

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Robert M. Young, Circuit Court Judge

Cause No. 09-CP-10-4264

Harold Simmons, Jr.,Appellant,

v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown,Respondents.

BRIEF OF APPELLANT

Harold Simmons, Jr.
1182 King Street
Charleston, South Carolina 29403
(843) 554- 7414
Pro Se

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STATEMENT OF ISSUES ON APPEAL

1. BECAUSE ONE FAMILY COURT JUDGE CANNOT IGNORE THE ORDER OF ANOTHER FAMILY COURT JUDGE. THE COURT ERRED IN IT'S DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.
2. BECAUSE A PERSON HAS THE RIGHT TO BE CLEARLY INFORMED OF THE NATURE AND CAUSE OF THE CHARGE AGAINST HIM. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.
3. BECAUSE A PERSON SHALL NOT BE IMPRISONED FOR A DEBT ECEPT IN THE CASE OF FRAUD, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.
4. BECAUSE NO PERSON SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OF LIBERTY. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.
5. BECAUSE A DEFENDANT MUST RECEIVE CREDIT AGAINST HIS OR HER JAIL TERM. THE COURT ERRED IN ITS DEISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT.
6. BECAUSE A COURT MAY ALSO ABUSE ITS DESCRETION WHEN THE RECORD CONTAINS NO EVIDENCE TO SUPPORT ITS DECISION. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

On July 10, 2009, this action was brought by Harold Simmons alleging false imprisonment and violations of his civil rights by the Charleston County Family Court: Judge Paul W. Garfinkel and South Carolina Department of Social Services: Attorney Pamela Brown. Due to the fact that when he appeared before the court on August 16, 2006 for a previously ordered review of his Workers' Comp cases, the review was turned into a Rule to Show Cause hearing on issues that were already resolved and he was subsequently found in civil contempt and imprisoned. This action was amended on December 7, 2010 in order to include negligent infliction of emotional distress.

The respondent's moved for a Motion for Summary Judgment arguing that they were entitled to judicial immunity.

On December 10, 2010, the case came before Judge Roger M. young, who granted the respondents' Motion for Summary Judgment. On February 22, 2011, Simmons served the Notice of Appeal on Respondent's.

ARGUMENTS

1. BECAUSE ONE FAMILY COURT JUDGE CANNOT IGNORE THE ORDER OF ANOTHER FAMILY COURT JUDGE. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

When Harold Simmons (Simmons) appeared before Judge Segars-Andrews (Segars-Andrews) on May 11, 2006, Judge Segars-Andrews ordered that Simmons return to court on August 16, 2006 for a review in order to determine the status of his Workers' Comp cases. This was ordered at the request of Charleston County Department of Social Services (DSS): Attorney Pamela Brown. (May 11, 2006 Transcript, Page 8, Lines 7-10). Charleston County Family Court: Judge Paul W. Garfinkel (Garfinkel), however, ignored Judge Segars-Andrews order and instead proceeded with a Rule to Show Cause Hearing. Judge Garfinkel decided that it was 'Judgment Day' and found Simmons in civil contempt and sentenced him to six months in Charleston County Jail. (August 16, 2006 Transcript, Page 7 Lines 4-8; December 10, 2010 Transcript, Page 3, Lines 11-14).

Cook v. Taylor holds that a circuit court judge does not have the authority to reverse another circuit court judge's determination of the proper mode of trial. Cook v. Taylor, 272 S.C. 536, 538, 252 S.E. 2d 923, 924 (1979)). However DSS stated in its Affidavit for Summary Judgment that the proceedings were procedurally proper, and both DSS: Attorney Brown and Judge Garfinkel contend that Simmons was not falsely imprisoned nor was any emotionally distressed negligently inflicted upon him. (DSS Affidavit, Page 2, Paragraph 4; Judge Garfinkel Affidavit, Page 3, Paragraph 11). Simmons was under doctor's care and suffered from back pain when he was sentenced to be incarcerated. Simmons in no way thought that he was going to be incarcerated on that day, since Simmons believed that he was going to a review and not a hearing. Therefore, Simmons was emotionally distressed by having to be subjected to being imprisoned while in pain when he never should have been incarcerated. Furthermore, because Judge Garfinkel ignored Segars-Andrews orders,

that allows Judge Garfinkel and DSS: Attorney Pamela Brown to be held liable for their actions because a declaratory decree was violated. (42 U.S.C. § 1983).

2. BECAUSE A PERSON HAS THE RIGHT TO BE CLEARLY INFORMED OF THE NATURE AND CAUSE OF THE CHARGE AGAINST HIM. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

Because Simmons was previously ordered to return to court on August 16, 2006, to review prior resolved issues by updating the Court on the status of his Workers' Comp cases, he was not prepared to defend himself regarding the child support issue nor did he have counsel present or available. In In Re Oliver, the court found that a contemnor must "be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf." (In Re Oliver, 333 U.S. 257 (1948)) Due to the fact that Judge Garfinkel arbitrarily decided to change the focus of the hearing, Simmons was unable to properly address the issues. Furthermore, due process requires that Simmons be given the opportunity to be represented by counsel at the Rule to Show Cause Hearing. Simmons was not afforded this opportunity.

3. BECAUSE A PERSON SHALL NOT BE IMPRISONED FOR A DEBT EXCEPT IN THE CASE OF FRAUD, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

When Simmons appeared on August 16, 2006, Charleston County Judge Garfinkel stated that two of the three cases Simmons was appearing for were debt only cases. Our Constitution expressly states that "no person shall be imprisoned for debt except in cases of fraud." (S.C. Const. art. I, § 19, 1970 (56) 2684; 1971 (57) 315).

Being that this was not a case of fraud, Simmons should not have been sentenced to jail time.

4. BECAUSE NO PERSON SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OF LIBERTY. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

On May 8, 2006 Harold Simmons Jr. was arrested for a Family Court Bench Warrant. For this Family Court Bench Warrant Simmons Jr. appeared before Judge Segars-Andrews on May 11, 2006 and was released from imprisonment and was ordered to return on August 16, 2006 for a "review" (only) just to determine the status of his Workers' Comp case. On October 20, 2006, at the Motion to Reconsider hearing, Judge Garfinkel denied the motion based on lack of payments in 2000, even though Simmons had already received sentencing on all three cases in year 2002, 2003. (October 20, 2006 Transcript, Page 19, Lines 1-13). Upon his return he was imprisoned again for the same warrant. In S.C. Constitution Article I Declaration of Rights section twelve Double Jeopardy; No person shall be subject for the same offense to be twice put in Jeopardy of life or liberty (1970) (56) 2684; 1971 (57) (315).

When Simmons appeared on August 16, 2006, Garfinkel stated that two of the three cases Simmons was appearing for were debt only cases. Our Constitution expressly states that "no person shall be imprisoned for debt except in cases of fraud." (S.C. Const. art. I, § 19, 1970 (56) 2684; 1971 (57) 315). Being that this was not a case of fraud, Simmons should not have been sentenced to jail time.

5. BECAUSE A DEFENDANT MUST RECEIVE CREDIT AGAINST HIS OR HER JAIL TERM. THE COURT ERRED IN ITS DEISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGEMENT.

On May 8, 2006 Simmons was arrested for a Family Court Bench Warrant. Simmons was released May 11, 2006 and ordered to return to court on August 16, 2006 in order to give an update on his Workers' Comp cases. On August 16, 2006, Judge Garfinkel imprisoned Simmons for the same charge and same warrant and sentenced him to six months incarceration time without good time or work credits. (August 16, 2006 Transcript, Page 7, Lines 5-7). He was then released February 16, 2007. However, federal law calls for the awarding of prior custody credit. (18 U.S.C. § 3585 (b)). Justia U.S. Law 2010 Wisconsin Code Chapter 973. Sentencing 973.155 Sentence Credit.

6. BECAUSE A COURT MAY ALSO ABUSE ITS DESCRETION WHEN THE RECORD CONTAINS NO EVIDENCE TO SUPPORT ITS DECISION. THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

On August 16, 2006, Judge Garfinkel's evidence for imprisoning Simmons was that Simmons had not paid any money in a year and a half. (August 16, 2006 Transcript, Page 6, Lines 20-24). On October 20, 2006, at the Motion to Reconsider hearing, Judge Garfinkel denied the motion based on lack of payments in 2000. (October 20, 2006 Transcript, Page 19, Lines 5-6; Page 24, Lines 18-22; Page 24, Lines 20-22). On May 11, 2006, however, Judge Segars-Andrews ruled on all money that was owed before May 11, 2006. (MGIC v. Moore, 952 F.2d 1120, 1122 (9th Cir. 1991)).

Accordingly, for the reason stated, based on applicable law, Appellant Harold Simmons Jr. is within his legal rights, is entitled to absolute due justice of the law, and the grant of summary judgment for him should be affirmed.

ADDITIONAL SUSTAINING GROUNDS

1. THIS ACTION IS WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD OF S.C. CODE ANN. § 15-78-110, SOUTH CAROLINA TORT CLAIMS ACT, AND IS NOT THUS TIME BARRED BY THAT PROVISION.

On May 8, 2006 Mr. Simmons was arrested on a family court warrant on a rule to show cause. And on May 11, 2006 he was brought before Charleston County Judge Segars-Andrews and South Carolina Department of Social Services Attorney Pamela Brown with also Mr. Simmons Workman Comp Attorney Thomas White of Steinberg Law Firm. Who argue reasons why his client Harold Simmons Jr. should not be charged with contempt and to be release from incarceration. On May 11, 2006 Mr. Simmons was released and was told to appear back in court on August 16, 2006 for a review just to give a workman comp update report. On August 16, 2006 Mr. Simmons was wrongful imprisoned by Charleston County Judge Paul Garfinkel and South Carolina Department of Social Services Attorney Pamela Brown. This comes under the legal term "wrong", because of this Mr. Simmons filed the following: False Imprisonment Dates from: August 16, 2006 through out October 20, 2006 to February 16, 2007.

As emphasized above all of the acts of which appellant complains in this action, including "False Imprisonment Dates from: August 16, 2006 through out October 20, 2006 to February 16, 2007," occurred during the years of 2006 and 2007, and ended on February 16, 2007.

The Appellant filed the action on July 10, 2009, well within his legal claim time frame based on the time frame of discovery of loss (on or around June through July 2009) and based on the exception provision (S.C. Code Ann. § 15-3-40, SCTCA), this case should be granted based on the SCTCA statute of limitations provisions set forth in S.C. Code Ann. § 15-78-110.

§ 15-78-110. Statute of limitations.

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

HISTORY: 1986 Act No. 463, Section 1; 1988 Act No. 352, Section 9.

The legal definitions along with a sentence usage form of the terms: commenced, loss, discover(y) are as follows according to meriam webster online dictionary:

Definition of COMMENCE

transitive verb

: to enter upon : BEGIN <commence proceedings>

intransitive verb

1: to have or make a beginning : START <the meeting will commence soon>

Sentence Usage:

1. Their contract commences in January.
2. The court commenced criminal proceedings.

Synonyms: begin, embark (on or upon), enter (into or upon), fall (to), get off, kick off, launch, lead off, open, start, strike (into)

What is COMMENCE? definition of COMMENCE (Black's Law ...

Definition of COMMENCE: To commence a suit is to demand something by the institution of process in a court of justice. Cohens v. Virginia, 0 Wheat. 408, 5 L.

thelawdictionary.org/commence/

Definition of LOSS

1: DESTRUCTION, RUIN

— at a loss

1: uncertain as to how to proceed <was at a loss to explain the discrepancy>

2: unable to produce what is needed <at a loss for words>

— for a loss

: into a state of distress <events had thrown him for a loss>

Sentence Usage:

1. A careless error resulted in the loss of the game.

Synonyms: mislaying, misplacement

What is LOSS? definition of LOSS (Black's Law Dictionary) 2nd edition free online

Definition of LOSS: In insurance. The injury or damage sustained by the insured in consequence of the happening of one or more of the accidents or misfortunes ...

thelawdictionary.org/loss/

Definition of DISCOVER

transitive verb

1

a : to make known or visible : EXPOSE

b archaic : DISPLAY

2

a : to obtain sight or knowledge of for the first time : FIND <discover the solution>

b : FIND OUT <discovered he was out of gas>

intransitive verb

: to make a discovery

Sentence usage:

1. She soon discovered what had been going on.

Synonyms: ascertain, catch on (to), find out, get on (to), hear, learn, realize, see, wise (up), get wind of

Accordingly, since the last act of the appellant initial and formal complaint occurred on July 10, 2009, and the filing of the action based on his discovery of his loss

occurred on or about June through July of 2009, well within the time frame of the complained of event, this case should not be barred based on the SCTCA statute of limitations provision set forth in S.C. Code Ann. § 15-78-110.

2. THIS ACTION IS WITHIN THE APPLICABLE EXCEPTION AS TO PERSONS UNDER DISABILITY OF S.C. CODE ANN. § 15-3-40, SOUTH CAROLINA TORT CLAIMS ACT, AND IS THUS WITHIN THE PROPER TIME FRAME FOR FILING A CLAIM.

On May 8, 2006 Mr. Simmons was arrested on a family court warrant on a rule to show cause. And on May 11, 2006 he was brought before Charleston County Judge Segars-Andrews and South Carolina Department of Social Services Attorney Pamela Brown with also Mr. Simmons Workman Comp Attorney Thomas White of Steinberg Law Firm. Who argue reasons why his client Harold Simmons Jr. should not be charged with contempt and to be release from incarceration. On May 11, 2006 Mr. Simmons was released and was told to appear back in court on August 16, 2006 for a review just to give a workman comp update report. On August 16, 2006 Mr. Simmons was wrongful imprisoned by Charleston County Judge Paul Garfinkel and South Carolina Department of Social Services Attorney Pamela Brown. This comes under the legal term "wrong", because of this Mr. Simmons filed the following: False Imprisonment Dates from: August 16, 2006 through out October 20, 2006 to February 16, 2007.

As emphasized above all of the acts of which appellant complains in this action, including "False Imprisonment Dates from: August 16, 2006 through out October 20, 2006 to February 16, 2007, " occurred during the years of 2006 and 2007, and ended on February 16, 2007.

The Appellant filed the action on July 10, 2009, well within his legal claim time frame based on the exception provision, this case should be granted based on the

SCTCA Exception as to persons under disability provisions set forth in S.C. Code Ann. § 15-3-40.

§ 15-3-40. Exceptions as to persons under disability.

If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued either:

(1) within the age of eighteen years; or

(2) insane;

the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:

(a) more than five years by any such disability, except infancy; nor

(b) in any case longer than one year after the disability ceases.

HISTORY: 1962 Code Section 10-104; 1952 Code Section 10-104; 1942 Code Section 359; 1932 Code Section 359; Civ. P. '22 Section 342; Civ. P. '12 Section 148; Civ. P. '02 Section 122; 1870 (14) 448 Section 124; 1918 (30) 715; 1976 Act No. 695, Section 1; 1988 Act No. 352, Section 1; 1996 Act No. 234, Section 1.

The legal definitions along with a sentence usage form of the term: disability are as follows according to meriam webster online dictionary:

Definition of DISABILITY

1a : the condition of being disabled

b : limitation in the ability to pursue an occupation because of a physical or mental impairment; also : a program providing financial support to one affected by disability<went on disability after the injury>

2: lack of legal qualification to do something

3: a disqualification, restriction, or disadvantage

Sentence Usage:

1. After he injured his back he had to quit his job and go on disability.

Medical Definition of DISABILITY

1: the condition of being disabled

2: inability to pursue an occupation because of physical or mental impairment

Accordingly, since the last act of the appellant initial and formal complaint occurred on July 10, 2009, and the filing of the action based on his discovery of his loss occurred on or about June through July of 2009, well within the time frame of the complained of event. The appellant contends that the cause of action did not accrue until June through July 2009. There is no merit to the respondent's argument that the date of complaint accrual on February 16, 2007. *Harrison v. Bevilacqua*, 354 S.C. 129, 137-38, 580 S.E. 2ND.109, 113 (2003). This case should be granted based on the SCTCA statute of Exceptions as to persons under disability provision set forth in S.C. Code Ann. § 15-78-110.

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 beyond 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 Officials

> 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?

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 represents 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 attorney 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.

Horn v. Madison County Fiscal Court, 22 F.3d 653 (6th Cir. 1994).

For liability to attach, the conduct must be more culpable than mere negligence; it must demonstrate deliberateness tantamount to intent to punish.

CONCLUSION

For the reasons stated, this Court should not affirm the honorable Roger M. Young, and the appeal in favor of the Pro Se Appellant.

Respectfully submitted,

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December 12, 2012

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2009-CP-10-4264

Harold Simmons, Jr.,

v. Appellant.

Charleston County Family
Court, Paul W. Garfinkel and
South Carolina Department of
Social Services, Pamela
Brown, Respondent,

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown by depositing a copy of it in the United States Mail, postage prepaid, on *December 12, 2012* addressed to his attorney of record, James A. Stuckey, 123 Meeting Street, Charleston, South Carolina 29401.

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