. These applications had been preceded by a series of egregious events, including:

> " directions to [GEORGE SASSOWER] [to] attend court in Riverhead, New York, for a pro forma conference when [respondent] knew that [GEORGE SASSOWER] was paralyzed and hospitalized in Westchester County; threatening [him] with the institution of disciplinary proceedings for his failure to attend court while paralyzed; directing [him], as executor, to sell certain real property and in other ways recognizing [him] as the executor, and thereafter asserting that [he] was unauthorized to sell such property and was unauthorized to act as executor; making various threats to [him] in order to compel [him] to comply with [respondent's] unlawful directions; causing the making of embarrassing inquiries and remarks against [him] in Supreme Court, Queens County; sentencing [him] to be incarcerated for criminal contempt (1) without any accusatory instrument, (2) without notifying [him] of any such criminal contempt trial, (3) causing a trial of [him] in his absence, (4) causing [him] to be convicted without his presence, (5) sentencing [him] without his presence, all known to be illegal by the [respondent]; directing the Sheriff's Office of Suffolk County to illegally transgress its bailiwick and its normal procedures in order to arrest [him]; denying him his basic constitutional rights including the right to habeas corpus relief, the right to counsel, and the right to remain silent; misrepresenting the facts to an Associate Justice of the Appellate Division to whom a Writ of Habeas Corpus had been presented; creating a climate preventing [him] from receiving fair and constitutional trials; intruding himself into the affairs of other judges and officials involving [GEORGE SASSOWER]; ... and in other ways maintaining and continuing a campaign of harassment against [GEORGE SASSOWER] and his family." (A86-A87).

4. On February 24, 1979, there was no motion before respondent involving appellants to be decided, nor did respondent decide or intend anything to be decided by the issuance of his diatribe of that day (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).

5. On February 24, 1979, respondent, without notice or warning, sua sponte, publicly broadcast an attack, not only against appellant, GEORGE SASSOWER, Esq., but also against his wife, DORIS L. SASSOWER, Esq., who was at that time neither a party nor attorney on any matter before Surrogate's Court, Suffolk County.

6. This published diatribe, in clear violation of Judiciary Law §90[10], concludes as follows:

> "I am accordingly directing the Chief Clerk to forward a copy of this decision to the Presiding Justice of the Appellate Division, Second Judicial Department for such disciplinary action as he may deem appropriate with regard to the conduct of George Sassower and Doris Sassower."

7. Respondent's diatribe, purporting to recite appellants' professional and ethical conduct in and out of Surrogate's Court, Suffolk County, was widely distributed at respondent's direction, inter alia, to the New York Law Journal, who published it in haec verba, on March 3, 1979, as well as to a number of other people.

8. The Table of Contents to the analysis of respondent's ad hominem published diatribe against appellants, based largely on documents on file in respondent's court, is already in this Court in a related matter, incorporated by reference herein, as well as in the files of the Appellate Division, First Department and respondent's attorney. It reveals a shocking, documented situation.

Signorelli Published Lie # 1
Signorelli Published Lie # 2
Signorelli Published Lie # 3
Signorelli Published Lie # 4
Signorelli Published Lie # 5
Signorelli Published Lie # 6
Signorelli Published Lie # 7
Signorelli Published Lie # 8
Signorelli Published Lie # 9
Signorelli Published Lie #10
Signorelli Published Lie #11
Signorelli Published Lie #12
Signorelli Published Lie #13
Signorelli Published Lie #14
Signorelli Published Lie #15
Signorelli Published Lie #16
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Signorelli Published Lie #18
Signorelli Published Lie #19

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Signorelli Published Lie #23
Signorelli Published Lie #24
Signorelli Published Lie #25
Signorelli Published Lie #26
Signorelli Published Lie #27
Signorelli Published Lie #28
Signorelli Published Lie #29
Signorelli Published Lie #30

9. Several months later, Suffolk County officialdom again incarcerated GEORGE SASSOWER, Esq. and this time also DORIS L. SASSOWER, Esq. (and their daughter) who had presented a Writ of Habeas Corpus at the Suffolk County Jail directing the immediate release of GEORGE SASSOWER, Esq.

Initially, the Suffolk County authorities wrongfully denied the request of DORIS L. SASSOWER, Esq. and appellants' daughter to see their incarcerated husband/father. Then they denied DORIS L. SASSOWER's request to see her incarcerated client. When DORIS L. SASSOWER, Esq. and appellants' daughter presented the Writ of Habeas Corpus, they were themselves incarcerated incommunicado, without access to telephone, food, water, or bathroom facilities.

10. The later pretext for not releasing appellant, GEORGE SASSOWER, Esq. and the incarceration of appellant, DORIS L. SASSOWER, Esq. and their daughter, according to the Assistant Suffolk County Attorney to the Appellate Division, Second Department, on June 24, 1982, was that the Judge who had signed such Writ was "illiterate".

DORIS L. SASSOWER:

1. In February 1979, appellant, DORIS L. SASSOWER, Esq., (and appellants' daughter) commenced an action against respondent, ERNEST L. SIGNORELLI (and others) for (1) the unjustified refusal to allow them to visit their husband/father; (2) the unjustified refusal to allow DORIS L. SASSOWER, Esq. to visit her client; (3) their incarceration incommunicado, without access to telephone, food, and bathroom facilities; (4) harassment for the ulterior purpose of compelling GEORGE SASSOWER, Esq. to desist from the proper exercise of his legal rights; (5) violation of Judiciary Law §90[10]; and (6) defamation by reason of the aforementioned publication.

Respondent's meritless motion for summary judgment was denied in Action "B" by Mr. Justice MATTHEW F. COPPOLA.

2. After the commencement of the 1979 action (Action "B"), in 1981, DORIS L. SASSOWER, Esq. was resoundingly vindicated by the Appellate Division of the respondent's published charges of misconduct, with the unprecedented "leave to seek sanctions against her prosecutors" for this meritless prosecution.

The Disciplinary Proceedings against appellants disclosed that there had been a massive destruction or secreting of exculpatory and vindicating documents in Surrogate's Court, under respondent's stewardship, misleading the Disciplinary Committee.

3. There had been some further post 1979 tortious conduct chargeable to respondent, all of which caused the issuance of process in Action "A" in 1982.

4. To repeat -- The only actions ever brought by appellant, DORIS L. SASSOWER, Esq. against respondent were the still pending 1979 action (Action "B"), and the 1982 action (Action "A"), arising out of causes and conduct after the 1979 action.

GEORGE SASSOWER:

1. There have been several actions and proceedings by George Sassower, Esq. against respondent.

There are none pending at the present time!

2. There is pending, sub judice since June 24, 1982, an appeal by GEORGE SASSOWER, Esq. from an Order of Suffolk County dismissing his action against respondent based upon respondent's tortious conduct in and prior to 1979.

Since there are no other actions pending by GEORGE SASSOWER against respondent, he, unlike DORIS L. SASSOWER, Esq., was unable to make a motion to amend any other action to include his three subsequently arising causes of action in Action "A" (CPLR 3025(b).

3. GEORGE SASSOWER, Esq. was also completely and rsoundingly vindicated of any professional or ethical misconduct charged by respondent's published complaints.

GEORGE SASSOWER, Esq., was also damaged by the destruction and secreting of public judicial documents by respondent and his Court. It is questionable whether the proceedings would have ever been instituted by the Disciplinary Committee had respondent and his Court not

represented and certified that they had, in fact, turned over true copies of all filed papers and transcripts. Significantly, it was only vindicating and exonerating material which was suppressed by respondent and his Court.

GEORGE SASSOWER, Esq. was also damaged by respondent's other tortious conduct subsequent to the dismissal of this appellant's prior action (presently sub judice on appeal).

RESPONDENT'S MOTION:

1. Respondent, by his attorney, the Attorney General, in an omnibus motion, moved (A9-A10):

> "for an order, pursuant to CPLR 3211(a), dismissing the complaint herein on the grounds that it is barred by res judicata, collateral estoppel and statute of limitations; there are other actions pending between the same parties for the same claims asserted herein in courts of the state or the United States; and the complaint fails to state a cause of action upon which relief could be granted against [respondent]; and further for an order, pursuant to the general equity powers of this Court, N.Y. Const. art. VI §7 subd. a, permanently enjoining [appellants] from commencing any action or proceeding against [respondent] herein in any court of this state based upon the same facts and occurrences at issue in the previous actions brought by [appellants], or either of them, from commencing any action or proceeding for money damages against the Attorney General or any Assistant Attorney General for defending any action brought by [appellants], or either of them, against [respondent] herein, and for such other ...".

The moving affidavit was executed by an Assistant Attorney General (A11-A18), whose information was received by examining certain attached documents, discussions with other attorneys handling related matters, and respondent's law secretary (A11).

APPELLANTS' CROSS-MOTION:

Appellants' cross-motion requested "an Order disqualifying ROBERT ABRAMS, Esq., as [respondent's] attorney" (A19-A20).

In support of such cross-motion, appellant stated (A62-A63):

> "The Attorney General in these various actions represents (1) itself; (2) its employees; (3) the Surrogate's Court; (4) the Appellate Division [First and Second Departments]; (5) the Grievance Committee; and (6) Surrogate Signorelli.
>
> The courts have an obligation to insure a fair judicial proceeding to all litigants and in that spirit will, on its own motion, disqualify an attorney from being an active witness and simultaneously representing a party. Nor will the court permit an attorney to represent in litigation adverse parties.
>
> As representative of defendant herein, the Attorney General is able to secure confidential and private information concerning plaintiffs from the Appellate Division and the Grievance Committee.
>
> The Grievance Committee has tried to prevent my disclosures in pertinent judicial proceedings under pain of new disciplinary proceedings against me.

> Obviously, access to the courts is being denied me, when under threat of new disciplinary proceeding I am advised by the Grievance Committee (the client of the Attorney General) that I may not disclose information detrimental to my adversary (also a client of the Attorney General).
>
> Certainly, if the Attorney General has no intention of having the State indemnify this defendant for any damage award against him, it has no right under the circumstances to defend him.
>
> Even if the State is going to indemnify this defendant, plaintiffs contend that the Attorney General should not conduct his defense because, absent some realistic Chinese Wall, information that plaintiffs must give to the Grievance Committee or the Appellate Division, will inevitably be transmitted and used in this defendant's defense."

The Attorney General did not oppose the relief requested by appellants' cross-motion.

THE DECISION OF HON. MATTHEW F. COPPOLA:

The Court, in its opinion (A89-A91):

1. Rejected appellants' contention that on respondent's omnibus motion "even one cognizable Cause of Action" mandates denial of his motion (A89-A90).

2. Granted respondent's motion to dismiss pursuant to CPLR 3211(a)[4][5], finding that:

> "The instant action involves nothing more than a rehash of allegations previously asserted in one form or another, in one forum or another, and either dismissed or presently pending."(A89)

3. Enjoined appellants from:

> "instituting any further proceedings in any New York State Courts based upon incidents relating to the Matter of Eugene Paul Kelly."(A90)

4. Denied, without prejudice to an appropriate showing, the Attorney General's request that appellants' right to bring lawsuits:

> "against attorneys charged by law with the responsibility of defendant public officials" (A89)

5. Denied appellants' unopposed:

> "cross-motion to disqualify Robert Abrams as [respondent's] attorney." (A90-A91)

THE ORDER:

The Ordering paragraphs allegedly embodying the decision of the Court follow (A7):

> "ORDERED, that the complaint be, and it hereby is, DISMISSED; and it is further
>
> ORDERED, that plaintiff, and each of them, be, and they hereby are, enjoined from instituting any further actions or proceedings in any New York State Court based upon incidents relating to the Matter of Eugene Paul Kelly; and it is further
>
> ORDERED, that that branch of defendants' [sic] motion seeking to enjoin the plaintiffs from bringing suit against attorneys charged by law with the responsibility of defending public officials is denied without prejudice to a renewal of the motion upon appropriate showing that the relief requested is required; and it is further

ORDERED, that plaintiffs' cross-motion to disqualify ROBERT ABRAMS as defendant's attorney is denied."

REARGUMENT AND RENEWAL BY DORIS L. SASSOWER:

Appellant, Doris L. Sassower requested (A65):

"an Order for leave to reargue ...; alternatively, for leave to amend Action 'B' so as to include my three causes of action contained in Action 'A', together with any other, further, and/or different relief as to this Court may seem just and proper in the premises."

In appellant's supporting affidavit, she stated (A68):

" Alternatively, I request, pursuant to CPLR 3025, that I be permitted to amend my complaint in Action "B" by incorporating my causes of action, in haec verba, from Action "A".

Prior to commencement of Action "A", there was consideration given to requesting amendment of Action "B" in lieu of commencing a new action. There were good reasons for pursuing that course.

Contrariwise, there were very good and substantial reasons for pursuing the course chosen.

Dismissal is inappropriate for choosing one legitimate course over another."

THE ORDER:

The Court denied leave to reargue, holding (A8):

"The alternative relief requested is denied for the reasons stated in this court's prior decision [A89-A91]".

POINT I

THE PROCEDURAL FRAMEWORK EMPLOYED BY SPECIAL TERM WAS ERRONEOUS

1. Contrary to the statement of nisi prius (A89-A90), it is well established that it is all or nothing on respondent's omnibus CPLR 3211 motion (Advance Music v. American Tobacco Co., 296 N.Y. 79, 84; Wright v. County of Nassau, 81 A.D.2d 864, 865, 438 N.Y.S.2d 875, 876 [2d Dept.]; Long Island v. Town of No. Hempstead 80 A.D.2d 826, 827, 436 N.Y.S.2d 351, 353 [2d Dept.]; Kaplan v. Simone, 77 A.D.2d 863, 864, 430 N.Y.S.2d 675, 676 [2d Dept.]; Quinn v. Cannibus, 72 A.D.2d 765, 766, 421 N.Y.S.2d 386, 387 [2d Dept.]; Matter of Fritz v. Board of Education, 70 A.D.2d 593, 594, 416 N.Y.S.2d 74, 76 [2d Dept.]; de St. Aubin v. Briggane, 51 A.D.2d 1054, 1055, 381 N.Y.S.2d 533, 534 [2d Dept.]; Griefer v. Newman, 22 A.D.2d 696, 253 N.Y.S.2d 791, 792; Shoehrer v. Sattler, 18 A.D.2d 683, 684, 236 N.Y.S.2d 16, 17 [2d Dept.]; Altman v. Altman, 15 A.D.2d 546, 223 N.Y.S.2d 719, 720 [2d Dept.]; Halio v. Lurie, 15 A.D.2d 62, 67, 222 N.Y.S.2d 759, 764 [2d Dept.]; Harlem v. Hall, 106 Misc.2d 627, 631, 434 N.Y.S.2d 618, 621 [Sup. Dutchess]).

2. The issue is not whether causes of action are stated, but whether appellants have at least one cause of action against respondent, however inartfully pleaded (Rich v. Lefkovits, 56 N.Y.2d 276, 452 N.Y.S.2d 1; Rovello v. Orofino, 40 N.Y.2d 633, 389 N.Y.S.2d 314; Brown v. Brown, 87 A.D.2d 680, 680-681, 449 N.Y.S.2d 63, 64 [3d Dept.]; Weinstein-Korn-Miller, ¶3211.36, Dec. 1981 Supp. p. 23 -25).

3. Defendant has the burden of pleading and proving any immunity or privilege he may wish to assert (Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578). As the Court stated in Dennis v. Sparks (449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190):

> "The burden is on the official claiming immunity to demonstrate his entitlement."

Distinguishable are those case wherein the absolute immunity is clear and patent and the courts foreshorten the proceedings in a summary manner (e.g. Park-Knoll v. Schmidt 89 A.D.2d 164, 168-169; 454 N.Y.S.2d 901, 904 [2d Dept.].

Subject matter and personal jurisdiction are "conjunctural", and both are necessary for the doctrine of judicial immunity to apply (Rankin v. Howard, 633 F.2d 844, 948 [9th Cir.], cert. den. 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326; Schorle v. City, 524 F. Supp. 821, 828 [Ohio]).

Particularly as to appellant, DORIS L. SASSOWER, Esq., respondent's lack of personal jurisdiction over her is clear. Certainly, respondent did not have subject matter jurisdiction to publish complaints of an ethical nature except to those authorized to receive disciplinary complaints. To do as respondent did expressly violated appellants' right of confidentiality.

4. Unless there is conclusive documentary evidence to the contrary, the courts are bound to accept as true, on respondent's CPLR 3211(a) motion, appellants' assertions that the facts upon which Action "A" are based arose subsequent to their prior actions.

Confirmed by documents in the possession of this Court and respondent's attorney, four of the causes of action in Action "A" arose no earlier than 1981, and consequently could not have been initially included in her 1979 action.

5. Summary dismissal cannot be supported merely upon respondent's attorney's affidavit, acknowledging that his statements therein are based upon discussions with (unidentified) colleagues and respondent's (unidentified) law secretary (A11), when the documents do not support his assertions or require further testimonial and probative explanation.

6. As a matter of law, respondent's CPLR 3211(a) dismissal motion should have been denied out-of-hand.

POINT II

APPELLANTS' HAVE STATED CAUSES OF ACTION BASED UPON MALICIOUS PROSECUTION

1. Each of the appellants have set forth in their complaint the necessary elements for a cause of action for malicious prosecution (A81, A83-A84).

Obviously, appellants could not, in 1979, commence an action for malicious prosecution when their respective vindications took place in 1981 and 1982.

The causes of action for malicious prosecution only arose upon exoneration (Whitmore v. City, 80 A.D.2d 638, 436 N.Y.S.2d 323, 324 [2d Dept.]; Peresluha v. New York, 60 A.D.2d 226, 230, 400 N.Y.S.2d 818, 819 [1st Dept.]; Giglio v. Delesparo, 46 A.D.2d

928, 361 N.Y.S.2d 721, 723 [3d Dept.]; Hines v. City, 79 A.D.2d 218, 225, 436 N.Y.S.2d 512, 518 [4th Dept.]; Boose v. Rochester, 71 A.D.2d 59, 65, 421 N.Y.S.2d 740, 746 [4th Dept.]; Viva v. New York, 104 Misc.2d 958, 961, 429 N.Y.S.2d 346, 348 [Sup. N.Y. per Greenfield, J.]; 36 NY Jur., Malicious Prosecution, § 3, p. 257-258).

Had appellants commenced a malicious prosecution action in 1979 -- prior to vindication -- it would have been dismissed as premature (Embassy Sewing v. Leumi Financial, 39 A.D.2d 940, 333 N.Y.S.2d 106, 108 [2d Dept]; Flaks v. Bank, 66 A.D.2d 363, 366, 413 N.Y.S.2d 1, 3 [1st Dept.]; Lewis v. Deposit, 40 A.D.2d 730, 336 N.Y.S.2d 672, 674 [3d Dept.], aff'd 33 N.Y.2d 532, 347 N.Y.S.2d 434; 36 NY Jur., supra, § 19, p. 274-276).

A cause of action for defamation arises upon publication or republication, with a one year statute of limitation. A cause of action for malicious prosecution arises only upon vindication. Obviously, appellants could not wait until vindication to commence an action for both defamation and malicious prosecution, since by that time the defamation action would have been outlawed

Therefore, respondent's dismissal motion under CPLR 3211(a)[4], based upon the assertion that there exists a prior pending action "between the same parties for the same cause of action" is wholly and completely specious, and without a scintilla of factual or legal support.

Respondent's attorney's assertion that DORIS L. SASSOWER's cause of action for malicious prosecution should be dismissed under CPLR 3211(a)[5], is wholly without foundation.

2. As hereinbefore shown, the 1979 action (Action "B") was commenced by appellant, DORIS L. SASSOWER, Esq., for different causes of action that arose prior to commencement. Action "A" was commenced for causes of action which arose subsequent thereto. In any event, CPLR 3211(a)(4) does not mandate dismissal, but only serves as authority to "make such order as justice requires".

2. The answer to substantive immunity, vel non, (an issue not discussed by Special Term) lies in the reasoning behind the decisions in Weiner v. Weintraub (22 N.Y.2d 330, 292 N.Y.S.2d 667) and Toker v. Pollak (44 N.Y.2d 211, 405 N.Y.S.2d 1).

In Weiner v. Weintraub (supra), the Court, granting absolute immunity, stated:

> "Assuredly, it is in the public interest to encourage those who have knowledge of dishonest or unethical conduct on the part of lawyers to impart that knowledge to a Grievance Committee or some other body designated for investigation. If a complainant were to be subject to a(n) ... action by the accused attorney, the effect in many instances might well be to deter the filing of legitimate charges. We may assume that on occasion false and malicious complaints will be made. But, whatever the particular hardship on a particular attorney ... requires that there be a forum in which clients or other persons unlearned in the law, may state their complaints, have them examined and, if necessary, judicially determined. A lawyer against whom an unwarranted complaint has been lodged will surely not suffer injury to his reputation among the members of the Grievance Committee since it is their function to determine whether or not the charges are supportable. Any other risk of prejudice is eliminated by the provision of the Judiciary Law (§90 [10]] which declares that 'all papers ... upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of any attorney ... shall ... be deemed private and confidential.' (at 332, 669).

Contrariwise, in Toker v. Pollak (supra), in denying absolute immunity, the Court stated:

> "Stern contends, however, that his communications to the District Attorney should be afforded absolute immunity because they were given on pain of a threatened subpoena to appear before the Grand Jury. He argues that since he would have been afforded absolute

> immunity had he testified before the Grand Jury, his affidavit submitted in lieu thereof, as well as his oral statements to the District Attorney, should similarly be afforded absolute immunity. We disagree.
>
> Testimony before a Grand Jury is afforded absolute immunity because, by statute ... Grand Jury proceedings are secret. Disclosure of the nature and substance of testimony elicited before this body is prohibited. No such statutory directive requiring confidentiality exists with respect to communications made to a District Attorney." (220-221, 6).

Consequently, the immunity is dependent on the confidential means employed by the complainant and the legal restrictions imposed upon the recipient. Had the complainant in Weiner v. Weintraub, make his complaint by way of a large bold advertisement in the New York Times, the outcome would unquestionably have been different.

Not only did respondent cause this diatribe to be sent to many persons unauthorized to receive professional and ethical complaints against attorneys, but also caused it to be sent and published in the New York Law Journal. It is blackletter law that a privilege or immunity may be destroyed by an excessive or overpublication.

Only the Appellate Division can impose disciplinary sanctions against an attorney or permit disclosure of such complaints (Erie v. Western, 304 N.Y. 342, 346, cert. den. 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690). Respondent was not granted any greater rights in this regard than held by any other person, and his liability should be the same. Liability based on disclosure of disciplinary complaints is historic (Cowley v. Pulsifer, 137 Mass 392, 50 Am Rep 316, per O.W. Holmes, J.). Judiciary Law §90[10] is crystal clear in its language.

Had respondent's attorney requested the conversion of this CPLR 3211(a) motion to CPLR 3211(c), appellants would have shown that respondent employed this massive publication as part of his effort to compel the Disciplinary Committee to undertake these prosecutions against appellants.

Faced with the publication of respondent's 1978 accusations in print against appellants, the prosecutorial hand of the Disciplinary Committee was forced by respondent, in order to justify to the public the proper fulfillment of its obligations.

Respondent's actions were nothing less than a calculated attempt to "cover-up" his 1976-1978 conduct by forcing appellants' silence or discrediting them.

There is authority for a malicious prosecution action based upon administrative and disciplinary proceedings (52 Am Jur 2d, Malicious Prosecution, §§19, 20, pp. 197-198). Clearly, under the unique circumstances at bar, summary disposition of appellants' causes of action for malicious prosecution, is unauthorized

POINT III

APPELLANTS HAVE STATED CAUSES OF ACTION BASED UPON THE DESTRUCTION OF JUDICIAL RECORDS

Appellants have asserted causes of action based upon the "destruction or suppression of exculpatory public documents" and misleading prosecuting authorities (A82, A85). Such conduct gives rise to a cause of action (Four Star v. Merrick, 56 A.D.2d 767, 768, 392 N.Y.S.2d 297, 298 [1st Dept.]; Briggs v. Goodwin, 569 F.2d 10, 26-29 [D.C. Cir.], cert. den. 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133; Jennings v. Shuman, 567 F.2d 1213 [3d Cir.]).

Judicial records are not the property of respondent, nor is their selective, self-serving destruction or suppression an emolument of his office. Respondent's conduct is nothing short of criminal, and even respondent's attorney would not characterize such conduct as a "judicial act".

POINT IV

APPELLANTS HAVE STATED CAUSES OF ACTION BASED UPON THE TORT OF OUTRAGE

1. Appellants have particularized some of respondent's intentional infliction of emotional distress exceeding all bounds of human decency, intolerable in a civilized (professional) society, solely to harm appellants, and without a shred of legal or moral justification (A83, A86-A87).

Some of the alleged misconduct has occurred since commencement of the last action enumerated by the appellants, including the assertion by GEORGE SASSOWER, Esq., that respondent has intruded (A87):

> "himself into the affairs of other judges and officials involving [GEORGE SASSOWER], including the Chairman of the Grievance Committee".

2. Appellants are entitled to a liberal view of their pleadings under a CPLR 3211(a) motion. In any event, since Special Term did not make any CPLR (a)[7] determination, appellants' amplification of these causes of action should await another day.

POINT V

CPLR 3025 RELIEF SHOULD HAVE BEEN GRANTED

On renewal, DORIS L. SASSOWER, Esq. requested that her 1979 action be amended pursuant to CPLR 3025(b) to include her three stated causes in her 1982 action. Respondent's failure to even claim prejudice (A70-A74), should be decisive in granting such motion.

Special Term failed to set forth any rational reason in either of its opinion for the denial of such relief.

POINT VI

ROBERT ABRAMS, ESQ. SHOULD BE DISQUALIFIED FROM REPRESENTING RESPONDENT

Appellants' unopposed motion to disqualify Robert Abrams, Esq. should have been granted.

1. It is unseemly for the Attorney General to represent in this and related cases, proceedings, and motions, the conflicting interests involved in defending Judiciary Law §90[10], the Appellate Division, the Grievance Committee, and various judges, including the respondent in a personal capacity.

a. Should the Attorney General defend the clear, unambiguous, and manifest intent (and those attorneys intended to be protected by its confidentiality provision) or respondent, who violated same?

b. Should the Attorney General defend the exclusive jurisdiction of the Appellate Division in disciplinary matters concerning attorneys or respondent, the usurper, who by his published "decision", rendered without first affording appellants the opportunity to be heard, publicly found appellants guilty of such extraordinary unethical conduct as to request the Appellate Division, Second Department to impose "appropriate" punishment?

c. Clearly reprehensible is the conduct of the Attorney General's office, fully aware of the clear and decisive victory of appellants in their disciplinary proceedings, to continue republishing at every pretense, the respondent's established false diatribe, in violation of statute, with apparent immunity from their client, the Appellate Division, while another client, the Grievance Committee, pursues appellant, GEORGE SASSOWER, Esq., for publishing, in pertinent judicial proceedings, vindicating material brought out during the disciplinary hearings.

Presently existing is the epitome of irrationality when respondent and his attorney, can with impunity publish and republish the accusation (the diatribe), while appellants are prohibited from publishing vindicating material, if not the vindication itself. Even the Chairman of the Grievance Committee acknowledged in writing (Exhibit "2") that he is "not unsympathetic to the predicament in which [appellant] find[s] [himself]" as a result of this "bizarre situation" (Exhibit "1"), in which Grievance Committee Counsel has no solution (Exhibit "3").

d. The Attorney General is able to secure confidential material secured from one client, the Grievance Committee, with whom appellants are compelled to cooperate, and use said information in the defense of respondent, another client.

e. The Attorney General's assistants are operating in obvious tandem, without even attempting to construct a moral "Chinese Wall" within their offices. If this condition continues to exist, one must conclude that in law, like chess, rank and position count.

f. Pertinent is a portion of a recent opinion by Hon. HENRY W. LENGYEL, of the Court of Claims, who held (G. Sassower v. State) that in the Attorney General's representation of respondent, he was entitled to the same privileges and immunities as any defense counsel, no more! In such opinion, His Honor stated:

> "I do not find that an Assistant Attorney General assigned to represent an individual in a civil action pursuant to Public Officers Law §17 is entitled to the same immunity granted by the quasi-judicial character of his actions when the Assistant Attorney General is in effect representing the interest of society as a whole. We have seen in the discussion of the Public Officers Law §17, supra, that in certain instances private counsel may have to be obtained by the employee defendant.

> Certainly that private counsel does not have the protection provided by quasi-judicial immunity. It would indeed be an anomalous result if two different attorneys providing the same legal service were accorded a different immunity status."

2. The instructions given in Federal Court to an Assistant Attorney General, as respondent's representative, and respondent's response to the Court in February 1978, will unquestionably be a probative matter in the 1979 action (Action "B"). On this essential matter, the Assistant Attorney General, will certainly be called upon to testify. There is nothing in any statute which requires the Attorney General to represent respondent, nor may a statute interfere with a proper judicial function.

This Court should disqualify the Attorney General from representing the respondent in this litigation.

POINT VII

SPECIAL TERM'S INJUNCTION IS UNCONSTITUTIONAL, ILLEGAL, AND UNWARRANTED

Appellants, absent manifest abuse, have a constitutional right to access to the courts in order to have their disputes resolved (Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113).

Nisi prius has given everyone a license to commit any kind of tortious act against appellants with impunity, providing it relates to the Matter of Eugene Paul Kelly. Considering that such estate is still pending in Surrogate's Court, the injunction is furthermore beyond the Special Term's jurisdiction. This absolutely incredible prior restraint is blatantly unconstitutional, illegal, and unwarranted, particularly in view of the egregious conduct committed against the appellants. The ravens are being acquitted, the doves condemned!

Thus far, the abuses and tortious conduct has been by respondent, and those acting with him or on his behalf. Appellants have merely responded by seeking redress in the judicial forum. Such form of relief should not be foreclosed. To do so is more than to affirm injustice, it is to deny all that our American way of life and law has achieved and for which it is rightly proud.

CONCLUSION

THE ORDERS OF SPECIAL TERM SHOULD BE REVERSED, WITH COSTS

Respectfully submitted,

GEORGE SASSOWER, Esq.
DORIS L. SASSOWER, Esq.
Attorneys for appellants-
pro se.

February 17, 1983