No. _______

In the Supreme Court of the United States

ALFONSO IGNACIO VIGGERS,
Petitioner,
v.

AL-AZHAR PACHA, *et al.*,
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

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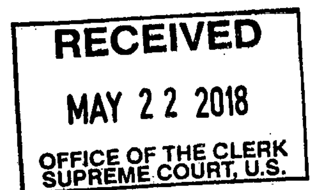
May 24, 2018



QUESTION PRESENTED

Whether the plaintiff in a civil action for defamation and wrongful termination has been deprived of the equal protection of the laws and of his reputation where the state court (1) concedes defendant a qualified privilege which under the circumstances is inapplicable, (2) palpably ignores evidence of the defendant's actual malice, and (3) favors the defendant via cross-motions for summary disposition despite the trial court's acknowledgment that there is a genuine issue of material fact.

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PETITION FOR WRIT OF CERTIORARI

The right of a man to the protection of his own reputation from unjustified and wrongful hurt reflects the basic concept of the essential dignity and worth of every human being -a concept at the root of any decent system of ordered liberty. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1996) (Justice Stewart, concurring). The right to that protection is encompassed in the Ninth Amendment, *Id.* The instant petition arises from the Michigan court's inexplicable departure from this tenet of justice and human dignity.

Employers and employees engage in negotiations during the course of employment. Some negotiations succeed, whereas others may fail. But when negotiations fail and the employer is unable to lure the employee into declining opportunities elsewhere, the employer is not entitled to defame his employee.

The instant matters are indistinguishable from the defamation case *Mareck v. Johns Hopkins University*, 60 Md.App. 217 (1984) (cert. denied) in various aspects regarding a defendant's actual malice.

OPINIONS BELOW

On March 5, 2018, the Supreme Court of Michigan denied Viggers's timely Application for Leave to Appeal (MSC#156495), App.1a, regarding the unpublished opinion the Michigan Court of Appeals released on August 15, 2017.

Viggers appealed the trial court's granting of Pacha's cross-motions for summary disposition,

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, of the Constitution of the United States provides in relevant part: "*No state shall [...] deny to any person within its jurisdiction the equal protection of the laws*".

The Ninth Amendment of the Constitution of the United States provides that "*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people*".

The Constitution of Michigan contains provisions similar to the aforementioned Amendments. The Constitution of Michigan in its Article I § 2 begins with: "*No person shall be denied the equal protection of the laws*", and Article I § 23 provides that "*The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people*".

STATEMENT OF THE CASE

A. Factual Background.

1. The University of Michigan Presents to Viggers an Offer of (Direct) Employment, and Viggers Accepts It.

Pacha employed Viggers to work for the University of Michigan (the University) as systems and database consultant. Except for the semester between Viggers's resignation in 2012 and his subsequent rehire, his employment lasted from July of 2007 to July of 2015.

who was Viggers's direct employer, and (2) some of the stepmother's calumnies falsely impute to Viggers the exerting of *undue influence* (for instance, by allegedly abusing his credentials). App.32a#3.

Viggers petitioned and was granted the Ex Parte Personal Protection Order 15-941-PH (PPO) against the stepmother. App.32a#4.

2. Viggers Seeks to Negotiate with Pacha toward Resuming Viggers's Green Card Process, But to No Avail.

The negotiations outlined herein illustrate Pacha's *purposeful* avoidance of the truth, which proves a defendant's actual malice.

Given the University's stalling of Viggers's hire process, the University's reluctance to sponsor Viggers for a green card, and the upcoming expiration of Viggers's second Labor Certification, Viggers pressed Pacha to resume Viggers's green card process by filing the USCIS form I-140. Pacha was renewedly evasive. App.32a#5.

Pacha eventually demanded that Viggers first decline his prospective employment at the University as a condition for resuming the green card process. Viggers felt uncomfortable about declining his prospective employment and being at risk that Pacha would let the second Labor Certification expire as in 2010. Therefore, Viggers asked Pacha to file the form I-140 first. The parties never reached an agreement.

offer by July 1, 2015. Pacha refused to give any guarantee whatsoever that this time he would file the USCIS form I-140. Given Pacha's erraticism, pattern of evasion, and novel incoherence, it would have been unreasonable for Viggers to rely on Pacha's oral statement that he would file I-140 thereafter.

That night, Viggers emailed Pacha to drill more sense into him. Viggers renewedly reminded Pacha of the revenues he kept getting thanks to Viggers's performance. App.32a#6. Pacha's frivolous approach during the negotiations prompted Viggers to mention the proverb *what goes around comes around*, denoting that life does not reward when one profits from others' effort while simultaneously obstructing their needs. See *Demelo v. U.S. Bank Nat. Ass'n*, 727 F.3d 117-120 (2013) ("*in February of 2008 [...] [t]he plaintiffs reached out to Downey Savings for assistance [regarding their growing monthly loan payment], but none was forthcoming.* ***What goes around comes around*** *and, in November 2008, the Office of Thrift Supervision closed Downey Savings and appointed the [FDIC] as its receiver*", emphasis added). In that email, Viggers reproached Pacha's short-sighted approach of taking revenge against Viggers for retaining his prospective employment. Pacha's reply reflects that he grasped Viggers's point, as Pacha sought to clarify that he was not seeking revenge against Viggers. Other than that, Pacha kept ignoring (1) the AAO decision, and (2) Viggers's concerns about Pacha's unreliability.

Loveless). At the meeting, Pacha falsely imputed to Viggers what is a *statement of threat consisting of tortious interference*. Deposition witness Lukeland Gentles (Mr. Gentles) testified that Pacha told the University that the threat "*had to do with you [Viggers] stating that once you receive your position at the University, you'd be in a position to negatively impact [Pacha] [...] that you would use your position to negatively influence o[u]r decisions and contracts in the future*". App.32a#8.

Although Mr. Gentles did not attend the meeting on July 22, 2015, Ms. Ranno and Mr. Loveless gave similar deposition testimony as to what Pacha told them at that meeting. Mr. Loveless testified that "*[Pacha] said that once you were employed with the university of Michigan that there would be some type of payback toward him and his company*". Likewise, Ms. Ranno testified as to what language Pacha attributed to Viggers: "*That once you were in -- a permanent employee of the University, you would have ability to cause him harm as [w]e would be a client*". App.32a#9. Moreover, Mr. Loveless confirmed that Mr. Gentles' testimony reflects what Pacha told the University. App.32a#10.

Several observations are pertinent at this point: (1) Viggers's emails make no reference to his future employment at the University other than his reluctance to decline it absent any guarantees that Pacha would timely file the USCIS form I-140; (2) Pacha's false accusation of Viggers's *statement of threat* of tortious interference strikingly

him -in Viggers's presence- that "this is not working" and his decision to terminate Viggers. Pacha's call to Mr. Triska was a theatrical effort to impress on Viggers the false and misleading appearance that his termination was decided impromptu.

On July 31, 2015, the University notified Viggers the decision to withdraw the offer of employment due to unspecified "additional information". App.32a#12.

In August of 2015 Viggers sued the stepmother in state court and served upon the University a subpoena requiring to produce records of any and all accusations against Viggers, regardless of their authorship. Petition for Writ of Certiorari in re MSC#156447. In the subsequent months, the University unjustifiably concealed from Viggers the false and defamatory publications Pacha made about Viggers in July of 2015.

Given the University's unresponsiveness and inconclusive production of subpoena records, on October 21, 2015, Viggers emailed Pacha to request a copy of his personnel file. In the request, Viggers emphasized his interest in "*any feedback/requests/notices from the client (University of Michigan)*". App.32a#13. Pacha fraudulently eluded that item by alleging that he "*does not have any*". App.32a#14. On November 4, 2015, Viggers emailed Pacha again to clarify the underlined item and give examples of records that were missing. App.32a#13. However, Pacha thereafter ignored Viggers's emphasized concern. App.32a#15.

where to safely perjure (being confident that Viggers had no more records to realize Pacha's concealment of information he actually possessed).

The trial court also entirely precluded the discovery on Pacha's phone activity, which would reveal interactions (if any) between Pacha and the University in the five hours between the servicing of the PPO upon the stepmother and Pacha's defamatory falsehoods about Viggers.

These impediments to the ascertainment of the truth prompted Viggers -still precluded from taking Pacha's deposition- to file a motion for recusal on April 11, 2016. At hearing on April 20, the judge alleged that she is not prejudiced in the instant case and denied Viggers's motion. App.33a#18.

2. Pacha's Deposition Testimony Is Replete with Inconsistencies and Blatant Avoidance of Questions.

Pacha's malingering of amnesia during his deposition is notorious on every aspect. To illustrate the extent of his evasion, Pacha testified that he does *not* know why his marketing associate accompanied him on July 30, 2015 (when Pacha terminated Viggers), nor whether he asked her to accompany him. App.33a#19. Pacha found himself cornered few moments later, and had to admit that he asked her to be a witness on July 30, 2015. App.33a#20.

Since Pacha insists that he perceived the proverb *what goes around comes around* as *direct threats*, Viggers asked him at deposition to elaborate on his alleged interpretation of that

his defamatory falsehoods. *Torosyan v. Boehringer Ingelheim*, 234 Conn. 1, 30 (1995).

3. The Trial Court Admits Viggers Did Not Threaten Pacha, And that There Is A Genuine Issue of Material Fact, But Nonetheless Favors Pacha Via Summary Disposition.

On June 2, 2016, Viggers timely filed a supplement to his motion for partial summary disposition (with hearing scheduled for June 15, 2016, thirteen days later). The supplement indicates in its first paragraph that the transcript of Pacha's deposition is attached as exhibit.

On June 15, 2016, the trial court favored Pacha on the counts of defamation and tortious interference. The trial court alleged that Pacha's statements were protected by qualified privilege and that "*Plaintiff will be unable to prove malice. He's offered no proof today except his suppositions and alleged motive*". App.33a#25.

However, the judge inadvertently revealed on July 13, 2016, that she had not even glanced at the transcript of Pacha's deposition (and by implication, Viggers's supplement dated June 2, 2016). App.33a#26. That explains why the court averred that Viggers presented no proofs "*except his suppositions*", App.33a#25, when dismissing the counts of defamation and tortious interference. The trial court thereafter ignored Viggers's Motion for Reconsideration (filed July 5, 2016).

On July 27 and August 8, 2016, Viggers filed a motion and supplement, respectively, for summary disposition on the remaining counts. In

> *"The State loves insurance companies and it loves employers and it loves oil companies and it loves anybody who's powerful. Okay? And it doesn't say that anywhere in our Constitution. But if you're not in those groups, the[n] you just kind of have to try and stay away -- stay out of the way*". App.#32.

That is precisely why Viggers moved for recusal four months earlier. A court cannot decide matters impartially when the judge adopts (and cannot even dissimulate) such bias.

The trial court's subsequent statements debunk Pacha's entitlement to summary dispositions in these claims. The trial court acknowledged that Viggers never threatened Pacha. Indeed, the judge corrected herself halfway through her statement to Viggers: "*You made a threat or you made a comment to -- **I took that back, don't shake your head at me**. You made a comment to [Pacha]* " (emphasis added). App.33a#33. Moreover, the trial court stated that "*There has been no finding by me or a jury that you did not earn any damage to your reputation, Mr. Viggers. That finding has not been made. It hasn't been found the other way either.*". App.33a#34. Thus, because (1) the court conceded that there were no threats, and (2) Pacha's defamatory falsehoods are *not protected by absolute privilege*, the judge's ambivalent remark (App.33a#34) establishes the existence of a genuine issue of material fact, which precludes the

REASONS FOR GRANTING THE PETITION

Vindicating one's reputation is the main interest at stake in a defamation case. *Spencer v. Kemna*, 523 U.S. 1,24 n.5 (Stevens, J., dissenting). The fundamental purpose of the judicial power to resolve controversies "*is quite simple: the fair ascertainment of the truth*". *In re Justin*, 490 Mich. 394; 809 N.W.2d 126, 136 (2012). Here, the trial court's recurrent disavowal of these too fundamental aspects is epitomized in the series of statements it made to Viggers few minutes prior to dismissing the instant case: App.33a#30, #31, #33, #34.

I. Pacha's Publications Are Neither Statements of Opinion Nor Truthful; They Are Defamatory Falsehoods.

Pacha belatedly alleges that he was *afraid* that Viggers, during his employment with Pacha, would do something that could make Pacha liable to the University. However, Pacha is not sued for his alleged and unfounded fear. Viggers sued Pacha for the *false statements of fact* made on July 21 and 22, 2015, whereby Pacha falsely imputed to Viggers (1) *direct threats* upon Pacha's refusal to allegedly violate U.S. immigration laws (Pacha's email dated July 21); and (2) a *statement of threat consisting of tortious interference* (Pacha's meeting with the University on July 22). "*Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event*", *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990). The falsity of

"*Q. When Pacha made that statement was he attributing to [Viggers] that claim? A: Yes*". App.34a#38. In the Viggers's emails at issue, there is no reference whatsoever as to *whether* or *how* Viggers allegedly planned to use his future employment at the University in regard to Pacha's business. Moreover, Pacha's falsehoods are defamatory because his narratives to the University are devoid of language connoting *subjective view, interpretation, conjecture, or surmise. Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1241 (2016).

A. Pacha's Falsehoods Also Are Defamatory Per se.

Under Michigan law, publications are defamatory per se when they falsely impute to the defamed plaintiff (1) an offense which is punishable for more than one year, or (2) moral turpitude. *Lakin v. Rund*, 873 N.W.2d 590 (2016) (citing *Mains v. Whiting*, 87 Mich. 172 (1891) and *Taylor v. Kneeland*, 1 Doug 72 (1843)). Pacha's defamatory falsehoods fall in both categories.

The appellate court's allegation (App.8a) that "*the record does not show that Pacha accused Viggers of any specific criminal activity. Consequently, Viggers cannot establish a claim of defamation per se*" is false and obliterates the decisions which the Michigan supreme court had recently directed the appellate court to follow, *Lakin, supra*. The Michigan supreme court reminded that all lower courts are bound to follow decisions which have not "*been clearly overruled or superseded [by the Michigan supreme court]*",

(on remand), supra at 82 (citations omitted). In certain contexts, it "*has been defined as involving 'fraud, deceit, and intentional dishonesty for purposes of personal gain'*", *Id.* (quotation marks in original). Pacha falsely imputed to Viggers a *statement of threat* that would definitely involve *dishonesty* in the form of exerting *undue influence* on the University's decisions to negatively impact Pacha's business. Moreover, Pacha articulated in his fraudulent narrative a purpose of Viggers's *personal gain*: the sponsorship of his green card. Falsely charging the plaintiff with improper conduct and *lack of integrity*, where the purpose of the defamatory statement is *to effectuate the plaintiff's discharge*, amounts to *defamation per se. Torosyan, supra at 35.*

II. Pacha's Defamatory Falsehoods Do Not Meet The Requirements for Qualified Privilege.

A. MCL 423.452 Supersedes Its Common-Law Counterpart, And Pacha Violated The Statute.

The Michigan supreme court states that "*[W]here comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.*", *Hoerstman Gen Contracting, Inc. v. Hahn*, 474 Mich. 66, 74 (2006) (citations omitted).

the individual's job performance" is unavailing. An employer's disclosed intention to terminate his employee relates to that employee's job performance in the same way a director's disclosed intention to file for bankruptcy relates to a company's performance. The legislation is devoid of language that would restrict the statutory scope to specific attributes of *job performance*, such as job description or employee's aptitude. But here, Pacha inextricably linked his disclosed intention to terminate Viggers with a justification therefor in the form of misleading contexts and defamatory falsehoods. In doing so, Pacha brought within the purview of MCL 423.452 his defamatory falsehoods.

MCL 423.452 does not exempt an employer from the statutory prerequisites if he is related to the prospective employer in any capacity, yet Pacha alleges that his disclosures were made to his client rather than to Viggers's prospective employer. That allegation is unavailing. Pacha was fully aware that his client and Viggers's prospective employer were the same entity: the University. This is why Pacha took the unprecedented step of publishing his defamatory falsehoods to a Human Resources employee of the University (Ms. Ranno). Hitherto Pacha had interacted only with Mr. Triska and Mr. Triska's supervisor (at that time, Mr. Loveless) in relation to Viggers's employment. By contrast, the record is devoid of any indication that Pacha hitherto ever interacted with HR staff of the University prior to July 21, 2015.

because that follow-up question is wholly derivative from the unsolicited email Pacha sent the previous day. When an unsolicited publication employs the deceitful and scandalous language of Pacha's email, containing factual allusions to *direct threats*, *fraud*, and *willful violation of the existing laws*, the defamer inevitably instigates follow-up questions from his alarmed audience.

Since Pacha premises his falsehoods on emails that Viggers sent on June 20 and July 1, 2015, another factor that weakens Pacha's pretense of *proper occasion* is his suspicious timing for calumniating Viggers: within six hours from the servicing of the PPO upon the stepmother, who repeatedly sought to contact Pacha.

Although *suspicious timing* alone does not create a genuine issue of fact, here it is notorious that Pacha's fraudulent narrative on July 22, 2015 (the falsely imputed *statement of threat* consisting of tortious interference), conflates in substance some of the stepmother's calumnies about Viggers (namely, her false accusations of *undue influence* and *abuse of credentials*, App.32a#11), and conduct that the University sanctions via its internal guidelines: "*staff must not use their official University positions or influence*", "*[refrain from] influencing a faculty or staff member's decision or behavior with respect to [...] uses of University resources*", "*avoid the intent and appearance of unethical practice in relationships*" in regard to vendors. App.34a#41.

Pacha's bare allegation that he waited twenty days [to accuse Viggers] because he wanted to

defendant competitors "*are not entitled to the protection of the shared interest privilege*").

Pacha alleges that his statements are in *good faith* and *limited in their scope* of announcing to the University that Viggers would no longer report to work. Employment was at will, whence Pacha was not required by contract or law to share with the University his pretext for terminating Viggers. See *Sias v. General Motors Corp.*, 372 Mich. 542 (1964) (employer had no interest sufficient to justify its statement that an employee was discharged for "misappropriation of company property", made to remaining employees for the purpose of restoring morale among them). Pacha's deliberate furnishing of false and misleading representations of fact and of law, with the scandalous language he employed in his communications shall subject him to the same outcome of *Sias*.

Pacha defeats himself by testifying that he concealed from the University Viggers's emails at issue because "*It's none of their business*". App.33a#22. Pacha thereby implicitly acknowledges that he exceeded the *limited in scope* element for qualified privilege in his false statements that Viggers's *emails* contained threats. App.34a#42. Pacha cannot reasonably argue why his mischaracterizations of Viggers's emails are the University's *business* whereas the actual emails are "*none of their business*". The supreme court of Michigan owes Viggers the consistency and diligence of *White v. Taylor Distributing Co., Inc.*, 753 N.W.2d 591, 595 (2008)

July 1, 2015. Cf. *New York v. Sullivan,* 376 U.S. 254, 287 (1964).

The extent of Pacha's awareness of his falsehoods is reflected in his decision *not to show* the University the emails at issue under pretext that "*It's none of their business*". Instead, Pacha gave "*a skewed and incomplete picture of the facts a reader would need to come to his or her own conclusions on the matter*", *Competitive Enterprise Institute, supra at 1247.* Pacha suppressed "*equally known facts which had they been published, would have given the reader the choice of what to believe*", *McHale v. Lake Charles American Press,* 390 So.2d 556, 562 (1980). That suppression "*has inferential significance in [plaintiff's] proof of [defendant's] actual malice*", *Id. at 564.* Here, the Michigan appellate court does not (and cannot) reasonably explain why "*not show[ing] the e-mails to the [University] employees*" (App.9a) should help Pacha, given that he has premised his falsehoods on those emails.

Pacha also knew that the proverb *what goes around comes around* does not constitute a threat. This is evident from his omission of the proverb on July 21 and 22, 2015, replacing it with falsehoods and scandalous language. See *Perez v. Scripps-Howard Broadcasting, Co.*, 35 Ohio St.3d 215, 220 (1988) ("*Where sensationalism is sought at the expense of the truth, actual malice could be inferred*").

agents [...] failed to investigate or retract the statement even after the plaintiff notified them that the statement was false").

Dermody v. Presbyterian Church (U.S.A.), 530 S.W.3d 467, 475-476 (2017) (Combs, J., concurring), Judge Combs reproached the defendant's demonstrated disregard of the plaintiff's reputation: "*The generalized announcement that [plaintiff] was dismissed due to 'ethical violations' has clearly cast a shadow over his name and presumed reputation [...]. Despite its secure position on legal grounds [of immunity], the [defendant] should have done better as a matter of conscience*". Unlike the defendant in *Dermody*, Pacha does not have absolute immunity. Pacha's disregard of Viggers's reputation constitutes *a matter of conscience* that establishes actual malice.

2. Pacha Did Not Feel Threatened, And His Publications Differ from His Deposition Testimony.

Pacha delayed twenty days his defamatory publication and his *urgent* request to meet with the University. Pacha's delay fails the analysis in *J.S. v. Bethlehem Area School Dist.*, 807 A.2d 847, 859-860 (2002) (the defendant's delay and *lack of immediate steps* regarding plaintiff's statements *severely undermine*, or *strongly counter*, defendant's allegation that a threat was made).

Pacha premises on the proverb (*what goes around comes around*) his false accusations of threat. When the University asked him *what the threat meant*, he should have answered as he did

[Defendant] knew full well that Mareck had complained to many agencies and newspapers and never breached the security of the project". That conclusion squarely applies to the current dispute. The email in year 2011, App.32a#1, evidences Viggers's recurrent (1) frustration about Pacha's practices, and (2) reminders to Pacha about the invoices and revenues he gets thanks to Viggers's work, and Pacha *knew full well* that Viggers never did anything that would harm Pacha or the University during his seven years of employment. Therefore, "*the actions of [Defendant] were not a reasonable response to a perceived threat [...] but amounted to an abuse [of the qualified privilege]*", *Mareck, supra*.

C. Pacha's Silent Fraud Reflects His Consciousness of Guilt.

Silent fraud consists of suppressing facts where the circumstances establish a legal duty to make full disclosure. Such a duty also arises when a party has expressed to another some particularized concern or made a direct inquiry. *Bank of Am. v. First Am. Title Ins. Co.*, 878 N.W.2d 816, 831-833 (2016). Viggers's direct and particularized inquiry on October 2, 2015, establishes that legal duty.

Pacha's concealment of his interactions with the University to sever their relation with Viggers are undeniably within the scope of the underlined item of "*feedback/requests/notices from the [University]*" in Viggers's inquiry. App.32a#13. Pacha calculated that the disclosure of those notices would have prompted further scrutiny

competently, but nonetheless Pacha is the offender who unlawfully harmed Viggers's reputation.

V. Michigan Law Does Not Require Viggers to Exhaust Administrative Remedies for Wrongful Termination.

The word "may", when used in a statute, usually implies some degree of discretion. *United States v. Rodgers*, 461 U.S. 677, 706 (1983). The term "may" is typically permissive *Walters v. Nadell*, 751 N.W.2d 431, 434 (2008).

Murphy v. Sears, 190 Mich.App. 384, 386 (1991) recognizes that the language of MCL 408.481(1) *"is permissive and does not require that a complaint be filed with the Department of Labor before proceeding with a lawsuit*". Federal court coincides with this interpretation. *Stubl v. T.A. Systems, Inc.*, 984 F.Supp. 1075, 1092-1093 (1997).

These conclusions are especially valid here because Pacha's offense of wrongful termination violates public policy and does not fall in the specific conduct that MCL 408.478(1) sanctions. Instead, MCL 408.478(1) contains *"sufficient legislative expression of policy to imply a cause of action for wrongful termination*", *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich. 692, 695-696 (1982). Moreover, Pacha's offense is intertwined with his defamatory falsehoods, thereby involving discovery and laws which greatly exceed the scope of the administrative