Judicial Immunity and the Oklahoma Judge

By D. Michael Haggerty II

As any practicing attorney knows, any case involving disputes between parties is likely to result in at least one party being unhappy with the result. While a few disputes may be resolved in such a manner as to render both sides reasonably happy with the outcome, in many cases the parties' expectations and desires are in such conflict that dissatisfaction is unavoidable. When this occurs, a number of unhappy litigants are bound to consider legal action against one or more of the authors of their discontent. In many cases, the unhappy party identifies the judge hearing the case as the culprit, with allegations against him ranging from stupidity to bias to outright corruption. Notwithstanding the prohibitions against expressing such allegations, even the practicing bar is not immune from such feelings.

Once dissatisfaction is present, then a party will naturally consider what remedies, if any, he may have against the cause of that displeasure. One remedy that has historically been pursued has been a lawsuit against the judge. This led to the doctrine of judicial immunity centuries ago, a doctrine that remains alive and well today. This article will examine the current status of the judicial immunity doctrine and how it impacts Oklahoma's hundreds of judges.

The doctrine of judicial immunity is of ancient origin, with its beginnings dating back to the 14th century reign of Edward III.[1] Its origins lie in disputes between the various courts in England for authority over the common law courts.[2] Initially applicable only to the highest judges of those courts, it was extended over time to all judges for actions within their jurisdiction.[3] This doctrine was adopted by the U.S. Supreme Court in 1871 in *Bradley v. Fisher*.[4] In that case, the court noted that the doctrine had been settled in England for "many centuries," had "never been denied" in the United States and "obtains in all countries where there is any well-ordered system of jurisprudence."[5] The court has also held that this doctrine is applicable to civil rights actions under 42 U.S.C. § 1983.[6] Judicial immunity is active in the court's jurisprudence, as will be seen below.

Oklahoma recognized this doctrine before statehood in *Comstock v. Eagleton*,[7] where the Supreme Court of Oklahoma Territory affirmed the dismissal of a false imprisonment lawsuit against a probate judge who had erroneously

remanded a defendant to custody for failing to pay court costs.[8] This doctrine continued to be recognized after statehood.[9] These early cases relied on the holding in *Bradley*.[10] The doctrine has now been codified as part of the Governmental Tort Claims Act.[11]

The obvious purpose of the doctrine is to permit judges to decide cases on their merits, without fear of personal repercussions.[12] Were judges to be threatened with personal consequences for rendering a decision, it would destroy the independence necessary to the judiciary.[13] Given the intense emotions aroused by almost any litigation, since a judge's errors may be corrected on appeal, "he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."[14] Accordingly, judges are immune from suit for damages for judicial acts, unless they act in the complete absence of all jurisdiction.[15] This immunity extends to an immunity from the suit itself, as well as the threat of damages.[16]

The limitations of this doctrine are important in determining whether a judge is immune for his actions. First, it should be understood that while a judge is immune from a suit for damages, this immunity does not protect against injunctive relief.[17] Additionally, while money damages cannot be awarded, in a civil rights case where the plaintiff seeks and obtains an injunction, a judge remains financially vulnerable to an award of attorney fees.[18] Thus, even when a judge acts within the other limitations of the doctrine, he is still not entirely invulnerable for constitutional violations. A judge's private co-conspirators do not share his immunity from suit, and the judge is not immune from being summoned as a witness against them.[19] A judge is not immune from criminal prosecution.[20] A judge is also not immune from bar discipline if his misconduct involves fraud, crime or dishonesty.[21] Finally, a judge is not immune from impeachment or removal proceedings to remove him from the bench for his unlawful or oppressive misconduct.[22]

The second limitation of this doctrine is that it must involve a "judicial act." Two factors have been recognized in determining whether a judge's act is judicial: first, there is the nature of the act, whether the act is "a function normally performed by a judge," and second, examining the expectations of the parties, "whether they dealt with the judge in his judicial capacity."[23] Thus, a judge acting on a petition submitted to him is acting judicially and is immune from suit.[24] Likewise, when a judge orders an attorney forcibly brought to his courtroom, he is immune.[25] However, when a judge acts in an administrative, executive or legislative capacity, he is not immune.[26] For instance, judges are not immune from suit because of alleged gender discrimination in hiring or firing because those are administrative and not judicial decisions.[27] When exercising rulemaking authority, a judge is not entitled to judicial immunity but *legislative* immunity for this type of legislative act.[28] A judge also does not have judicial immunity when serving on a board with merely legislative and administrative powers.[29] Whether an act is "judicial" is not affected by the formality of the proceedings. Thus, a judge can commit a judicial act even if a case has not been filed, no docket number assigned, outside of a courtroom and without his robe.[30]

The final limitation is that of subject matter jurisdiction. The cases draw a distinction between situations where a judge merely acted in excess of his jurisdiction versus situations where a judge had no jurisdiction at all over the subject matter. Only the latter instance, when a judge is exercising "usurped authority," subjects him to liability.[31] Thus, when a petition to sterilize a minor was heard *ex parte*, without notice to the minor, by an Indiana judge with general original jurisdiction, the judge was immune from suit for his wrongful decision to grant the petition because that type of case fell within his subject matter jurisdiction.[32]

It is plain from the cases that *only* subject matter jurisdiction is required. *Bradley* spoke primarily of subject matter jurisdiction.[33] A judge is immune from suit even if he had no personal jurisdiction[34] over the person he rules against.[35] Thus, a failure to give another party notice *even when that party should have been given notice* does not deprive the judge of his immunity.[36] This jurisdiction must be construed broadly for immunity purposes.[37] In short, a judge, or the court of which he is a part, must simply have jurisdiction over the type of case which is before him.[38]

This immunity remains in place even if "grave procedural errors" are committed by the judge, such as failing to give notice to an adverse party or otherwise comply with procedural due process.[39] A judge is not liable if he acts with malice, or corruptly, or as part of a conspiracy with others who are not immune.[40] Error in granting or

denying relief, even when that error is plainly apparent, only constitutes an action "in excess of jurisdiction" for which the judge remains immune.[41]

Examples given in the cases help illustrate this point. For example, if an Oklahoma district judge were to convict and sentence a defendant for a non-existent crime, that would fall within his subject matter jurisdiction, and his action would merely be in excess of jurisdiction; he would remain immune.[42] Likewise, a judge who sentences a defendant to a penalty greater than that provided by law would merely exceed his jurisdiction.[43] Were a district judge to order the sterilization of a child, without notice to that child or anyone else, he would remain immune.[44] On the other hand, were a court of limited jurisdiction, such as a probate court, to take action in a criminal case, a case beyond its cognizance, then the probate judge would be acting in the absence of all jurisdiction and would lose his immunity.[45]

Oklahoma's municipal courts provide an appropriate context to explore this issue. Oklahoma's municipal courts are courts of sharply limited jurisdiction with power only to hear criminal cases charging violations of municipal ordinances.[46] Thus, unlike district judges, there are large classes of cases that are outside a municipal judge's subject matter jurisdiction. For instance, a probate petition, a motion to modify in a divorce or an ordinary civil action are well outside any concept of a municipal judge's subject matter jurisdiction; thus, a municipal judge acting on one of those matters would not be immune. However, if acting on a criminal complaint for violation of a municipal ordinance, a municipal judge retains immunity even if his specific action is not authorized by law. For instance, were a municipal judge of a court not of record to issue a search warrant for investigation of possible violations of city ordinances, which he is not authorized to grant,[47] he would retain his immunity since violations of ordinances are within his subject matter jurisdiction.[48] The same reasoning applies to excessive punishments.[49] Likewise, if a municipal judge convicts and sentences a defendant under an unlawful ordinance, either because it was not properly enacted, purports to criminalize an act which under state law is a felony[50] or because it unlawfully discriminates based on race, gender, religion, etc., he retains immunity even though the ordinance is invalid.[51]

Judicial immunity is not limited solely to judges. Since judicial immunity involves a functional analysis of the judge's conduct, it is not limited strictly to those who hold the title of judge. Administrative law judges and other hearing officers employed by an executive agency have judicial immunity.[52] So do receivers,[53] guardians ad litem[54] and witnesses appointed as advisers to the court.[55] Court clerks and other court officials are also protected, so long as they are acting in a quasi-judicial capacity or under court order; they lose this protection when they perform non-discretionary ministerial functions not specifically ordered by a court.[56]

To summarize, extraordinary care should be taken in deciding whether to sue either a judge or someone acting in a judicial capacity. It seems reasonable to assume that most judges hearing such a suit, with an eye toward their own liability, would be generous toward applying judicial immunity; this is particularly true when the applicable cases tell them to construe this immunity broadly. There is also the danger that an attorney and/or his client could be sanctioned for bringing such a suit. Such risks warrant extreme caution in initiating a claim for damages against someone in this position.

However, this does not mean that judges are bulletproof. Judges can be removed from office, criminally prosecuted and disbarred in appropriate circumstances. They are subject to injunction, and in the civil rights context at least, can be ordered to pay attorney fees if an injunction is granted. Thus, for a host of reasons (including their oaths to do so) judges should make every effort to ensure that their actions are in full conformity with applicable law.

1. *Schuer v. Rhodes,* 416 U.S. 232, 239 n.4 (1974), *overruled on other grounds Imbler v. Pachtman,* 424 U.S. 409 (1976).
2. *Pulliam v. Allen,* 466 U.S. 522, 530 (1984).
3. *Id.*
4. 80 U.S. (13 Wall.) 335 (1871).
5. *Id.* at 347.
6. *Pierson v. Ray,* 386 U.S. 547, 554-55 (1967).
7. 1902 OK 20, 69 P. 955, *appeal dismissed* 196 U.S. 99 (1905).
8. *Id.*, 1902 OK 20 at ¶¶ 8-13.
9. *See Waugh v. Dibbens,* 1916 OK _____, 160 P. 589, 590-92 (affirming directed verdict in favor of judge in false imprisonment claim, on basis of judicial immunity).
10. *See Comstock* at ¶¶ 11-12 *and Waugh* at 591 (citing *Bradley* as authority for holding).
11. *See* 51 O.S. § 155(2) (state or political subdivision not liable for claim resulting from judicial function).
12. *Bradley* at 347.
13. *Id.*
14. *Pierson* at 554.
15. *Mireles v. Waco,* 502 U.S. 9, 11-12 (1991).
16. *Id. See Allen v. Zigler,* 2002 OK CIV APP 30, 41 P.3d 1060 (following *Mireles*).
17. *Pulliam* at 541-42.
18. *Id.* at 543-44.
19. *Dennis v. Sparks,* 449 U.S. 24, 29-31 (1980).

20. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

21. *State ex rel. Okla. Bar Assoc. v. Sullivan*, 1979 OK 1, ¶ 18, 596 P.2d 864. This point is illustrated by two recent cases involving disbarment of judges. Judge Lile from the Court of Criminal Appeals was disbarred for his false travel and expense reimbursement claims (among other issues) while he was serving as a judge. *State ex rel. Okla. Bar Assoc. v. Lile*, 2008 OK 82, ¶¶ 15, 27, ____ P.3d _____. Likewise, Judge Thompson from Sapulpa was disbarred for exposing himself on the bench while serving as district judge. *State ex rel. Okla. Bar Assoc. v. Thompson*, 2008 OK 89, ¶¶ 5-8, _____ P.3d _____.

22. *Bradley* at 350. Also, note that in *Sullivan, supra,* while the Court held that judicial immunity protected the judge from bar discipline, it had not protected him from removal prior to the bar disciplinary proceedings.

23. *Stump v. Sparkman,* 435 U.S. 349, 362 (1978).

24. *Id.* at 362-63.

25. *Mireles* at 12-13. However, it has been held that the act of applying force to a person in the courtroom, as opposed to merely ***ordering*** that force, can be a non-judicial act. *See Stump* at 361 n.10, *discussing Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).

26. *Allen, supra* at ¶ 5.

27. *See Forrester v. White*, 484 U.S. 219, 229-30 (1988) (permitting suit against judge for allegedly demoting and firing probation officer because of her gender).

28. *Supreme Court of Virginia v. Consumers Union of the United States Inc.*, 446 U.S. 719, 734 (1980). Interestingly, although judicial immunity does not protect the defendant judge from attorney fees liability, legislative immunity ***does*** immunize him from attorney fees. *See id.* at 738-39 (rulemaking judges immune from attorney fees due to legislative immunity).

29. *Stump* at 361 n.10.

30. *See Stump* at 360-61 and the cases cited therein. Thus, a judge awakened in the middle of the night, in his own home, clad only in his pajamas, commits a "judicial act" when reviewing and approving or disapproving a search warrant affidavit. *See Burns v. Reed*, 500 U.S. 478, 492 (1991) ("[T]he issuance of a search warrant is unquestionably a judicial act.")

31. *Bradley* at 351-52.

32. *Stump* at 358-60.

33. *See Bradley* at 351 (drawing distinction between excess of jurisdiction and "the clear absence of all jurisdiction over the subject matter").

34. In one case, the Ninth Circuit previously held that personal jurisdiction was also required for judicial immunity. *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980), *cert. denied sub nom. Zeller v. Rankin*, 451 U.S. 939 (1981). However, even the Ninth Circuit abandoned this reasoning in *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc). The early Oklahoma cases also refer to personal jurisdiction, although it is clear that the Court in each case noted that the judge at issue had ***both*** subject matter ***and*** personal jurisdiction. *See Comstock* at ¶ 9 (noting that plaintiff admitted defendant judge had both personal and subject matter jurisdiction); *Waugh* at 590 (judge who had personal and subject matter jurisdiction was immune from suit); *Quindlen v. Hirshchi*, 1955 OK 164, ¶¶ 5, 8, 284 P.2d 723 (same holding). However, Oklahoma now apparently recognizes that only subject matter jurisdiction is necessary. *See Gregory v. Fransein*, 2008 OK CIV APP 35, n.5, 42 P.3d 298 (citing Tenth Circuit, noting that only subject matter jurisdiction is necessary).

35. *See Ashelman* at 1076 (judge entitled to judicial immunity if he has subject matter jurisdiction but lacks personal jurisdiction); *Dykes v. Hoseman*, 776 F.2d 942, 947-50 (11th Cir. 1985) (en banc) (same holding); *John v. Barron*, 897 F.2d 1387, 1392 (7th Cir. 1990) (following *Ashelman*); *Crabtree v. Muchmore*, 904 F.2d 1475, 1477 (10th Cir. 1990) ("no attorney" could conclude that judge lacked immunity if he had subject matter but not personal jurisdiction, affirming award of sanctions against plaintiffs who sued judge); *Green v. Maraio*, 722 F.2d 1013, 1017-18 (2d Cir. 1983) (judge who lacked personal jurisdiction but had subject matter jurisdiction retained judicial immunity).

36. *Stump* at 359.

37. *Id.* at 356.

38. *Bradley* at 352.

39. *Stump* at 359.

40. *Bradley* at 351; *Stump* at 355-56; *Dennis, supra* at 27.

41. *Bradley* at 352; *Stump* at 359; *Gregory* at n.4.

42. *Bradley* at 352.

43. *Id.*; *Okla. Tax Comm'n v. City Vending of Muskogee Inc.*, 1992 OK 110, ¶ 7, 835 P.2d 97 (Opala, J., concurring).

44. *Stump* at 359.

45. *Bradley* at 352.

46. Okla.Const. art. 7 § 1; 11 O.S. §§ 27-103, 28-102(A).

47. It has long been held that a municipal court, referred to in older cases as a "police court," does not have the authority to issue search warrants. *Crump v. State*, 29 Okla.Cr. 7, 8, 231 P. 901 (Okla.Cr. 1925); *Grimes v. State*, 65 Okla.Cr. 99, syl.6, 115, 83 P.2d 410 (Okla.Cr. 1938). However, municipal judges of courts of record are expressly authorized to issue search warrants. 11 O.S. § 28-121.

48. As noted in *Stump,* the judge retains jurisdiction over the request, ***even if the only permissible action is to deny it***. *See Stump* at 359 (fact that law required petition to be denied did not deprive judge of subject matter jurisdiction).

49. This issue was brought to municipal judges' attention by the opinion in *House v. Town of Dickson*, 2007 OK 57, _____ P.3d _____, wherein the Town of Dickson was sued for levying excessive penalties against defendants in its municipal court. The action in House was premised on Dickson's failure to compile and supplement its ordinances as required by 11 O.S. §§ 14-109 and 14-110. In such a case, the maximum penalty for violation of a municipal ordinance is capped at $50.00. 11 O.S. §§ 14-111(E) and 27-119. *See House* at ¶ 3 (discussing this limitation). At a recent conference of the Oklahoma Municipal Judges Association, the opinion was expressed that a judge who entered a sentence in excess of that permitted by law was subject to potential personal liability. However, under existing cases, a judge retains immunity under these circumstances. *Bradley* gave as an example of immunity a judge who gave a greater punishment than that authorized by law. *Bradley* at 352. This example has been broadly applied by other courts in cases of excessive punishment. *See McAllister v. District of Columbia*, 653 A.2d 849, 850-51 (D.C. 1995) (judge immune for ordering excessive sentence); *Hurlburt v. Graham*, 323 F.2d 723, 725 (6th Cir. 1963) (justice of peace immune for sentence in excess of statutory authority).

50. Municipalities are not permitted to criminalize felonies in their ordinances. 11 O.S. § 14-111(B)(1) and (C).

51. *See Pierson* at 553-54 (judge immune for convicting defendants of violating ordinance which unlawfully discriminated based on race). *But cf. Schorle v. City of Greenhills*, 524 F.Supp. 821 (S.D. Ohio 1981), *overruled on other grounds Thomas v. Shipka*, 829 F.2d 570 (6th Cir. 1987) (mayor acting as municipal judge lacked all jurisdiction, and thus was not immune, for hearing prosecution for case more serious than those for which he had jurisdiction). It should be noted that *Schorle* has not been widely followed; the Sixth Circuit has declined on at least one occasion to follow its reasoning. *See DePiero v. City of Macedonia*, 180 F.3d 770, 784-85 (6th Cir. 1999) (declining to follow *Schorle*).

52. *Butz v. Economou*, 438 U.S. 478, 512-14 (1978).

53. *Hervey v. Ward Real Estate Co.*, 1998 OK CIV APP 185, ¶ 9, 972 P.2d 42; *Farrimond v. Fisher*, 2000 OK 52, n.4, 8 P.3d 872.

54. *Perigo v. Wiseman*, 2000 OK 67, 11 P.3d 217.

55. *Hartley v. Williamson*, 2001 OK CIV APP 6, ¶ 16, 18 P.3d 355 (approved for publication by Oklahoma Supreme Court). This is separate from the immunity of witnesses for their in-court testimony. *See Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983) (witnesses immune from civil rights suit for perjured testimony).

56. *See Forte v. Sullivan*, 935 F.2d 1, 3 n.4 and n.5 (1st Cir. 1991) (discussing cases from various circuits); *Wilhelm v. Gray*, 1988 OK 142, ¶ 20, 766 P.2d 1357 (Kauger, J., dissenting) (court clerks); *Antoine v. Byers & Anderson Inc.*, 508 U.S. 429, 435-37 (1993) (court reporter not immune from suit for failure to perform non-discretionary act in preparing transcript in timely manner).

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