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Plaintiff may sue state employee in supreme court for individual tort claim, even if state must indemnify employee

Under the common law, those injured by the tortious acts of a state employee could sue the employee for his personal liability, but were barred from bringing suit against the state by the doctrine of sovereign immunity.¹ Rigid application of this doctrine has been tempered by case law² and by a legislative waiver of sovereign immunity in exchange for a limited consent to suit.³ In New York, the Court of Claims Act⁴ permits an injured party to sue the state, but the Act limits the forum to the New York Court of Claims.⁵

¹ See 2 S. SPEISER, C. KRAUSE & A. GANS, *THE AMERICAN LAW OF TORTS* § 6.17, at 103-04 (1985) [hereinafter SPEISER, *LAW OF TORTS*]. The ancient doctrine of sovereign immunity is based on the medieval concept that "the king can do no wrong" and that a sovereign cannot be sued in its own court without its consent. See Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1363 (1954) [hereinafter Leflar, *Tort Liability*]; McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 Sr. JOHN'S L. REV. 1, 3 (1965) [hereinafter McNamara, *Court of Claims*]. In more modern times, the doctrine has been justified as a rule of social policy that "protects the state against burdensome interference with the performance of its governmental functions and preserves its control over state funds, property and instrumentalities." *Glassman v. Glassman*, 309 N.Y. 436, 440, 131 N.E.2d 721, 723 (1956). See also *United States v. Lee*, 106 U.S. 196, 206 (1882) (performance of public duties endangered without sovereign immunity); Leflar, *Tort Liability*, *supra*, at 1364 (fear that state cannot pay for tort liabilities).

This principle has been applied to each of the states, as well as the federal government. See *Lee*, 106 U.S. at 206. However, a state is always amenable to suit in federal court and, in addition, if compensation is sought in a New York State court for expropriated property, sovereign immunity will not apply. See McNamara, *Court of Claims*, *supra*, at 3. See also U.S. CONST. amend. V (just compensation required for taking of property); N.Y. CONST. art. I, § 7 (same).

² See, e.g., *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963) (en banc) (governmental immunity from tort liability discarded as rule of law); *Campbell v. State*, 259 Ind. 55, 61, 284 N.E.2d 733, 737 (1972) (sovereign immunity not any more available to state than to municipal corporations and counties); *Willis v. Department of Conservation & Economic Dev.*, 55 N.J. 534, 540, 264 A.2d 34, 37 (1970) (time for judiciary to take responsibility and adjudicate state tort liability).

The concept of sovereign immunity has met with "doubtful reception" from the earliest days of the Republic. See *Lee*, 106 U.S. at 207. Courts have criticized sacrificing the rights of an injured person for the benefit of the public treasury, and have found the doctrine "archaic, anachronistic, undemocratic and ill-suited to modern views as to social responsibility." See SPEISER, *LAW OF TORTS*, *supra* note 1, § 6.1, at 13.

³ See, e.g., ILL. CONST. art. XIII, § 4 ("Except as the General Assembly may provide by law, sovereign immunity in this State is abolished"); CONN. GEN. STAT. § 4-160(a) (1987) ("[w]hen the claims commissioner deems it just and equitable, he may authorize suit against the state"); FLA. STAT. ANN. § 768.28(1) (West 1986) ("the state . . . hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act").

⁴ N.Y. CT. CL. ACT (McKinney 1963 & Supp. 1987).

⁵ See *id.* § 8 (McKinney 1963). Section 8 of the Court of Claims Act provides that: The State hereby waives its immunity from liability and action and hereby as-

Therefore, if a court determines that a claim against a state employee is, in essence, a claim against the state, the suit must be brought in the Court of Claims.⁶ Recently, however, in *Morell v. Balasubramanian*,⁷ the New York Court of Appeals held that in a malpractice action against state-employed physicians, the employees are the real parties in interest, and therefore the supreme court may properly hear the action.⁸

In *Morell*, the plaintiff's wife was treated in a state hospital for severe rheumatoid arthritis.⁹ During a hip replacement procedure performed by the defendant state-employed physicians, she

sumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

Id. Prior to the state's waiver of immunity, the only recourse an injured plaintiff had was to petition the Legislature for relief and "rely on the sense of justice" of that body. *See People ex rel. Swift v. Luce*, 204 N.Y. 478, 483, 97 N.E. 850, 851 (1912); *McNamara, Court of Claims*, *supra* note 1, at 3-4.

The Court of Claims is a constitutional court of record with exclusive jurisdiction to "hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide." N.Y. CONST. art. VI, § 9. *See, e.g., Breen v. Mortgage Comm'n*, 285 N.Y. 425, 429, 35 N.E.2d 25, 26-27 (1941) (state may only be sued in Court of Claims); *Samuel Adler, Inc. v. Noyes*, 285 N.Y. 34, 35, 32 N.E.2d 781, 782 (1941) (judgment granted by County Court against state void because New York has not consented to suit in that court); *Wilkins v. Perales*, 128 Misc. 2d 265, 268 n.4, 487 N.Y.S.2d 961, 964 n.4 (Sup. Ct. N.Y. County 1985) (claim against state must be brought in Court of Claims, not supreme court).

Section 9 of the Court of Claims Act sets forth the jurisdiction and the powers of the court. It provides that: "The court shall have jurisdiction . . . [t]o hear and determine a claim of any person, corporation, or municipality against the state for . . . the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article." N.Y. CT. CL. ACT § 9(2) (McKinney Supp. 1987). Only the state can be sued in the Court of Claims. *See id.* A plaintiff who sues in the Court of Claims must have his claim heard by a judge, unlike in the Supreme Court where a party may demand a jury trial. *Compare* N.Y. CT. CL. ACT § 12(3) (claim heard and judgment rendered upon by judge) *with* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.21(c) (1986) (trial by jury may be demanded as provided by CPLR 4102).

⁶ *See, e.g., Schaffer v. Evans*, 57 N.Y.2d 992, 994, 443 N.E.2d 485, 486, 457 N.Y.S.2d 237, 238 (1982) (action against comptroller and chief administrator primarily claim against state and can only be entertained in Court of Claims); *Psaty v. Duryea*, 306 N.Y. 413, 420, 118 N.E.2d 584, 588 (1954) (action against Commissioner of Conservation is suit against state and cannot be brought in supreme court); *Niagara Falls Power Co. v. White*, 292 N.Y. 472, 478, 55 N.E.2d 742, 745 (1944) (supreme court lacks jurisdiction over real property action against state Water Power Commission); *Ashland Equities Co. v. Clerk of N.Y. County*, 110 App. Div. 2d 60, 65, 493 N.Y.S.2d 133, 137 (1st Dep't 1985) (action against county clerk for negligent filing is within exclusive jurisdiction of the Court of Claims).

⁷ *Morell v. Balasubramanian*, 70 N.Y.2d 297, 514 N.E.2d 1101, 520 N.Y.S.2d 530 (1987).

⁸ *See id.* at 300, 514 N.E.2d at 1101, 520 N.Y.S.2d at 530.

⁹ *See id.* Rebecca Morell was treated at Helen Hayes Hospital from June 1981 until February 1982. *See id.*

suffered cardiac arrest and died.¹⁰ The plaintiff commenced a suit against the state in the Court of Claims and a suit against the defendant-doctors in the supreme court to recover money damages caused by defendants' negligent medical treatment.¹¹ The defendant-doctors' motion to dismiss for lack of subject matter jurisdiction was denied by the supreme court.¹² The Appellate Division, First Department, reversed the order, holding that since the plaintiff had brought suit against the doctors for actions taken in their official capacities, the action, in reality, was an action against the state and could only be entertained in the Court of Claims.¹³

The New York Court of Appeals reversed and reinstated the complaint.¹⁴ Writing for a unanimous court, Judge Hancock held that when a suit against a state agent or officer is in tort for damages "arising from the breach of a duty owed individually by such agent or officer directly to the injured party, the State is not the real party in interest—even though it could be held secondarily liable . . . under [the doctrine of] respondeat superior."¹⁵ The court

¹⁰ See *id.*

¹¹ See *id.* at 300, 514 N.E.2d at 1101-02, 520 N.Y.S.2d at 531. Plaintiff commenced the two malpractice actions individually and as administrator of his deceased wife's estate. *Id.*

¹² See *id.* at 300, 514 N.E.2d at 1102, 520 N.Y.S.2d at 531. The Supreme Court, New York County, held that state employees may be sued in that court for tortious acts committed within the scope of their employment. See *id.*

¹³ *Morell*, 124 App. Div. 2d 498, 498-499, 507 N.Y.S.2d 865, 865-66 (1st Dep't 1986), *rev'd*, 70 N.Y.2d 297, 514 N.E.2d 1101, 520 N.Y.S.2d 530 (1987). The First Department held that in a suit against a state employee acting in his official capacity, the state is the real party in interest. *Id.* at 499, 507 N.Y.S.2d at 866. However, the two cases relied upon by the Appellate Division in support of its decision, *Ashland Equities Co. v. Clerk of New York County* and *Schaffer v. Evans*, are distinguishable. *Ashland Equities Co. v. Clerk of New York County* was a non-tort case that involved a suit against a county clerk for negligently filing a *lis pendens* against real property. See *Ashland Equities Co. v. Clerk of N.Y. County*, 110 App. Div. 2d 60, 493 N.Y.S.2d 133 (1st Dep't 1985). In *Schaffer v. Evans*, another non-tort claim, the plaintiff sued the Chief Administrator of the Unified Court System of New York State for monies allegedly due him for services rendered as a law secretary to a supreme court justice. See *Schaffer v. Evans*, 57 N.Y.2d 992, 433 N.E.2d 485, 457 N.Y.S.2d 237 (1982). The other departments of the appellate division have held, at least as to tort actions, that the employee remains personally liable, regardless of indemnification. See *Paone v. Tryon*, 112 App. Div. 2d 149, 150, 491 N.Y.S.2d 669, 670 (2d Dep't 1985); *Ott v. Barash*, 109 App. Div. 2d 254, 257, 491 N.Y.S.2d 661, 664 (2d Dep't 1985); *Olmstead v. Britton*, 48 App. Div. 2d 536, 539, 370 N.Y.S.2d 269, 273 (4th Dep't 1975); *De Vivo v. Grosjean*, 48 App. Div. 2d 158, 160, 368 N.Y.S.2d 315, 316-17 (3d Dep't 1975).

¹⁴ *Morell*, 70 N.Y.2d at 300, 514 N.E.2d at 1101, 520 N.Y.S.2d at 530.

¹⁵ *Id.* at 301, 514 N.E.2d at 1102, 520 N.Y.S.2d at 531. Under the doctrine of respondeat superior, a master is rendered vicariously liable for the torts committed by his servant while acting within the scope of his employment. See *Riviello v. Waldron*, 47 N.Y.2d 297, 302, 391 N.E.2d 1278, 1280-81, 418 N.Y.S.2d 300, 302 (1979). Respondeat superior simply means "look to the man higher up," and has been justified in modern times by policy considera-

rejected the Attorney General's contention that whenever the state can be held vicariously liable under respondeat superior, tort actions brought against state employees must be considered claims against the state, actionable only in the Court of Claims.¹⁶ Judge Hancock noted that such a reading of the Act would deprive an injured plaintiff "of any forum for an action against the individual tort-feasor since only the State can be sued in the Court of Claims."¹⁷

The court also dismissed the defendants' assertion that section 17 of New York's Public Officers Law,¹⁸ which provides for indem-

tions that favor allocating the risk to the employer rather than the injured plaintiff. See Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 584-85 (1929); see generally 1 J. DOOLEY, MODERN TORT LAW LIABILITY & LITIGATION §§ 16.01 to -.08 (B. Lindhall rev. ed. 1982) (discussing common-law development, modern application and justification for respondeat superior).

The Court of Appeals stated that actions against state officers, acting in their official capacity, are generally deemed to be claims against the state, entertainable only in the Court of Claims. See *Morell*, 70 N.Y.2d at 300, 514 N.E.2d at 1102, 520 N.Y.S.2d at 531. A suit against a state officer will be held to be asserted against the state if "it arises from actions or determinations of the officers made in his or her official role and involves rights asserted, not against officers individually, but solely against the State." *Id.* at 301, 514 N.E.2d at 1102, 520 N.Y.S.2d at 531.

¹⁶ See *Morell*, 70 N.Y.2d at 302, 514 N.E.2d at 1103, 520 N.Y.S.2d at 532. The Attorney General, counsel for the defendant-doctors, had argued that, in return for the Court of Claims Act's waiver of immunity and assumption of the burden of respondeat superior, the state provided that exclusive jurisdiction for such suits was vested in the Court of Claims. See Brief for Respondents at 8, *Morell v. Balasubramanian*, 70 N.Y.2d 297, 514 N.E.2d 1101, 520 N.Y.S.2d 530 (1987) (No. 011483/84) [hereinafter Brief for Respondents].

¹⁷ *Morell*, 70 N.Y.2d at 302, 514 N.E.2d at 1103, 520 N.Y.S.2d at 532. The Attorney General had asserted that while a plaintiff could not sue the employee as a named defendant in the Court of Claims, the employee's errors or omissions would be litigated in the suit against the State. See Brief for Respondents, *supra* note 16, at 31-32.

However, in cases decided prior to the enactment of the Court of Claims Act, state employees had been sued in supreme court and held individually liable for their torts. See, e.g., *Murtha v. New York Homeopathic Medical Center & Flower Hosp.*, 228 N.Y. 183, 185, 126 N.E.2d 722, 724 (1920) (state agents remain personally liable in tort). The Court of Appeals found nothing in the Act or its history to suggest that the legislature, in creating a new right for an injured party to sue the state in the Court of Claims "was at the same time, intending to take away the injured party's established right to sue the individual tort-feasor." *Morell*, 70 N.Y.2d at 303, 514 N.E.2d at 1103, 520 N.Y.S.2d at 532.

¹⁸ N.Y. PUB. OFF. LAW § 17(3)(a) (McKinney Supp. 1987). Section 17(3)(a) provides:

The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.

nification and defense of state employees, was enacted to protect state employees in federal civil rights claims and was not intended to create an alternative to the Court of Claims' exclusive forum for actions against state officers and employees.¹⁹ The court declared that the language of section 17 supports the conclusion that the Legislature did not intend that an injured party forfeit the right to sue a state employee for damages.²⁰ Noting that individuals are not subject to suit in the Court of Claims, the Court of Appeals reasoned that if state employees could not be sued in any other court, there would be no need for an indemnification statute because there would then be no court in which state employees could be sued.²¹

The *Morell* court's determination, that regardless of indemnification state employees retain personal liability for their torts, has helped clarify the law for the New York practitioner. The court's interpretation of the Court of Claims Act and the Public Officers Law is consistent with legislative intent²² and applicable case law.²³

Id. The law was enacted in 1978 to consolidate previous indemnification and defense provisions applicable to state employees sued in their individual capacities for acts committed or omitted in the performance of their employment. See Memorandum of the Law Revision Commission Relating to the Indemnification and Defense of Public Officers and Employees, [1978] N.Y. LAW REV. COMM'N REP., reprinted in [1978] N.Y. LAWS 1606 (McKinney) [hereinafter Memorandum]. The law also provides that the state will pay reasonable defense costs for employees the attorney general is unable to defend, including defense costs incurred for claims brought against state employees in federal court. See N.Y. PUB. OFF. LAW § 17(2) (McKinney Supp. 1987).

¹⁹ Brief for Respondents, *supra* note 16, at 36-37. The Attorney General asserted that developments in federal constitutional and statutory law had exposed state employees to new liabilities for which the Court of Claims mechanism was ill-suited. *Id.* at 38. Since individuals were barred from suing states directly for violations of federal constitutional rights, and were free to sue individual state officials, the Attorney General contended that Public Officers Law section 17 was enacted to indemnify and protect only those employees from exposure to personal liability. See *id.* at 40. The court found this argument without merit, noting that the statute plainly applies to "any civil action or proceeding in any state or federal court arising out of any alleged act or omission" as well as to actions brought to enforce federal civil rights. See *Morell*, 70 N.Y.2d at 303-04 n.2, 514 N.E.2d at 1104 n.2, 520 N.Y.S.2d at 533 n.2; N.Y. PUB. OFF. LAW § 17(2)(a) (McKinney Supp. 1987).

²⁰ *Morell*, 70 N.Y.2d at 303, 514 N.E.2d at 1104, 520 N.Y.S.2d at 533. The court stated that the references in section 17 to settlements by or judgments against state employees "in any state or federal court" indicates the legislature's recognition that state employees can be sued in such courts. *Id.*

²¹ *Id.*

²² See Memorandum, *supra* note 18, reprinted in [1978] N.Y. LAWS 1606 (McKinney). The Law Revision Commission referred to the indemnification and defense of those employees "sued in their individual capacity." *Id.* (emphasis added). Since individuals are not subject to suit in the Court of Claims, this supports the conclusion that the legislature recognized that employees will be sued in other courts for their tortious acts. See *Morell*, 70

Although the court rejected the defendants' construction of these statutes, the Attorney General did recognize that where the plaintiff sues both the state and the employee, the state will be forced to provide the defense in two separate, but nearly identical, actions.²⁴ Such a system is unnecessarily costly, time-consuming and, in addition, presents potential *res judicata* problems.²⁵

N.Y.2d at 303, 514 N.E.2d at 1103-04, 520 N.Y.S.2d at 532-33.

When the legislature enacted section 17 of New York's Public Officers Law, it did not use the language found in General Municipal Law sections 50-b and 50-c, which provides that the municipality will assume the liability of the employee. *See* *Olmstead v. Britton*, 48 App. Div. 2d 536, 539, 370 N.Y.S.2d 269, 273 (4th Dep't 1975). Rather, it stated that the state would hold the employee harmless and indemnify him. *Compare* GML § 50-c(1) (McKinney 1986) ("shall be liable for, and shall assume the liability to the extent that it shall save harmless") with N.Y. PUB. OFF. LAW § 17(3)(a) ("the state shall indemnify and save harmless").

Section 17 provides in part "[t]he benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party . . ." N.Y. PUB. OFF. LAW § 17(5) (McKinney Supp. 1987) "Thus, section 17 must be construed as simply creating a cause of action on behalf of State employees against the State for indemnification, without affecting the remedies available to an injured plaintiff." *Ott v. Barash*, 109 App. Div. 2d 254, 257, 491 N.Y.S.2d 661, 664 (2d Dep't 1985). *See also* *De Vivo v. Grosjean*, 48 App. Div. 2d 158, 160, 368 N.Y.S.2d 315, 316-17 (3d Dep't 1975) (indemnification does not prohibit plaintiff's action against state employee in Supreme Court).

²³ *See, e.g.,* *Paone v. Tryon*, 112 App. Div. 2d 149, 150, 491 N.Y.S.2d 669, 670 (2d Dep't 1985) (state not real party in interest solely because of indemnification); *Ott v. Barash*, 109 App. Div. 2d 254, 257, 491 N.Y.S.2d 661, 664 (2d Dep't 1985) (statute does not impose direct liability upon state for negligent act of employees, nor does it limit plaintiff's remedies); *Olmstead v. Britton*, 48 App. Div. 2d 536, 539, 370 N.Y.S.2d 269, 273 (4th Dep't 1975) (legislature did not intend to have state assume direct liability for employee's acts; statute designed to change only employee's rights); *De Vivo v. Grosjean*, 48 App. Div. 2d 158, 160, 368 N.Y.S.2d 315, 317 (3d Dep't 1975) (deliberate inclusion in statute that its benefits shall not diminish rights of any party confirms legislative intention to leave undisturbed plaintiff's right to sue in supreme court).

Prior to the enactment of Public Officers Law section 17, it was held that the Court of Claims Act did not relieve the defendant of his personal responsibility for wrongs committed by him. *See Rhynders v. Greene*, 255 App. Div. 401, 401, 8 N.Y.S.2d 143, 143 (3d Dep't 1938).

²⁴ *See* Brief for Respondents, *supra* note 16, at 17-18. The Public Officers Law provides that an employee shall be entitled to representation by private counsel of his choice when the attorney general determines that representation by the State would be inappropriate, or whenever a court determines that a conflict of interest exists. *See* N.Y. PUB. OFF. LAW § 17(2)(b) (McKinney Supp. 1987). The statute further provides that reasonable attorney's fees and litigation expenses shall be paid by the state to such private counsel. *Id.* The Attorney General had argued that if multiple state employees were involved in a malpractice case and any of them included a claim that another employee was to blame, then costly outside counsel would have to be retained at state expense—a problem that would not arise in the Court of Claims. *See* Brief for Respondents, *supra* note 16, at 15-16.

²⁵ *Res judicata* refers technically to the common-law doctrine precluding the relitigation of a cause of action, but in the broader sense, describes a policy that seeks to avoid unnecessary duplication. *See* SIEGEL § 442, at 585-86 (1978 & Supp. 1987). It can be argued

It is submitted that a merger of the courts would be a judicially efficient means of achieving a compromise between the state's interest in limiting suits against the sovereign and a party's right to a jury trial. Proponents of court merger have found that the present "patchwork" of specialized trial courts engenders the potential for duplicate efforts and wasteful use of the judiciary's resources.²⁶ It is suggested that creating a single trial court of unlimited general jurisdiction would allow the two actions to be consolidated and entertained in the same court. Furthermore, while merger proposals have simply devised a new court structure, such a change could permit a bifurcated trial wherein the jury would determine the liability of the employee and the judge would determine the liability of the state.²⁷ Accordingly, concerns for efficiency

that if a plaintiff's successful suit in the supreme court establishes that the defendant employee, likely represented by the attorney general, was acting within the scope of his state employment, *res judicata* would apply against the state in the Court of Claims. *Cf. Jones v. Young*, 257 App. Div. 563, 568, 14 N.Y.S.2d 84, 90 (3d Dep't 1939) (*res judicata* applicable because claim could have been brought initially in Supreme Court). However, as Professor Siegel notes, using prior court's determination may not be practical as actions in the Court of Claims generally have a shorter statute of limitations. *See* SIEGEL § 470, at 631 (1978 & Supp. 1987). Actions initiated in the Court of Claims clearly will have preclusionary effect. *See* N.Y. Ct. Cl. Act § 20(4) (McKinney 1963). "The principle of the conclusiveness of prior adjudications extends to all bodies upon whom judicial powers have been conferred," including the Court of Claims. *Chaffee v. Lawrence*, 282 App. Div. 875, 875, 124 N.Y.S.2d 425, 426 (2d Dep't 1953). *Cf. Levin & Leeson, Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113 (1984) (discussing use of issue preclusion against United States as sovereign).

²⁶ *See* N.Y. Gov. Ann. Mess. 116-17 (1986). "The existing fragmentation creates delays and hinders the efficient use of resources." *Id.* at 117. *See also* Amrod & Robinson, *Court Unification Viewed as Reform Long Overdue*, N.Y.L.J., Aug. 26, 1982, at 4, col. 1 (Court of Claims' "inability . . . to summon before it all of the parties necessary to achieve a final disposition" impedes judicial economy and "the goal of complete resolution of disputes"). *But see Court Reforms Narrowly Pass Assembly Panel*, N.Y.L.J., May 2, 1985, at 1, col. 2 (proposed merger of all trial courts "nothing more than window dressing") (statement of Assemblyman Ralph Goldstein). For a discussion of the strengths and weaknesses of court unification plans nationwide, see Tarr, *Court Unification and Court Performance: A Preliminary Assessment*, 64 JUDICATURE 356 (1981).

²⁷ *See* N.Y.A. 11, 210th Sess. (1987). The bill proposed amendments to article six of the state constitution that would abolish the Court of Claims, the Family Court, the Surrogates' Court, the County Court, District Courts, and the city-wide courts of civil and criminal jurisdiction for New York City, and merge the jurisdictions of such courts into the Supreme Court. *Id.* The proposed court merger failed in the 1987 legislative session for many reasons, including the many questions left unanswered by these structural changes. It should be noted that such a plan would require a vote by the people after twice being passed by the legislature. *See* N.Y. CONST. art. XIX, § 1. Presumably, the Court of Claims Act would be repealed after the abolition of the Court of Claims, and actions against the State would be governed by the CPLR. Subsequent legislation would have to determine the role of the judge and/or jury in claims against the state. The bifurcated trial is suggested as a workable

could be effectively balanced with the party's right to a jury trial and the state's interest in a manageable forum for suits against the sovereign.

Carolyn Kearns

CIVIL PRACTICE LAW AND RULES

CPLR 3211(e): When the defendant moves to dismiss the complaint without including a personal jurisdiction objection under CPLR 3211(a), and the plaintiff amends the complaint, the defendant may not include that objection in an answer to the amended complaint; the objection is waived

CPLR 3211¹ is the primary vehicle by which a party to a lawsuit may move for pre-trial dismissal of a cause of action or a defense.² CPLR 3211(a) specifies the grounds upon which a motion to dismiss a cause of action may be made,³ while the mechanical re-

solution.

¹ Under CPLR 3211, any party to a lawsuit may move to dismiss any cause of action or defense, asserted against it in a complaint, counterclaim, cross-claim, third-party complaint, or any responsive pleading. See SIEGEL § 257, at 317; H. WACHTELL & T. MIRVIS, NEW YORK PRACTICE UNDER THE CPLR 270-71 (6th ed. 1986) [hereinafter WACHTELL & MIRVIS]; J. WEINSTEIN, H. KORN & A. MILLER, CPLR MANUAL § 21.02, at 21-4 (rev. ed. 1987) [hereinafter CPLR MANUAL]; 4 WK&M ¶ 3211.01, at 32.17. CPLR 3211(a) is most often used by defendants against plaintiffs, but plaintiffs may also use it. See SIEGEL § 257, at 317; CPLR 3211, commentary at 56 (McKinney 1974). Plaintiffs may move to dismiss one or more defenses on the ground that a defense is not stated or has no merit. See CPLR 3211(b) (McKinney 1974).

² See CPLR 3211 (b) (McKinney 1974). A party may interpose his 3211 objection either through a pre-answer motion to dismiss or by including it as an affirmative defense in his answer. See CPLR 3211(e) (McKinney 1974). See also *Gager v. White*, 53 N.Y.2d 475, 488, 425 N.E.2d 851, 856, 442 N.Y.S.2d 463, 468 (1981) (failure to raise objection by prescribed methods results in waiver); *Bides v. Abraham & Strauss Div. of Federated Dep't Stores*, 33 App. Div. 2d 569, 569, 305 N.Y.S.2d 336, 338 (2d Dep't 1969) (failure to raise jurisdiction in answer to cross complaint resulted in personal jurisdiction though service of summons was lacking); *Gazerwitz v. Adrian*, 28 App. Div. 2d 556, 557, 280 N.Y.S.2d 233, 234 (2d Dep't 1967) (jurisdictional objection may properly be raised by motion to dismiss or in the answer).

³ CPLR 3211(a) (McKinney 1974). Rule 3211(a) states in pertinent part:

[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

....

7. the pleading fails to state a cause of action; or