12/16/82

COURT OF CLAIMS : STATE OF NEW YORK

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In the Matter of the Claim of

GEORGE SASSOWER,

Claim No. 67058

-against-

Motion No. 27932

THE STATE OF NEW YORK,

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STATE OF NEW YORK)
)ss.:
COUNTY OF WESTCHESTER)

GEORGE SASSOWER, Esq., first being duly sworn, deposes, and says:

Background:

This affidavit is submitted in opposition to the Attorney General's CPLR 3211(a) motion, converted to CPLR 3211(c), on the Court's own motion during oral argument.

1. Responding to the Court's announced conversion, the Assistant Attorney General, by letter to His Honor, dated November 23, 1982, stated:

> "Pursuant to your direction of November 9, 1982 at the return date and argument of the State's motion to dismiss the above entitled claim, let this letter serve to advise the Court and claimant that the State intends to submit no further materials in support of its motion at this time, and its belief that the exhibits annexed to its motion papers are sufficient to support its contentions regarding dismissal."

2. I respectfully contend that a unique situation, as hereinafter detailed, precludes me from producing all my available evidence to insure a resounding defeat of the Attorney General's motion; therefore a CPLR 3211(c) conversion is inappropriate (CPLR 3211[d]).

I further contend that despite this disability, there is more than sufficient evidence and authority warranting the denial of any summary judgment dismissal motion.

a. On November 10, 1982, I wrote (Exhibit "1") to Frank H. Connelly, Jr., Esq., Chairman of the Grievance Committee, regarding the bizzare situation wherein Assistant Attorneys-General freely republish and distribute the sua sponte "Signorelli diatribe", while "I am restrained from publishing any vindicating evidence or results".

b. On November 15, 1982, said Frank Connelly, Esq., responded that he was "not unsympathetic to the (claimant's) predicament", referring the matter to the Committee's Chief Counsel Gary L. Casella, Esq., "to investigate what may be done consistent with the Judiciary Law and the Rules of the Court" (Exhibit "2").

c. On November 23, 1982, Gary L. Casella, Esq. quoted Judiciary Law §90[10] (Exhibit "3") and further confirmed to your deponent, in a subsequent telephone conversation, that if His Honor directed the production of any confidential records, he would respectfully refuse to honor the direction, unless the Appellate Division, by order, directs otherwise. Mr. Casella's position is that, by statute, only the Appellate Division may authorize disclosure of disciplinary complaints and proceedings, even to a judicial tribunal.

Liability:

The aforementioned exchange with the Grievance Committee highlights some of the substantive legal questions facing resolution by this Court:

A. Is there liability in damages against a party who republishes information, mandated by statute to be kept confidential?

B. Did the Assistant Attorney General's republication constitute actionable defamation?

C. Was the conduct of the Assistant Attorney General sufficiently flagrant and egregious to warrant imposition of liability?

The Attorney General does not argue against claimant's liability contention. Instead, he asserts various absolute privileges and immunities, which he contends defeat claimant's cause, however meritorious.

I do not now argue that defendant does not have any (qualified) privileges -- only that it does not have an absolute privilege or immunity.

On this dismissal motion, for the Attorney General to succeed, it is absolute privilege (immunity) or nothing -- since there is ample evidence of malice to defeat any possible grant of summary relief based on an assertion of qualified privilege (Stukuls v. State, 42 N.Y. 2d 272, 275, 397 N.Y.S.2d 740, 742).

The Attorney General bases his motion on the conclusory, factually lacking assertions contained in his affirmation dated October 15, 1982 that:

1. The Signorelli diatribe was published on March 3, 1978 and

> "[t]hus these standards must be deemed to be established unless reversed, modified, or expunged by an appellate court and cannot be collaterally attacked in this court. Under these circumstances, it is submitted, there can be no defamation."

2. The Signorelli diatribe

> "was at the very heart of the underlying litigation and thus pertinent to the judicial proceedings therein", and absolutely privileged "so long as they relate to the matter at hand".

The Attorney General's substantive arguments therefore revolve around (a) the function the Assistant Attorney General was performing at the time of republication, rather than his title; (b) consequences of republication; (c) legal status of the Signorelli diatribe; and (d) pertinency.

The State's Procedural Deficiencies:

The Attorney General's substantive arguments have been presented in a procedurally deficient manner:

1. Since summary judgment is the procedural equivalent of a trial, the movant must base his motion on probative, admissible evidence. All of the Attorney General's papers have been executed by an Assistant Attorney General who neither has, nor claims to have, testimonial knowledge of the matters asserted (Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597-598).

2. The only subdivision of CPLR 3211(a) permitting dismissal of a complaint based upon a "privilege" defense is subdivision "1", which requires production of supporting "documentary evidence".

3. The Attorney General's dismissal request is based upon alleged defenses; therefore, his pleading or motion must comply with CPLR §3013 requiring "the material elements of each ... defense" (Jerry v. Borden, 45 A.D.2d 344, 346-347, 358 N.Y.S.2d 426, 430 [2d Dept.]). Additionally, for summary judgment, probative evidence must be tendered in support of the "material elements".

The function, not the title, of the actor, is determinative on the issue of privilege or immunity. Immunity or privilege depends on something more than the statement "I am an Assistant Attorney General", particularly when it conclusively appears that at the time of publication, the Assistant Attorney General was functioning essentially as a defense attorney in private civil litigation.

Confidentiality - Judiciary Law §90[10]:

1. Judiciary Law §90(10) specifically prohibits everyone, except the Appellate Division, from disclosing and authorizing the disclosure of disciplinary complaints and proceedings. This has been interpreted to preclude unauthorized disclosure by anyone, including the accused attorney, without an order of the Appellate Division. Judiciary Law §90[10] differs from Judiciary Law §45, which expressly permits disclosure by the accused judge.

That is the position of the Attorney General's own client, the Grievance Committee of the Ninth Judicial District (Exhibit "3"), even under the sympathetic circumstances at bar (Exhibit "2").

The clear, plain, and unambiguous reading of the statute must be given effect (1 McKinney's, Consolidated Laws of New York, Statutes §76), particularly by nisi prius. Any exceptional circumstances warranting deviation can, and should, be made only by the Appellate Division, which has been given almost exclusive executive, legislative, and judicial power in matters concerning disciplinary proceedings of attorneys (Supreme Court of Va. v. Consumers' Union, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed. 2d 641; Erie v. Western, 304 N.Y. 342, 346, cert. den. 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690).

2. This was also the rule prior to statute. In Cowley v. Puslifer (137 Mass 392, 50 Am Rep 316), Mr. Justice Holmes held that the publication of a disciplinary complaint, which had been filed in court [the procedure at that time], was not privileged, and upheld the attorney's action against the publisher thereof.

In People ex rel. Karlin v. Culkin (248 N.Y. 465), Mr. Chief Justice Cardozo, speaking for the Court, stated:

> "The argument is pressed ... we put into its hands a weapon whereby the fair fame of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages. ... There is a practice of distant origin by which disciplinary proceedings, unless issuing in a judgment adverse to the attorney, are recorded as anonymous." (at 478-479)

3. Repeatedly, the courts have upheld causes of action based upon defamation and violation of the right of privacy, where confidential material has been published (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; Danzinger v. Hearst, 304 N.Y. 244, 249; Stevenson v. News, 276 App. Div. 614, 96 N.Y.S.2d 751 [1st Dept.], aff'd on other grounds, 302 N.Y. 81; Houston Chronicle v. Tiernan (Tex) 171 SW 542; McCurdy v. Hughes, 63 N.D. 435, 248 NW 512, 87 ALR 683, 696).

In Danzinger v Hearst (supra), the Court stated:

> "The statutory words just quoted [then CPA §337, now Domestic Relations Law §235] are read by the defendants as embracing judicial proceedings that are not public. We cannot adopt that construction. ... A contrary construction would do violence to the public policy behind the statute. See Holmes, J., in Cowley v. Pulsifer, 137 Mass. 392, 394; 18 Halsbury's Laws of England [1st ed.], p. 694; Odgers on Libel and Slander [6th ed.], pp. 253-257. Moreover, such a construction would in effect nullify other statutes whereby the Legislature has directed preservation of secrecy in respect of records of a number of judicial proceedings (see Judiciary Law, §90[10]; N.Y. City Dom. Rel. Ct. Act, §52; Mental Hygiene Law, §74(6), McK. Consol. Laws, c. 27, Code Crim. Pro., §§913-f, 952-t; L. 1951, ch. 716, §23)."

In Stevenson v. News (supra), the Court stated: (615-617, 753-755):

> "We are here concerned, not with the right of a party to make charges, but with the right of defendant to publish them. ... At common law the pleadings or papers filed in an action or proceeding were not open to public inspection, but only to the inspection of those having an interest therein or right of access thereto. In accordance with this rule it was held that the privilege did not attach to those papers filed in the course of a judicial proceeding which were not open to public inspection. ... That the statutory privilege is limited only to reports of papers in judicial proceedings which are open to public inspection ...."

In Shiles v. News (supra), the Court concluded (19, 111):

> "[T]he statutory privilege accorded to fair and true report of a judicial proceeding is not available to the defendant for the articles published and may not be invoked as a defense either to the causes of action for libel or for invasion of privacy. Nor is truth a valid defense to the latter causes."

4. Significantly, and ironically, it has been the Office of the Attorney General which has previously uniformly contended that confidential material may not be disclosed or made subject to inspection.

a. In Clegg v. Bon Temps (114 Misc.2d 805, 452 N.Y.S.2d 825 [Civil, N.Y.], the Attorney General successfully argued against production of privileged material to a judicial tribunal, as prohibited by Labor Law §537(1).

b. In a constitutionally more compelling case, Nicholes v. Gamso (35 N.Y.2d 35, 358 N.Y.S.2d 712), involving a public figure (a judge), the Attorney General successfully argued, with an impressive Brief (Exhibit "4"), against disclosure of disciplinary proceedings.

In sustaining the arguments of the Attorney General, the Court of Appeals said:

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

In Gannett v. DePasquale (43 N.Y.2d 370, 378 n. 2, 401 N.Y.S.2d 756, 760, [aff'd 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608]), the Court stated:

> "Secrecy is also the rule in ... professional disciplinary investigations and proceedings"

5a. In Leff v. State Commission on Judicial Conduct (Exhibit "5"), the judge himself, joined by the intervening press, requested that the proceedings be made public, and the Court refused to grant the petition.

b. In Doe v. McMillan (412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed. 2d 912), the Court unanimously restrained the United States Superintendent of Documents and Public Printer (the disseminators of congressional material), from distribution of otherwise confidential reports violating the right of privacy of citizens.

c. With hypocritical arrogance, the Attorney General's Office contends that its numerous Assistants have the right to publish -- without notice -- and with impunity, disciplinary complaints, disclosure of which, by statute, is reserved only to the Appellate Division (and without notice, only in the discretion of the presiding or acting presiding justice of that court).

If this, be true then each Assistant Attorney General has more power and authority in that respect than the Presiding Justice of the Appellate Division, who, by law, is the only one who can dispense with notice of the application before the Court publishes disciplinary complaints.

It also follows, then, that a similar right to publish confidential material exists with all Assistant District Attorneys, Assistant County Attorneys, and defense counsel in general.

d. In establishing the immunity for lodging disciplinary complaints against attorneys, the Court in Weiner v. Weintraub (22 N.Y.2d 330, 332, 292 N.Y.S.2d 667, 669), justified its holding on the fact that "risk of prejudice is eliminated", since such complaints were confidential. Where confidentiality does not exist, neither does the absolute immunity (Toker v. Pollak, 44 N.Y.2d 211, 220-221, 405 N.Y.S.2d 1, 6-7).

e. Clearly, neither logic nor law, judicial nor official privilege, can immunize the Assistant Attorney General's transgression from a cause of action for damages arising out of the clear violation of claimant's statutory right to privacy.

Privilege and Immunity - Functional:

The civil defense function of the Assistant Attorney General at the time of republication did not afford him absolute judicial nor official immunity in an action based upon defamation.

1. With the possible exception of the absolute civil damage immunity accorded to the Office of the President of the United States through recent constitutional interpretation (Nixon v. Fitzgerald, (U.S. , 102 S.Ct. 2690, 73 L.Ed. 2d 349), the functional approach to immunity is well established and strongly entrenched (White, J., dissenting in Nixon v. Fitzgerald, supra, at , 2709, 373).

As applied to the judiciary, this is exemplified by Supreme Court of Va. v. Consumers Union (supra), wherein the Chief Justice and the highest state court, although absolutely immune in their legislative, not judicial, capacity, were held liable in their enforcement function (p. 736, 1976, 656), for which they had to respond in money damages (on remand, Consumers Union v. American Bar Association, 505 F. Supp. 822, app. dis. 451 U.S. 1012, 101 S.Ct. 2998, 69 L.Ed. 2d 384).

This state, even for members of the judiciary, has long followed the functional approach (Lange v. Benedict, 73 N.Y. 12, 26).

2. Public prosecutors, even while engaged in prosecutorial matters, have not been given absolute immunity for all their functions.

In Hampton v. Chicago (484 F.2d 602, 608 [7th Cir.], cert. den. 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed. 2d 471), Judge (now Justice) Stevens stated:

> "The availability of the (prosecutorial) immunity depends on the character of the conduct under attack."

In Nixon v. Fitzgerald, supra, Mr. Justice White, [who has authored many of the immunity and privilege cases in the Supreme Court, e.g. Gavel v. U.S., 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583; Doe v. McMillan, (supra); Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214; Cox Broadcasting v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328; Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24; Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331; Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895; Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115], stated:

> "The absolute immunity of prosecutors is likewise limited to the prosecutorial function."

In Martin v. Merola (532 F.2d 191, 198 [2d Cir.], Judge Lumbard warned:

> "We believe the time has come for prosecutors to realize that failure to conduct themselves within the law and in accordance with the constitutional rights of those accused of crime, may subject them to a suit in a federal court for the damages caused by their disregard of the law."

In Chappell v. Dewey (173 Misc. Rep. 438, 442, 16 N.Y.S.2d 477, 480-481 [Sup: West]), then District Attorney Thomas E. Dewey was unable to dismiss an action on the ground of prosecutorial immunity based on functionally non-prosecutorial allegations.

Immunity was similarly denied in Jacobs v. Herlands, 51 Misc.2d 907, 908-909, 17 N.Y.S.2d 711, 713 [Sup: Kings]; 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; Marrero v. Hialeah, 625 F.2d 499, 505 [5th Cir.], cert. den. 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 237; Jennings v. Shuman, 567 F.2d 1213 [3d Cir]; Redcross v. County, 511 FS 364, 370-372 [N.D. N.Y.]).

Consequently, reliance by the Attorney General on Gautsche v. State (67 A.D.2d 167, 415 N.Y.S.2d 280 [3d Dept.]), Installment v. State, 21 A.D.2d 211, 250 N.Y.S.2d 124 [3d Dept.]), and Levy v. State (86 A.D.2d 574, 446 N.Y.S.2d 85 [1st Dept.]) is misplaced, since in those cited cases, the Assistant Attorney General involved was acting as an official or public prosecutor and not, as here, as a defense attorney in a civil action.

3. Well settled is the proposition that even constitutionally mandated judicially appointed defense counsel are legally "akin to private defense counsel" and hence not entitled to the privileges and immunities of public prosecutors (Ferri v. Ackerman, 444 U.S. 193, 205, 100 S.Ct. 402, 410, 62 L.Ed.2d 355, 364). To hold otherwise would give the Assistant Attorney General, acting pursuant to state statutes, greater judicial privileges than given to those acting under federal constitutional mandates.

The official obligations and immunities are also different between a state prosecutor and a defense counsel. Immunized statements made by the former carry no similar immunity when made by the latter (Barto v. Felix, 250 Pa. 262, 378 A.2d 927). At bar, the Assistant Attorney General served merely as a Public Defender or Legal Aid Attorney for the public officials being sued, pursuant to Public Officers Law §17. Under Public Officers Law §17, would Signorelli have been entitled to any lesser rights had private counsel appeared for him instead of the Attorney General?

In his capacity as a defense attorney, the Assistant Attorney General was entitled to the same rights, privileges, and immunities of any private civil defense attorney, with the same duties and obligations -- no more, no less!

In Ferri v. Ackerman (supra), the Court stated (202-204, 408-409, 362-363):

> "There is, however, a marked difference between the nature of (defense) counsel's responsibilities and those of other officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the

maximum ability to deal impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. ... [H]is duty is not to the public at large ... . His principal responsibility is to serve the undivided interests of his client."

With respect to official immunity, the Court stated in Stukuls v. State (supra, at 278, 744):

"This analysis leads us to conclude that, unless an official is a principal executive of State or local government or is entrusted by law with administrative or executive policy-making responsibilities of considerable dimension, policy considerations do not require that he be given an absolute license to defame."

In Butz v. Economou (supra, at 506, 2910, 915-916), the Court restated the fundamental principle:

" 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it' ".

Qualified Judicial Immunity:

The absolute immunity of counsel does not exist or is strictly dependent on pertinency when the defamed person (1) does not have the right to respond or (2) is not a party to the litigation.

1. Despite the much more extensive judicial privilege giving rise to immunity recognized by English courts, nevertheless, the leading case of Buckley v. Wood (Mich. 33 & 34 Eliz., 4 Co. Rep. 14b-15a; 76 Eng. Rep. 888, 890 [1591]) held absolute privilege i.e., immunity applied only where the court had jurisdiction.

> "[Where] the Court has no power or jurisdiction to do that which appertains to justice, nor to punish the said offences, and if such matters may be inserted in bills exhibited in so high and honourable a Court, in great slander of the parties, and they cannot answer it to clear themselves, nor have their actions as well to clear themselves of the crimes, as to recover damages for the great injury and wrong done them, great inconvenience will ensue; but the said libel, without any remedy given the party, will always be on record, to his shame and infamy, which will be of great inconvenience."

American courts have followed this principle. 158 ALR 592 states:

> " ... the various courts in the United States, as well as some of the courts in England, appear to have adhered to the rule that lack of jurisdiction destroys the privilege of defamatory allegations or statements made in judicial proceedings (cases cited, including Thorn v. Blanchard, 5 Johns 508; Hosmer v. Loveland, 19 Barb 111; Perkins v. Mitchell, 31 Barb 461). [at 592].
>
> The foregoing case (Buckley v. Wood [supra] was quoted with approval in Thorn v. Blanchard [supra]." [at 594].

This same reasoning limiting absolute privilege (immunity) was adopted in Toker v. Pollak (supra), when the Court, in distinguishing absolute privilege situations, stated (222, 7):

> "In contrast, in the present case ... no quasi-judicial hearing at which plaintiff Toker was permitted to challenge defendant's Stern's allegations was ever held. Nor does it appear that the Department of Investigation was empowered based upon its findings, to grant any tangible form of relief reviewable on appeal in the courts. In sum, the proceeding before the Department of Investigation lacked all of the safeguards traditionally associated with a quasi-judicial proceeding."

That eminently logical rationale is applicable to the case at bar. Claimant has been prohibited by Judiciary Law §90[10] and the Grievance Committee from publishing the unasssailable judicial refutation of the Assistant Attorney General's defamatory republication -- a refutation found in the sworn testimony of the original libelor himself, Signorelli! Whether the State is estopped from alleging or relying on traditional defenses such as truth or qualified privilege, while simultaneously prohibiting claimant's exercise of disclosure rights in claimant's defamation action need not now be argued. It may be that, employing the principle underlying the Dead Man's Statute [CPLR §4519], the law will not hear one side, when the other side cannot speak. At this juncture, certainly, fairness demands that there be no absolute privilege or immunity for a defamer who has precluded the other side from controverting the defamation (Buckley v. Wood (supra) or not afforded the victim a judicial or quasi-judicial tribunal to controvert publicly the false charges (Toker v. Pollak (supra).

2. The constitutional right of "due process" is basically a concept of fair play, i.e., notice and opportunity to respond. Prohibiting me from responding to the published defamation of Signorelli or the republished version of the Assistant Attorney General, with my decisive rebuttal evidence on the subject, is plainly repugnant to our Anglo-Saxon concepts of procedural and substantive due process.

3a. The immunity to defame third persons in the judicial forum has received authoritative review and limitation in (Wels v. Rubin, 280 N.Y. 233; Moore v. Manufacturers, 123 N.Y. 420; Battu v. Smoot, 211 App. Div. 1011, 206 N.Y. Supp. 780 [1st Dept.]; Rusciano v. Mihalyfi, 165 Misc. Rep. 932, 1 N.Y.S.2d 787 [Sup., Bx.]; Anonymous v. Trenkman, 48 F.2d 571 [2d Cir.]; Potter v. Troy, 175 F. 128 [2d Cir.]; Union v. Thomas, 83 F. 803 [9th Cir.]; Laun v. Union, 350 Mo. 572, 166 SW2d 1065, 144 ALR 622).

Unquestionably, I was legally a stranger in the litigation involving my wife and daughter in Supreme Court, Westchester County, as shown by the aforementioned cases wherein a substantially similar nexus between the litigating party and the party defamed was held inadequate to protect the defamer. In Moore, the stranger was a third party who allegedly collaborated with the embezzler; in Wels, Anonymous, and Union, the third person was an attorney for a party; in Battu, it was the officers and directors of the corporate party; in Rusciano, it was the president of the corporate party; and in Potter, it involved the executive officer of the corporate party.

b. Examination of the complaint filed by my wife and daughter in their Supreme Court action (Exhibit "C") reveals that their causes of action exist, irrespective of whether I be "saint or sinner", "moral or amoral".

My wife and daughter could not be legally incarcerated merely because they served a Writ of Habeas Corpus mandating my release, irrespective of my alleged guilt or the alleged crime involved.

My attorney-wife could not be defamed with impunity nor her Judiciary Law §90[10] rights transgressed because of my alleged misconduct, at least not since the Married Women's Property Act of 1848 (Domestic Relations Law §50). That revolutionary reform recognized married women's separate entity status, thereby obliterating the ancient common law concept of marital oneness crystallized in the expression "vir et mulier ut una persona in lege". The Constitution of the United States outlawed the infamous "bills of attainder" (Art. 1, §9 clause 3, §10 clause 1), which, in effect, the Assistant Attorney General attempted to resurrect by including the ex cathedra sua sponte diatribe of Signorelli, unjustifiably impugning the professional conduct of my wife, a non-party to the Surrogate's Court proceeding.

If there is any legal relationship between the tortious acts committed against claimant's wife and daughter, as set forth in their complaint, and the Signorelli sua sponte diatribe against claimant, which the Assistant Attorney General gratuitously inserted in their action, the Attorney General has utterly failed to show such relationship in his moving affirmation of October 15, 1982 or elsewhere.

Pertinency:

Assuming, arguendo, claimant were a party to the Supreme Court action, liability exists if the (Signorelli) diatribe was not pertinent to that litigation (Dachowitz v. Kranis, 61 A.D.2d 783, 401 N.Y.S.2d 844 [2d Dept.]) or the trier of the facts finds that the publication or republication by the Assistant Attorney General was "motivated by no other desire than to defame" (Dachowitz v. Kranis (supra, at 784, 847).

In Rice v. Coolidge (121 Mass. 393, 395), the Court stated:

> "It seems settled by the English authorities that ... counsel ... are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings (cases cited). The same doctrine is generally held in the American courts, with the qualification, as to ... counsel ..., that in order to be privileged, their statements made in the course of an action must be pertinent and material to the case."

The facts at bar reveal that the motivation of the Assistant Attorney General, who had knowledge of the falsity of the Signorelli diatribe, was, in fact, to defame and to deprive the claimant's wife and daughter of a fair and impartial decision (Shepherd v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600):

1. The Signorelli diatribe was injected, although wholly without probative value in the form presented (significantly, Signorelli refused to execute a sworn affidavit embodying such diatribe). A gratuitous, unsworn opinion has no evidentiary value for the truth thereof in an independent action.

2. Similarly valueless is the Assistant Attorney General's unsupportable, conclusory statement in his affirmation that:

> "the (Signorelli) opinion was at the very heart of the underlying litigation and thus pertinent to the judicial proceedings therein ... (the Signorelli diatribe) relate(d) to the matter at hand".

No supportable, legally pertinent or legitimate reason has ever been advanced for introducing the defamatory language contained in the Signorelli diatribe into the Supreme Court action. Its introduction was patently, solely to defame claimant and to prejudice the court against claimant's wife and daughter.

3a. On the question of pertinency, examination of the cases reveals that where the defamatory remarks have been made by a lay person, the privilege has been sustained, since a lay person has obviously not been schooled to know what is or may be relevant (Martino v. Frost, 25 N.Y.2d 505, 508, 307 N.Y.S.2d 425, 427; Scully v. Genesee, 78 A.D.2d 982, 434 N.Y.S.2d 48 [4th Dept.]; Friedman v. Alexander, 79 A.D.2d 627, 433 N.Y.S.2d 627).

b. Where the remarks have been made during the heat of argument or litigation, remarks, even by attorneys, have been held pertinent (Star v. Simonelli, 76 A.D.2d 861, 428 N.Y.S.2d 617 [2d Dept.]; Wekstein v. Romm, 87 A.D.2d 867, 449 N.Y.S.2d 308 [2d Dept.]).

c. The pertinency of defamatory material has become a subject for closer scrutiny when the remarks, as here, have been prepared and made in the calm, deliberate, and serene atmosphere surrounding an attorney's desk (Moore v. Manufacturers, supra; Dachowitz v. Kranis, supra; Wiser v. Koval, 50 A.D.2d 523, 374 N.Y.S.2d 652 [1st Dept.], app. dis. 39 N.Y.2d 873, 382 N.Y.S.2d 743, 39 N.Y.2d 922, 386 N.Y.S.2d 407).

Significant, at bar, is the fact that this Assistant Attorney General was personally and repeatedly warned about the falsity of the Signorelli diatribe, the legal consequences of republication, and was even specifically advised of the authoritative citations supporting claimant's position. Nevertheless, with ample opportunity to research, consult, and deliberate, the Assistant Attorney General intentionally decided to go forward and republish.

Notwithstanding similar forewarnings, other Assistant Attorney Generals have, likewise, since that time, blithely chosen to republish the Signorelli diatribe in other tribunals.

d. At the time this Assistant Attorney General republished, he knew that the Signorelli sua sponte diatribe had been analyzed and compared against Signorelli's own sworn testimony and records in his Court, and that the accusations contained in said diatribe had been found to be lies and distortions, from beginning to end!

In his possession, the Attorney General had a copy of such analysis, which had been filed in the Appellate Division, First and Second Departments, and whose partial Table of Contents reads as follows:

"The Lies Published by Surrogate Signorelli

The Assistant Attorney General knew at the time of his republication that neither Signorelli nor anyone on his behalf had in any way controverted the aforesaid analysis.

The Assistant Attorney General had been supplied a written authorization to obtain a transcript of the Signorelli testimony so that he could, by his own reading and analysis, see how utterly false, deceptive, and misleading the Signorelli charges were.

The Assistant Attorney General knew that in the action by claimant's wife and daughter, Signorelli had not pleaded "truth", "good faith", or any such defenses.

The Assistant Attorney General was repeatedly advised that if he were intent on submitting such diatribe to the Supreme Court, he should obtain a sworn affidavit executed by Signorelli as to the truth of the assertions contained therein.

The Assistant Attorney General had available to him an avalanche of material from deponent's complaint in the federal court, the records of the Surrogate's Court, the records of the Grievance Committee, the records of the Appellate Division, all exposing the Signorelli deception.

The Assistant Attorney General knew also that I was being gagged from revealing this outrageous calumny because the State's own client, the Grievance Committee was objecting to release of probative evidence at hand.

The Assistant Attorney General was not presenting the Signorelli diatribe to the Supreme Court as a sua sponte pronouncement without a semblance of due process and without any support in the record or elsewhere, but as a deliberate judicial opinion purportedly made after all sides had been given an opportunity to be heard by submission of papers or the taking of testimony (see Stukuls v. State, supra, at 281, 746).

As clearly stated in Bradley v. Fisher (80 U.S. [13 Wall] 335, 352, 20 L.Ed. 646, 651), where want of jurisdiction is known, no excuse is permissible. This fundamental principle was repeated in Stump v. Sparkman (435 U.S. 349, 356 n. 6, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331, 339) and applied in Rankin v. Howard (633 F.2d 844 [9th Cir.], cert. den. 451 U.S. 939, 101 S.Ct. 2020, 68 L.Ed.2d 326) and Schorle v. City (524 F. Supp. 821, 828 [Ohio]).

Unquestionably, the Assistant Attorney General knew he had no jurisdiction to republish in violation of Judiciary Law §90[10].

As Mr. Justice Cardozo said in Jacobs & Young v. Kent (230 N.Y. 239, 244):

> "The willful transgressor must accept the penalty of his transgression."

The Diatribe:

1. There is no need in this litigation in this Court to resolve the issue of Signorelli's immunity, vel non, for his publication. 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) seems despositive of such issue. The Writ of Prohibition issued therein could only be justified on the ground that the Surrogate therein had no jurisdiction when he went on a similar irresponsible rampage.

Nonetheless, it is clearly established that even an immune or privileged defamation does not immunize or privilege a republication (Doe v. McMillan, supra, 314 n. 8, 2025-2026, 922; Hutchinson v. Proxmire, 443 U.S. 111, 121 n. 10, 99 S.Ct. 2675, 2681, 61 L.Ed.2d 411, 422).

In Doe v. McMillan (supra), the Court stated (314 n. 8, 2025-2026, 922):

> "The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected. See generally 1 F. Harper & F. James, The Law of Torts §5.18 (1956); W. Prosser, Torts 766-769 (4th ed. 1971). See also Gravel v. United States, 408 U.S., at 622-627, 33 L.Ed.2d 563."

2. The issue of immunity or privilege is not determined in a vacuum. A privileged publication may be destroyed by a simultaneously unprivileged publication (Bingham v. Gaynor, 203 N.Y. 27, 32).

Nor is there any question that a privilege or immunity may be destroyed by an inappropriate or excessive publication. In Stukules v. State (supra), the Court of Appeals repeated the proposition concerning the failure of the qualified privilege when the defamer excessively or inappropriately published, stating:

> "the protection of the privilege will still be subject to defeasance by excessive publication (Restatement, Torts 2d §604), or by the publication of defamatory matter solely for an improper purpose (id., §605), including its publication 'solely from spite or ill will' (id., §603, Comment a)." (at 281, 746)

Even Judge Wachtler, who dissented, on the ground that an absolute privilege existed, nevertheless recognized:

> "Further, the subject of the communication must be relevant to the matter at issue (case cited). Thus, while Dr. Corey's statements before the committee are protected by absolute privilege, were he to read the same letter to the general public from the steps of the schoolhouse, no such protection would be granted." (at 288, 751)

The Tort of Outrage

The State does not deny that at the time the Assistant Attorney General made his submission he was aware that the Signorelli diatribe was completely fabricated.

The State does not deny that the Assistant Attorneys General now knows the Signorelli diatribe is false and misleading.

Nevertheless, the State makes no apologies for its dishonest and reckless submission, then or now.

On the contrary, the State persists in arguing through its numerous Assistant Attorneys General, that they are free to republish, and, in fact, it has continually and deliberately republished such diatribe in every tribunal wherein litigation is pending with by me, my wife and daughter.

Clearly, such indiscriminate, carefully calculated republication is not entitled to be protected by any privilege or immunity, absolute or qualified (Bingham v. Gaynor (supra).

In Halio v. Lurie (15 A.D.2d 62, 222 N.Y.S.2d 759 [2d Dept.], the Court stated (66, 763):

> "The question remains, however, whether there may be recovery for the intentional infliction of mental distress without proof of the breach of any duty other than the duty to refrain from inflicting it. We see no reason why there should not be."

As the Attorney General Office knows, my wife and I were not only vindicated, but Signorelli and his entourage were massacred -- confronted by their lies, they and sunk as surely as the Titanic.

Nevertheless, despite such vindication, documented by the official records of the Appellate Division (Exhibits "6" and "7") the State keeps on publishing the Signorelli lies and his public complaint calling for disciplinary action against us.

The State's motion should be resoundingly rejected for inter alia "for conduct exceeding all bounds usually tolerated by a decent (professional) society" (Fisher v. Maloney, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 992).

A substantial monetary award will alter the egregious course the State has charted for itself.

WHEREFORE, it is respectfully prayed that the State's motion be denied in all respects with costs.

GEORGE SASSOWER

Sworn to before me this
16th day of December, 1982

Barbara Tatesure

BARBARA TATESURE
Notary Public State of New York
No. 24—4760746
Qualified in Kings County
Commission Expires March 30, 1984