STATE OF NEW YORK : COURT OF CLAIMS

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In the Matter of the Claim
of

GEORGE SASSOWER,

Claimant.

Claim #62894

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CLAIMANT'S MEMORANDUM OF LAW

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POINT I

THE NOTICE OF CLAIM
WAS TIMELY FILED

1. The State erroneously claims that claimant's cause of action accrued when the Appellate Division issued its opinion on November 6, 1978 and therefore the filing on March 9, 1979 was untimely.

Claimant contends that his cause of action accrued on or about December 20, 1978 by the unofficial mass publication of the opinion in 409 N.Y.S.2d 756, or when it thereafter was officially published in 65 A.D.2d 756. Either date would mandate a holding that claimant's claim was timely filed.

In Sorge v. Parade Publications (20 A.D.2d 338, 247 N.Y.S.2d 317-1st Dept.), the Court reiterated the proposition that:

> " Publication occurred when the matter was availed of for its ultimate purpose by public distribution. Mere relinquishment of possession by delivery ... to the common carrier, without more, did not constitute publication. It is the date of actual distribution rather than what may be termed the 'release date' which controls." (p. 343, 322).

The symbiotic relationship between the courts and the official reports is set forth in Williams Press v. Flavin (35 N.Y.2d 499, 364 N.Y.S.2d 154) and no further exposition is needed herein.

It would seem that the "official" mass publication should control, which was after claimant's filing, particularly in view of Murray v. Brancato (290 N.Y. 52), wherein it was held that publication by West Publishing Co. was not officially authorized.

The fact that claimant's notice of claim was filed before it was officially reported is without legal signficance (Budgar v. State, 98 Misc.2d 588, 414 N.Y.S.2d 463, 467 n.2), and is not even raised by the State herein.

2. In any event, there has been no prejudice to the State of New York by any late filing, as contended by claimant's notice of cross-motion.

The Attorney General represented the appellant before the Appellate Division and immediately received respondent's protest to that tribunal respecting the inclusion of the irrelevant material. The Attorney General represented the Appellate Division in the United States District Court of the Southern District of New York, and now represents that body before the Circuit Court of Appeals.

Therefore the State of New York through the Attorney General immediately knew

> "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 ... " (Court of Claims Act §10[6]).

Claimant contends that the entire opinion was irrelevant and impertinent except that portion which states that the Writ of Habeas Corpus should be sustained and the Order appealed from by the Attorney General affirmed.

POINT II

CPLR 3016(a) is INAPPLICABLE

Pleadings as provided in the CPLR is clearly inapplicable in the Court of Claims (Doe v. State, 86 Misc. 2d 639, 641, 383 N.Y.S.2d 172, 174-175), except as otherwise provided, e.g. Court of Claims Act §24. In any event the failure to comply with CPLR 3016(a) should merely afford claimant an opportunity to replead or refile.

POINT III

JUDICIAL IMMUNITY DOES EXIST AT BAR

1. Judicial immunity for defamatory language or for invasion of privacy is not boundless (Youmens v. Smith, 153 N.Y. 214, 220).

Where the objected material is "obviously impertinent" or "needless defamatory" there is no judicial immunity for bench, bar, or witness (Restatement of Torts-2d, §635, p. 362-363).

A court, particularly an appellate court, which knew its determination was final and not appealable by the appellant, knew the issues and the matters which were pertinent to a proper disposition. The Appellate Division did not need the foresight and elasticity of the trial court or bar,

who may not know in advance matters which are then irrelevant and thereafter may become pertinent or even central to the controversy.

Significantly, this same court in Dachowitz v. Kranis (61 A.D.2d 783, 401 N.Y.S.2d 844-2d Dept.), held that judicial immunity was not applicable where the defamatory material was clearly irrelevant.

2. Claimant's cause is not only bottomed on defamation but on his right not to be placed in a false light before the public (Cox Broadcasting v. Cohn, 420 U.S. 469, 493 n.22, 95 S. Ct. 1029, 1045, 43 L. Ed. 2d 328, 348; Doe v. Roe, 93 Misc. 2d 201, 212, 400 N.Y.S.2d 668, 676), which right has received statutory recognition (Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S. 2d 104, cert. den. 400 U.S. 999; Gannett v. DePasquale, 43 N.Y.2d 370, 378 n. 2, 401 N.Y.S.2d 756, 760; Judiciary Law §90[10]-see also Doe v. McMillan, 412 U.S. 306).

POINT IV

THE STATE MAY BE LIABLE FOR THE ACTS COMPLAINED OF HEREIN

Unquestionably where the act is ministerial judicial immunity does not and never did exist (Kendell v. Stokes, 44 U.S. 87, 98; Yates v. Lansing, 5 Johns [N.Y.] 282, 291, 296-7; 48 C.J.S. Judges, §64, p. 1032; 46 Am Jr. Judges §82, p. 151; Prosser on Torts, 4th ed. p. 989-991.

There are many other varied circumstances wherein it has been held that judicial immunity does not exist (e.g. Murray v. Blancata, 290 N.Y. 52; Dean v. Kochendorfer, 237

N.Y. 384; Zarcone v. Perry, 572 F.2d 52-2d Cir.; Gregory v. Thompson, 500 F.2d 59-9th Cir.; Spires v. Bottorff, 317 F.2d 273-7th Cir. cert. den. 379 U.S. 938; Atkins v. Atkins, 459 F. Supp. 406, 408).

Claimant questions whether in all such cases the State would not be liable. In fact the governmental authorities did pay the compensatory damages recovered in Zarcone v. Perry, supra.

The fact that the State or other governmental units involved undertook the defense in the aforesaid actions is an indication that it was ready to pay any award rendered.

In view of the aforementioned the dicta in Murph v. State (98 Misc. 2d 374, 413 N.Y.S.2d 854, 856) to the effect that the State's liability ends where a judge has no immunity is overstated and unwarranted.

CONCLUSION

THE MOTION BY THE STATE OF NEW YORK SHOULD BE DENIED, IN ALL RESPECTS

Respectfully submitted,

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pro se.