To be argued by:
GEORGE SASSOWER
Time: 30 minutes

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

GEORGE SASSOWER,
Claimant-Appellant,

-against-

THE STATE OF NEW YORK,
Defendant-Respondent.

APPELLANT'S BRIEF

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1. The Claim Number is 62894

2. The full names of the original parties appear in the caption herein. There has been no change of parties.

3. The proceeding was commenced in the Court of Claims.

4. The proceeding was commenced by the filing of claimant's Notice of Claim on or about March 9, 1979.

5. The object of the claim is for money damages by reason of information, right of privacy, and related torts committed by state officials.

6. The appeal is from a Judgment dated and entered September 19, 1979 and from an Order dated May 29, 1979 and entered on September 11, 1979 (Hon. LEONARD SILVERMAN).

7. The appeal is being brought on the appendix method and there is no transcript as part of this appeal.

QUESTIONS PRESENTED

1. Was appellant's notice of claim timely, when it was filed within 90 days after mass distribution?

The Court below held in the negative.

2. If the notice of claim was not timely filed, should leave have been granted to file same one month late where the defendant knew and participated in all of all the events?

The Court below held the issue moot.

3. Is the defendant immune for all acts of the judiciary?

The Court below held in the affirmative.

4. Did the Court have absolute immunity in the case at bar, as a matter of law?

Special Term did not determine this issue.

STATEMENT

Claimant-appellant appeals (2) from a judgment summarily dismissing his claim (3-4), upon defendant's CPLR 3211 motion (5) and held as "moot" his cross-motion for (14):

> " ... permission to belatedly file his Notice of Claim in the event this Court finds that plaintiff's claim was not timely filed ...".

The Surrogate of Suffolk County employing the gratuitous services of the Office of the Attorney General [and *taxpayers monies] prosecuted an obviously meritless appeal from an Order of Special Term which sustained claimant's Writ of Habeas Corpus.

On November 6, 1978, the Appellate Division unanimously affirmed, despite the inclusion in its opinion of factually false, denigrating, irrelevant, and impertinent material concerning claimant (19).

Since claimant was not "aggrieved" by the unanimous order of affirmance, that litigation was concluded by this Appellate Division determination.

Claimant immediately moved at the Appellate Division to have the factually false, irrelevant, impertinent, and derogatory material expunged, which motion was unopposed. Nonetheless, relief was denied to claimant on December 11, 1978, although the Appellate Division knew its publication, unofficially and officially, was to shortly follow (9).

Claimant then moved for relief in the United States District Court wherein the Appellate Division was represented by the Attorney General (15-16).

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* On appeal the Attorney General did not even contend that appellant's conviction was legal.

In normal course, on December 19, 1978, the complained about decision was *first published by West Publishing Co. in its advance sheets [409 N.Y.S.2d 762](9, 10, 20).

On or about March 5, 1979, claimant filed his Notice of Claim (9, 20) and thereafter the same decision was published officially at 65 A.D.2d 756 (10).

In defendant's CPLR 3211 motion defendant contended that the (a) the claim was untimely [Court of Claims Act §10(3)]; (b) ... (c) ... (d) the Court and its jurists are immune; and (e) the State is not liable for the alleged torts committed by a judge (7-8).

In defendant's motion it stated (8):

> " Assuming, without conceding, that some of the statements in the Appellate Division decision were gratuitous or irrelevant, this cannot be the basis of liability ..."

Appellant opposed and contended (a) that the statute ran, at the earliest, from the date of mass distribution by West Publishing Co., on December 20, 1978 (10) [neither party contended that the eviscerated publication in the New York Law Journal had any legal significance]; and

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* The opinion by the Appellate Division was only partially published by the New York Law Journal - the identifying names of the parties was omitted in the title. Neither side in this action relied on such partial publication at nisi prius.

(c) for the purposes of this motion the Court must assume that the

> " ...gratuitous irrelevant matters were manifestly impertinent and beyond the scope of the issues presented ... besides being false in fact.
>
> Additionally such gratuitous remarks infringed upon (appellant's) liberty and property interests by publicizing matters which by statute are deemed private and confidential." (11)

Without conceeding that his Notice of Claim was untimely, appellant cross-moved requesting permission to file a belated Notice of Claim (14), for which there could not be any prejudice since the Attorney General handled the litigation at Trial Term, the appeal, and in the United States District Court brought immediately after denial of claimant's motion on December 11, 1978 (10, 15-16).

In the federal litigaton, appellant unsuccessfully attempted to have such material dedacted or compel a due process hearing to clear his name.

It is appellant's claim that such improperly inserted material was false, placed him in a false light (20), was egregiously ex parte received from an improper source and considered, was not presented to the Appellate Division by the attorneys for the parties in their briefs [there was no oral argument], was not contained in the record on appeal, and was manifestly impertinent to the issues presented, and to the decision of the Appellate Division.

POINT I

APPELLANT'S NOTICE OF CLAIM WAS TIMELY FILED; ALTERNATIVELY, LEAVE SHOULD HAVE BEEN GRANTED FOR A TARDY FILING

The Court below, without citation of any authority, stated it (20):

> " ...believes that the action was untimely [filed]".

The Appellate Division unquestionably knew that publication and mass distribution would follow the rendition of its opinion, which is mandated by statute (Judiciary Law §§431-434).

Beyond cavil, mass distribution fixed the date from which claimant's cause of action arose (Gregoire v. G.P. Putnam's Sons, 298 N.Y. 119, 126; Clarke v. N.Y. Telephone, 52 A.D.2d 1030, 384 N.Y.S.2d 562 [4th Dept.], aff'd 41 N.Y.2d 1069, 396 N.Y.S.2d 177; Rinaldi v. Viking Peguin, 73 A.D.2d 43, 45, 425 N.Y.S.2d 101, 102 [1st Dept.]; Sorge v. Parade Publications (20 A.D.2d 338, 343, 247 N.Y.S.2d 317, 322 [1st Dept.]; Pascuzzi v. Montcalm Pub. Corp., 65 A.D.2d 786, 410 N.Y.S.2d 325, 326 [2nd Dept.]; Terry v. County of Orleans, 72 A.D.2d 925, 926, 422 N.Y.S.2d 826, 827 [4th Dept.].

Whether the publication in the advance sheets of the official reports following that by West Publishing Co., started the statute to run anew (Rinaldi v. Viking Penguin, supra), is moot, since claimant filed his Notice of Claim within 90 days after publication in the unofficial reports*.

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* Also academic is whether the mass distribution of the bound volumes also caused the time to again run anew.

There is a symbiotic relationship between the courts and the official reports, fully set forth in Williams Press v. Flavin (35 N.Y.2d 499, 364 N.Y.S.2d 154), for which no further exposition is necessary in order to support the contention that the official distribution is legally referable to the courts of this state.

The fact that claimant's notice of claim was filed before it was officially reported certainly makes such notice of claim clearly timely (Budgar v. State, 98 Misc.2d 588, 593, n. 2, 414 N.Y.S.2d 463, 467.

B. The Attorney General represented the adverse party at trial, in the Appellate Division proceeding, in the United States District Court, and in all other proceedings leading and subsequent to the complained of opinion by the Appellate Division. Therefore the State of New York could not have been prejudiced by any claimed late filing of one month, and leave to so file should have been granted.

From the foregoing it is seen that the State of New York, through the Attorney General always knew (Court of Claims Act §10[6]):

> " ...of the essential facts constituting the claim ... had an opportunity to investigate the circumstances underlying the claim ... (and it did not) result in substantial prejudice to the state ...".

POINT II

DEFENDANT'S IMMUNITY FOR THE ACTS OF THE JUDICIARY COULD NOT BE SUMMARILY DETERMINED

It was on the point that the State 'can never be liable for the acts of its Judges', that the Court below bottomed its dismissal.

On this subject the Court below stated (21):

> " Clearly, this Court is bound by the judicial privilege repeatedly recognized by the highter courts of this State. The Cause of action against the State must be dismissed. '[T]he State is not liable for the errors of a judicial officer on the theory of respondeat superior * * *." (Jameison v. State of New York, 7 AD2d 944, 945.)
>
> To the extent that the Judges of the Appellate Division might have been acting in a nonjudicial capacity when rending the allegedly libelous decision, the State would not be liable for their action and would not be the proper party to this action, nor would this Court be the proper forum. The motion to dismiss would thus likewise have to be granted.
>
> Since, as broadly stated by Judge Weisberg of this Court in a decision published during the pendency of this motion, 'the State of New York can never be liable for the acts of its Judges' (Murph v. State of New York, 98 Misc2d 324, 326), the motion to dismiss must be GRANTED and the cross-motion is DENIED as moot."

Appellant contends that there are some instances when the state is liable for the acts of its judges, some when it is not, and some when it is a question of fact.

In the case at bar, appellant asserts that it cannot be stated summarily that the state is not liable as a matter of law under a CPLR 3211 motion.

A. Nisi prius made the erroneous assumption that a judicial officer cannot be liable if he is acting in an official capacity.

The law is clear to the contrary, and where the act or omission is ministerial, judicial immunity does not and never did exist (Kendall v. Stokes, 44 U.S. [3 How] 87, 98, 11 L.Ed. 506, 512; Ex parte Virginia, 100 U.S. 339, 348, 25 L.Ed. 676, 680; Yates v. Lansing, 5 Johns [N.Y.-1810] 282, 291, 296-297; Ferguson v. Earl of Kinnoull, 9 Cl & F 251, 311-314, 8 Eng. Rep. 412, 434-435 [1842]; 48 C.J.S., Judges, §64, p. 1032; 46 Am Jur 2d, Judges, §82, p. 151-152; Prosser on Torts [4th Ed.] p. 989-992; 2 Harper & James on Torts, §29.10, p. 1638-1639; Salmond on Torts [11th Ed.] 217, 732-733; Clerk & Lindsell on Torts [12th Ed.], §§1781, 1803 et seq., p. 931, 942-943).

In Luckie v. Goddard (171 Misc. 774, 776, 13 N.Y.S.2d 808, 809-810), Mr. Judge (then Justice) Van Voorhis stated:

> " Defendant asks for judgment on the pleadings on the ground that he is protected by the immunity from suit which surrounds judicial acts. The plaintiff contends that the making of a certificate of conviction was a ministerial and not a judicial function for which an action wil lie. The distinction was stated thus in Wilson v. Mayor [1 Den. 595, 599]: 'But the civil

> remedy for misconduct in office is more restrictive, and depends on the nature of the duty which has been violated. ... Where this occurs, and the minsiterial duty is violated, the officer although, for most purposes, a judge, is still civilly responsible for such misconduct.'".

CPLR §7003[c] also imposes liability on a Judge or a Court for failure to issue a Writ of Habeas Corpus, but it is questionably under this particular situation whether indemnification would be contrary to public policy (Hartford Accident v. Village of Hempstead, 48 N.Y.2d 218, 422 N.Y.S.2d 47).

Liability for ministerial misconduct is independent of any question of jurisdiction. Consequently, the fact that the acts are committed within the judicial role does not preclude liability.

Indemnity by the State exists for officials and employess for ministerial misfeasance. Is only the judiciary to be excepted from this monetary state umbrella? It would probably shock members of the judiciary to find that they were not protected by the government purse when comparable action by other state officials or employees is so indemnified.

B. A master-servant or principal-agent relationship is not the sine qua non of governmental liability (Drake v. City of Rochester (96 Misc.2d 86, 95, 408 N.Y.S.2d 847, 854).

In Riviello v. Waldron (47 N.Y.2d 297, 302-303, 418 N.Y.S.2d 300, 302-303, the Court stated:

> " The definition of 'scope of employment', however, has not been an unchanging one. ...
>
> So no longer is an employer necessarily excused merely because his employees, acting in furtherance of his interests, exhibit human failings and perform negligently or otherwise than in an authorized manner. Instead, the test has come to be 'whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions' (cases cited).
>
> Thus formulated, the rule may appear deceptively simply but, because it depends largely on the facts and circumstances peculiar to each case, it is more simply said than applied (case cited). ... [T]he question is ordinarily one for the jury (cases cited).

Judicial immunity does not only apply to judges in law courts, it also applies to all those involved in the judicial process such as parties, witnesses, jurors, attorneys, as well as those who are engaged in similar activities before administrative tribunals and agencies (Butz v. Economou, 438 U.S. 478, 509, 98 S.Ct. 2894, 2914, 57 L. Ed.2d 895, 918).

There are many cases wherein judicial immunity has been found to be inapplicable (Briggs v. Goodwin, 569 F.2d 10 [D.C. Cir.], cert. den. 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133; Zarcone v. Perry, 572

F.2d 52 [2d Cir.], cert. den. 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38; Newburger, Loeb v. Gross, 563 F.2d 1057, 1080 [2d Cir.] cert. den. 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782; Gregory v. Thompson, 500 F.2d 59 [9th Cir.]; U.S. v. Wiseman, 445 F.2d 792 [2d Cir.]; Spires v. Bottorff, 317 F.2d 273 [7th Cir.]; Johnson v. Crumlish, 224 F. Supp. 22; Murray v. Brancato, 290 N.Y. 56; Dean v. Kochendorfer, 237 N.Y. 384; Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844 [2d Dept.]).

There is no question that in Gregory v. Thompson (supra) and Dean v. Kochendorfer (supra), the judges were pursuing proper purposes, but employing improper means.

Assume the facts in Dachowitz v. Kranis (supra), except the judge or the Appellate Division in writing the published opinion made the knowingly false defamatory statements, without any evidence to support same, and irrelevant or impertinent to the issues. Under such circumstances, would not the Court be liable for such defamation to the same extent as the attorney-Kranis?

If a Judge is liable for ministerial conduct (Luckie v. Goddard, supra); for assaults in the courtroom (Gregory v. Thompson, supra); for malicious prosecution (Dean v. Kochendorder, supra); for false arrest (Zarcone v. Perry, supra); there is no reason that he may not be liable for defamatory remarks which are not pertinent to the proceeding (Dachowitz v. Kranis, supra), or for making public which, by

statute, is required to be private and confidential (Gannett v. DePasquale, 43 N.Y.2d 370, 378 n. 2, 401 N.Y.S.2d 756, 760; 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; cf. Nicholson v. State Commission, 36 N.Y.2d 597, N.Y.S.2d).

Unlike Nicholson v. State Commission (supra), it was appellant who was involuntarily dragooned into the judicial trial arena and to the Appellate Division by an arrogant judge, an invalid arrest, and specious appeal.

C. The statement by the Court below attributed to Jameison v. State (7 A.D.2d 944, 945, 182 N.Y.S.2d 41, 42 [3d Dept.]), was merely a restatement from Koeppe v. City of Hudson (276 App. Div. 443, 95 N.Y.S.2d 700 [3d Dept.]) and Newiadony v. State (276 App. Div. 59, 93 N.Y.S.2d 24 [3d Dept.]), as the Jameison court acknowledged.

In Kelly v. State (57 A.D.2d 320, 331, 395 N.Y.S.2d 311, 319 [3d Dept]), the same court stated:

> " ...the broad statement in Newiadany v. State ... clearly has not survived the Court of Appeals decision in Jones [v. State, 39 N.Y.2d 275, 352 N.Y.S.2d 169]."

Even the court below acknowledged that the statement in Murph v. State (98 Misc.2d 324, 413 N.Y.S.2d 854) was "broadly stated".

D. The state has made itself liable to the same extent as "an individual or corporation" [Court of Claims Act §12]. As Riviello v. Waldron (supra) discussed the scope of the principal's liability, Owen v. City of Independence (U.S. , 100 S.Ct. 1398, 1419, 63 L.Ed.2d 673, 697), set forth the philosophy, when the high Court stated:

> " Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.
>
> We believe that today's decision ... properly allocates these costs among the three principals in the scenario ... the victim of the ... deprivation; the officer whose conduct caused the injury; and the public, as represented by the [governmental] entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy.' (Monell v. New York City Dept. of Social Services, ...".

POINT III

THE APPELLATE DIVISION HAS NO ABSOLUTE IMMUNITY AT THIS STAGE OF THE PROCEEDING

A. Defendant moved pursuant to CPLR 3211 without attempting to employ the summary judgment procedures provided in CPLR 3211[c] (Rovello v. Orofino, 40 N.Y.2d 633, 389 N.Y.S.2d 314).

Defendant's motion legally assumes the validity of appellant's assertions, which is buttressed by the specific acknowledgment in defendant's attorney's affirmation, wherein he states:

> " Assuming, without conceding, that some of the statements in the Appellate Division decision were gratuitous or irrelevant ...".

B. The law, as set forth by Prosser, (supra, p.778):

> " It is the rule in England that immunity exists as to any utterance arising out of a judicial proceeding and having any reasonable relation to it, although it is quite irrelevant as to any issue involved. The majority of American courts have adopted the rule that there is no immunity unless particular statements are in some way 'relevant' or 'pertinent' to some issue in the case."

While on the merits, the American rule, with its liberal view of relevancy and pertinency, may at times be indistinguishable from the English rule, there is presented at this juncture a question of law pursuant to CPLR 3211.

In Wels v. Rubin (280 N.Y. 233, 235), the Court stated:

> " Defendant Egan moved under rules 113 and 114 of the Rules of Civil Practice for summary judgment dismissing the first cause of action. ... [T]he Appellate Division reversed, dismissed the first cause of action as against Egan.
>
> ... . The relevancy or materiality of these assertions against him is difficult to discover. (Moore v. Manufacturers Nat. Bank, 123 N.Y. 420, 427.) ... .
>
> The judgment of the Appellate Division should be reversed ..."

C. An abandonment of the American rule in favor of the English rule would be contrary to the judicial attitude in restricting, rather than expanding, absolute privilege in all areas of government.

It was restricted in the executive branch in Clark v. McGee (49 N.Y. 613, 427 N.Y.S.2d 740; it was restricted for legislators in Owens v. Town of Independence (supra) and Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411; and for the judicial branch in Dachowitz v. Kranis (supra).

In Clarke v. McGee (supra), the Court stated (618-619, 743-744):

> " While the absolute privilege is thus a creature of strong public policies (case cited), there do exist powerful countervailling considerations which preclude broad application or expansion

> of this privilege. Public office does not carry with it a license to defame at will, for even the highest officers exist to serve the public, not to denigrate its members. Although the needs of effective government mandate that certain important officials be absolutely privileged with respect to statements made in the course of and concerning their public responsibilities, it is yet true that 'a balance must be struck between this objective and the right of an individual to defend himself against attacks upon his character' (case cited). For these reasons, the privilege is not to be extended liberally, and instead must be carefully confined to that type of situation in which the protection provided by the privilege will serve a necessary societal function (cases cited). 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' ".

In Kilcoin v. Wolansky (75 A.D.2d 1, 6, 428 N.Y.S.2d 272, 276 [2d Dept.), this Court stated:

> " ... This substantially greater protection [absolute privilege] has been applied sparingly since it is rarely in the public interest to leave without remedy those who have been maliciously defamed."

In Schermerhorn v. Rosenberg (73 A.D.2d 276, 283, 426 N.Y.S.2d 274, 280-281 [2d Dept.], this Court stated:

> " Yet it is both the genius and the strength of our system that right, no matter how important, are never absolute; rather, they must be harmonized with the legitimate requirements of other protected rights. This is true as well of the guarantee of a free press (case cited), which must be reconciled, inter alia, wth the individual's interest in maintaing his good name, a right which 'reflects no more than our basic concept of the essential dignity and worth of every human being-a concept at the root of any decent system of ordered liberty.' "

In Dachowitz v. Kranis (supra), this Court denied the judicial privilege when the defamation was prematurely published and irrelevant at that stage of the proceeding.

D. At this juncture no answer has been interposed by the defendant and a plea of absolute privilege, or any other non-CPLR 3211 defense, should not be considered. No longer is there any public policy that suits against public officials must be terminated at the threshhold (Gomez v. Toledo, U.S. , 100 S.Ct. 1920, 64 L.Ed. 572).

POINT IV

DEFENDANT'S TECHNICAL OBJECTION IS MERITLESS

Except for appeals (Court of Claims Act §24), the Court of Claims has its own peculiar practice procedures.

There is no complaint in the Court of Claims, instead there is a notice of claim (Court of Claims Act §10), whose contents are perscribed (Court of Claims Act §11, Appendix to the Rules A-D). Therefore CPLR 3016 is inapplicable (Court of Claims Act §9[9]; Sheinbaum v. State, 101 Misc.2d 250 , 420 N.Y.S.2d 855).

If this Court opins otherwise, leave to amend appellant's Notice of Claim is respectfully requested so that appellant may comply with CPLR 3016 or any other pleading procedure.

POINT V

THIS ACTION HAS SUBSTANTIAL MERIT

A. Because appellant relies on the CPLR 3211 status of this action, it should not be thought that appellant does not have a good cause on the merits.

As the limited record herein reveals, the Appellate Division knew by appellant's post-decision motion that its decision contained false and derogatory matter not pertinent to the issues. This was brought directly to the attention of the Appellate Division prior to mass publication and supports the necessary element of legal malice (Maule v. NYM Corp. A.D.2d , 429 N.Y.S.2d 891, 893 [1st Dept.]).

B. There is no public policy interest to be served by permitting a court receiving ex parte, impertinent, status derogatory material, and having it published from an unassailable citadel.

C. Unlike a party or his attorney at trial, or a nisi prius jurist, where there may exist uncertainty to what may be pertinent later on in the trial, or to an appellate court, the Appellate Division knew in this case, as a final arbiter, that the derogatory information received dehors the record was manifestly irrelevant to the issues.

Mr. Justice Blackmun observed in Wolston v.Readers' Digest (443 U.S. 157, 171, 99 S.Ct. 2701, 2709, 61 L.Ed.2d 450, 462):

> " Historians ... may well run a greater risk of liability for defamation."

It may be that an appellate tribunal, like historians, who do not have the time and deliberation constraints of litigants and newspapers have a greater burden.

D. In Ferguson v. Earl of Kinnoull (supra), the Lord Chancellor (Lyndhurst), speaking for the Court stated (313, 315, 435-436):

> " The members of the presbytery need not feel their dignity hurt by this doctrine [liability for ministerial acts]; for I humbly apprehend it would apply to the supreme Judges of Scotland, the senators of the College of Justice. ...
>
> Of law, I hope it may ever be said with truth in this country, 'All things do her homage; the very least feeling her care, and the greatest not exempted from her power.'".

CONCLUSION

THE JUDGMENT AND ORDER APPEALED FROM SHOULD BE REVERSED, WITH COSTS

Respectfully submitted,

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Attorney for appellant.