Court of Appeals
State of New York

GEORGE SASSOWER,
Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI and HARRY E. SEIDEL,
Defendants-Respondents,

ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, NEW YORK NEWS, INC., and VIRGINIA MATHIAS,
Defendants.

NOTICE OF MOTION FOR LEAVE TO APPEAL, BRIEF AND SUPPORTING PAPERS

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I N D E X

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Defendants.

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of GEORGE SASSOWER, Esq., sworn to on the 15th day of February, 1984; Appellant's "Memorandum" of February 15, 1984; Appellant's Brief, Appendix and additional papers to the Appellate Division, Second Department; Respondents' Brief in Doris L. Sassower and Carey A. Sassower, plaintiffs-respondents against Ernest L. Signorelli, presently sub judice , in the Appellate Division, Second Department; Appellant's Brief and

Appendix in George Sassower and Doris L. Sassower, plaintiffs-respondents against Ernest L. Signorelli, defendant-respondent, presently sub judice in the Appellate Division, Second Department; the Order of the Appellate Division, Second Department of December 30, 1983, insofar as requests renewal [resettlement presently sub judice]; the Order of June 28, 1983; and all pleadings and proceedings had heretofore herein, the undersigned will move this Court at a Stated Term of the Court of Appeals, Court of Appeals Hall, Albany, New York, on the 5th day of March, 1984, at 2:00 o'clock in the afternoon of that day or as soon thereafter as Counsel may be heard for an Order (1) granting appellant leave to appeal to the Court of Appeals; (2) vacating the sua sponte dismissal of Action No. 3 in the Order of the Court of Appeals dated January 17, 1984; (3) holding in abeyance any decision in this matter pending determination of the interrelated aforementioned appeals, sub judice, at the Appellate Division, Second Judicial Department [in addition to appeals pending in

this action in the First and Fourth Departments of the Appellate Division]; (4) together with any other, further, and/or further relief as to this Court may seem just and proper in the premises.

Dated: February 15, 1984

Yours, etc.,

GEORGE SASSOWER, Esq.
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2125 Mill Avenue,
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To: Robert Abrams, Esq.
Attorney for respondent

Martin B. Ashare, Esq.
Patterson, Belknapp, Webb & Tyler, Esqs.
Attorneys for defendants

STATE OF NEW YORK : COURT OF APPEALS

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI and HARRY E. SEIDEL,

Defendants-Respondents,

ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, , NEW YORK NEWS, INC., and VIRGINIA MATHIAS,

Defendants.

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

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

Deponent is the plaintiff-appellant in the above matter and makes this application for an Order (1) granting appellant leave to appeal to the Court of Appeals; (2) vacating the sua sponte dismissal of Action No. 3 in the Order of the Court of Appeals dated January 17, 1984; (3) holding in abeyance any decision in this matter pending determination of the interrelated aforementioned appeals, sub judice, at the Appellate Division, Second Judicial Department [in addition to

appeals presently pending in the First and Fourth Departments of the Appellate Division in this action]; (4) together with any other, further, and/or further relief as to this Court may seem just and proper in the premises.

1a. Orders with Notice of Entry were not served with respect to any of the Orders mentioned herein.

b. Appellant's motion for, inter alia, leave to the Court of Appeals from the Order of the Appellate Division, Second Judicial Department of July 25, 1983 was dated, and timely served, on August 24, 1983.

Jurisdiction:

2a. This request for leave is made without prejudice to appeal, as a matter of right, pursuant to CPLR §5601(b)[1], and in this regard, deponent respectfully requests that the sua sponte Order of this Court, dated January 17, 1984, regarding this action (Action No. 3), be vacated.

b. Appellant's Notice of Appeal of September 6, 1983, was primarily, if not exclusively, aimed at Action No. 2, based on the contention that "double jeopardy" triggered jurisdiction in this Court, without the necessity of a formal Order denying a Writ of Prohibition.

Apparently, by its Order of January 17, 1984, this Court disagreed.

Thus, deponent moved by way of a Writ of Prohibition, and thus far, as of the return date, deponent has received no opposition.

3. The constitutional contention regarding Action No. 3, is different, and arose not earlier than upon oral argument at the Appellate Division on June 24, 1982.

a. Deponent, knew or assumed that there was a transactional involvement between Signorelli and former Presiding Justice Frank A. Gulotta on June 23, 1977.

It was and still is inconceivable that His Honor would deny bail to appellant on that day had he been correctly informed by Signorelli that appellant's incarceration for criminal contempt was made (1) without any accusation; (2) without notice of any hearing or trial; (3) a trial; (4) a conviction; and (5) and sentence, all in absentia.

There was nothing known or assumed by appellant which would warrant the disqualification of the Second Department in this matter.

b. It was the unsolicited oral remarks by the Assistant Suffolk County Attorney to the Appellate Division which mandated some further inquiry, which deponent made.

Of particular significance was the admission that the Assistant Suffolk County Attorney that he personally was at the Suffolk County Jail on June 10-11, 1978 when not only was a Writ of Habeas Corpus disobeyed, but deponent's wife and child were incarcerated for serving same. The justification claimed was that the Supreme Court jurist who signed same was "illiterate".

The results of such inquiry, insofar as it came from reliable sources or seemed reliable, was set forth in deponent's motion promptly made motion. Any information which did not come from reliable sources, or which did not seem reliable, was not mentioned.

The result of that investigation, deponent believes mandated transfer of this appeal or a denial of the material set forth in appellant's papers.

c. Additional factors started to come to light. At the commencement of the disciplinary hearings, which the Second Department referred to the First Department, the Referee directed full and complete disclosure between the parties.

Both sides complied in all respects. As a result of such exchange deponent learned of the covering letter sent by Presiding Justice Milton Mollen to the Grievance Committee regarding the disciplinary complaint sent His Honor by Signorelli and the effect it had upon its employees.

Recognition of the effect of this cordial acknowledgement of the Signorelli "diatribe" by the Presiding Justice, a copy of which was sent to the Grievance Committee, can best be recognized by the fact that even laudable conduct became the subject of inquiry by the young, idealistic, and enthusiastic employees of the Grievance Committee. It was not treated as just another complaint to be investigated, but a "burning bush" from the citadel mandating a jihad against appellant and his attorney-wife.

Thus, in the complaint against appellant's wife, seventeen (17) out of twenty (20) charges, were summarily dismissed on her motion for summary judgment, without even pre-trial procedures.

In all, as a result of one of the most intensive and expensive investigations and trials conducted by the Grievance Committee, thirty-four (34) charges were resoundingly dismissed. A record which deponent believes is unparalled.

To the credit of the attorneys for the Grievance Committee, when they recognized they had been misled by the Signorelli's "diatribe", by the pruned documents supplied them, and the massive number of exculpatory documents that had been concealed or destroyed by Signorelli and his Court, they acted most properly and ethically.

d. Thereafter, the Second Department, for reasons unknown and unsuspected at the time, that Court transferred two (2) other non-final appeals to the Fourth Department. Such action was before deponent learned through the examination before trial of Art Penny, the reporter for the defendant, New York News, of his relationship with two (2) of the justices in the Appellate Division.

e. Also, in the interim, the action had been transferred from Suffolk County to New York County, and as a result of the aforementioned information and other information, deponent moved to examine various judges of the Appellate Division, Second Department, before trial.

f. Furthermore, in view of the strenuous attempts made by deponent to clear his name, as a result of the extensively published disciplinary complaint by Signorelli, the refusal of the Appellate Division to compel the "expeditious termination" of the Kelly estate in Surrogate's Court, Suffolk County (Exhibit "A"), so that appellant could have such "diatribe" reviewed (CPLR §5501(a)[4]), borders on unconstitutionality. This estate is lying fallow in Surrogate's Court, according to the evidence and findings of the Referee, obviously attempting to preclude review.

g. The position of the Second Department in permitting its attorney, the Attorney General, and the Suffolk County Attorney to extensively republish the "diatribe" with impunity, albeit its proven falsity, and not permitting appellant to publish his vindication or vindicating material, even in relevant judicial proceedings, borders on the profane.

Thus, prior to the decision of the Appellate Division on July 25, 1983, deponent had concluded that because of its transactional involvement in this matter, and its other conflicting non-judicial functions, it was an unconstitutional forum for the resolution of this appeal, and so contended.

This contention was strongly urged in appellant's renewal motion, resulted in the Order of December 30, 1983 [after appellant's Notice of Appeal], and is presently the subject of a motion to resettle.

4. The results reached by such Court cannot be ignored in this regard, and reveals a disposition, not only incorrect, but patently incredible.

A few specific examples should suffice.

a. A remand to determine whether appellant waived his constitutional right to be present, the first time a matter is on for trial, because he was otherwise engaged in a higher court in the midst of trial, which no one disputes and easily verifiable, borders on the absurd.

b. A new pleading requirement, not raised by respondent, and not supported by any known case or text, modern or ancient, and clearly at odds with CPLR §3013, is impossible to justify.

c. A total disregard of the conservative allegations of appellant's complaint, on a CPLR 3211(a)[7] omnibus motion, where entitlement to immunity is not shown, and clearly negated by the complaint, is incredible, particularly since in collateral proceedings many of the allegations had been proven correct, and none incorrect.

To say more would be supererogatory!

5. Thus, appellant contends that the point had been reached where the Appellate Division, Second Department should not have even had the discretion to justify its refusal to recuse itself.

6. Deponent recognizes the procedural problems involved in such determination, and merely as a possible suggestion requests that the Second Department make an in camera disclosure to this Court on the subject so that this Court could determine whether appellant was deprived of his constitutional right to a proper tribunal.

Related Proceedings:

7. Although finality exists at bar, there is sub judice in the Second Department, two appeals which are interrelated to the present appeal. Under the circumstances deponent respectfully requests and suggests that disposition of this motion be held in abeyance until disposition therein.

a. In one such appeal, sub judice, Ernest L. Signorelli, is the appellant from an Order [Westchester County], which denied him CPLR 3212 summary judgment in my wife's related case, involving a portion of the same transactional events.

b. The other, involves the same transactional occurrences, but whose causes of action arose only upon vindication by the disciplinary tribunal, and wherein a constitutional issue is clearly involved.

c. There are also presently pending matters which may render part of the relief sought herein moot.

8. Obviously the Court will be advised upon any event which might affect the disposition of this matter.

9. Clearly at issue in the case at bar are matters of great procedural and substantive importance including the relationship between 3211(a)[7] and (e) wherein the alleged defect in pleading is not raised; the extent of immunity, vel non, under Judiciary Law §90[10], where the complaint is overpublished or misdirected; the limits of judicial immunity for non-judicial conduct or conduct known to be violative of well established or known law.

WHEREFORE, it is respectfully prayed that leave to appeal be granted, together with any other, further, and/or different relief as to this Court may seem just and proper in the premises.

GEORGE SASSOWER

Sworn to before me this
15th day of February, 1984

Patricia A. Raffe

PATRICIA A. RAFFE
Notary Public, State of New York
No. 30-4761120
Qualified In Nassau County
Commission Expires March 30, 19 84

#8345

s

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 12, 1982.

HON. MILTON MOLLEN, Presiding Justice
HON. DAVID T. GIBBONS
HON. MOSES M. WEINSTEIN
HON. RICHARD A. BROWN
Associate Justices

----------x

In the Matter of the Estate of Eugene Paul Kelly, deceased.

George Sassower,

Appellant;

Order

Ernest L. Signorelli et al.,

Respondents.

----------x

A proceeding having been instituted by George Sassower to compel the respondents and other participants in the Estate of Eugene Paul Kelly, deceased, to expeditously terminate said proceedings so that he may proceed with his appeal; or in the alternative, to grant leave to prosecute an appeal;

Now, upon the papers filed in support of and in opposition to the application, and the application having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the application is hereby denied and proceeding dismissed, without costs.

Enter:

IRVING N. SELKIN

Clerk of Appellate Division

affirmed insofar as appealed from, without costs or disbursements, and matter remitted to the Supreme Court, Rockland County, for further proceedings in accordance herewith.

Order entered January 5, 1983 reversed, on the facts, without costs or disbursements, and, upon defendant's motion to amend the judgment entered October 7, 1981, said judgment is amended to provide that the separation agreement afforded defendant only six months from the date of the parties' separation to exercise his option to purchase plaintiff's interest in the marital premises at the agreed upon price.

Order entered July 22, 1982 affirmed, without costs or disbursements.

[1] It is apparent that the court, in making the award of a counsel fee, did not distinguish between those services rendered in connection with the matrimonial causes of action and those rendered in connection with the nonmatrimonial causes of action such as the action for conversion. This court has repeatedly held that counsel fees are not recoverable on a nonmatrimonial cause of action (cf. *Osetek v. Osetek*, 75 A.D.2d 867, 427 N.Y.S.2d 884; *Weseley v. Weseley*, 58 A.D.2d 829, 396 N.Y.S.2d 455). We therefore remit the matter to Special Term to establish an appropriate counsel fee upon such further proceedings as the court may deem necessary.

[2] The order entered January 5, 1983, resettling the court's prior judgment entered October 7, 1981, improperly interprets the separation agreement as giving defendant an open-ended option to purchase plaintiff's interest in the marital premises at the agreed upon price. The separation agreement clearly states that defendant had only six months from the date of the separation to exercise this option to purchase. Having apparently concluded that defendant was no longer entitled to purchase her interest for the agreed upon amount, plaintiff, in or about March of 1981, commenced an action for partition of the marital premises and to have the proceeds divided equally between the parties. Upon defendant's default, the court entered an interlocutory judgment on April 15, 1982 directing a sale of said premises and declaring each of the parties entitled to an equal share of the proceeds. In an order entered July 22, 1982, the court properly denied defendant's motion to vacate the judgment entered on default as defendant failed to demonstrate a justifiable excuse for the default and a meritorious defense.

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George SASSOWER, Petitioner,

v.

John P. FINNERTY, Sheriff of Suffolk County, Respondent. (Action No. 1).

PEOPLE of the State of New York, ex rel. George SASSOWER, Appellant,

v.

SHERIFF OF SUFFOLK COUNTY, Respondent. (Action No. 2).

George SASSOWER, Appellant,

v.

Ernest L. SIGNORELLI et al., Respondents, et al., Defendants. (Action No. 3).

Supreme Court, Appellate Division, Second Department.

July 25, 1983.

Appeal was taken from portions of judgment and order of the Supreme Court, Suffolk County, Gowan, J., in three actions. The Supreme Court, Appellate Division, held that: (1) with respect to habeas corpus proceeding, case would be remitted for an evidentiary hearing; (2) surrogates enjoyed judicial immunity from claims of false arrest and malicious prosecution; (3) surrogate was exempt from liability for posing allegedly defamatory opinion; and (4) cause of action in prima facie tort had to be

dismissed for failure to allege essential element of special damages for sufficient particularity.

Ordered accordingly.

1. Habeas Corpus ⇐113(13)

Since the Supreme Court, Appellate Division, could not determine on the record whether defendant's failure to appear on date set for contempt hearing constituted voluntary waiver of his right to be present and proffer evidence in his defense, appeal from habeas corpus proceeding would be held in abeyance and case remitted to special term to hear and report on that issue.

2. Judges ⇐36

Judicial immunity extends to all judges and encompasses all judicial acts, even if such acts are in excess of judges' jurisdiction and are alleged to have been done maliciously or corruptly.

3. Judges ⇐36

Acts performed by judges in excess of jurisdiction are privileged while acts performed in the clear absence of any jurisdiction over subject matter are not privileged.

4. Judges ⇐36

Although acts of false arrest and malicious prosecution may have been in excess of surrogates' jurisdiction, they were not performed in a complete absence of jurisdiction; consequently, surrogates were absolutely immune from suit for the judicial acts alleged in amended complaint.

5. Judges ⇐36

Refusal to comply with order is a ministerial act and immunity is not accorded to judicial officer who performs ministerial act so as to injure another.

6. Judges ⇐36

Where writ of habeas corpus directing defendant's release from incarceration was addressed to sheriff of county and to surrogates, surrogates enjoyed judicial immunity from claims of false arrest or malicious prosecution.

7. Pleading ⇐307

Attaching articles containing allegedly defamatory material to amended complaint as an exhibit is sufficient to satisfy pleading with particularity requirements. McKinney's CPLR 3016(a).

8. Libel and Slander ⇐84

Absent an allegation that surrogate procured publication of allegedly defamatory statements by affirmative acts, plaintiffs alleging defamation failed to state a cause of action against surrogate. McKinney's CPLR 3211(a), par. 7.

9. Judges ⇐36

Decision in law journal which plaintiff claimed contained false and defamatory statements was written and filed in a matter upon which surrogate was called to rule; thus, even if decision had been written with knowledge of its falsity and with actual intent to injure plaintiff, surrogate, as a matter of public policy, would be exempt from liability for composing it.

10. Judges ⇐36

Each judge, as an official duty, is to facilitate publication of his opinion or decision in official report and all acts done in connection with statutory duty fall within scope of judicial immunity, though done maliciously or corruptly.

11. Judges ⇐36

A judge is not immune from liability for defamatory statements and if h· acts to procure publication of his opinion in unofficial reports.

12. Judges ⇐36

An act to procure publication of a judicial decision or opinion in a certain law journal is a judicial act entitled to absolute immunity. McKinney's Judiciary Law § 91, subd. 2.

13. Libel and Slander ⇐38(1)

Doctrine of absolute privilege with respect to acts of judge in the course of judicial proceedings is not limited, as in the case of suitors and counsel, to matters that are pertinent or relevant.

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14. Pretrial Procedure ⇐651

To the extent that two causes of action were founded in prima facie tort, those causes of action had to be dismissed for plaintiff's failure to allege essential element of special damages with sufficient particularity.

15. Costs ⇐189

Reimbursement for costs of procurement of transcript are not assessable against judicial defendants.

George Sassower, White Plains, appellant pro se.

David J. Gilmartin, County Atty., Hauppauge (Erick F. Larsen, Hauppauge, of counsel), for respondent in Action No. 2.

Robert Abrams, Atty. Gen., New York City (George D. Zuckerman and Robert S. Hammer, Asst. Attys. Gen., New York City, of counsel), for respondents in Action No. 3.

Before DAMIANI, J.P., and WEINSTEIN, RUBIN and BOYERS, JJ.

MEMORANDUM BY THE COURT.

Appeal, as limited by the appellant's notice of appeal and brief, from stated portions of a judgment and order (one paper) of the Supreme Court, Suffolk County, dated February 10, 1981, which (1) in Action No. 2, *inter alia*, denied his motion for summary judgment and thereupon dismissed a writ of habeas corpus and (2) in Action No. 3 granted the motion of the respondents Signorelli and Seidell pursuant to CPLR 3211 (subd. [a], par. 7) to dismiss appellant's amended complaint in said action as against them.

Judgment and order affirmed insofar as it grants the motion of the respondents in Action No. 3 to dismiss appellant's amended complaint in said action as against them, without costs or disbursements, and appeal held in abeyance insofar as it pertains to Action No. 2 and matter remitted to the Supreme Court, Suffolk County, for further proceedings in accordance herewith.

Appellant had served as executor of the estate of Eugene Paul Kelly pursuant to the terms of the decedent's will. In the probate proceeding, by order dated April 28, 1977, appellant was directed to turn over his records pertaining to the estate in order that an accounting could be conducted. Thereafter, appellant was given until June 22, 1977, to comply. On said date, appellant failed to appear in court as he had been directed. The Surrogate adjudged appellant in contempt of court for failure to comply with the turnover order and sentenced him to 30 days in the County Jail. On the following day, appellant was apprehended. He obtained a writ of habeas corpus and was released on bail pending the hearing. After a hearing on the writ in Supreme Court, Suffolk County, Special Term found that appellant was not present in court before the Surrogate when he was adjudged in contempt, and annulled the adjudication of contempt without prejudice to a renewal of the contempt proceeding. This court affirmed a resettled judgment of the Supreme Court, Suffolk County, entered upon that decision of Special Term, noting that a summary adjudication of contempt is only permitted if the contemnor is within the court's presence (*Sassower v. Signorelli*, 65 A.D.2d 756, 409 N.Y.S.2d 762).

By order to show cause served personally upon appellant, further criminal contempt proceedings were commenced on behalf of the Public Administrator of Suffolk County, defendant in Action No. 3 Anthony Mastroianni, based upon appellant's alleged continued failure to comply with the April 28, 1977, turnover order. The matter was set down for a hearing on March 7, 1978 and appellant was notified of the charges and hearing date. Although appellant failed to appear, a hearing was held on that date in his absence and appellant was again held in criminal contempt. By order dated March 8, 1978, respondent Acting Surrogate SEIDELL determined that appellant was guilty of criminal contempt of court for failure to comply with the turnover order and that appellant was to be punished by 30 days imprisonment in the County Jail. On the same day, Acting Surrogate SEIDELL also issued a warrant of commitment directed to

the Sheriff of the County of Suffolk, respondent John P. Finnerty, commanding him to take appellant into custody and "detain him until the judgment and sentence of the [Surrogate's Court] is satisfied unless sooner released by further order of [the Surrogate's Court]".

By affidavit dated March 6, 1978, and received by the Surrogate's Court on March 8, 1978, appellant had informed that court that on March 7, 1978, the date for the hearing, he would be actually engaged in another court in Brooklyn and therefore requested an adjournment.

Appellant was taken into custody on June 19, 1978. He then commenced a habeas corpus proceeding (Action No. 2) and moved for "summary judgment" sustaining the writ. Appellant also commenced a separate action (Action No. 3) against a number of individuals including Surrogate SIGNORELLI, Acting Surrogate SEIDELL, Sheriff Finnerty, Public Administrator Mastroianni and the New York News. The complaint in Action No. 3 asserts nine causes of action based on alleged tortious conduct. The respondents in Action No. 3 moved pursuant to CPLR 3211 (subd. [a], par. 7), to, *inter alia*, dismiss the amended complaint as against them for failure to state a cause of action.

Special Term consolidated, *inter alia*, for the purpose of its decision only, appellant's application in the habeas corpus proceeding and the motion of the respondents in Action No. 3. After a "summary hearing", Special Term denied appellant's application in the habeas corpus proceeding and dismissed the writ. Special Term granted the application of the respondents in Action No. 3 and dismissed that action as against them, *inter alia*, on the ground of judicial immunity.

[1] With respect to the habeas corpus proceeding, we cannot determine on this record whether appellant's failure to appear on the date set for the contempt hearing constituted a voluntary waiver of his right to be present and proffer evidence in his defense. An evidentiary hearing should be conducted on this issue. Accordingly, so much of the appeal as pertains to Action No. 2 is held in abeyance and that case is remitted to Special Term to hear and report on that issue.

Regarding the amended complaint in Action No. 3, we concur with Special Term's conclusion that it fails to state a cause of action against the respondents in that action.

[2–4] To the extent the first, fourth and fifth causes of action asserted in the amended complaint in Action No. 3 purport to assert a claim for false arrest and malicious prosecution, the claims cannot withstand a motion to dismiss predicated on judicial immunity. Judicial immunity extends to all judges and encompasses all judicial acts, even if such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly (*Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331; *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257; *Virtu Boutique v. Job's Lane Candle Shop*, 51 A.D.2d 813, 380 N.Y.S.2d 263). There is a distinction between acts performed in excess of jurisdiction and acts performed in the clear absence of any jurisdiction over the subject matter. The former is privileged, the latter is not (*Murray v. Brancato, supra*). Although the pleadings allege that Surrogate SIGNORELLI and Acting Surrogate SEIDELL knew that they lacked any jurisdiction, it is also alleged that said knowledge was acquired from a prior unreported decision and resettled judgment of Special Term (McINERNEY, J.), which was affirmed by this court (see *Sassower v. Signorelli*, 65 A.D.2d 756, 409 N.Y.S.2d 762, *supra*). However, that decision in favor of appellant was predicated on judicial acts in excess of jurisdiction. The acts complained of in the amended complaint were performed by the respondents SIGNORELLI and SEIDELL while in the exercise of their judicial roles. Although said acts may have been in excess of their jurisdiction, they were not performed in the complete absence of jurisdiction. Consequently, the moving defendants, as Surrogates, are absolutely immune from suit for the judicial acts alleged in the amended complaint.

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[5, 6] Neither does the allegation that the judicial defendants refused to timely comply with a writ of habeas corpus, directing appellant's release from incarceration, save the dismissal of the first and fourth causes of action. Although the refusal to comply with an order is a ministerial act (Prosser, Torts [4th ed.], § 132, p. 988) and immunity is not accorded to a judicial officer who performs a ministerial act so as to injure another (*Scott v. City of Niagara Falls*, 95 Misc.2d 353, 407 N.Y.S.2d 103; see, generally, 28 N.Y.Jur.2d, Courts & Judges, § 91, p. 166), we take judicial notice of the fact the writ was addressed to the Sheriff of Suffolk County, and not to the respondents.

The second, sixth and seventh causes of action sound in defamation. The second cause of action alleges that on June 27, 1977, and August 17, 1977, the New York News published two articles by Art Penny, containing defamatory material about appellant which was acquired, from among other sources, defendant Surrogate SIGNORELLI's out-of-court statements.

[7, 8] Initially we note that attaching the articles containing the allegedly defamatory material to the amended complaint as an exhibit is sufficient to satisfy the pleading with particularity requirement of subdivision (a) of CPLR 3016 (see *Cabin v. Community Newspapers*, 50 Misc.2d 574, 270 N.Y.S.2d 913, affd. 27 A.D.2d 543, 275 N.Y.S.2d 396; accord *Rinaldi v. Village Voice*, 79 Misc.2d 57, 359 N.Y.S.2d 176, mod. on other grounds 47 A.D.2d 180, 365 N.Y.S.2d 199). "[I]n the absence of proof of *affirmative* acts causing a publication to be made, a slanderous statement uttered in the presence of third persons is not the proximate cause of an injury alleged to have been sustained by its *subsequent* publication in newspapers by such persons (*Schoepflin v. Coffey*, 162 N.Y. 12 [56 N.E. 502]), even though made with intent that such slanderous statement should be widely circulated (*Lewis v. Chemical Foundation*, 233 App. Div. 287 [251 N.Y.S. 296])." (*Bradford v. Pette*, 204 Misc. 308, 318, mot. to dismiss app. granted 285 App.Div. 960, 139 N.Y.S.2d 907.) Although appellant does not have to proffer proof of affirmative acts to defeat a motion under paragraph 7 of subdivision (a) of CPLR 3211, absent an allegation that Surrogate SIGNORELLI procured the publication by affirmative acts, the second cause of action asserted in the amended complaint fails to state a cause of action against him.

[9] The sixth and seventh causes of action allege that respondent Surrogate SIGNORELLI caused to be published in the New York Law Journal a memorandum decision containing defamatory material. The decision which appellant claims contains false and defamatory statements was written and filed in a matter upon which that respondent was called to rule. Even if the decision had been written with knowledge of its falsity and with actual intent to injure the appellant, the respondent SIGNORELLI, as a matter of public policy, would be exempt from liability for composing it (*Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 251, *supra*).

[10, 11] Moreover, the law of this State places upon each judge an official duty to facilitate the publication of his opinion or decision in the official reports, all acts done in connection with the statutory duty fall within the scope of judicial immunity, though done maliciously or corruptly. However, a judge is not immune from liability if he acts to procure the publication of his opinion in unofficial reports (see *Murray v. Brancato, supra*, p. 57, 48 N.E.2d 257).

[12] The execution of an annual contract with the publisher of the New York Law Journal pursuant to subdivision 2 of section 91 of the Judiciary Law imposes an implied duty upon the Surrogate to make copies of opinions and decisions available to the New York Law Journal for publication (see *Bradford v. Pette, supra*). Consequently, an act to procure the publication of a judicial decision or opinion in the New York Law Journal is now a judicial act entitled to absolute immunity (*Bradford v. Pette, supra*, see, also *Hanft v. Heller*, 64 Misc.2d 947, 316 N.Y.S.2d 255; *Sheridan v. Crisona*,

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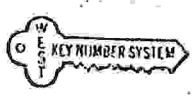
14 N.Y.2d 108, 249 N.Y.S.2d 161, 198 N.E.2d 359).

[13] Furthermore, the fact that the allegedly defamatory statement in the opinion may not have been relevant or pertinent to the question the judge was called upon to decide does not mandate a contrary conclusion. The "doctrine of absolute privilege in respect to the acts of a judge in the course of judicial proceedings is not limited, as in the case of suitors and counsel, to matters that are pertinent or relevant" (*Bradford v. Pette, supra*, 201 Misc. at p. 317).

[14] To the extent the eighth and ninth causes of action sound in prima facie tort, those causes of action must be dismissed for appellant's failure to allege the essential element of special damages with sufficient particularity (*Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453, 458, 280 N.Y.S.2d 641, 227 N.E.2d 572; *Motif Constr. Corp. v. Buffalo Sav. Bank*, 50 A.D.2d 718, 713, 371 N.Y.S.2d 868).

[15] The third cause of action, insofar as it pertains to the respondents in Action No. 3, seeks reimbursement for the amount of money paid for stenographic minutes, which appellant allegedly did not accept because his need for said minutes was rendered moot by unspecified acts of the judicial defendants. Reimbursement for the costs of procurement of a transcript are not assessable against the judicial defendants (see *Segal v. Jackson*, 183 Misc. 460, 48 N.Y.S.2d 877).

Accordingly, the amended complaint as to the respondents in Action No. 3 was properly dismissed.



In the Matter of
BERNCOLORS–POUGHKEEPSIE, INC., Petitioner,

v.

CITY OF POUGHKEEPSIE and Michael D. Haydock, Building Inspector of the City of Poughkeepsie, Respondents.

Supreme Court, Appellate Division, Second Department.

July 25, 1983.

Property owner brought Article 78 proceeding to review so much of determination of city as, after hearing, upheld order of building inspector that certain building be demolished on the ground that it was unsafe. The Supreme Court, Appellate Division, held that demolition order was within police power and determination of hearing officer was supported by substantial evidence.

Affirmed.

1. Municipal Corporations ⇐628

Record contained substantial evidence that a building suffered severe damage from rocking due to explosion in nearby building which resulted in destabilization of significant portions of load-bearing southerly wall and other walls connecting therewith and inasmuch as there were no official guidelines or criteria to determine whether or not building should be demolished, matter was properly left to judgment of building inspector, based upon facts as he perceived them as an individual experienced in architectural and engineering matters and decision to have building demolished constituted a valid exercise of police power.

2. Constitutional Law ⇐318(1)

Combination of investigative and adjudicative functions in a single administrative agency or officer is not, ipso facto, a denial of due process. U.S.C.A. Const.Amends. 5, 14.

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STATE OF NEW YORK : COURT OF APPEALS

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GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI and HARRY E. SEIDEL,

Defendants-Respondents,

ANTHONY MASTROIANNI, VINCENT G. BERGER, JR., JOHN P. FINNERTY, ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN, , NEW YORK NEWS, INC., and VIRGINIA MATHIAS,

Defendants.

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PRELIMINARY STATEMENT

1. The facts in this case represents about the worst outrage and scandel in the modern judicial history of this State, both in the happening and its attempted cover-up.

The judicial multifurcation of this action, so that appeals in this and related actions presently pend in the First, Second, and Fourth Department, with varying and possible inconsistent decisions, mandates review by this Court.

2. Although before this Court is only the legal propriety of a CPLR 3211(a)[7] dismissal, the events pleaded in appellant's 1978 complaint have been shown to be a conservative and restrained recitation of what truly occurred, as substantiated by Orders of the Appellate Division, First Judicial Department, the Reports of the Referee appointed by that Court, the concessions of the Grievance Committee, and the testimony and admissions of Signorelli and his entourage at such hearings.

Thus, while nisi prius in Suffolk County, was initially dealing with a Notice of Motion dated January 15, 1979, attacking, in omnibus fashion, plaintiff's nine (9) cause of action complaint, four and one-half years later, when the Second Department ruled, and ruled on renewal, on this omnibus CPLR 3211(a)[7] motion, most of the allegations had been proven correct and subject to issue, if not claim, preclusion in favor of appellant, not Signorelli.

In effect, the Second Department not only ignored the plain words of plaintiff's complaint, but disregarded the fact that many of the issues (and more) had been judicially proven correct in collateral judicially binding proceedings.

3. Pending, sub judice, in the Appellate Division, Second Judicial Department, is the interrelated appeal brought by defendant-respondent herein, Ernest L. Signorelli, and defendant-appellant therein, from an Order which denied his CPLR 3212 motion for summary judgment, in an action brought by Doris L. Sassower and Carey A. Sassower against Ernest L. Signorelli, and others.

Although the pending appeal by Signorelli, in an action brought by appellant's wife and daughter are independent, for jurisdiction purposes, they are in inseparable in innumerable respects, legally and factually. Thus, since Special Term denied Signorelli's summary judgment motion, review by this Court is ultimately assured, unless the Appellate Division distinguishes the cases.

4. There are appeals pending in the Appellate Division of the First Department and Fourth Department whose dispositions may now, or in the future, be different than that made by the Second Department.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is based upon:

1. A request for leave to appeal to and by this Court, within the time limitation provided by law, after this Court, sua sponte, on January 17, 1984, dismissed appellant's Notice of Appeal of September 6, 1984.

2. A request for leave to appeal to and by this Court, from an Order of the Appellate Division, Second Department, dated December 30, 1983, insofar as it denied appellant renewal. The aforesaid Order with Notice of Entry has not been served by any party.

3. Appeal, as of right, since there is directly involved the federal and state constitutional question of due process and equal protection of the laws, insofar as the Appellate Division, Second Department, has by various intermediate orders refused to recuse itself, refused to disclose its transactional involvement with the events in this matter, refused to place a "Chinese Wall" between extraneous material in its possession and the probative facts in this matter, and refused to disqualify the attorney representing Signorelli.

Some of the post-argument and pre-decisional matters giving rise to this constitutional disqualification of the Appellate Division, Second Department in this matter, is set forth in appellant's moving affidavit.

QUESTIONS PRESENTED

1. Does appellant's "nine (9) causes of action" complaint set forth at least one cognizable cause of action, sufficient to defeat an omnibus CPLR 3211(a)[7] motion by Surrogate, Prosecutor, Sheriff, Columnist, Jailor, Complainant and Recusant Signorelli, who has not shown any entitlement of immunity and wherein such immunity is negated by the complaint itself?

The Court below responded in the negative.

2. Does appellant's "nine (9) causes of action" 1978 complaint, as supplemented by thereafter proven facts in the judicial arena, thus given rise to issue, if not claim, preclusion in favor of appellant?

The Court below did not respond to this question, but obviously chose to ignore all the supporting evidence and judicial determinations which arose between the date of the complaint and its decision, four and one-half years later.

4. Where a completely new pleading doctrine, sua sponte, is enunciated by the Appellate Division, is the appellant entitled to leave to replead, where the evidence reveals that such new allegation is supportable?

The Appellate Division, sub silentio, held in the negative.

5. Did the Appellate Division correctly interpret §90[10] of the Judiciary Law so that the disciplinary complaints against attorneys may be freely published and overpublished, even after exoneration, while the vindication and the vindicating material remain secret under pains of further disciplinary proceedings?

No rational answer was or can be given to such "upside-down" result by the Appellate Division.

THE FACTS - ABBREVIATED

In abbreviated narrative chronological form, appellant's nine (9) cause 1978 complaint, reads as follows:

1. On Wednesday, June 22, 1977, Ernest L. Signorelli, Surrogate of Suffolk County, (1) without any accusatory document or instrument; (2) without notifying appellant of any trial or hearing; (3) tried, (4) convicted, and (5) sentenced appellant to be incarcerated for 30 days in the Suffolk County Jail, all in absentia.

The complaint alleges that Signorelli, a former Assistant District Attorney, County Court Judge, and Acting Supreme Court judge knew he had no jurisdictional basis for the aforementioned as well as his other conduct, judicial and non-judicial.

2a. Very early the following morning, Thursday, June 23, 1977, Sheriff Ernest L. Signorelli, dispatched two Deputy Sheriff's of Suffolk County, beyond their jurisdictional bailiwick to Westchester County, arrested appellant, who was completely unaware of the events of the prior day.

b. The Suffolk County Deputy Sheriffs drove appellant from Westchester to Suffolk County, all the time refusing to permit appellant to present his hastily written Writ of Habeas Corpus to any federal or state judge upon the instructions from Sheriff Signorelli.

c. Still upon instructions from Sheriff Signorelli, his deputies refused to take appellant to the County Jail, as provided in the Warrant of Commitment, where appellant knew he could have his Writ processed, but instead took him to Signorelli's courthouse facility.

d. At the courthouse facility, upon instructions from Jailor Signorelli, the Deputy Sheriffs kept appellant incommunicado, not even permitting him to call a lawyer, family, or friends, even though a pay telephone booth was about 15 feet away.

e. Eventually, appellant was brought before Inquisitor Signorelli, assaulted by one of his appointees, and questioned. Appellant pleaded the Fifth Amendment, which Signorelli refused to recognize, and jailed appellant in the County Jail.

3a. At the Suffolk County Jail, with the aid of a clergyman and a Legal Aid Attorney, appellant was able to have his Writ presented to a Supreme Court Justice, and was released on a small cash bail.

b. Almost simultaneously, a colleague of appellant, learning of the jailing, but unaware that appellant was able to present his own Writ, proceeded to the Appellate Division with his own prepared Writ of Habeas Corpus, and presented same to Presiding Justice Frank A. Gulotta.

Justice Gulotta, directly or through the Clerk of the Court, telephoned Signorelli, was told a fabricated and distorted story, and consequently, denied bail to appellant, who, at the time, was already free or about to be freed.

Thus, since appellant and his colleague were unaware of each others actions, neither Writ recited anything about prior or contemporaneous applications.

The Writ presented by appellant set a return date for a hearing for Monday, June 27, 1977, in State Supreme Court, Suffolk County.

[The alleged crime committed by appellant was the assertion by Signorelli, made for the first time in 1977, that appellant had been removed, as executor, in March of 1976 and thereafter entered into a contract to sell a parcel of real property owned by the deceased without authority.

Despite the proven destruction or concealment of judicial document by Signorelli and his Court, it was conclusively shown by documents and stenographic minutes that everyone, including Signorelli, recognized appellant, as executor for one year after the contrived assertion of removal; that Signorelli had specifically authorized, on the record, appellant's authority to enter into such contract of sale, and in fact directed it.

Furthermore that appellant had turned over the records of the estate to the Public Administrator even before the June 22, 1977 "mock" criminal contempt proceeding.

These "confessed facts" were revealed, at a full and fair judicial hearing, incorporated by the Referee in his report, and confirmed by the Appellate Division, First Department, to whom the Second Department had referred the disciplinary matter for disposition.

In short -- the entire factual, as well as legal, basis of this entire matter criminal contempt accusation was a complete fabricated sham.]

4. On Friday, June 24, 1977 (when no proceedings were taking place in Suffolk County), Columnist Signorelli, had two (2) of his appointees make several telephone calls to Art Penny, a reporter for the New York Daily News, was requested to come over quickly to Signorelli's courthouse facility for a "hot story".

b. Thereupon, Signorelli and his appointees, gave Art Penny a private false and defamatory story concerning appellant, intending same to be published, on the morning of the commencement of the habeas corpus proceeding [June 27, 1977], in Suffolk County Supreme Court, and it was so republished, with the intent to deprive appellant of a fair trial.

5. Based upon the aforementioned conceded facts, there was clearly no constitutional basis for the aforementioned criminal contempt conviction and subsequent incarceration.

Nevertheless, the habeas corpus proceedings dragged on for days until a federal judge, to whom appellant had applied for relief, issued a verbal "gun-to-the head" edict, at which time the proceedings were terminated, and the Writ sustained.

Signorelli's attorney, the Attorney General, upon his client's insistence filed a Notice of Appeal from the Order which properly sustained appellant's Writ of Habeas Corpus.

6. Signorelli, in the private, administrative, and judicial capacity then entered upon a most egregious course of conduct against appellant, his wife, his family, and associates compelling appellant to again return to federal court for relief.

7. Despite the strong federal policy of non-interference with state judicial proceedings a sufficiently strong case has been set forth for the federal court to state to Signorelli that he either recuse himself or federal intervention would be seriously considered.

The response, through the Attorney General was that Signorelli would recuse himself.

8. At the time there was no pending proceeding before Signorelli or his Court, nor any issue to be determined.

Nevertheless, Signorelli, sua sponte, without notice of warning, Pearl Harbor style, caused to be issued, published, and overpublished an ethical "diatribe" against appellant and his attorney- wife, regarding their alleged misconduct in his court, in other courts, and elsewhere, which in every respect was false, deceptive, and misleading, and found to be so either by a Grievance Committee investigation or at the disciplinary hearings themselves.

[Signorelli has repeatedly refused to verify such "overpublished diatribe", although repeatedly challenged to do so by appellant.]

This "diatribe" which decided nothing, nor was it intended to decide anything was a complete "hoax" from beginning to end -- there is nothing in it which can be called, in any sense of the word, truthful or honest, which no one disputes as a result of the disciplinary hearings.

Such "diatribe", which decided nothing, concluded with the following:

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

Not only was this "diatribe" sent to Presiding Justice, Milton Mollen, but to various and many other persons, including Judge Harry Seidel [who was to succeed Signorelli on this matter].

Such "diatribe" was also forwarded to the New York Law Journal, with the alleged knowledge by Signorelli that in the format contained this entire "diatribe" would be published, in haec verba, in the New York Law Journal.

[Signorelli was to thereafter testify that he knew, at the time, generally about the contents of Judiciary Law §90[10], and knew that his "diatribe", which he had labeled "decision", and stated it constituted an Order of the Court, would be published in the New York Law Journal.]

Thus, presented is an extensively published disciplinary complaint against attorneys, clearly violating the letter and spirit of Judiciary Law §90[10], requesting the Presiding Justice of the Appellate Division, to take "action" over a matter, which as an individual jurist, His Honor has no jurisdiction or power.

Notwithstanding its label, it was a "decision" which decided nothing! It was an "order" which ordered nothing!

It was an ad hominem, wholly unjustified, patently false, ethical attack on a matter which Signorelli had no jurisdiction to make, except confidentially, to the Grievance Committee or to the Appellate Division, and not to the Presiding Justice.

9. Prior to the issuance of such "diatribe", and when it was made clear in June of 1977, that appellant would not succumb to the "Signorelli Code of Star Chamber Proceedings", a disciplinary complaint had been lodged against appellant, by a Signorelli appointee, with the Grievance Committee. This complaint was fully and satisfactorily answered by appellant it was lying dormant for months with such Committee, awaiting a requested reply by the Signorelli entourage. It was a response which they could not possibly give, and assuredly have been closed in the ordinary course of events without any punitive action whatsoever.

Upon receipt of the "diatribe" by Presiding Justice Mollen, His Honor sent a gracious response to Signorelli, acknowledging receipt thereof, with a copy of same to the Grievance Committee.

To the young, idealistic, righteous, and enthusiastic employees of the disciplinary body, this Signorelli complaint, was not only a published complaint from a judge, but it now had the implied approval of the Presiding Justice. It thus became a "mandate" to prosecute, with the intensity of a jihab, which it did.

Given the confidentiality of its findings, even when innocence is clear, a disciplinary body is compelled to prosecute in order to justify a possible public outcry that it is lax in its assigned task, when the complaint is publicized.

Thus, the Grievance Committee, undertook one of the most intensive and expensive investigations in its history. Just about everything and anything was put aside for this investigation of appellant and his wife, to an extent that the body itself clearly transcended law and propriety. Nothing, no matter how remote or irrelevant became the subject of inquiry.

To the credit of the Grievance Committee staff attorneys, with the obvious surfacing of the truth, to the extent that it was possible, they merely "threw in the sponge" at the hearings, making sure that they set forth in full the reasons for their actions.

The accusations and charges went down "like the Titanic", clear and decisive. It was a massacre!

There was no need for appellant to testify, and indeed on most issues, appellant did not testify.

10. Prior to recusal, Signorelli signed for his appointee an application to hold appellant in contempt, on the same fictitious charges, to which appellant plea was "not guilty".

11a. The first time it appeared on the calendar, appellant was in the middle of a trial before Hon. Joseph DiFede in Supreme Court, Bronx County and so advised the Surrogate's Court [Seidell, J., presiding, to whom Signorelli had personally sent a copy of his "diatribe" previously].

b. Despite the clear mandate of established law, and the prior holding which sustained appellant's Writ of Habeas Corpus, which Seidel personally knew about, once more appellant became the subject of an in absentia trial, conviction, and again he was sentenced to be incarcerated for 30 days in the Suffolk County Jail. Once more the Warrant was turned over to the Suffolk County Sheriff's Office for execution outside the bailiwick of this, by statute, local office.

12a. Again appellant returned to federal court and the Assistant County Attorney by the Court into the federal judge's private law library, shown by the judge's secretary controlling United States Supreme Court authority on the subject, with a statement that his office would be better advised to act accordingly.

b. At Signorelli's insistence (who by that time had recused himself), they refused to withdraw the Warrant.

So informed, appellant agreed, in writing, to submit to arrest, at the convenience of the Suffolk County authorities, at Special Term in Westchester, New York, or Bronx Counties [so that he could obtain an immediate Writ of Habeas Corpus].

The Sheriff's Office refused (again on Sheriff Signorelli's insistence).

Instead, the Suffolk County Sheriff's Office made numerous and expensive forays into Westchester and New York Counties in the succeeding months, in what they describe as an attempt to "capture" appellant. They even planned, as the Appellate Division was told by the Assistant County Attorney, to surround the federal courthouse and, "John Dillinger" style, capture appellant, as he was leaving such building.

Eventually, several months later, one Saturday morning, two (2) Suffolk County Deputy Sheriffs "captured" appellant while he was alone, in Westchester County, handcuffed him, physically assaulted him while he was trying to get the attention of local police, abducted appellant and incarcerated him in the Suffolk County Jail.

13a. Learning of the event, appellant's wife and daughter obtained a Writ of Habeas Corpus, demanding the immediate release of appellant, and drove to the Suffolk County Jail, requesting first to see appellant, during the then visiting hours.

b. When they were, in effect, refused permission to visit, appellant's wife, an attorney, requested to see appellant, her client, producing her professional card.

c. When this request was, in effect, denied, she produced the Writ of Habeas Corpus, and both she and our daughter were themselves incarcerated, without food, water, or bathroom facilities.

14a. During oral argument, the Assistant County Attorney, who was present at the jail at the time, attempted to justify the refusal to release appellant pursuant to such Writ, and the incarceration of appellant's wife and daughter, on the grounds that the Supreme Court Justice who signed such Writ was "illiterate".

Thus, the Signorelli sycophants, contended that they were the ex parte arbiters of the literacy qualities of Supreme Court jurists from other judicial districts, and that they needed to obey only those jurists who were literate by their standards!

15a. Immediate, post-argument investigation, revealed that the defendants wanted and needed additional time in order to have such Writ revoked or modified, and wanted appellant to be incarcerated until Monday.

Ironically, appellant was scheduled to be engaged at a trial in mid-state, representing a judge at trial on a personal matter.

In an attempt to prevent such Writ from being executed, while they attempted to have it revoked or modified, which included communications to jurists of the Appellate Division, Second Department, who contacted the Judge who signed such Writ for that purpose, they had to keep appellant's wife and daughter incommunicado, and thus incarcerated them.

To the credit of the jurist who signed the Writ, he was correctly and properly adamant in refusing to modify or revoke same under the circumstances of this incarceration.

b. Since possible appellate relief, pursuant to CPLR §5704(a), was either not pursued by defendants, including Signorelli, or refused, appellant and his family were, a number of hours later, released.

16a. Shortly thereafter, a felonious assault complaint was lodged against appellant, claiming that while handcuffed, appellant then 55 years of age, had physically beaten Deputy Sheriff Anthony (Arnold Schwarzenegger) Gryzmalski, causing him to receive hospital care and treatment, and a loss of work of about eleven days.

Thus, although the charge was held in a local criminal court in Westchester County, a full and complete hearing was given to the complainant, Deputy Sheriff Gryzmalski, who was acting in concert with the recused Signorelli. This factually preposterous felonious assault charge was dismissed because the Deputy Sheriffs, local officers, had no police authority to effectuate an arrest in Westchester County, as they did.

17a. Despite, the reluctance of the Attorney General to file or press the appeal from the Order which sustained, appellant's Writ of Habeas Corpus from a Signorelli incarceration wherein appellant was never (1) charged; (2) never notified of a trial or hearing; (3) tried; (4) convicted; and (5) sentenced all in absentia, Signorelli, employing the clout of his office compelled the Attorney General to do so.

b. The only issue raised by Signorelli was whether appellant was entitled to a Writ of Habeas Corpus.

As Signorelli asserted in his published sua sponte "diatribe", appellant's remedy while incarcerated was not a Writ of Habeas Corpus, which his colleague sustained [after a federal judge placed a verbal "gun-to-his-head"], but to remain incarcerated while appellant moved to vacate a default at a hearing that he was never advised of. Even his cited authority in his "diatribe" did not support Signorelli's position. Thus the published "diatribe" even contained his criticism of his colleague's holding and his contention at the Appellate Division.

c. The Appellate Division, also disagreed with Signorelli's absurd contention as set forth not only in his Brief but included in his "diatribe", and affirmed the Order which sustained appellants writ.

Unfortunately, and improperly the Appellate Division, disregarded the record, disregarded the issues raised, and rendered an opinion, which while it sustained appellant's writ of habeas corpus, copied almost in haec verba the Signorelli "diatribe" which was not part of the record (Sassower v. Signorelli, 65 A.D.2d 756, 409 N.Y.S.2d 762).

Thus, as contained in the "diatribe", the opinion of the Appellate Division translated the "Fifth Amendment" was translated into a "refusal to comply", a subsequently secured Writ of Habeas Corpus by appellant's colleague, became a failure by appellant to disclose "prior" [but actually subsequent] applications, etc.

As far as the "diatribe" was concerned the (1) failure to accuse; (2) the failure to notify of a hearing; (3) a trial; (4) conviction; and (5) and sentencing, all in absentia, were "technical grounds" for sustaining a Writ of Habeas Corpus.

d. Thus, the sua sponte "diatribe" which Signorelli refuses to verify, found to be false, deceptive, and misleading in every respect, found respectable lodging in the reports of the Appellate Division, because Signorelli sent same to the Presiding Justice, rather than the Grievance Committee.

e. Reargument, suits in the state and federal courts to have such false asserted facts, irrelevant to the issues, were all unsuccessful. Since the Order sustaining appellant's Writ was affirmed, appellant was not aggrieved, and could not further appeal.

f. Attempts, in the Second Department to compel defendant Mastroianni terminate the estate, which has been lying dormant for several years, and so found by the Referee, have also been unsuccessful (Exhibit "A"), thus precluding appellate review of such sua sponte "diatribe".

18a. Furthermore, when attempting to set forth, in pertinent judicial proceedings, some of the vindicating material brought out at the disciplinary hearings, the Grievance Committee, an arm of the Appellate Division, sua sponte, upon complaints from Suffolk County, commenced a new disciplinary proceeding, contending that appellant, under its view is precluded under §90[10] from disclosing.

Thus, in the upside-down world of the Second Judicial Department, the Signorelli ethical "diatribe" can and is constantly republished, but appellant is precluded from publishing vindicating material, if not the vindication itself, without violating §90[10 -- believe it or not!

b. Such absurd position was brought about because of complaints coming from Suffolk County.

c. Thus, the Grievance Committee, has stated it would refused any judicial direction to disclose any material regarding appellant, even if subpoened or directed by any judge, except by permission of the Appellate Division.

d. Thus, in moving to confirm the Referee's report, appellant was precluded from consulting with wife, counsel, or others. This aspect was temporarily resolved informally, at a conference with Hon. THEODORE R. KUPFERMAN of the Appellate Division, First Department, but otherwise remains unresolved.

e. Appellant, with this Sword of Damocles over him has, when he believes necessary, as here, discreetly disobeyed such edict, but the constitutional chill remains!

19a. The same few Assistant Attorney General's have defended the constitutionality of Judiciary Law §90, as applied herein; have defended Signorelli in his overpublication of his disciplinary "diatribe"; have represented the Appellate Division and the Grievance Committee in appellant's attempt to rectify this skewed interpretation of §90[10], in state and federal courts; have represented the Grievance Committee in various aspects of the proceedings to punish it for meritless prosecutions [in fact, in affirming the Referee's report, leave was given to appellant's wife to seek sanctions against such Committee]; have represented Signorelli and his Court in their refusal to terminate this estate or issue some order which would permit review of such sua sponte diatribe; have resisted all efforts to have the records in Surrogate's Court impounded in this matter and rectify the disappearance, of admittedly, more than 20 documents, all exculpatory; and many other inconsistent positions.

b. All efforts in the Second Department, while this matter was pending in that Court to disqualify the Attorney General from representing Signorelli were denied by intermediate Order, on which review is also being sought.

c. Thus, the Attorney General's Office, has been able to obtain information in its defense of Signorelli and Seidel, otherwise not normally available, including confidential information.

20. Presently, because of related transfers, and orders of nisi prius, the action is pending in New York County, with appeals pending in the same case, in the Appellate Division, First, Second, and Fourth Departments.

21. Pending in the Second Department, is a Writ of Prohibition preventing a remand as prohibitive of, inter alia, "double jeopardy", by reason of the preclusive effect of the Order of the First Department which affirmed the Referee's Report, which found, after the confession by Mastroianni that in fact, appellant did turn over the estate papers before the initial criminal contempt proceeding.

SPECIAL TERM, SUFFOLK COUNTY

At Special Term in Suffolk County, several matters were consolidated or handled jointly:

1. Appellant's application to restrain the Sheriff of Suffolk County from arresting appellant outside of his County, under a Warrant resulting from an in absentia conviction, was mooted by precisely such arrest in Westchester County.

2. On appellant's Writ of Habeas Corpus, the Court held that appellant's absence, the first time the criminal contempt proceeding was scheduled for trial, albeit engaged in the midst of a trial in a higher court, was a voluntary, conscious, waiver of his constitutional right to be present.

3a. Although, the Attorney General submitted only a omnibus Notice of Motion claiming dismissal on behalf of his clients, Signorelli and Seidel by reason of CPLR 3211(a)[7], the Court found judicial immunity was a complete bar without any factual showing of entitlement thereto by Signorelli, his attorney, or the Court.

b. On appellant's defamation cause of action, which, appellant claimed also constituted an infringement of his constitutional right to a fair trial, nisi prius apparently construed the cause as only a defamation from Signorelli to Penny, and thus held that the complaint did not set forth the precise words (CPLR 3016[a]), and dismissed.

Essentially all the factual material for the opinion of nisi prius was copied from the Signorelli's sua sponte "diatribe".

THE APPELLATE DIVISION, SECOND DEPARTMENT

1. Between the time the respondents made their motions to dismiss and an Order issued, more than two years had elapsed.

2a. The appeal was calendared for argument at the Appellate Division for June 24, 1982, more than three years after Signorelli's and Seidel's motion, and a decision handed down on July 25, 1983, about four and one-half years later.

The point is that by the time this matter was argued, the Appellate Division, Second Department knew that the Referee had rendered and filed its report, had before it appellant's brief with respect thereto. Furthermore, long prior to the decision of July 25, 1983, the Order of the Appellate Division, First Department confirming the Referee's report -- to whom the Second Department had referred the matter.

Thus, for the Second Department to have discarded various material and essential allegations of appellant's complaint, proven true in the judicial arena, in deciding this matter was manifest improper and erroneous.

b. By the time this matter was argued in the Appellate Division on June 24, 1982, the Signorelli's sua sponte "diatribe" had been shown to be false, contrived, and deceptive in every respect.

Thus, for the Appellate Division to have relied upon, in any way, the facts set forth in its prior opinion, was an improper incorporation of the extra-judicial "diatribe".

Particularly did the Appellate Division improperly rely on the "diatribe", when it was aware that appellant had made every attempt to have the factual material corrected therein, by reargument, by lawsuits in the State and Federal Courts, and by compelling its review by mandamus proceedings in that Court.

c. Regarding the Second Cause of Action, the Second Department totally ignored the defamation from Signorelli to Penny, and without any known authority in any text, ancient or modern, held that appellant had to "plead" an affirmative act in the publication by the New York News, or as it should have said in the "republication" by the Daily News.

CPLR §3013 and every authoritative case decided thereunder, was ignored.

Obviously, since appellant did not have the prescience to know in 1978, that the Appellate Division would enunciate a new pleading requirement in 1983, he did not request to replead.

POINT I

UNIFORMITY MANDATES REVIEW SINCE APPEALS NOW ARE PENDING IN THREE DEPARTMENTS

Despite appellant's attempts, the courts has fragmented this and related cases, so that appeals presently pend in the First, Second, and Fourth Departments.

At this juncture, the only way to obtain a semblance of uniformity of law, is by review in this Court.

POINT II

THE DECISION OF THE APPELLATE DIVISION WAS "SHOT FULL OF ERROR"

It is well-established law, needing little, or no, citation of authority, that in an omnibus CPLR 3211(a)[7] motion:

1. A single viable cause of action pleaded mandates the defeat of the entire motion, a principle repeated more often by the Appellate Division, Second Department, than in all other three departments combined.

2a. On a CPLR 3211(a)[7] motion, the allegations of the complaint must be accepted as true.

b. Plaintiff's complaint is to be liberally construed, requiring little, if anything more, than "notice" (CPLR §3013), and absent a showing of prejudice, is subject to amendment, formal or informal, and thus defeating a demurrer motion.

c. Any and all extraneous material before the Court, directly or indirectly, which might salvage a defectively pleaded complaint, must be considered in opposition to a demurrer motion.

3. Sua sponte dispositions by the courts, even by appellate courts, are out (Hecht v. City, 60 N.Y.2d 57, 467 N.Y.S.2d 187; McLearn v. Cowan, 60 N.Y.2d 57, 467 N.Y.S.2d 187).

4. Immunities, must be shown by probative evidence for "entitlement". Nothing was shown by the judicial defendants, their attorney, or even the Appellate Division (except in conclusory terms).

5. An immunity or privilege is dependent on the function performed, not on the title of the actor.

6. Denial of a Signorelli motion for summary dismissal, on a transactional related matter, on a 3212 motion (Doris L. Sassower v. Signorelli), is inconsistent with a 3211(a)[7] dismissal.

Judged by the aforementioned criteria, the disposition of the Appellate Division is indefensible, in fact is so completely without support as to clearly indicate an interest to be served which is incompatible with the judicial function.

POINT III

THE APPELLATE DIVISION, SECOND DEPARTMENT: TRANSACTIONAL INVOLVEMENT MADE THE TRIBUNAL AN UNCONSTITUTIONAL FORUM

The facts as set forth in appellant's moving affidavit are set forth as an exhibit ("B"), and are sufficient to require another body to have heard this appeal or to determine whether the Second Department could ethically and constitutionally hear this appeal.

This contention is made without prejudice to appellant's contention that he has a right to appeal to this Court on constitutional grounds.

POINT IV

JUDICIAL IMMUNITY DOES NOT EXIST FOR OVERPUBLICATION OR IMPROPER PUBLICATION OF CONFIDENTIAL MATERIAL

1. The Appellate Division has exclusive initial jurisdiction to impose disciplinany sanctions against attorneys (Erie v. Western, 304 N.Y. 342, 346).

2. The immunity granted to complainants, clearly does not apply to those who overpublish or misdirect the complaint. The subject matter is dealt with in (Lincoln v. Daniels, 1 Q.B. 237, 3 All E.R. 740), and a authoritative decision is warranted in this country on the subject, particularly since public professional and ethical charges are not uncommon by some members of the judiciary against attorneys. This statement is not a concession that Signorelli could gain an immunity by issuing his "diatribe", which decided nothing and not intended to decide anything, by blithely calling it a "decision" (see 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; Matter of Wilhelm, 88 A.D.2d 6, 14-15, 452 N.Y.S.2d 963 [4th Dept., per Simons, J.]).

POINT V

INCORPORATION OF THE RESPONDENTS' BRIEF AND POINTS IN SIGNORELLI'S APPEAL IN THE CASE BROUGHT BY DORIS L. SASSOWER IS APPROPRIATE TO SHOW THE THE RELATIONSHIP BETWEEN THE CASES AND THE NECESSITY FOR JOINT REVIEW IN A MATTER PENDING IN THE SECOND DEPARTMENT, WITH A MATTER NOW PENDING IN TWO OTHER DEPARTMENTS, AS WELL.

1. Since appellant had and intends to continue his action against Signorelli under a pleading, consistent with the facts, under the law enunciated by the Second Department, in New York County, where such action has been transferred, it seems that in related cases there should not be a different rule of law.

Therefore, the Brief of Doris L. Sassower v. Signorelli, presently pending in the Second Department is incorporated herein.

2. Furthermore, such Brief deals in more extensive manner, with the legal points involved.

CONCLUSION

LEAVE TO APPEAL SHOULD BE GRANTED

Dated: February 15, 1984

Respectfully submitted,

GEORGE SASSOWER, Esq.
Attorney for appellant

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 12, 1982.

HON. MILTON MOLLEN, Presiding Justice
HON. DAVID T. GIBBONS
HON. MOSES M. WEINSTEIN
HON. RICHARD A. BROWN
Associate Justices

In the Matter of the Estate of Eugene Paul Kelly, deceased.

George Sassower,

Appellant;

Order

Ernest L. Signorelli et al.,

Respondents.

A proceeding having been instituted by George Sassower to compel the respondents and other participants in the Estate of Eugene Paul Kelly, deceased, to expeditously terminate said proceedings so that he may proceed with his appeal; or in the alternative, to grant leave to prosecute an appeal;

Now, upon the papers filed in support of and in opposition to the application, and the application having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the application is hereby denied and proceeding dismissed, without costs.

Enter:

IRVING N. SELKIN

Clerk of Appellate Division

Exh. 6. Y "A"

3. The constitutional contention regarding Action No. 3, is different, and arose not earlier than upon oral argument at the Appellate Division on June 24, 1982.

a. Deponent, knew or assumed that there was a transactional involvement between Signorelli and former Presiding Justice Frank A. Gulotta on June 23, 1977.

It was and still is inconceivable that His Honor would deny bail to appellant on that day had he been correctly informed by Signorelli that appellant's incarceration for criminal contempt was made (1) without any accusation; (2) without notice of any hearing or trial; (3) a trial; (4) a conviction; and (5) and sentence, all in absentia.

There was nothing known or assumed by appellant which would warrant the disqualification of the Second Department in this matter.

b. It was the unsolicited oral remarks by the Assistant Suffolk County Attorney to the Appellate Division which mandated some further inquiry, which deponent made.

Exhibit "B"

Of particular significance was the admission that the Assistant Suffolk County Attorney that he personally was at the Suffolk County Jail on June 10-11, 1978 when not only was a Writ of Habeas Corpus disobeyed, but deponent's wife and child were incarcerated for serving same. The justification claimed was that the Supreme Court jurist who signed same was "illiterate".

The results of such inquiry, insofar as it came from reliable sources or seemed reliable, was set forth in deponent's motion promptly made motion. Any information which did not come from reliable sources, or which did not seem reliable, was not mentioned.

The result of that investigation, deponent believes mandated transfer of this appeal or a denial of the material set forth in appellant's papers.

c. Additional factors started to come to light. At the commencement of the disciplinary hearings, which the Second Department referred to the First Department, the Referee directed full and complete disclosure between the parties.

Both sides complied in all respects. As a result of such exchange deponent learned of the covering letter sent by Presiding Justice Milton Mollen to the Grievance Committee regarding the disciplinary complaint sent His Honor by Signorelli and the effect it had upon its employees.

Recognition of the effect of this cordial acknowledgement of the Signorelli "diatribe" by the Presiding Justice, a copy of which was sent to the Grievance Committee, can best be recognized by the fact that even laudable conduct became the subject of inquiry by the young, idealistic, and enthusiastic employees of the Grievance Committee. It was not treated as just another complaint to be investigated, but a "burning bush" from the citadel mandating a jihad against appellant and his attorney-wife.

Thus, in the complaint against appellant's wife, seventeen (17) out of twenty (20) charges, were summarily dismissed on her motion for summary judgment, without even pre-trial procedures.

In all, as a result of one of the most intensive and expensive investigations and trials conducted by the Grievance Committee, thirty-four (34) charges were resoundingly dismissed. A record which deponent believes is unparalled.

To the credit of the attorneys for the Grievance Committee, when they recognized they had been misled by the Signorelli's "diatribe", by the pruned documents supplied them, and the massive number of exculpatory documents that had been concealed or destroyed by Signorelli and his Court, they acted most properly and ethically.

d. Thereafter, the Second Department, for reasons unknown and unsuspected at the time, that Court transferred two (2) other non-final appeals to the Fourth Department. Such action was before deponent learned through the examination before trial of Art Penny, the reporter for the defendant, New York News, of his relationship with two (2) of the justices in the Appellate Division.

e. Also, in the interim, the action had been transferred from Suffolk County to New York County, and as a result of the aforementioned information and other information, deponent moved to examine various judges of the Appellate Division, Second Department, before trial.

f. Furthermore, in view of the strenuous attempts made by deponent to clear his name, as a result of the extensively published disciplinary complaint by Signorelli, the refusal of the Appellate Division to compel the "expeditious termination" of the Kelly estate in Surrogate's Court, Suffolk County (Exhibit "A"), so that appellant could have such "diatribe" reviewed (CPLR §5501(a)[4]), borders on unconstitutionality. This estate is lying fallow in Surrogate's Court, according to the evidence and findings of the Referee, obviously attempting to preclude review.

g. The position of the Second Department in permitting its attorney, the Attorney General, and the Suffolk County Attorney to extensively republish the "diatribe" with impunity, albeit its proven falsity, and not permitting appellant to publish his vindication or vindicating material, even in relevant judicial proceedings, borders on the profane.

Thus, prior to the decision of the Appellate Division on July 25, 1983, deponent had concluded that because of its transactional involvement in this matter, and its other conflicting non-judicial functions, it was an unconstitutional forum for the resolution of this appeal, and so contended.

This contention was strongly urged in appellant's renewal motion, resulted in the Order of December 30, 1983 [after appellant's Notice of Appeal], and is presently the subject of a motion to resettle.

4. The results reached by such Court cannot be ignored in this regard, and reveals a disposition, not only incorrect, but patently incredible.

A few specific examples should suffice.

a. A remand to determine whether appellant waived his constitutional right to be present, the first time a matter is on for trial, because he was otherwise engaged in a higher court in the midst of trial, which no one disputes and easily verifiable, borders on the absurd.

b. A new pleading requirement, not raised by respondent, and not supported by any known case or text, modern or ancient, and clearly at odds with CPLR §3013, is impossible to justify.

c. A total disregard of the conservative allegations of appellant's complaint, on a CPLR 3211(a)[7] omnibus motion, where entitlement to immunity is not shown, and clearly negated by the complaint, is incredible, particularly since in collateral proceedings many of the allegations had been proven correct, and none incorrect.

To say more would be supererogatory!

5. Thus, appellant contends that the point had been reached where the Appellate Division, Second Department should not have even had the discretion to justify its refusal to recuse itself.

6. Deponent recognizes the procedural problems involved in such determination, and merely as a possible suggestion requests that the Second Department make an in camera disclosure to this Court on the subject so that this Court could determine whether appellant was deprived of his constitutional right to a proper tribunal.