STATE OF NEW YORK : COURT OF CLAIMS

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In the Matter of the Claim
of

Claim #62894

GEORGE SASSOWER,

Claimant.

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CLAIMANT'S MEMORANDUM

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Although the letter from the Attorney General dated June 5, 1979 reflects, sub silentio, an abandonment of all his arguments, save one, in support of the State's motion and in opposition to claimant's cross-motion, I nevertheless will respond to all issues raised by the State.

POINT I

CLAIMANT'S NOTICE OF CLAIM WAS TIMELY FILED; ALTERNATIVELY A LATE FILING SHOULD BE EXCUSED

1. Clark v. New York Telephone Co. (52 A.D.2d 1030, 384 N.Y.S.2d 562, aff'd 41 N.Y.2d 1069, 396 N.Y.S.2d 177 [relied upon by the State], correctly states the general rule respecting the time a cause of action arises in defamation for purposes of the Statute of Limitations when a single statement is involved. This was also the rule at common law, even for defamation by "mass publication".

> "'[The] common law rule (was) that each communication of a defamatory matter constitute(d) a separate publication'" (Sorge v. Parade Publications [20 A.D.2d 338, 340, 247 N.Y.S.2d 317, 320-1st Dept.]).

The aforesaid common law rule has been changed when, as here, mass publication is involved (Gregoire v. G.P. Putnam, 298 N.Y. 119) and

> "the courts have developed a theory of a 'single publication' as one composite tort which embraces all the acts involved in the printing and distribution of a newspaper or magazine to its millions of readers in many jurisdictions. Under this rule there is but one publication and thus one tort.'" (Sorg v. Parade Publications, supra, at p.340, 320).

Consequently, as in the case herein, the time commences to run when mass distribution is made to the ultimate readers, albeit by third parties.

As specifically stated in Sorge v. Parade (supra., at p.343, 322):

> " Publication occurred when the matter was availed of for its ultimate purpose by public distribution. Mere relinquishment of possession ... did not constitute publication. It is the date of actual distribution ... which controls."

Recently in Pascuzzi v. Montcalm Pub. Corp. (65 A.D.2d 786, 410 N.Y.S.2d 325,326-2d Dept.), the Court stated:

> "... injury occurred ... at the time the alleged offending publication was placed on sale to the public (see Zuck v. Interstate Pub., 317 F2d 727; Khaury v. Playboy Pub., 430 FS 1342)."

2. Alternatively, for reasons set forth in claimant's prior "Memorandum", leave should be granted to file late,

since there has been and could not be any showing of prejudice and since the State, through the Office of the Attorney General has been actively involved in this matter in the various State and Federal courts from its inception and is cognizant in all respects as to the events leading to this claim .

a. Sassower v. Signorelli (409 N.Y.S.2d 762,763) patently reveals the direct involvement of the Attorney General and knowledge thereby of the facts by the following caption in the printed opinion:

> "Louis J. Lefkowitz, Atty. Gen., New York City (Leonard J. Pugatch and Samuel A. Hirshowitz, New York City, of counsel), for appellant."

b. The record in the United States District Court of the Southern District of New York (File No. 79-7205) reveals that the Attorney General appeared for the Appellate Division.

c. The file in the United States Circuit Court of Appeals for the Second Circuit (File No. 79-7205) also reveals that the Attorney General appeared for the Appellate Division.

POINT II

CPLR 3016(a) IS INAPPLICABLE

1. As heretofore stated in my prior "Memorandum", the Civil Practice Law and Rules are generally inapplicable in the Court of Claims, particularly insofar as pleadings are concerned.

In the Court of Claims, by Statute and Rules of the Court, the requirements for a Notice of Claim are specifically set forth (Court of Claims Act §§10,11 [cf. §9(9)]; Official Forms for Court of Claims) and they are different than the requirements for a pleading in the Supreme Court (CPLR §3013) or the Civil Court of the City of New York (Civ. Ct. Act §§902,903).

Had the Legislature desired that the Notice of Claim in the Court of Claims conform to that of a complaint in the Supreme Court, the statute could have so stated.

Had this Court desired that the Notice of Claim in this Court conform to that of a complaint in the Supreme Court, the Official Forms could have explicitly provided.

2. CPLR 3016(a) is specifically applicable to libel and slander. In this claim, the cause of action is also bottomed on claimant's 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), his statutory right to secrecy (Judiciary Law §90[10]; Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert. denied 400 U.S. 999), his right not to be caused needless mental distress (Halio v. Lurie, 15 A.D.2d 62, 65-67, 222 N.Y.S.2d 759, 762-764-2d Dept.; Prosser on Torts [4th Ed.] §12, p. 55-56) and a prima facie tort (Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79).

3. In any event, the failure to comply with CPLR 3016(a) merely leads to a right to replead (7B McKinney's, Civil Practice Law and Rules, C3016:2 p. 70-71, Commentaries by David O. Siegel), except where the record is such that a cause of action could not be set forth even if such opportunity were afforded to the plaintiff (Schwartz v. Andrews (50 A.D.2d 1057, 376 N.Y.S.2d 722-4th Dept.).

3. Schwartz v. Andrews (supra)[cited by the State], was an action which was commenced in the Supreme Court, not in the Court of Claims. Futhermore, the Court stated (p.1057, 723):

> " They have failed to state a cause of action in libel and have failed to set forth ... factual allegations which would indicate that they could, upon being granted leave to replead, set forth a cause of action."

POINT III

THE STATE MAY BE LIABLE FOR THE ACTS COMPLAINED OF HEREIN

a. In the Attorney General's letter memorandum of June 5, 1979, he seems to have abandoned all his contentions and limits himself to the sole argument that:

> "the state is not responsible for his (a judge's) wrongdoing since, in order to find liability, the judge must be acting in an official capacity."

The argument that a person must be acting in his official capacity or within the scope of his employment in order for the employer to be responsible was again recently

rejected in Riviello v. Waldron (____N.Y.2d_____, _____N.Y.S.2d_____ [6/7/79 #258], reversing 63 A.D.2d 592, 404 N.Y.S.2d 858).

In Riviello v. Waldron (supra), the Court of Appeals last week stated:

> " Applying the pertinent legal precepts to this factual framework, we first note what is hornbook law: the doctrine of respondeat superior renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment (Mott v. Consumers Ice Co., 73 NY 543; 2 Mechem on Agency [2d ed] §1874). 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' (citing cases).
>
> Thus formulated, the rule may appear deceptively simple but, because it depends largely on the facts and circumstances peculiar to each case, it is more simply said than applied (see Riley v. Standard Oil Co., 231 NY 301, 304). For, while clearly intended to cover an act undertaken at the explicit direction of the employer, hardly a debatable proposition, it also encompasses the far more elastic idea of liability for 'any act which can fairly and reasonably be deemed to be an ordinary amd matural incident or attribute of that act' (2 Mechem on Agency [2d ed] §1884, p.1461). And, because the determination of whether a particular act was within the scope of the

> servant's employment is so heavily dependent on factual considerations, the question is ordinarily one for the jury (Rounds v. Del. L. & W.R.R. Co., 64 NY 129, 137-138; see McLaughlin v. New York Edison Co., 252 NY 202, 208; Note, 45 U.Cin.L.Rev. 235, 236).
>
> That is not to say there are no useful guidelines for assessing whether the conduct of a particular employee, overall, falls within the permissible ambit of the employment. Among the factors to be weighed are: the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of the departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated (see Prosser on Torts [4th ed] §70, p.461; Restatement of Agency 2d §229).
>
> Initially, it bears noting that for an employee to be regarded as acting within the scope of his employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected (see 2 Mechem on Agency [2d ed] §1884). As indicated earlier, it suffices that the tortious conduct be a natural incident of the employment. Hence, general rather than specific foreseeability has carried the day even in some cases where employees deviated from their assigned tasks."

It would probably shock members of the judiciary to find they were not protected by the government purse when comparable action by other state officials or employees is so indemnified.

b. The State makes the erroneous assumption that a judicial officer cannot be held liable if he is acting in an official capacity.

The law is clear that where the act or omission is ministerial, judicial immunity unquestionably does not and never did exist (Kendell v. Stokes, 44 U.S. 87,98; Ex parte Virginia, 100 U.S. 339, 348; 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).

CPLR §7003(c) is a monetary penalty imposed on a Judge or a Court for failure to issue a Writ of Habeas Corpus.

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 employees of the State for ministerial misfeasance. Is only the Judiciary to be excepted from this monetary State umbrella, as the Attorney General contends?

In Yates v. Lansing (supra), the first case in the United States on this subject, Mr. Chief Justice JAMES KENT, speaking for the Court stated (296-297):

> " The penalty (damages) ... is given only for their refusal ... to allow a writ of habeas corpus, when duly applied for. ... It is only when they refuse, in a mere ministerial capacity, to allow a writ, that they are made responsible. The allowance of a writ is not a judicial act. ... [A]nalagous is the case ... where it was held that an action on the case lay against a justice of the peace, for refusing to take the oath of a party robbed, because in such case he did not act as a judge, but as a particular minister appointed by statute ... to take examinations."

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 will 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 ministerial duty is violated, the officer, although, for most purposes, a judge, is still civilly responsible for such misconduct.'".

In Ferguson v. Earl of Kinnoull, supra., the Lord Chancellor (Lyndhurst), speaking for the Court stated (p. 310-315, 434-436):

> " On these facts, my Lords, I am of opinion that this action is well brought. ...I believe

by the law of every civilised country, where damage is sustained by one man from the wrong of another, an action for compensation is given to the injured party against the wrongdoer.

* * *

I will now consider the several objections to the action brought forward on the part of the Appellants.

* * *

Where the Presbytery is acting judicially, or in any matter where its members have a discretion to exercise, no action could be maintained against them ... . The Church judicatories acting within their jurisdiction, must be respected and upheld. But when the members of the Presbytery were required to take Mr. Young on trial, in my opinion they were required to do a mere ministerial act. Touching that act they had no discretion; they had no judgment to exercise. How then could it be judicial? There is no difficulty whatsoever in separating the act of appointing him to appear before them to be examined, and the act of forming a judgment upon his qualifications when he has appeared before them and been examined. It is for a refusal to do the first act that this action is brought, and the first act is purely ministerial.

Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion entrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions should not subject him to an action, ... As to the ministerial act, which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character.

... Everything, therefore, turns on the quality of the act. ...

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

c. Drake v. City of Rochester (96 Misc.2d 86, 408 N.Y.S.2d 847), in several ways is pertinent to the issue at hand. The fact that a City and County were therein involved instead of the State, and that it was the District Attorney's Office, rather than the Appellate Division, as will hereinafter be shown, does not change the legal results.

Some of the statements in said opinion follow:

> " Defendant county challenges the legal sufficiency of plaintiffs' complaints ... (contending that) defendant county cannot be vicariously liable for any of the alleged acts and omissions of either the Monroe County District Attorney or his assistants or the city police officers ... even if the county might otherwise be liable, it is entitled to share in the alleged immunity of the district attorney or assistant district attorney in connection with the acts or omissions alleged in the instant actions."(p. 94, 853).
>
> "... a master-servant relationship is not a sine qua non of county liability..." (p. 95, 854).
>
> "(Fisher v. State, 23 Misc.2d 935, 203 N.Y.S.2d 363, aff'd 13 A.D.2d 608, 212 N.Y.S.2d 209, aff'd 10 N.Y.2d 60, 217 N.Y.S.2d 52) ... uses language strongly suggesting

> that the assistant district attorney is ... a person for whose acts the county may be liable." (p.94, 854).
>
> "In view of the foregoing, the court holds that the Monroe County District Attorney is a county officer within the meaning of County Law ...
> This being the case, the county may be vicariously liable, if, in addition, the acts of such officers or employees were official acts." (p. 96, 854-855).

d. Judicial immunity does not only apply to Judges in law courts, it also applies to 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).

There are many cases wherein judicial immunity as found to be inapplicable (Briggs v. Goodwin, 569 F.2d 10 [D.C. Cir.], cert. denied 437 U.S. 904, 98 S.Ct. 3089; Zarcone v. Perry, 572 F.2d 52 [2d Cir.]; Newburger, Loeb v. Gross, 563 F.2d 1057, 1080 [2d Cir.]; 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, 244 F. Supp. 22; Rhodes v. Houston, 202 F. Supp. 624; 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.).

e. It is absurd to state, as does the Attorney General, that in cases where judges were held liable they "were

pursuing private ends and were not acting in their official capacity".

There is no question that in Gregory v. Thompson (supra) and Dean v. Kochendorfer (supra), the Judge was pursuing a proper purpose, but employing improper means.

There is no question that in cases of ministerial misconduct there is liability, albeit within the scope of the duties of the judicial officer.

There is no reason for the State to claim that misconduct of other state officials which would impose liability upon it, would not cause a similar liability when committed by a judicial officer.

2. The Attorney-General in his initial "Memorandum" contended that even if the statements were "libelous, such would not be actionable" (p.4).

a. As heretofore noted, the judicial immunity is not the exclusive protective device of the law judge, but protects all those, including parties, witnesses, attorneys, and jurors, connected with the judicial process, as well as administrative agencies performing judicial functions (Butz v. Economou, supra).

a. Assume the facts in Dachowitz v. Kranis (supra), except that the defendant-attorney did not make the defamatory remarks in his legal papers, but instead the Judge in writing his published opinion made the claimed defamatory statements, although as there, they were not relevant, nor were any such

statements suggested in any of the papers submitted by the litigants or their attorneys.

Under such circumstances, the Judge would be liable for such defamation to the same extent as attorney-Kranis.

b. If a Judge is liable for ministerial conduct (Luckie v. Goddard, surpa), for assaults in the courtroom (Gregory v. Thompson, supra), for malicious prosecution (Dean v. Kochendorfer, 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 information which, by statute, is required to be private and confidential (Gannet v. DePasquale, 43 N.Y.2d 370,378 n.2, 401 N.Y.S.2d 745,760).

c. In support of its contention, the Attorney General cites Gross v. State (33 A.D.2d 868, 306 N.Y.S.2d 28-3rd Dept.).

That case specifically states that for ministerial functions, the official who errs causes the State to be liable.

d. In Jameison v. State (7 A.D.2d 944, 182 N.Y.S.2d 41-3rd Dept.), the Court's statement respecting immunity was stated to be the "general rule". A "general rule" is not a rule without exceptions.

3. The Attorney General has also stated that the statements of the Appellate Division in this matter are "deemed true until vacated or modified by the same court or until reversed by a superior appellate authority."

Such statement is pure sophistry.

Furthermore, the Attorney General knows that in fact the statements made by the Appellate Division were false in fact.

a. Even if reversed, any libelous statements by a Court would be immune, provided they were pertinent to the proceeding.

b. To the extent they are not pertinent, the defamatory remarks are actionable since there is no immunity, and they are not dependent upon the actions of an appellate tribunal.

c. A court, especially an appellate one, does not have the jurisdiction to set forth defamatory matter, not pertinent to the issues, which does not have any factual support in the Briefs submitted to it. It may not, like a loose torpedo, make defamatory statements with impunity, where they are not relevant to the proceedings before it.

d. If the position by the Attorney General were correct, then the Supreme Court of the United States could make any irrelevant, defamatory statement, however absurd and egregious, and it would be "deemed true".

In U.S. v. United Mine Workers (330 U.S. 258, 308-309), Mr. Justice Frankfurter (concurring) stated:

> " No one, no matter how exalted his public office or how righteous his

private motive, can be judge in his own case ..."

CONCLUSION

THE MOTION OF THE ATTORNEY GENERAL SHOULD BE DENIED IN ALL RESPECTS; ALTERNATIVELY CLAIMANT'S CROSS-MOTION SHOULD BE GRANTED.

Dated: June 15, 1979

Respectfully submitted,

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