Judicial Immunity Is NOT Absolute!

Also see article on **How To Sue A Judge** and always remember, case law is ALWAYS changing.

Here is a selection of case/reference citations regarding judicial immunity when personally suing a Judge for money damages, from the collection of former Phoenix, AZ Attorney Robert A. Hirschfeld, JD. (Warning: Look up and read the cited case for consistency with your situation, before citing it in your own brief.)

When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost. Rankin v. Howard, (1980) 633 F.2d 844, cert den. Zeller v. Rankin, 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326.

In Rankin v. Howard, 633 F.2d 844 (1980) the Ninth Circuit Court of Appeals reversed an Arizona District Court dismissal based upon absolute judicial immunity, finding that both necessary immunity prongs were absent; later, in Ashelman v. Pope, 793 F.2d 1072 (1986), the Ninth Circuit, en banc , criticized the "judicial nature" analysis it had published in Rankin as unnecessarily restrictive. But Rankin's ultimate result was not changed, because Judge Howard had been independently divested of absolute judicial immunity by his complete lack of jurisdiction.

Some Defendants urge that any act "of a judicial nature" entitles the Judge to absolute judicial immunity. But in a jurisdictional vacuum, (that is, absence of all jurisdiction) the second prong necessary to absolute judicial immunity is missing. Stump v. Sparkman, id., 435 U.S. 349.

"Where there is no jurisdiction, there can be no discretion, for discretion is incident to jurisdiction." Piper v. Pearson, 2 Gray 120, cited in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872)

A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. Davis v. Burris, 51 Ariz. 220, 75 P.2d 689 (1938)

Generally, judges are immune from suit for judicial acts within or in excess of their jurisdiction even if those acts have been done maliciously or corruptly; the only exception being for acts done in the clear absence of all jurisdiction. Gregory v. Thompson, 500 F2d 59 (C.A. Ariz. 1974)

There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. Cooper v. O'Conner, 99 F.2d 133

When a judicial officer acts entirely without jurisdiction or without compliance with jurisdiction requisites he may be held civilly liable for abuse of process even though his act involved a decision made in good faith, that he had jurisdiction. State use of Little v. U.S. Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697.

"... the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury v. Madison, 1 Cranch 137 (1803).

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it betond these boundaries is nothing less than lawless violence." Ableman v. Booth, 21 Howard 506 (1859).

"The courts are not bound by an officer's interpretation of the law under which he presumes to act." Hoffsomer v. Hayes, 92 Okla 32, 227 F 417.

> Journal: Cato Journal Vol 8, No. 1 - 1988
> Author : Bruce Benson
> Title : An Institutional Explanation for Corruption of Criminal Justice Officals

> Journal: Cato Journal, Vol. 7, No. 2, 1987
> Author : Robert Craig Waters
> Title : Judicial Immunity versus Due Process: When Should a Judge Be Subject to Suit?

Justice Field in Bradley v. Fisher. (13 Wall) 353 (1871) stated: "...judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction."

"The doctrine of judicial immunity originated in early seventeenth-century England in the jurisprudence of Sir Edward Coke. In two decisions, Floyd & Barker and the Case of the Marshalsea, Lord Coke laid the foundation for the doctrine of judicial immunity." Floyd & Barker, 77 Eng. Rep. 1305 (1607; The Case of the Marshalsea, 77 Eng. Rep. 1027 (1612) were both cases right out of the Star Chamber.

Coke's reasoning for judicial immunity was presented in four public policy grounds:
1. Finality of judgment;
2. Maintenance of judicial independence;
3. Freedom from continual calumniations; and,
4. Respect and confidence in the judiciary.

The Marshalsea presents a case where Coke denied a judge immunity for presiding over a case in assumpsit. Assumpsit is a common-law action for recovery of damages for breach of contract. Coke then explained the operation of jurisdiction requirement for immunity:

. "[W]hen a Court has (a) jurisdiction of the cause, and proceeds iverso ordine or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But (b) when the Court has not jurisdiction of the cause, there the whole proceeding is [before a person who is not a judge], and actions will lie against them without any regard of the precept or process..."

Although narrowing the availability of judicial immunity, especially in courts of limited jurisdiction, Coke suggested that there was a presumption of jurisdiction and that the judge must have been aware that jurisdiction was lacking.

Thus, questions of personam, rem and res jurisdiction are always a proper issue before the court to obviate the defense that the court had no way to know they lacked jurisdiction.

"Stump v Sparkman Revisited" continues to show it was Chief Justice Kent (circa 1810) that was instrumental in establishing the "doctrine" of JI in America, in Yates v. Lansing, 5 Johns 282. Thereafter Justice incorporated the "doctrine" in two cases: Randall v. Brigham, 74 U.S. (7 Wall.) 523, and Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). Both Yates and Randall dealt with officers of the court.

"The belief that Bradley narrowed the scope of the doctrine respresents a serious misunderstanding of the decision. First, Bradley provides no authority for the belief that a judge of general jurisdiction may be liable for acts taken in absence of subject matter jurisdiction. The distinction between excess of jurisdiction and absence of jurisdiction in the opinion is simply explanatory. Because a court of general jurisdiction has jurisdiction over all causes of action, a judge of such a court will always be immune for his judicial acts, even if he exceeds his authority. See Bradley, 80 U.S. at 351-52."

CASE NOTE: "Federal tort law: judges cannot invoke judicial immunity for acts that violate litigants civil rights; Robert Craig Waters. Tort & Insurance Law Journal, Spr. 1986 21 n3, p509-516"

A Superior Court Judge is broadly vested with "general jurisdiction." Evidently, this means that even if a case involving a particular attorney is not assigned to him, he may reach out into the hallway, having his deputy use "excessive force" to haul the attomey into the courtroom for chastisement or even incarceration. Mireles v. Waco, 112 S.Ct. 286 at 288 (1991). Arguably,

anything goes, in a Superior Court Judge's exercise of his "general jurisdiction", with the judge enjoying "absolute judicial immunity" against tort consequences. Provide he is not divested of all jurisdiction.

A Judge is not immune for tortious acts committed in a purely Administrative, non-judicial capacity. Forrester v. White, 484 U.S. at 227-229, 108 S.Ct. at 544-545; Stump v. Sparkman, 435 U.S. at 380, 98 S.Ct. at 1106. Mireles v. Waco, 112 S.Ct. 286 at 288 (1991).

Administrative-capacity torts by a judge do not involve the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights," and therefore do not have the judicial immunity of judicial acts. See: Forrester v. White, 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988); Atkinson-Baker & Assoc. v. Kolts, 7 F.3d 1452 at 1454, (9th Cir. 1993). A Judge as a State Actor is not vested with the sovereign immunity granted to the State itself . See: Rolfe v. State of Arizona, 578 F.Supp. 987 (D.C. Ariz. 1983); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, (9th Cir, 1981) cert. granted Kush v. Rutledge, 458 U.S. 1120, 102 S.Ct. 3508,73 L.Ed.2d 1382, affirmed 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d. 413, appeal after remand 859 F.2d 732, Ziegler v. Kirschner, 781 P.2d 54, 162 Ariz. 77 (Ariz. App., 1989).

It is said that absolute judicial immunity is favored as public policy, so that judges may fearlessly, and safe from retribution, adjudicate matters before them. True. But equally important, is the public expectation that judicial authority will only be wielded by those lawfully vested with such authority.

The history of Arizona's admission to the Union reveals at least one reason why historic public policy in Arizona would favor ARCP Rule 42(f)(1)'s complete and expeditious divestiture of jurisdiction, and its concurrent divestiture of absolute judicial immunity in the event a renegade judge persists in wielding the tools of his office after having been affirmatively stripped of them.

In 1912, the U.S. Congress refused to admit Arizona to the Union for the stated reason that Arizona's proposed Constitution provided the public with a mechanism for removing sitting judges from office. Joint Res. No. 8, 8/21/11, 37 U.S. Stat. 39, cited in Vol. 1, Ariz. Rev. Stats., p.130. To facilitate admission to the Union, the judge-removal mechanism was excised from the State Constitution, allowing Arizona to become a State on 2/14/12. Soon afterward, on 11/5/12, Arizona voters restored the mechanism by amendment. Ariz. Constitution, Art. VIII "Removal from Office", section 1; A.R.S. Vol. 1, p. 178. So strong was the citizens' distrust of sitting State Court Judges in Arizona, that after Arizona copied the Federal Rules of Civil Procedure, it added the present Rule 42(f)(1) to provide a mechanism for a litigant to permanently remove the assigned judge from the case.

The difference between selectively disabling a judge in various aspects of adjudication (such as during the appellate period) and the permanent extinguishment of his jurisdiction in a given case, has a logical relevance to a Judge's expectation of enjoying absolute judicial immunity in that case.

In examining entitlement to immunity, the U.S. Supreme Court focused upon the nature of the act: is it an act ordinarily performed by a Judge? Unfortunately, judges sometimes exceed their jurisdiction in a particular case. But an act done in complete absence of all jurisdiction cannot be a judicial act. Piper v. Pearson, id., 2 Gray 120. It is no more than the act of a private citizen, pretending to have judicial power which does not exist at all. In such circumstances, to grant absolute judicial immunity is contrary to the public policy expectation that there shall be a Rule of Law.

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