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Trials&TRIBULATIONS

Hard cases may, indeed, make bad law

Especially involving judicial immunity

It has been said that when a court is influenced by "moral indignation" or where a judge rules with his or her heart, there is a risk that bad law may result.

The notion that "hard cases make bad law" was first printed in the 1842 English case of *Winterbottom v. Wright* (20 Meeson & Welsby 109 [Exchequer of Pleas(England) 1842]) by Judge Rolfe, and it has been repeated in numerous cases including the dissenting opinion of Justice Oliver Wendell Holmes Jr. in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) .

By MICHAEL R. WOLFORD
Daily Record Columnist

That principle came to mind when I read the recent decision in *Pacherille v. Burns*, 214 WL 3040420 (NDNY July 3) (Sharpe, J.).

This case had its genesis in a criminal action filed against Mr. Pacherille's son, Anthony Jr., who was 16 years of age and was charged with "attempted murder in the first degree as a hate crime," in which he shot a classmate who was African American.

Anthony Jr. pled guilty to attempted murder in the second degree before Otsego County Court Judge Brian Burns and his attorney requested that his client be sentenced as a youthful offender. In support of his request, the defense attorney submitted 62 letters, including one from defendant's father, Anthony Pacherille Sr., who made reference in his letter to the fact that Judge Burns had a son who was the same age as the defendant.

Furthermore, Mr. Pacherille helped create a website which contained numerous satirical messages highly critical of Judge Burns, the district attorney and the father of the shooting victim.

Judge Burns denied the request for youthful offender status, and sentenced Anthony Jr. as an adult to an 11-year prison term, see *People v. Pacherille*, 106 A.D.3d 1136 (3rd Dep't 2013).

Following the sentence, Mr. Pacherille began to plan a protest of the court's decision, which included obtaining an application from the City of Oneonta to publically protest the judge's sentencing of his son. Since the application required the place of protest to be listed, Mr. Pacherille went to Judge Burns' residence to confirm his address and to measure the sidewalk, in order to allegedly avoid having the protest infringe upon the judge's property. While at the residence, Mr. Pacherille went to the front door and when the judge's wife answered it, she immediately asked him to leave the porch, which he presumably did.

Thereafter, Judge Burns called the police and on Aug. 5, 2011, he filed a criminal complaint charging Mr. Pacherille with harassment. Mr. Pacherille also received a telephone call from the chief of police who advised him to stay away from Judge Burns' home and he received a cease and desist letter from the New York State Unified Court System to avoid any contact with the judge. In addition, an order of protection was issued thereby prohibiting Mr. Pacherille's protest.

The harassment charge against Mr. Pacherille was dismissed on Feb. 16, 2012, on the grounds that his conduct was protected by the First Amendment.

Following dismissal of the harassment charge, Mr. Pacherille commenced an action in federal court against Judge Burns individually, and in his capacity as an Otsego County Court Judge, pursuant to 42 USC §1983, in which he alleged that his First and Fourth amendment rights under the United States Constitution had been violated.

In response to the complaint, Judge Burns filed a motion to dismiss on the grounds that he is entitled to absolute judicial immunity, or at the very least, qualified immunity.

Generally, a judge is immune from lawsuits unless he has either acted outside of his judicial capacity or without jurisdiction, see *Huminski v. Corsones*, 386 F.3d 116 (2nd Cir. 2004). Therefore, in deciding Judge Burns' motion to dismiss, the court was required to determine whether Judge Burns' action in filing a criminal complaint against Mr. Pacherille fell within the required parameters to apply the doctrine of judicial immunity.

The U.S. Supreme Court has laid out a two-prong test to deter-

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mine whether an act is judicial. First, the court must consider whether the function is "normally performed by a judge," and second, the court must assess whether the parties dealt with the judge in his or her judicial capacity, *Stump v. Sparkman*, 435 U.S. 349 (1978).

A judge is not entitled to immunity when acting in an administrative, legislative or executive role, *Id*. Indeed, where a judge takes an action that does not involve adjudication between parties, that action is less likely to be considered "judicial,." *Cameron v. Seitz*, 38 F.3d 264 (6th Cir. 1994). For example, judges have not been entitled to judicial immunity in the following instances: demoting and firing a probation officer; issuing a moratorium on the issuance of certain writs for a limited time period; deliberately misleading a police officer as to the identity of the subject of an arrest warrant; repeated communications with the press and city officials criticizing a police lieutenant, which appeared to be race-based, see *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997) (collecting cases).

Judge Burns' motion to dismiss relied heavily on the Court of Appeals case of *Huminski v. Corsones*, and his attorney claimed it was directly on point. Although the District Court admitted that the case was not identical to the *Pacherille* case, it did claim that it was persuaded by the factual similarities to the *Huminski* case and it appears to have relied upon these similarities in dismissing Mr. Pacherille's lawsuit.

In analyzing the *Pacherille* decision, it is necessary to determine whether the similarities with the *Huminski* case are sufficient to support the granting of the motion to dismiss.

In *Huminski*, the plaintiff was a longtime critic of the Vermont justice system and believed that he had been mistreated by Vermont judges and prosecutors. As a result, he began a campaign of regularly making denunciations of them in public. Based upon his behavior and the belief by the courts that he was a "potential threat to personal safety and property," he was prohibited from being present around state courthouses.

Ultimately, Judge Nancy Corsones presided over one of Huminski's cases, in which he was charged with obstruction of justice. Judge Corsones approved a plea agreement, but based upon Huminski's bizarre behavior, the plea agreement was vacated and the charges reinstated.

Judge Corsones thereafter became the subject of a number of complaints by Huminski, including communications with her former law office where her husband continued to practice. Huminski also filed complaints against Judge Corsones with the Judicial Conduct Board and ultimately began stalking the judge in the various courthouses in which she presided. Huminski began to park his van outside the courthouses, and he also began to put up signs suggesting that the Judge was a "Butcher of the Constitution" and had violated the code of professional responsibility.

Judge Corsones became concerned for her safety and asked that trespass notices be issued to Huminski, preventing him from going near her residence or her former law office where her husband worked. Another judge familiar with the situation issued a notice against trespass barring Huminski from the court premises. In response, Huminski filed a lawsuit pursuant to 42 U.S.C. §1983 against Judge Corsones and others in the sheriff's department alleging violations of his First Amendment rights.

In response, the judge filed a motion to dismiss on the grounds of absolute judicial immunity.

The District Court found that the issuance of the criminal trespass notice in Vermont is not a judicial act and therefore, the judge did not qualify for judicial immunity. However, the Court of Appeals for the Second Circuit reversed, holding that Judge Corsones was entitled to immunity and that the judge's acts were within the scope of her authority. The court concluded that Judge Corsones did not act in the absence of jurisdiction when she participated in a decision to issue Huminski trespass notices barring him from certain premises.

Additionally, the court concluded that Judge Corsones engaged in a judicial act because the general nature and function of her actions was substantially judicial. The court held that there was a nexus between Judge Corsones' actions and Huminski's criminal case, explaining that the judge's actions "were clearly designed to address ... [Huminski's] conduct, and directly related to her role in adjudicating the case which engendered [Huminski's] conduct in the first place," *Huminski*, 386 F.3d 116, 141 (2d Cir. 2004).

It furthermore agreed with the Sixth Circuit in the *Barrett* case, 130 F.3d 257 (1997), when that court said, "[i]n circumstances when a judge reasonably perceives a threat to himself or herself arising out of the judge's adjudicatory conduct, the judge's response, be it a letter to a prosecutor or a call to the marshal's office for security, is a judicial act within the scope of judicial immunity".

When one applies the principles of *Huminski* to the *Pacherille* fact pattern, there does not appear to exist a nexus between the criminal case before Judge Burns and his decision to file harass-

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ment charges against Mr. Pacherille. Mr. Pacherille was never a party to any case presided over by Judge Burns. Indeed, Mr. Pacherille's sole involvement with Judge Burns was in connection with his son's case.

Even so, the District Court held that the cloak of judicial immunity protected Judge Burns from Mr. Pacherille's lawsuit by concluding that Mr. Pacherille was actively involved in the proceeding concerning his son since he sent a presentencing letter to the court and was "extremely vocal and critical about the proceeding and Judge Burns as demonstrated by his online criticism of Judge Burns."

In reviewing judicial immunity precedent, this case stands alone. Indeed, the holding in *Pacherille* effectively expands the doctrine of judicial immunity to lawsuits commenced by persons even tangentially involved in cases presided over by a judge and appears to fly in the face of the Supreme Court's hesitance to extend the doctrine "further than its justification would warrant," *Burns v. Reed*, 500 U.S. 478 (1991).

Although it is extremely important to protect judges from collateral attacks on their decisions by disgruntled parties, there should be a clear nexus between the case that served as the basis of the complaint and the action against the judge.

That nexus appears lacking in *Pacherille*, and if the Court of Appeals reviews the decision, it will likely be reversed.

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