

VOL 62 ISS 1 ART 6 | 0 | INTRODUCTION

Since 1871, the Supreme Court has made available a very broad privilege of immunity to judges of courts of general jurisdiction in civil actions when such actions arise out of judicial acts not done in the complete absence of jurisdiction.¹ In the recent case of Stump v. Sparkman,² the United States Supreme Court again considered the defense of judicial immunity and, for the first time, offered some definition of what constitutes a judicial act. In this author's view, in putting forward a broad definition of judicial act, and in reaffirming the use of a broad construction of jurisdiction in immunity cases, the Court assured the maintenance of a nearly absolute immunity privilege for judges in courts of general jurisdiction when they appear to be acting in a judicial capacity.

Sparkman involved alleged violations of plaintiffs' constitutional rights,³ which were said to have occurred during the process culminating in Linda Sparkman's involuntary sterilization. Prior to the operation, the sterilization had been approved by Harold Stump, a judge in an Indiana court of general jurisdiction, after a petition by Ms. Sparkman's mother to have her daughter sterilized was filed in his court. The petition was granted the day it was presented, in an ex parte proceeding without a hearing. Neither the petition nor the order were ever filed or recorded; no notice was given the daughter; nor was a guardian ad litem appointed. The operation was performed seven days later after Ms. Sparkman was told she was to have her appendix removed. Two years later, after Ms. Sparkman's marriage, when she consulted a doctor concerning her inability to conceive, she was informed that she had been sterilized.⁴

In response, Ms. Sparkman and her husband filed a federal action under 42 U.S.C. §§ 1983 and 1985⁵ against Judge Stump, together with pendent state claims for assault and battery and malpractice against her mother, the mother's attorney, the doctors involved in the surgery, and the hospital where it was performed. Judge Stump's motion to dismiss based on the defense of judicial immunity was granted in the district court and the entire action was then dismissed.⁶

A three-judge panel of the Seventh Circuit Court of Appeals unanimously reversed the district court, holding that the defense of judicial immunity was not available to Judge Stump, first because he had acted extrajudicially in ordering the sterilization and second, because the act in question was performed without



jurisdiction.⁷ The Supreme Court, however, in a five-three decision, again reversed, holding that the judicial immunity defense did protect Judge Stump.⁸ The majority and minority views in *Sparkman* represent two historical positions on the breadth of protection which should be afforded under the judicial immunity privilege, and these opinions must necessarily be examined in the light of this history.

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Footnotes

¹. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871).

². 98 S. Ct. 1099 (1978).

³. The Supreme Court majority referred to the district court's summary of the constitutional claims asserted: violations of due process, equal protection, the right of privacy, the right to be free of cruel and unusual punishment and the right to procreate. *Id.* at 1103.

⁴. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977).

⁵. (1970). Section 1983, originally enacted as Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, reads in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

⁶. The claims against the remaining defendants were dismissed since it was held that without Judge Stump's presence in the case, there could be no showing of the state action necessary under section 1983. Civil No. F75-129 (N.D. Ind., filed May 13, 1976).

⁷. 552 F.2d 172 (7th Cir. 1977).

⁸. 98 S. Ct. 1099 (1978).

