IMMUNITY;

SO YOU THINK YOU CAN'T BE SUED?

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I. A Balancing Act

It goes without saying that the judiciary is one of the three branches of our government, the other two being the legislative and executive branches. It has long been recognized that in order to proper facility the judiciary's role in our society, the judicial actors who make the branch function must feel free to exercise their discretion without the fear of civil reprisal. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Hence, judges are absolutely immune from liability for judicial acts that are performed within their jurisdictional power, no matter how erroneous the act or how evil the motive. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921, 109 S. Ct. 3250, 106 L. Ed. 2d 596 (1989); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961). Judges are granted this broad immunity because of the special nature of their responsibilities. *Kegans*, 870 F.2d at 995. Judicial immunity, which is firmly established at common law, protects not only the individual judges, but benefits the public "whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Bradley v. Fisher*, 80 U.S. 335, 350, 20 L. Ed. 646 (13 Wall. 335) (1871) (citations omitted). In short, judicial immunity is an absolute immunity that protects judges and other judicial actors such as clerks and bailiffs.

However, not all judicial immunity is the same. Additionally, even if a judge or other actor steps outside the bounds of their judicial immunity, other immunities may still cover the judge or actor for their official acts. This paper is not intended to be an all-encompassing treaty on the subject, but it will touch on, and give general explanations on, the various different types of immunities the judge and other court actors may possess.

II. When is a Judge Entitled to Absolute Immunity?

Absolute Immunity is a tool designed specifically to allow judges the ability to effectively perform their job. A Judge acting in his or her official judicial capacity enjoys absolute immunity from liability for judicial acts performed within the scope of their jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 221 (5th Cir. 2009); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (Tex. 1961). "**Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction.**" *Alpert v. Gerstner*, 232 S.W.3d 117, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (quoting *City of Houston v. W. Capital Fin. Servs. Corp.*, 961 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.)). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdictions.'" *Stump*, 435 U.S. at 356-57.

"Judicial immunity is immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9, 1991 (1991); *Bradt v. West*, 892 S.W.2d 56, 69 (Tex. App. Houston 1st Dist. 1994). Therefore, it makes no difference what specific causes of action are brought; the judge is immune from being sued at all. *Id* at 288. Despite the unfairness to litigants that sometimes results, the existence of the doctrine of judicial immunity is in the best interests of justice as a whole. *Stump*, 435 U.S. at 363, 98 S. Ct. at 1108. It allows a judge, in exercising the authority vested in him, to be free to act according to his best judgment, unencumbered by anxiety about being sued for acts he performs in discharging his duties. *Id*. The public has a right to expect the unfettered execution of those duties; this doctrine helps the judge fulfill those expectations. Thus, absolute judicial immunity "should not be denied where the denial carries the potential of raising more than a frivolous concern in a judge's mind that to take proper action might expose him to personal liability." *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5thCir. 1993). "The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit." *Stump*, 435 U.S. at 364, 98 S. Ct. at 1108.

In essence, as long as the judge acts 1) within his judicial capacity (not administrative capacity) and 2) within his jurisdiction, the judge is entitled to absolute judicial immunity. So, how does a judge establish these two elements?

Judicial Act: Courts around the country have followed the lead of the United States Supreme Court and adopted a "functional approach" in determining whether a party is entitled to absolute immunity. See *Gardner v. Parson*, 874 F.2d 131, 145-46 (3d Cir. 1989); *Hodorowski v. Ray*, 844 F.2d 1210, 1213-15 (5th Cir. 1988); *Meyers v. Contra Costa County Dep't of Social Serv.*, 812 F.2d 1154, 1157 (9th Cir.), cert. denied, 484 U.S. 829, 108 S. Ct. 98, 98 L. Ed. 2d 59 (1987); *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir.), cert. denied, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986). Under the functional approach, courts determine whether the activities of the party seeking immunity are **"intimately associated with the judicial process."** *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 994-96, 47 L. Ed. 2d 128 (1976). The question is whether the activities undertaken by the party are "functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtaman*, 424 U.S. at 430, 96 S. Ct. at 995. In other words, a party is entitled to absolute immunity when the party is acting as an integral part of the judicial system or an "arm of the court". *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S. Ct. 1108, 1115, 75 L. Ed. 2d 96 (1983). **The focus is on the nature of the function performed, not the identity of the actor.** *Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. App. Houston 14th Dist. 1996); *Forrester v. White*, 484 U.S. 219, 230, 108 S. Ct. 538, 545-46, 98 L. Ed. 2d 555 (1988)).

Texas judges have absolute immunity for their judicial acts "unless such acts fall clearly outside the judge's subject-matter

jurisdiction." *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957-58 (Tex. App.--Dallas 1985, no writ); see *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir.), cert. denied, 474 U.S. 1037, 106 S. Ct. 605, 88 L. Ed. 2d 583 (1985); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986). Thus, in determining whether absolute judicial immunity applies, courts look to a two-part inquiry: First, were the acts "judicial" ones? Second, were those acts "clearly outside" the judge's jurisdiction? *Bradt v. West*, 892 S.W.2d 56, 66-67 (Tex. App. Houston 1st Dist. 1994).

The factors considered in determining whether a judge's act is a "judicial" one are (1) whether the act complained of is one normally performed by a judge, (2) whether the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) whether the controversy centered around a case pending before the judge, and (4) whether the act arose out of a visit to the judge in his judicial capacity. *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993) (citing *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These factors should be broadly construed in favor of immunity. *Malina*, 994 F.2d at 1124; *Adams*, 764 F.2d at 297. Not all of the factors must be met for immunity to exist. *Malina*, 994 F.2d at 1124; *Harris v. Deveaux*, 780 F.2d 911, 915 (11th Cir. 1986). In some circumstances, immunity may exist even if three of the four factors are not met. *Adams*, 764 F.2d at 297 n.2. Nor are the factors to be given equal weight in all cases; rather, they should be weighted according to the facts of the particular case. *Id*. at 297.

Within Judge's Jurisdiction: In determining whether an act was clearly outside a judge's jurisdiction for judicial immunity purposes, the **focus is not on whether the judge's specific act was proper or improper, but on whether the judge had the jurisdiction necessary to perform an act of that kind in the case.** See *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 289, 116 L. Ed. 2d 9 (1991) (where judge was alleged to have authorized and ratified police officers' use of excessive force in bringing recalcitrant attorney to judge's courtroom, and thus to have acted in excess of his authority, his alleged actions were still not committed in the absence of jurisdiction where he had jurisdiction to secure attorney's presence before him); *Malina*, 994 F.2d at 1124 (because judge had power to cite for contempt and to sentence, where judge cited motorist for contempt and sentenced him to jail, these acts were within his jurisdiction, even though judge had acted improperly in stopping the motorist himself, privately using an officer to unofficially "summon" the motorist to court, and charging the motorist himself); *Sindram v. Suda*, 300 U.S. App. D.C. 110, 986 F.2d 1459, 1460 (D.C. Cir. 1993) (judge's prohibiting plaintiff from filing any new civil actions pro se before paying outstanding sanctions was "well within" judge's "jurisdiction" as term is used for judicial immunity test).

So, once a judge establishes he or she is entitled to absolute immunity, what is the next step? The case law is a little vague as

to the proper mechanism to utilize, but the result is the same. **A judge should file either a plea to the jurisdiction or a motion for summary judgment asserting absolute judicial immunity.**[1] If a trial court denies the assertion of immunity, the judge is entitled to an interlocutory appeal pursuant to Tex. Civ. Prac. Rem Code §51.014(5) (*Vernon* 2005). If the judge is entitled to such immunity, the judge should be dismissed with prejudice.

III. Judicial Immunity for Other Court Actors

Judicial Immunity protects actors of the court as well. When judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App. -- Dallas 1994, writ denied). Officers of the court who are integral parts of the judicial process, such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees are entitled to judicial immunity if they actually function as an arm of the court. *Id.* See also *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989), cert. denied, 493 U.S. 1072, 110 S. Ct. 1118, 107 L. Ed. 2d 1025 (1990) (holding social worker absolutely immune); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1985) (holding probation officers absolutely immune); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir.)(Holding state Supreme Court justices and clerk absolutely immune), cert. denied, 459 U.S. 840, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982); *Ashbrook v. Hoffman*, 617 F.2d 474 (7th Cir. 1980) (holding partition commissioner absolutely immune). **This type of absolute immunity is referred to as "derived judicial immunity."** See *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992). The policy underlying derived judicial immunity that protects participants in judicial and other adjudicatory proceedings is well established. Not only does the policy guarantee an independent, disinterested decision-making process, these immunities prevent the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion. *Johnson v. Kegans*, 870 F.2d 992, 996-97 (5th Cir.),

Again, the courts use a functional approach to determining derivative judicial immunity. *Delcourt v. Silverman*, 919 S.W.2d 777, 781-782 (Tex. App. Houston 14th Dist. 1996). Applying the functional approach, a psychologist who is appointed by the court is entitled to absolute immunity if he or she is appointed to fulfill quasi-judicial functions intimately related to the

[1] The reason the mechanism is grey is due to the contradictory holdings regarding judicial immunity. Judicial immunity, as an absolute immunity, is immunity from suit. This means there is no jurisdiction to bring the judge before another judicial tribunal and should be challenged through a plea to the jurisdiction. However, other courts have held that judicial immunity is an affirmative defense. Kassen v. Hatley, 887 S.W.2d 4, 8-9, 38 Tex. Sup. Ct. J. 73 (Tex. 1994) (official immunity is a common law affirmative defense); DeWitt v. Harris County, 904 S.W.2d 650, 653, 38 Tex. Sup. Ct. J. 916 (Tex. 1995) (discussing immunity from liability); Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 422, 47 Tex. Sup. Ct. J. 852 (Tex. 2004) (discussing immunity from suit). Affirmative defenses are not jurisdictional. As a result, affirmative defenses should be raised in a motion for summary judgment.

judicial process. *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir.). **The focus is on the nature of the function performed, not the identity of the actor.** *Forrester v. White*, 484 U.S. 219, 230, 108 S. Ct. 538, 545-46, 98 L. Ed. 2d 555 (1988). Numerous courts have extended absolute immunity to psychiatrists and other mental health experts assisting the court in criminal cases. See, e.g., *Moses v. Parwatikar*, 813 F.2d at 892 (holding psychiatrist entitled to absolute immunity when appointed in competency examination). The consistent reasoning given by the courts in these cases is that the psychiatrist or mental health professional performed a special task closely related to the judicial process pursuant to a court directive. *Lavit*, 839 P.2d at 1145.

However, in *Antoine v. Byers & Anderson, Inc*., 508 U.S. 429, 124 L. Ed. 2d 391, 113 S. Ct. 2167 (1993), the United States Supreme Court resolved a circuit conflict regarding the extent of judicial immunity granted to court reporters -- some circuits had extended absolute immunity to court reporters while others afforded them qualified immunity. *Id*. at 432 & 432 n.3 (citing cases). Although the circuit decisions involved various court-reporter functions, *Antoine* involved the court reporter's potential liability for the courtroom recording of judicial proceedings. In that context, the Court was unwilling to extend the protection of judicial immunity to court reporters and used the functional approach to determine that court reporters do not exercise discretion or engage in judicial decision making processes. *Id.* at 436-37. The Court characterized judicial immunity as extending only to officials whose "judgments are 'functionally comparable' to those of judges" and who "'exercise a discretionary judgment' as a part of their function." *Id*. at 436(citations omitted). The Court further noted that the application of the functional approach in granting judicial immunity does not hinge on the importance of the court officer's duty to the judicial process, but rather focuses on the amount of **subjective discretion** that the officer exercises in the performance of a particular job. *Id*. at 436-37. The Court framed its decision broadly and held that court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity. *Id.* at 437.

IV. If Not Absolute Immunity, Then What?

So, absolute judicial immunity extends only so far. But what of the official who, while trying to perform their job in good faith, still gets sued? Not to fear. If judicial immunity is not applicable, other immunities may kick-in to protect good faith actions. The subject of official immunity is one which can qualify for a paper unto itself, as it covers all forms of public officials, from elected officials, appointed officials, public employees and staff, and even certain contractors. However, for purposes of this paper, I'm simply going to focus on the immunity as it applies to judges and possibly clerks.

"Official immunity," "qualified immunity," "quasi-judicial immunity," "discretionary immunity," and "good faith immunity" are "all terms used interchangeably to refer to the same affirmative defense available to governmental employees sued in their individual capacities." *Baylor College of Med. v. Hernandez*, 208 S.W.3d 4, 11 n.7 (Tex. App.—Houston [14th Dist.] 2006, pet.

denied); see also *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993).[2] In essence, if an official, including a judge or court clerk, is performing administrative tasks not integrally associated with the judicial process, but necessary nonetheless, official immunity may still apply.

Official immunity is a common law affirmative defense rendering individual officials immune from both liability and suit. See *Kassen v. Hatley*, 887 S.W.2d 4, 8-9, 38 Tex. Sup. Ct. J. 73 (Tex. 1994) (official immunity is a common law affirmative defense); *DeWitt v. Harris County*, 904 S.W.2d 650, 653, 38 Tex. Sup. Ct. J. 916 (Tex. 1995) (discussing immunity from liability); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422, 47 Tex. Sup. Ct. J. 852 (Tex. 2004) (discussing immunity from suit). Although official immunity applies only to individuals, an agency or institution may be shielded from respondent superior liability for its employee's negligence if the employee possesses official immunity. See *DeWitt*, 904 S.W.2d at 654.

Government employees are entitled to official immunity from suit arising from the performance of their **(1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.** *Baylor College of Med. v. Hernandez*, 208 S.W.3d 4, 10-11 (Tex. App. Houston 14th Dist. 2006). Thus, a motion for summary judgment asserting official immunity will expressly list official immunity as a ground for judgment, or will move for summary judgment on the basis that the plaintiff's claims arise from the good faith performance of an official's discretionary duties within the scope of his authority--the elements of official immunity. See Tex. R. Civ. P. 166a(c) ("The motion for summary judgment shall state the specific grounds therefor."); see also *Cathey v. Booth*, 900 S.W.2d 339, 341, 38 Tex. Sup. Ct. J. 927 (Tex. 1995)(stating that a defendant "who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment.").

Under absolute judicial immunity, the motives or intent of a judge exercising judicial authority is immaterial. No matter how evil the motives, absolute immunity protects the judge. Unlike absolute immunity, official immunity turns heavily on the motives of the official. However, it's not as bad as it may appear. The U.S. Supreme Court has established an objective reasonableness test for determining whether a public official acted in good faith as a condition to the protection of federal qualified immunity. The Supreme Court stated bluntly: "[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly [428] motivated. **Evidence concerning the defendant's subjective intent is simply irrelevant to that defense**." *Crawford-El v. Britton*, 523

[2] Federal courts recognize a qualified immunity for public officials, which is analogous although not identical to Texas official immunity. Qualified immunity protects governmental officers with discretionary authority from liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Crawford-El v. Britton*, 523 U.S. 574, 588, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 429 (Tex. 2004)

U.S. 574, 588, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998).

Under Texas law, probative evidence on the issue of good faith is limited to objective evidence. See *Wadewitz,* 951 S.W.2d at 466 ("[A] court must measure good faith in official immunity cases against a standard of objective legal reasonableness, without regard to the officer's subjective state of mind."); *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 427-428 (Tex. 2004)

The Texas Supreme Court has also been rather blunt in its rejection of a subjective intent to harm. It expressly stated in *Ballantyne,* in that reliance on subjective evidence in considering the good faith prong of the official immunity doctrine is improper. “It is not germane to the official immunity analysis.” 144 S.W.3d 427-428. Important reasons exist for allowing only objective evidence in consideration of good faith. An objective standard furthers the purpose of official immunity, which is “to permit decision making public officials to perform their jobs without hesitation or concern that their decisions will subject them individually to civil liability under state law.” *Id* at 428. Suits against government official’s exact costs against society, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 428 (Tex. 2004) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (U.S. 1982). Employing a subjective standard of good faith significantly increases these societal costs. *Id.* at 816.

The Texas Supreme Court in *Ballantyne* adopted the U.S. Supreme Court explanation of the reasons for objective analysis:

> The judgments surrounding discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. These variables . . . frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. Id. at 816-17. We likewise recognize a substantial public interest in shielding public officials from the costs associated with defending civil lawsuits instituted to challenge their judgment on public issues.
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> *Ballantyne* 144 S.W.3d at 428.

So, in other words, **an official may be entitled to official immunity if they are performing their official discretionary actions in a way that is objectively reasonable for the official’s particular scope of work.** *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 161 (Tex. 2004).

V. What other Immunities Are Out There?

I'm glad you asked. In addition to absolute and official/qualified immunity, public officials, including judges and clerks, have additional statutory protections from suit. Texas Civil Practice and Remedies Code states:

> a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.
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> Tex. Civ. Prac. & Rem. Code § 101.106 (West 2011).

A common mistake many plaintiffs commit is to sue the individual official, judge, clerk, whoever, as well as the "deep pockets" of the city or county employing the official. Such a pleading automatically entities the judge to immediate dismissal, regardless of any other defenses or immunities he or she may possess. Further, if the plaintiff brings a claim simply against the judge, but the judge was acting within the scope of his or her employment, the employing entity can be substituted for the judge who is again entitled to immediate

dismissal. Now, there are potential ways around the statutory immunity, so do not rely on it as an ultimate defense to a claim.

VI. Illustrations

How does the interplay between absolute, official, and §101.106 immunity apply, you may ask. For illustration purposes, let's consider the case of Judge Hardin Nails. Judge Nails is a municipal court judge presiding over the City of Deep Pockets.

One day, Defendant Duey Suem appears before Judge Nails on a health and safety ordinance violation with a fine of up to $2,000. Not being particularly experienced or savvy in the ways of a court, Mr. Suem begins his defense by insulting the officer who wrote him the ticket, personally threatening the prosecutor with suit, and informs Judge Nails that if the Judge did not let him go immediately, he would "sue him for everything he's got."

Judge Nails allows the trial to go forward and Mr. Suem is convicted. Judge Nails sentences him to the full amount of $2,000 plus the cost of the officer's overtime for appearing in court. Mr. Suem storms out of the courtroom.

Later that day, Judge Nails is asked to go to a city council meeting to provide input to the council on ordinance enforcements. While backing out of the parking lot, Judge Nails is in an automobile accident. A minor fender/bender only; however, the driver of the other car is Mr. Suem. Mr. Suem learns of Judge Nails requested appearance at the council meeting later that day. As you may expect, Mr. Suem sues the Judge for 1) sentencing him to the max plus court costs on a "bogus" charge, 2) falsely and maliciously encouraging the city to develop code enforcement protocols for ordinance violations, and 3) "slamming" into him in the parking lot.

Result: Judge Nails has absolute immunity for his judicial sentencing of Mr. Suem. It is objectively reasonable for the judge to provide information to the City Council on the statistics of ordinance cases in the court. Administrative statistic collection and education may not qualify for absolute immunity given its administrative nature. However, Judge Nails would retain official immunity for such acts and so Mr. Suem's second cause of action should be dismissed against Judge Nails. Finally, Mr. Suem sued the City and Judge Nails for the car accident. Pursuant to §101.106(e), Judge Nails is entitled to immediate dismissal (but the City is still stuck in the case). Should any of Judge Nails' assertions of immunity be denied, he retains the ability to file an interlocutory appeal pursuant to Tex. Civ. Prac. & Rem. Code §51.014(5)(West 2011).

VII. So, What Can You be Sued For?

Judges acting in their official judicial capacity have immunity from liability and suit for judicial acts performed within the scope of their jurisdiction. See *Dallas*

County v. Halsey, 87 S.W.3d 552, 554, 46 Tex. Sup. Ct. J. 51 (Tex. 2002).

Whether an act is judicial (or nonjudicial) is determined by the nature of the act, i.e., whether it is a function normally performed by a judge, as contrasted from other administrative, legislative, or executive acts that simply happen to be done by judges. *Forrester v. White*, 484 U.S. 219, 227, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988). Nonjudicial acts include other tasks, even though essential to the functioning of courts and required by law to be performed by a judge, such as making personnel decisions regarding court employees and officers. *Twilligear v. Carrell*, 148 S.W.3d 502, 504-505 (Tex. App. Houston 14th Dist. 2004)

Sometimes the lines of whether or not an act is judicial are not clear cut. In the case of *Harper v. Merckle*, 638 F.2d 848, (5th Cir. 1981), the Fifth Circuit analyzed a situation which could blur some of the lines between judicial and non-judicial. In *Harper*, the Plaintiff went to the courthouse for the sole purpose of delivering a support payment to his ex-wife who worked with a Judge Coe. Finding both doors to Judge Coe's chambers closed, Harper entered an adjacent office, that of Judge Merckle. During a discussion with Judge Merckle's secretary, the Judge entered the room and asked for the divorce file (of which he was not assigned and had been closed). Judge Merckle ordered Harper to raise his hand to be sworn in to answer questions and Harper refused. Merckle held him in contempt and placed him in jail.[3] Harper filed suit under 42 U.S.C. §1983 for violations of his constitutional rights.

When analyzing Judge Merckle's claim of judicial immunity the Fifth Circuit held:

> Judge Merckle, in asking Harper to raise his right hand to be sworn in, and in later finding Harper in contempt, most assuredly was performing a "normal judicial function." And Judge Merckle's allegedly unconstitutional actions clearly took place "in the judge's chambers." But under the third and fourth factors of *McAlester*, Judge Merckle's position loses ground. The controversy that led to Harper's incarceration did not center around any matter "then pending before the judge"; rather, it centered around the domestic problems of one of the Judge's friends, Harper's former wife. These problems were brought to the Judge's attention in a social, not judicial, forum. Moreover, as the facts clearly establish, Harper did not visit Judge Merckle "in his official capacity." To the contrary, Harper sought only his former wife, whose office was adjacent to Judge Merckle's chambers, to settle his account with her. The emphasis that we place upon the third and fourth factors of *McAlester* is clearly warranted under the language of

[3] The full factual explanation is actually far more dramatic including a foot chase, dodging in and out of offices, and a mass of bailiffs pulling weapons.

> *Stump*. There Justice White distilled the relevant cases addressing the term "judicial act" and concluded that consideration must be given not only to "the nature of the act itself" but also "to the expectations of the parties." 435 U.S. at 362, 98 S. Ct. at 1107, see *Crowe v. Lucas*, supra, 595 F.2d at 990. While in *Stump* "both factors indicate(d) that … approval of the sterilization petition was a judicial act," 435 U.S. at 362, 98 S. Ct. at 1107 (footnote omitted), in the case before us they do not. We think it clearly unreasonable to conclude that Harper entertained the expectation that judicial matters were at hand when he entered Judge Merckle's office on nonjudicial business.
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> *Harper v Merckle*, 638 F.2d 848, 858-59 (5th Cir. 1981).

As you can imagine, the end result was a denial of judicial immunity for the Judge. Even though parts of Judge Merckle's actions took place within his own chambers and were for powers he is authorized to perform, the totally of the circumstances swung against immunity.

Another aspect to keep in mind is that judicial immunity is not a bar to ***prospective injunctive*** relief against a judicial officer acting in a judicial capacity or to attorney's fees for obtaining such relief. *Twilligear v. Carrell*, 148 S.W.3d 502, 505 (Tex. App. Houston 14th Dist. 2004)(citing *Pulliam v. Allen*, 466 U.S. 522, 542-44, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984). As a result, a judge can be sued via injunction to correct an error of law of judicial character or administrative character, and can be liable for attorney's fees.

VIII. Conclusion

Public Policy dictates that public officials be given the latitude to made discretionary calls in the performance of their official duties. Judges and other court staff possess absolute judicial immunity for certain acts, and other common law and statutory immunities for actions outside of the judicial realm. They are given these tools to allow them to perform their jobs in an efficient and effective manner. It is only when they act outside of their authority and official powers with some form of objectively malicious purpose does liability creep in.