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In the

Supreme Court of the United States

HAROLD D. STUMP, JOHN HINES, M. D.,
HARRY M. COVELL, M. D., and
WARREN G. SUNDAY,

PETITIONERS,

V.

LINDA K. SPARKMAN and
LEO SPARKMAN,

RESPONDENTS.

No. 76- 1750

Washington, D. C.
January 10, 1978

Pages 1 thru 58

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY, Petitioners,	:	
v.	:	No. 76-1750
LINDA K. SPARKMAN and LEO SPARKMAN, Respondents.	:	

Washington, D.C.
Tuesday, January 10, 1978

The above-entitled matter came on for argument at 11:16 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GEORGE E. FRUECHTENICHT, Esq., Indiana Bank Building, Fort Wayne, Indiana 46802; for the Petitioners.

RICHARD H. FINLEY, Esq., 124 East Rush Street, Kendallville, Indiana 46755; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1750, Stump against Sparkman.

Mr. Fruechtenicht, you may proceed whenever you are ready.

ORAL ARGUMENT OF GEORGE E. FRUECHTENICHT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. FRUECHTENICHT: Mr. Chief Justice, may the Court please:

As the document indicates, I represent Harold Stump, petitioner in this matter.

Q Would you raise your voice a little, counsel.

MR. FRUECHTENICHT: Yes, sir. I represent Harold Stump, and I would like to identify my client. He is the Circuit Judge of DeKalb County, Indiana. DeKalb County lies in the northeastern part of the state, just next to Ohio, about 30,000 residents occupy the county. The county seat is Auburn, a town of about 6,000 people. That is where the courthouse is. The judge lives there. That is where he works.

Q There is only a single judge in that county?

MR. FRUECHTENICHT: This action occurred, Your Honor, in 1971, and at that time he was the sole court of general jurisdiction.

He has been elected four times and is now serving his 20th year. His father, Walter Stump, served as a circuit court

judge on the same bench for 12 years before him. Judge Stump is a judge of considerable experience, and I will indicate to this court a judge of the highest integrity.

Q The important issue, of course, is the scope of his jurisdiction.

MR. FRUECHTENICHT: That is correct, Your Honor. The issue, the principal issue, is whether the doctrine of judicial immunity should be applied to an approval signed by Judge Stump of a petition filed by the mother and sole guardian of a 15-year-old girl to have surgery performed upon her. That surgery was a tubal ligation.

The larger issue, I would submit to this Court, would be whether the doctrine of judicial immunity should be permitted to be, in my view, diluted and altered by the pronouncements of the opinion of the Seventh Circuit Court of Appeals.

The context in which the matter was presented or is presented--the factual background so far as the judge is concerned--is as follows. The mother, Ora McFarlin, determined that apparently because of facts set out in the petition, her daughter, 15 years old, should have a tubal ligation. The petition speaks for itself. It is set forth in the brief of the respondents along with the approval. Briefly it suggests or alleges under oath that the daughter is sexually promiscuous, that she has been uncontrollable, that the mother is concerned obviously that the daughter is going to become pregnant, and

that for the best interests of the child, she asks that the court approve a petition by the mother to have a tubal ligation performed upon her.

When that petition was presented to the court by the mother and her attorney, the court then was required to make a primary threshold decision, and that was whether or not he had jurisdiction to approve that petition. He, I submit to the Court, made this decision as courts of general jurisdiction in every county, every day throughout this country must make in matters of this particular type.

Q How many of these do we have in the country?

MR. FRUECHTENICHT: I beg your pardon?

Q How many cases do we have in the country where a mother asks for--

MR. FRUECHTENICHT: I am talking about courts of general jurisdiction, Your Honor--

Q Oh.

MR. FRUECHTENICHT: --required to make decisions of this particular type in every county throughout the nation.

At that time the court realized that he had a general jurisdiction statute under which he functioned, and that general jurisdiction statute in broad language, enacted by the Legislature of the State of Indiana and to this date unamended, indicates that he shall have original, exclusive jurisdiction in all cases at law and equity whatsoever. And he shall have

jurisdiction of all other causes, matters, and proceedings.

Also in existence--

Q Is there not--

MR. FRUECHTENICHT: I beg your pardon.

Q Is there not some limitation on that if it is not assigned to some other court?

MR. FRUECHTENICHT: I am sorry. Yes, sir, Your Honor. If it is not conferrad--where exclusive jurisdiction thereof is not conferred by law upon some other court, board, or officer, that is correct.

Q In other words, he would not have probate jurisdiction, for example.

MR. FRUECHTENICHT: He would.

Q He would?

MR. FRUECHTENICHT: Yes, he would in this case.

Q But there would be some jurisdiction that he would not have?

MR. FRUECHTENICHT: I cannot think of it except where jurisdiction has been specifically proscribed, where there has been a bar, either by common law or by legislation. A court of general jurisdiction in a county has it all, Your Honor.

Q Are there no other layers of courts--

MR. FUECHTENICHT: None. He has criminal jurisdiction, juvenile jurisdiction; he has civil jurisdiction; he has the general jurisdiction over all causes, matters, and

proceedings. With this in mind, also there were not jurisdictional statutes in existence but there were statutes in existence in the State of Indiana at that time which in general terms permitted parents to consent to medical treatment on behalf of their minor children. There are two such statutes, one for people who are incompetent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, and the like. And the other is simply any person who is the parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child, including surgery.

Q What if--

MR. FRUECHTENICHT: I beg your pardon.

Q What if Mrs. McFarlin had presented a piece of paper to your client, the judge, and said, "My daughter is incompetent. She is a kleptomaniac. She has done a lot of shoplifting. And I want your approval to have her right hand chopped off, and the judge had signed the approval and that surgery had been performed. Would your argument--

MR. FUECHTENICHT: Your Honor, Judge Swygert--I must remark on the parallel--he said both of her hands cut off when we were arguing in the Court of Appeals. That would not be an operation, Your Honor, I would suggest, that a court would even consider, especially a court such as Judge Stump--

Q Assume that this court did do that.

MR. FRUECHTENICHT: If he did do that.

Q You say that a parent can have surgery done on behalf of a child, and here let us assume in my case that the court had ordered that operation on that representation by the parent. Would you be making the same argument?

MR. FRUECHTENICHT: If I may respectfully suggest, Your Honor, that assumption is not germane to the issues in this particular case.

Q I think it tests your argument, if I may say so.

MR. FRUECHTENICHT: It certainly does.

Q Is there a statute in your state against mutilation as there are statutes in most states against the mutilation of the human body?

MR. FRUECHTENICHT: If there is, Your Honor, I am unaware of it. I am unaware of it.

In answer to your question, Your Honor, that would be an appropriate action on the part of a judge. It is certainly not before us.

Q Do you concede that this action was at least inappropriate, do you not?

MR. FRUECHTENICHT: This statute, Your Honor, is a medical care statute. Your premise was that she was a kleptomaniac.

Q That the mother said she was.

MR. FRUECHTENICHT: Yes. Certainly cutting off her

hand is not going to improve her physically.

Q Do you think this improved this child physically, this operation?

MR. FRUECHTENICHT: I think, Your Honor, that decision was made. And from the standpoint of improving her physically, it was at least surgery. And at least surgery under these circumstances is permitted by the statute. And it is within the context of that statute that this particular approval was made.

Q But so would it be in my hypothetical case.

MR. FRUECHTENICHT: Then you are entitled to that conclusion, Your Honor. This is one that I most certainly do not conclude. And I do not think that a court of general jurisdiction of this court's experience would entertain such a petition.

Q Counsel, supposing the petition recited a different reason, that said, "I want approval of amputation of the right arm"--

MR. FRUECHTENICHT: Your Honor--

Q --"because it is malignant" or something like that.

MR. FRUECHTENICHT: Your Honor, yes.

Q The judge would have jurisdiction under such--

MR. FRUECHTENICHT: Yes, he would. There is no question about that.

Q So, the question is whether he acted for the right reason or not?

MR. FRUECHTENICHT: That is not the question. The final question, Your Honor, is whether he had jurisdiction to act at all.

Q Did he have jurisdiction to decide the example that Justice Stewart gives you?

MR. FRUECHTENICHT: Of chopping off their hands? In the final analysis, yes, he would have jurisdiction to act. What he would do, I am suggesting, under those circumstances is refuse. He would refuse to consent.

Q But your argument is that if he did give consent, because he had jurisdiction, he would have judicial immunity?

MR. FRUECHTENICHT: Yes.

Q Was this an action at law or on equity?

MR. FRUECHTENICHT: This was not an action at law or in equity, Your Honor.

Q Where did he get jurisdiction?

MR. FRUECHTENICHT: He got jurisdiction by virtue of the provisions of the general jurisdiction statute which permits him to have jurisdiction of all other matters, causes, and proceedings.

Q Does that include admiralty?

MR. FRUECHTENICHT: Yes, I would assume so, if there

is such a thing in DeKalb County, Indiana. I think they have some streams there that are navigable.

Q Streams that are navigable?

MR. FRUECHTENICHT: Yes, they do.

Q Streams that are navigable. Stream. Do you mean river?

MR. FRUECHTENICHT: Yes. I believe that is defined by a log that can--an eight-inch log that can float.

Q Do they have jurisdiction over bankruptcy?

MR. FRUECHTENICHT: No, that is federal law.

Q You and I both know that when you use a general term, you do not mean everything.

MR. FRUECHTENICHT: Of course, not. He has jurisdiction over receiverships. Receiverships--those are insolvencies.

Q Could he entertain a petition of a man to have Mrs. John Doe sterilized, Mrs. John Doe being no relation at all?

MR. FRUECHTENICHT: No.

Q Why not?

MR. FRUECHTENICHT: I do not think he would have jurisdiction, Your Honor.

Q Why not?

MR. FRUECHTENICHT: Because there has to be some reason for him to be presented with a petition. He cannot

simply sit back and say, "This morning I think I will simply have somebody sterilized." The matter obviously must be presented to him.

Q A petition was filed.

MR. FRUECHTENICHT: By whom?

Q By John Jones to have Mary Brown sterilized.

MR. FRUECHTENICHT: Okay. And would the petition--the petition would set forth the reasons why the sterilization should occur?

Q The same reason given here.

MR. FRUECHTENICHT: Obviously the difference that you are suggesting is that John Jones is not the natural parent and guardian of Mary Smith.

Q That is right.

MR. FRUECHTENICHT: In this particular case, the mother was the natural parent and guardian of this lady, and she asked whether or not the court would approve. He did not order anything. He simply approved this.

Q Could she on her own have the child sterilized?

MR. FRUECHTENICHT: On her own? At that particular time obviously the court concluded that she should have, that she could have.

Q Why did she go to court?

MR. FRUECHTENICHT: I do not know. Perhaps that is simply the context in which this approval--

Q What statute do you have in Indiana that authorizes a parent to sterilize a child without the child's permission?

MR. FRUECHTENICHT: In 1971 there was neither a statute authorizing nor was there a statute barring such a procedure, Your Honor, and that is significant. That is significant in this particular case. May I suggest this to you?

Q When you get through suggesting, will you give me the case that the judge cited? He did not cite a piece of law about anything.

MR. FRUECHTENICHT: The case that we have cited, the cases we have cited is that this is a matter which has really not to do with sterilization. This is a matter to do with whether or not the doctrine of judicial immunity should apply under these circumstances. When this petition was presented to this court, he was duty-bound at that particular point to determine whether he had jurisdiction to decide this particular case, to act in this case--that is, to issue an approval. And that source, that power, flows from the cases in Indiana, and they come basically from Bradley v. Fisher, which says this: "Every court possesses the power of determining its own jurisdiction both as to the parties and the subject matter of the action. It is well settled that when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgement thereon is conclusive against collateral attack

unless the want of jurisdiction is apparent on the face of the proceedings." Now--

Q The point is, Where is his jurisdiction?

MR. FRUECHTENICHT: His jurisdiction--I will repeat again, Your Honor--lies in the general jurisdiction statute, as pointed out by the District Court, which gives him jurisdiction over all other causes, matters, and proceedings.

Q Does the supreme court of your state have the same jurisdiction?

MR. FRUECHTENICHT: I cannot be certain. It has appellate jurisdiction. I do not think it has original jurisdiction of this type. It may have. But may I suggest this or may I offer this also, Your Honor, that in 1971 the parental consent statutes had not in any way been construed by any court. In other words, they had not been amended by legislation nor had any court construed the consent statute so as to prohibit certain types of surgery.

So, when you say, "Was there a statute permitting a tubal ligation?"--nor was there a statute permitting the judge to consent to an appendectomy or a tonsillectomy, none of that. But, on the other hand, there was not a statute that said he could not consent to that, he could not issue an approval of such. And, once again, keep in mind, this was not an order.

Q May I ask a question?

MR. FRUECHTENICHT: Yes, you may.

Q Was this petition filed in court?

MR. FRUECHTENICHT: This petition was presented to the judge, Your Honor, and any suggestion that it was not is totally without base.

Q That was not my question. Is there any record in the courthouse--

MR. FRUECHTENICHT: No, sir.

Q --that this petition was ever filed?

MR. FRUECHTENICHT: No, sir, and I would like to respond to that at a later time, but I shall do so now. There has been a suggestion in the Seventh Circuit Court of Appeals that that condition makes it some sort of proceeding. That is not the case, Your Honor. It is true that this does not carry a cause number. But that is not an unusual occurrence. Approvals of documents which are submitted to circuit courts frequently do not carry any sort of a file marking. They are not adversary proceedings.

An example would be in a minor's estate it is customary before a settlement is approved that a petition is prepared. The minor is absent. Presented to the court. And although the thing may be numbered, there is certainly no adversary proceeding, and it is not an adversary cause. It was simply decided in the absence of the minor.

Q But the minor is also represented by counsel too, is he not?

MR. FRUECHTENICHT: No, need not be.

Q Does he not have a committee appointed for him?

MR. FRUECHTENICHT: No, sir. He need not be.

Q How can he be present if he is a minor--

MR. FRUECHTENICHT: His natural guardian, Your Honor, presents in the form of his mother or his father comes to the court and under oath advises the court that she or he thinks that the settlement is proper, and the court approves the settlement. Same way.

Q May I--

MR. FRUECHTENICHT: Yes, sir.

Q May I follow up my question? If there is no record in the court, no record of a date on which this order was entered, how would one have appealed? Assume this young woman had learned about this operation--

MR. FRUECHTENICHT: So far as I know--

Q --earlier rather than four years later.

MR. FRUECHTENICHT: So far as I know, Your Honor, approvals are not appealed because they are not orders. This was simply an approval. There was no appeal.

Q Was this a judicial act?

MR. FRUECHTENICHT: Yes, sir, it was certainly a judicial act. It was presented to the judge as a judge, signed by him as a judge.

Q Suppose the young lady had known on the occasion

what her mother was doing and had objected as vigorously as she could. The judge nevertheless had entered this consent. Would she have had no recourse to appellate courts in Indiana?

MR. FRUECHTENICHT: Of course that did not happen, did it?

Q No. But--

MR. FRUECHTENICHT: But supposing if it had. She would not have had recourse, Your Honor, from the action of the judge. She has sued seven people. One of the defendants is the judge. She would have her state court action, as she possesses today.

Q Wait a minute, you are saying today that she does not have any recourse against the judge.

MR. FRUECHTENICHT: That is correct.

Q So, she would not be able to appeal and she would not have--

MR. FRUECHTENICHT: That is correct.

Q --any recourse--

MR. FRUECHTENICHT: It was simply an approval. This was not an appealable order, and there is no--

Q So, she would have no recourse whatever?

MR. FRUECHTENICHT: Against the judge, no, sir, she would not.

Q Or anybody else?

MR. FRUECHTENICHT: Yes, she would.

Q Whom?

MR. FRUECHTENICHT: Those people who would have presumed to act. Her mother, who had presumed to act. She has retained her state court action.

Q How about the physician?

MR. FRUECHTENICHT: Yes.

Q The surgeon.

MR. FRUECHTENICHT: Yes.

Q But her consent her indemnifies her position in the hospital.

MR. FRUECHTENICHT: That of course is an agreement between the mother and the surgeon, a contract between the two of them. I do not think that that binds the daughter.

Q I would not think so.

Q It does mean that the mother is eventually exclusively liable, does it not?

MR. FRUECHTENICHT: Exclusively liable?

Q Under the indemnification agreement?

MR. FRUECHTENICHT: I suppose it depends upon whether the indemnification agreement is enforceable. I would not prejudge that, Your Honor.

Q I would not either.

MR. FRUECHTENICHT: May I suggest this also, and perhaps I had better stop suggesting and just simply advise what our position is. The facts of the case are known to the

Court. The operation did occur. It was not disclosed to this girl by her mother that it was a tubal ligation. She was told it was an appendectomy. The girl married a couple of years later. And approximately four years after the incident occurred, some time in 1975, through investigation it was disclosed that indeed a tubal ligation had occurred. That is when an action was commenced in the federal district court under 42 USC 1983, in which the mother was sued along with the judge, the lawyer, three doctors, and a hospital.

The opinion of the federal district court is the one which this petitioner feels should be restored because that opinion deals with this problem we think appropriately and correctly in that it appropriately and correctly applies the doctrine of judicial immunity.

The federal district judge, Judge Eschbach, had no difficulty in finding that this, being a court of general jurisdiction, that court being entitled to entertain all types of causes, matters, and proceedings, most specifically undertook this act albeit not in an adversary proceeding--undertook this act with jurisdiction to do so. He acknowledged that it was not an order. It was simply an approval. Approvals occur with frequency. That court summed up I think--well, I would like to read--"Except when there is a clear absence of all jurisdiction over the subject matter, a judge is entitled to complete immunity to suit, based upon his official acts. An

absolute immunity defeats a suit at the outset so long as the official's actions were within the scope of the immunity. The allegedly wrongful acts committed by Judge Stump consisted solely in his approval of the petition filed in this court by Defendant McFarlin. The circuit courts of Indiana are courts of general jurisdiction having original exclusive jurisdiction in all cases of law and equity whatsoever. There is jurisdiction in such a court to hear petitions for tubal ligation, A.L. v. G.R.H. by implication, although the court there held that on the merits the sterilization could not be thus consented to. But whether or not Judge Stump's approval of the petition may in retrospect appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and to act thereon. Accordingly, Judge Stump is clothed with absolute judicial immunity, and neither he nor his alleged co-conspirators may be held liable under Sections 1983, 1985, or under the Fourteenth Amendment."

The case, Your Honors, to which the judge made reference, A.L. v. G.R.H., was a case of first impression in Indiana, decided four years after the judge entered his approval. That is 1975. That case was--

Q After Judge Stump--

MR. FRUECHTENICHT: That is correct, after Judge Stump's approval.

That case was brought because there obviously was a

a question as to whether or not a parent could consent under the consent statute to have a tubal ligation performed upon a minor child. In that case a declaratory judgment action was filed, and Indiana then determined as a matter of policy--the court in Indiana--as a matter of policy that they did not think anybody under any circumstances could be sterilized. It joined a number of other states. But once again that decision--once again--did not remove the jurisdiction from the court of general jurisdiction of Judge Stump to consider further petitions of this type. All it did was say if somebody walked in to Judge Stump today with a petition to have a tubal ligation performed on a minor, he would have to act upon it because he has jurisdiction to act upon it. But his action would be, "I am now aware of the fact that in Indiana there is a policy against permitting parents to do so, and I must tell you that I cannot approve your petition."

But the key to this is that he retains jurisdiction. I have suggested in the brief and suggest to you now the policy which has been established by Bradley v. Fisher, Randall v. Brigham over a century ago and consistently applied by the federal courts down to this time with respect to the application of the doctrine of judicial immunity is similar--at least in my view after reading all these cases--to the policy which is employed by courts when dealing with criminally accused people. And that is the accused is considered innocent

until proved guilty beyond a reasonable doubt. The policy with respect to judicial immunity is that the court is presumed to have jurisdiction until it is shown that he acted in clear absence of all jurisdiction over the subject matter.

Q Then, Mr. Fruechtenicht, if Judge Stump had done what he did in 1966, after the decision of the Indiana court in A.L. against G.R.H., it would have been erroneous as a matter of state law, but it would not have been in the absence of jurisdiction.

MR. FRUECHTENICHT: That is correct.

Q So, your argument would be the same.

MR. FRUECHTENICHT: My argument would be, yes. Under those circumstances, I would simply say that to assume that a judge of this experience under these conditions would do that is beyond at least understanding.

Q And there was no adversary process here, and it might very well be that he did not know of that decision--

MR. FRUECHTENICHT: It might very well be.

Q --if nobody pointed it out to him.

MR. FRUECHTENICHT: It might very well be.

Q But, in any event, if he had done what he did, quite contrary to the precedent of A.L. against G.R.H., your argument would be precisely the same, would it not?

MR. FRUECHTENICHT: Precisely. And I would say this with respect to the liability, Your Honor, of those additional

parties, that under those circumstances then the mother must be construed to be dealing at her peril, as the doctors, because they are presumed to know the law also.

Q Counsel, is there not a difference between this proceeding and the G.L.--whatever the initials are--the other case?

MR. FRUECHTENICHT: Yes.

Q That was a suit or a declaratory judgment in which counsel--a guardian was appointed and counsel--

MR. FRUECHTENICHT: Correct.

Q --and it was an adversary proceeding. There was clearly jurisdiction to entertain such a suit. This is a petition for approval where there was nobody appointed of any kind. You say approvals are common. Would you give me some other examples of approvals. I am just not that familiar with them.

MR. FRUECHTENICHT: I have given you the example whereby a parent will come into the court and simply petition the court that he wants a sum of money approved by the court as being reasonable to take care of the minor's injury based upon the parents--

Q That is ancillary to a pending case.

MR. FRUECHTENICHT: No, that is ancillary to settling a case. The case may not even have been tried. Frequently they are not. A minor is run over by an automobile, suffers a

broken leg, $2500 is agreed upon; it goes into court, the minor never even shows up. Approvals as far as--you are getting at, I think, Your Honor, the failure to appoint a guardian ad litem for this girl. I must suggest that in every case where a mother decides to sue her husband and where there are children, those children automatically through the mother come under the aegis of the court, and he makes dispositions of those children's future interests which are extremely important to that child. To suggset, as I think maybe the logical inference of the suggestion that guardians ad litem ought to be appointed--to suggest that in each case where a child is the subject of a matter having to do with visitation and custody and its future religious practices in a divorce action, that that child, each individual child, is entitled to a guardian ad litem and presumably an attorney would boggle the entire system. Courts customarily assume jurisdiction over the children under those circumstances.

Q Is it your position that the state legislature has appointed the natural parents as the guardian ad litem--

MR. FRUECHTENICHT: That is correct.

Q --for minor children?

MR. FRUECHTENICHT: That is correct, Your Honor, in many instances.

As an example also--and I pointed it out in the reply brief--when underage people come before or come--they want to

get married and they are under the age of consent, they can go before the circuit court judge either by written or oral petition, and he can approve that under-age marriage. There is no file marking.

Q That is by statute, is it not?

MR. FRUECHTENICHT: Yes, sir, there is a statute which provides--

Q But there is no statute here.

MR. FRUECHTENICHT: Your Honor, that simply establishes the fact that a judge can function under many, many general circumstances, absent what we would consider to be the formality of an adversary proceedings.

Q That is what puzzles me. You say these approvals, ex parte approvals, are common. But each example you give is related to some more or less traditional judicial proceeding. If the judge's view of the law were correct here, his approval probably was not necessary.

MR. FRUECHTENICHT: That is correct. That is correct. All I can do is surmise--we have had no evidence in this case, Your Honor--surmise that this is the context in which Mrs. McFarlin and her attorney determined that they wished this consent to be made. They wished the court to approve it.

Q Perhaps the doctors insisted upon it.

MR. FRUECHTENICHT: Perhaps. There is no evidence of that. Perhaps.

Q Are you saying, if I followed the last question and answer, that it would have been unnecessary for the judge to enter evidence of his consent--the consent of the mother would have been sufficient under Indiana law?

MR. FRUECHTENICHT: A careful reading of these statutes, Your Honor, does not--these statutes with respect to consent by the parent do not confer jurisdiction upon the court. These are not jurisdictional statutes. They simply permit the parent to consent to surgery. And so the answer to your question would be yes.

Q Does that not leave the court in a position of performing only a ministerial act?

MR. FRUECHTENICHT: I do not think so, Your Honor.

Q What judgment does he make?

MR. FRUECHTENICHT: There was a verified petition presented to him. This is a very careful and conscientious judge. This mother was faced with a very real situation, at least in her lifetime. And he made a determination that it would be for the best interests of the child that this occur.

Q Is there any evidence of that?

MR. FRUECHTENICHT: There is the evidence of the verified petition, Your Honor.

Q I have read the petition. It said very little.

MR. FRUECHTENICHT: What it did say it at least said. Remember, this is a county of 30,000 people--

Q We do not know whether he made any independent inquiry of any kind.

MR. FRUECHTENICHT: We do not know that he did not either, Your Honor. I would presume that he did because of the fact that he has jurisdiction to do so by the general jurisdiction statute.

Q But we cannot act on your presumption.

MR. FRUECHTENICHT: I beg your pardon, sir?

Q Do you think we can act on your presumption?

MR. FRUECHTENICHT: I would prefer.

Q Did he take testimony?

MR. FRUECHTENICHT: I do not know.

Q Do you not think if he had taken testimony, somebody by now would have said so?

MR. FRUECHTENICHT: The testimony, if he did, would be by way of a verified petition, Your Honor, which he has a right to accept as proof.

Q My brother says that there might be some more. I mean, for example, a child might have done nothing in the world wrong. Is that not a possibility?

MR. FRUECHTENICHT: Your Honor--

Q Is that not a possibility--

MR. FRUECHTENICHT: Of course it is a possibility.

Q --so far as the record in this case is concerned?

MR. FRUECHTENICHT: Of course it is a possibility. I

must repeat, the issue with which we are confronted is whether or not the doctrine of judicial immunity should be applied to this act. And if there is jurisdiction on the part of this judge to entertain and approve this petition, it being a judicial act, then he is clearly entitled to the application of the doctrine. The policy reasons underlying that particular doctrine are most important to the continuation of the fearlessness ab out which the cases like Bradley v. Fisher talk about.

Thank you, Your Honor.

Q Are there some states, if you know, which require that on an application for sterilization that the panel of physicians must be designated to advise the court?

MR. FRUECHTENICHT: Indiana will not permit it at all. But I think Illinois does, Your Honor. Sterilization is permitted, I believe, in Illinois under these specific statutory circumstances.

MR. CHIEF JUSTICE BURGER: Mr. Finley.

ORAL ARGUMENT OF RICHARD H. FINLEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FINLEY: Mr. Chief Justice, and may it please the Court:

Your Honors, I believe that the questioning today indicates what is truly the crux today, and that is that probably the doctrine of judicial immunity need not come into

play in your decision. The question asked by Mr. Justice Powell--Was this not merely an administrative act, as discussed in Ex parte Virginia, and non-judicial act, as discussed in several lower court, federal court cases?--probably is going to be the correct and the logical determining decision in this case.

The consent statute which authorized the parent to consent to surgery of a minor child clearly can be read only in the terms of common sense necessary surgery. Certainly sterilization on a petition, as filed by the mother in this instance, is not necessary surgery. There is a long line of cases which has developed on the kidney transplant cases, for example; but a parent just does not have the power to consent to non-therapeutic, non-beneficial surgery.

Q You would not make the rule of judicial immunity turn on whether the judge reached a correct conclusion as to whether the surgery was necessary, would you?

MR. FINLEY: No, Your Honor, I would not. I would have the decision be that the judge never made a judicial decision. If the case had been properly presented as in A.L. v. G.R.H., a case was filed with the court, a guardian ad litem was appointed to represent Linda, if attorneys briefed and prepared arguments on each side, and the court made a determination that we will allow sterilization under Indiana and common law as it exists today, then I would say in that

instance, Your Honor, that the judge made a mistake but he is entitled to immunity for his action because he had subject matter--and I honestly also believe--personal jurisdiction--

Q Are you saying that the principle of judicial immunity does not apply to an ex parte decision by the judge?

MR. FINLEY: Yes, Your Honor. I cannot imagine an ex parte decision without some case or matter being properly in front of a judge. The examples given by Mr. Fruechtenicht were ex parte, but the judge had in front of him some case which--

Q Then you are not saying that judicial immunity does not apply to an ex parte decision. You are saying he must have a case before him--

MR. FINLEY: Yes, I--

Q --albeit perhaps it may be decided on an ex parte basis.

MR. FINLEY: Yes, Your Honor. In that sense, that is how I was using--

Q You would not rule out the historic power of a court of equity to enter an ex parte injunction, would you?

MR. FINLEY: No, Your Honor. But in the injunction or TRO, temporary restraining order, circumstances the statutes always provide for notice.

Q There is no adversary proceeding there, is there?

MR. FINLEY: No, but notice is--I have never seen a

statute authorizing temporary restraining orders of that type of action, and I have never seen an action outside of a statute in an equitable nature where notice is not given to the party whose property is being restrained or taken away, so that afterwards the party's rights are preserved.

Q In a temporary restraining order? Certainly the state where I practiced in which I followed the federal rules up until the mid-sixties, when those rules were amended, you could get a temporary restraining order without notice to the adverse party. It had to be returnable in three days. But you could get it without notice.

MR. FINLEY: Yes. But generally speaking, Your Honor, I would submit that in that instance, when it was returnable within that three days, before it was made permanent, the party had a right to appear and present his side of a story, assuming that there was an issue on which he wanted evidence presented.

Q What about an improper, wrong decision on the temporary restraining order which was not noticed and the adverse party did not have notice of, that can be cured by the time it is returnable and you have your hearing on the preliminary injunction?

MR. FINLEY: That is a tough question, Your Honor. My inclination would probably be to say that I would like some kind of qualified immunity if it were a good faith--

Q What about issuance of a search warrant where there is no criminal case pending, just an investigation?

MR. FINLEY: Again, upon the issuance of that search warrant the criminal defendant, if he ultimately becomes one, he is going to have the chance in court to see-

Q There may never be any case.

MR. FINLEY: If no case is filed, he is probably not going to be permanently deprived of any right.

Q The officers came into his house, and he claims illegally. And he sues the judge for a gross error.

MR. FINLEY: I do not believe it is a gross error. I think it is a mistake. I think the judge--

Q You think to make a case out of it all the judge has to do is make it a case? He puts a number on it and puts it in the file?

MR. FINLEY: I think that that goes a long way toward making it a judicial act, which under the--

Q If the judge here had said, "I think I had better appoint a guardian ad litem before I pass on this" and they did and he gave it a number and the guardian ad litem came in and opposed it and the judge says, "I am going to grant it"--

MR. FINLEY: There would be immunity.

Q --would there not be immunity?

MR. FINLEY: Yes, Your Honor, I think there would be immunity there under the statutes as--

Q He would have had jurisdiction then to--perhaps mistakenly--but jurisdiction to--

MR. FINLEY: Yes, Your Honor.

Q --to issue the order?

MR. FINLEY: Yes, Your Honor.

Q Mr. Finley, have you not given your case away? Because if I understand you, the petition which was filed did give the judge the power, if he had thought it the wise procedure, to appoint a guardian ad litem. Could he not have done that on the basis of this petition and said, "I will treat this as a complaint for declaratory judgment and appoint a guardian"?

MR. FINLEY: No, Your Honor, I do not believe I have given the case away because a petition was never filed. There is no file--

Q You rest on the lack of a number?

MR. FINLEY: I rest on the total lack--not just--if you are going to draw a line and say--

Q Let me ask you this question. Had this very same petition, this very same action, been filed and taken, except it was filed in court and a number was put on it, would your case then be gone?

MR. FINLEY: My inclination is to say that probably it would be. But that question is not in front of us because in this instance, Linda Sparkman was given absolutely no case.

There was absolutely no--

Q I know, but my assumption is that she still does not get notice and the same unfortunate consequences all follow. My inference is they put a copy in the clerk's office.

MR. FINLEY: Your Honor, at that point I would say that probably a judicial act occurred, and then it would be necessary to determine if under our law of judicial immunity as established by Randall and Bradley and Pierson allows for a determination of jurisdiction with just subject matter or also personal jurisdiction, a determination without the presence of personal jurisdiction. My feeling is that the language used in each one of these three cases, although in Bradley v. Fisher they used the term "subject matter jurisdiction," they really mean personal jurisdiction because in each of the instances, personal jurisdiction was present.

Q What do you mean by personal jurisdiction?

MR. FINLEY: Jurisdiction over the persons so as to preserve that person's right of appeal before the total deprivation of his due process rights.

Q That answer does not necessarily make a good deal of sense to me. Perhaps it is my fault rather than yours. If the person has a right to appeal from the order, even though he may be outside of the state and never have been served with process or in the state and never notified of it, does that by your definition confer personal jurisdiction?

MR. FINLEY: No, I would say that it does not. I would say that the same basic right to appeal is going to be preserved if he had knowledge. So, I think you are correct, Your Honor, in saying--

Q Mr. Finley, let me give you one other case that has been turning over in my mind. Supposing the allegation in the petition, instead of being that she was retarded and promiscuous, had rather been that she was infected with a malignant cancer and that a medical judgment of a doctor was that it should be removed by this procedure, and then the judge did exactly what he did here and acting in all good faith, thinking he was right, they did not appoint a guardian, he did not file a paper in court, he did not do anything else. But later on it turns out they were wrong. Would he be liable?

MR. FINLEY: I would say, Your Honor, that it would probably have been technically not a judicial act; and probably technically under my theory there could, if one could show damages, be a cause of action--

Q Your answer is yes.

MR. FINLEY: --against the judge.

Q That leads me to wonder--I think this is relevant to your immunity argument. If we agreed with you and the case went forward, are you not going to have to--in showing damages--are you not going to have to show that his act was really sort of an important factor in this procedure and that perhaps the

doctor required a judicial consent or that it really was instrumental in producing these consequences?

MR. FINLEY: I think it would be incumbent upon us in trial to convince a jury that the judge had had some reason beyond the normal judicial reason for doing what he did.

Q Also that the judge's action was a proximate cause of the operation.

MR. FINLEY: Yes, Your Honor.

Q Why do you suppose anybody went to the judge?

MR. FINLEY: I believe--

Q Because the doctor wanted it or what?

MR. FINLEY: --because the doctor. I think the facts--

Q So, the doctor required a judicial act?

MR. FINLEY: I think the doctor wanted the protection of an instrument signed by a judge. I think that Linda, the facts would show, was in the hospital a few weeks earlier, supposedly for the purpose of having her appendix removed and then was discharged.

Q At least the parties who were acting here wanted a judicial act, something that would pass for one.

MR.FINLEY: They wanted a piece of paper with the judge's name on it, I believe.

Q And sometimes that is a judicial act, is it not?

MR. FINLEY: I think it can become a judicial act if the judge treats it as such. But where the judge did absolutely

none of the things that a judge does, when particularly deciding contrary to the rights of an individual, it is no longer a judicial act.

Q What about a TRO then? A TRO may impede a very important act because there is damage to someone. And whether the particular court jurisdiction requires a three-day return or a five-day, nevertheless the TRO could be granted on the same kind of representations and petition as was presented here, could it not?

MR. FINLEY: It would be filed in court, Your Honor. It would be filed in court and would ultimately become the basis of an appeal, could become the basis of an appeal, whereas when it is done in total secrecy, there is no way--

Q The TRO, whether you call it total secrecy or in chambers or ex parte, a TRO is usually entered that way, is it not? You go in to the judge in chambers and you present an affidavit and an order. And if he is persuaded by the affidavit and the representations made, he will perhaps restrain some act that causes someone a great deal of damage.

MR. FINLEY: But, Your Honor, a temporary restraining order is that, temporary. It is not--

Q Yes, but it might be fatal. Suppose it is a temporary restraining order that restrains the giving of a blood tra-sfusion to a member of Jehovah's Witnesses and the patient dies as a result of it in the three-day period. That

is pretty permanent, is it not?

MR. FINLEY: I would think, Your Honors, that is clearly a--

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

[A luncheon recess was taken at 12:00 o'clock noon.]

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AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Finley. Before you do, let me give you a corollary to the question I put at the noon break. I think there I had a man, a Jehovah's Witness, in the hospital who declined--there was an injunction to enjoin the giving of a blood transfusion, and he died. Suppose you have the opposite. The hospital petitions for authority to give the blood transfusion in order to save the man's life. And the judge having jurisdiction, let us assume for the moment, generally issues the order requiring him to take the blood transfusion. That would be a battery, I assume, would it not?

MR. FINLEY: Yes, Your Honor.

Q If you had the kind of situation you have here as to jurisdiction, immunity or not?

MR. FINLEY: I would think that there would be immunity had the matter been properly petitioned and filed in the court of the judge who made this order.

Q No, this is an ex parte--

MR. FINLEY: Even without a filing in court.

Q A transfusion is given an hour after the paper is presented to the judge and the judge has it in his pocket. It is not filed in the clerk's office at all.

MR. FINLEY: But it is contemplated that it would be filed. I would say if it was contemplated that it would be

filed, my inclination would be, say, in that instance that there would be immunity since I would at that point think it was probably a judicial act. I think that differs from the instant case because there was no contemplation, I believe, Your Honor, in a filing of the case in Sparkman's court. I think that that goes to the real basis of the justification for the doctrine of judicial immunity as this Court has previously set it.

In 1967 when this Court I think last considered judicial immunity in Pierson v. Ray, it indicated that they realized that immunity was a necessary fact for a judge in order to be able to act. But this Court also recognized, as it recognized in Bradley and in Randall that there is a counter-balance inherent within the judicial system that protects the litigant, and that is the right to appeal.

Q How do you distinguish your colleague's example of the settlement of a minor's personal injury claim, which I think takes place fairly often, in most states where the minor's case has not even been filed say against the automobile driver or the train company, but a settlement has been reached and the court is simply called upon to approve a settlement?

MR. FINLEY: I think, Your Honor, in that instance there are specific rules and specific statutes authorizing the judge to approve of a minor's settlement in that type of instance, whereas in our case there was no statute authorizing--

Q Those are two different kinds of distinctions. One is you are saying that there was no subsequent authorization for the judge to act the way he did, and the other is you are saying there really was not even any judicial act or case before it.

MR. FINLEY: In the instance of your example, I think there was a case presented to a judge although in a manner outside of a filing perhaps. Something was filed in his court. I am sure he spoke through the court's record when he approved of the settlement. At least in our state the court would have spoken through its record at that point.

Q Would it have been filed?

MR. FINLEY: In the instance that Mr. Justice Rehnquist--

Q The case where it has not reached court yet.

MR. FINLEY: Still the court would--

Q When the settlement is made, is that filed in the court? Because my next answer is, Filed under what?

MR. FINLEY: I have only handled one, Your Honor.

Q Those are not filed.

MR. FINLEY: In the State of Indiana I have only handled one, and I did file it in the circuit court. I titled it "In Re the Settlement of Minor Child So and So." It was filed in court, and the court on a docket sheet made a record.

Q That brings me to the other point. What about

the petitioner's point that he did not need to sign this at all?

MR. FINLEY: My feeling is that probably--

Q Can you not do better than your feeling?

MR. FINLEY: I think the law is that the decisions to date assert there must be a judicial act.

Q Is not the law that an operation of a minor is controlled by his parents?

MR. FINLEY: I would say that the law in the State of Indiana is that a parent may consent to necessary surgery of a minor; but, Mr. Justice Marshall, I would submit that this was not the type of necessary surgery--

Q Do you have a statute or a case or what? Nobody seems to have a statute or a case that says yes or no on this point.

MR. FINLEY: I would say that A.L. v. G.R.H., which was decided in 1975 by the Indiana Court of Appeals sitting en banc says that that statute does not given a parent the consent that the authority could consent to a sterilization on a minor.

Q But the general one is still true?

MR. FINLEY: The general statute is still true.

Q Tonsillectomy, for example.

MR. FINLEY: Tonsillectomy--I would have no question that a parent could consent to a tonsillectomy of a minor child

because that is necessary surgery.

Q An there is no intervention of a court or a judge or anything else in that?

MR. FINLEY: That is right. It need not go to a court.

Q So, the judge in this case assumes that what he is doing is just perfunctory. But he assumes that he has authority to do it.

MR. FINLEY: I do not know. I would assume that he assumed that he had authority to do it.

Q I assume that he did. I am not drawing any meaning from whatever I say--I thought the judge thought he was doing just what was right. And I still do not know that it was wrong.

MR. FINLEY: But the manner in which it was done in a non-judicial--

Q But your only complaint is he did not file it.

MR. FINLEY: Not only that he did not file it--

Q What else?

MR. FINLEY: --that he did not appoint a guardian ad litem to represent Linda.

Q Like he did in that other case.

MR. FINLEY: That he did not make any record of his approval, that he did not let his approval be known to Linda so that she could appeal the act--appeal the approval and

prevent the act of permanent sterilization from being performed.

Q When he grants that consent of the mother, who is by law the guardian ad litem, has he not given constructive notice to the minor?

MR. FINLEY: Your Honor, in Indiana, Trial Rule 17, the Indiana Trial Rules state that a guardian ad litem--that a natural parent in effect is the guardian ad litem. This is an extrapolation of what the statute says. If the interest of the guardian ad litem would be contrary, then the court must appoint a new guardian ad litem to represent.

Clearly when a mother, on extremely untutored--to say the least--allegations that her child may be somewhat retarded although progressing normally through school--when she turns to a court and makes these types of allegations, clearly she is no longer acting in the best interest of her child.

Q What you are saying then, are you not, is that the judge made a judicial error? He did not have that law or rule that you refer to in mind.

MR. FINLEY: I cannot believe that it was a judicial error when he did nothing that a judge does. It was an error in an administrative capacity perhaps because I think if the judge knew of this statute, the consent statute, and he felt that he was following the consent statute dicta or demand, then it was not necessary for him to do anything. And his signature on that piece of paper was a nullity. There was no reason for

it to have even been there.

Q How is your client injured?

MR. FINLEY: As a result of the judge's actions?

Q Yes.

MR. FINLEY: Because the judge I think conspired--and our allegations are such in the complaint--he conspired with these others to hide the fact from Linda. I think that a judge sitting on a bench--

Q I am not so sure you have any right to charge him with conspiracy at all. You do not know whether he saw anybody.

MR. FINLEY: Well...

Q Do you?

MR. FINLEY: Factually it is not in the record because we have never had a trial, Your Honor.

Q That is right. So, I do not see how you can call it conspiracy. You have got to have people.

MR. FINLEY: I think we could show it, if there were a trial, that there was a conspiracy.

Q Can we not decide this case without using words like that?

MR. FINLEY: Yes, sir.

Q Mr. Finley, you bother me somewhat with your distinction between necessary and unnecessary surgery. What about cosmetic surgery? A child has a disfiguring facial scar.

It is not necessary. Would you say a mother cannot consent to this? What about ear piercing these days? And when you say tonsillectomy is necessary, I question it. There is an awful lot of madical opinion these days that in certain cases tonsillectomy is not at all necessary.

MR. FINLEY: Mr. Justice Blackmun, I appreciate determining what is necessary surgery is sometimes difficult. Again I would go back probably to the discussions of the kidney transplant cases. Is it necessary to have a kidney transplant, let us say, from identical twins when doctors might testify that the twin who does not receive the transplant will die but that the twin who is asked to give up a kidney to save his twin brother is not benefited. Courts have--and I frankly do not agree with the decisions--in all but one instance that I have been able to find, courts have said that that is not necessary surgery. So, I think that a court can look factually--maybe through psychiatrists' testimony--as to what the cosmetic surgery might do for the benefit of the child who needs it or on whom it is sought to be performed. Perhaps psychiatrists could testify as to the beneficial nature to that child. But I think in the example, the instant case, clearly anybody could see that sterilization is not beneficial or therapeutic or necessary in order to prevent Linda Sparkman from having children. There could have been other things done if in fact that were the desire--

Q Did I get the impression from something you said that this consent, approval of the judge, really was not necessary at all?

MR. FINLEY: If one were to take the analysis of the petitioners that the consent statute authorized the mother to consent to the sterilization of her child, then arguably it could be said that the judge never even had to be petitioned. There is the other side to that story again under Trial Rule 17. Once it was submitted to the judge, he as a judge, I would assume, would owe a duty to then proceed to protect the rights of Linda Sparkman, whose natural guardian clearly was requesting something contrary to her rights.

Q Would you cast that in terms of a judicial duty, he had a judicial duty to do that?

MR. FINLEY: I would think so. But I think he completely evaded it and did not treat it in any sense. Witness the fact he did nothing to protect Linda. He did what he did in total secrecy. It can be shown and will be shown factually, if we ever get to that point, that he had lots of opportunities to tell Linda Sparkman that she was sterilized, and he never took those opportunities.

If I may just very brief--

Q Mr. Finley, just pause there. Supposing he had taken all of those opportunities, would that have made this a judicial act?

MR. FINLEY: No. No, because I think at that point it is much too late. But all I am saying is that I think maybe you can infer from the opportunities at the end what his real intent was, and that was evading the judicial act nature of it from the beginning.

A judge owes a duty to protect the people brought in front of him just as much as he owes a duty to penalize the people brought in front of him. But getting back to the rationale--

Q Do you concede people were brought in front of him?

MR. FINLEY: No, if they were. That piece of paper said "Linda Sparkman" on it. And he must have read it before he signed it. If he had been acting as a judge--

Q Supposing he spent a couple hours in his chambers with the lawyer and said, "Do we really have authority to do this? Is it really appropriate for me to do?" and they talked it over and they looked up the law and they spent a time doing that; then they said, "Do you think we ought to give notice?" and he says, "No, it really will not help because she is retarded" or whatever he said; they talked it all through and he nevertheless entered the order. It would still not have been a judicial act?

MR. FINLEY: I do not think it would have been a judicial act, and I know it would have been clearly outside of

any jurisdiction he might have had. The Indiana law did not permit--getting back to the consent, and I think this is important and I have not mentioned it to date and petitioners have not--there were statutes on the books in Indiana in 1971 authorizing sterilization of institutionalized individuals.

Q But this is not an institutionalized individual.

MR. FINLEY: That is precisely what I am saying. And through statutory construction--and the Seventh Circuit so held in this case, and I think it is common statutory construction in law, that through the express permission, sterilization of certain of its citizens--Indiana is saying that you cannot sterilize other citizens.

Q Are you saying that there is no way under the law of Indiana where, had there been good grounds to do so, this child could have been sterilized?

MR. FINLEY: In 1971 the only way that this child could have been sterilized is if she were an institutionalized, mentally retarded child and if the procedures were specifically followed--

Q Even if she had fatal cancer in her tubes?

MR. FINLEY: I would say that in that instance I would go around the statute, no matter what it might say, and--if I were a judge--and order the sterilization.

Q But you think that the law would never permit it under any circumstances. I just wonder if that is right.

Judge Eschbach did not think that. He is a pretty good Indiana lawyer.

Q He practiced in Indiana for a number of years before taking the bench, did he not?

MR. FINLEY: Judge Eschbach, I recognize, felt that also what you are saying--that did not--

Q And really the Indiana case you cite does not say that. That says the particular reason given there was insufficient even though the parents sincerely believed that it was--

MR. FINLEY: In 1975 when A.L. v. G.R.H. was decided--

Q But that case does not hold it is never permissible.

MR. FINLEY: Your Honor, the other statutes were removed from the books by that time. They were no longer on the books.

Let me say, getting back to Judge Eschbach, he also said, Mr. Justice Rehnquist, that the consent statute referred to here did not authorize the parent to consent to it. He said it was derogative of common law and--

Q But he thought he was talking about substantive Indiana law, which really is not the question we are talking about. You said Judge Stump had jurisdiction to consider the petition, and that was all it took to confer immunity. Is that not what Judge Eschbach at any rate said?

MR. FINLEY: Yes, Your Honor. I believe that that is what Judge Eschbach said. But I do not believe that that is a correct analysis of the prior Supreme Court decision which preserved the right to a litigant to appeal. And the manner in which the sterilization was approved by Judge Stump totally destroyed and intentionally destroyed any right to appeal.

Q Essentially then we must disagree with Judge Eschbach to hold for you?

MR. FINLEY: Yes, Your Honor.

Q On the Indiana jurisdictional question.

MR. FINLEY: I would say so, Your Honor. There are other ways in which it could be decided; 42 USC 1988, which says that state law should be applied rather than federal law on immunity. And I think it is clear that state law in Indiana of immunity is that a court, before he has jurisdiction, must have subject matter and personal jurisdiction. And again I think it is clear from the fact in the instant case that the judge had no personal jurisdiction even though he might--I would not concede it, but he might argumentatively--have subject matter jurisdiction.

Q In Pierson v. Ray we certainly did not look to Alabama law rather than federal law in deciding whether judges had absolutely immunity.

MR. FINLEY: No. I think that as I understand it, the federal law is--in Lynch v. Johnson, Monroe v. Peyton--all say

that federal law applies, generally speaking. But if the state law is more protective of the rights of the individual, then I think it is questionable under 1988 if perhaps the state law is not the law of judicial immunity which is to be applied.

Q Mr. Finley, I am sorry, but I just have to ask one other question. You said it is clear they do not have personal jurisdiction in this case. But how did they get personal jurisdiction in A.L. v. G.R.H.?

MR. FINLEY: Guardian ad litem was appointed.

Q What you are saying is that there was no personal jurisdiction until a guardian was appointed?

MR. FINLEY: That is right, Your Honor.

Q But if there had been a guardian appointed, then there would be jurisdiction?

MR. FINLEY: No question. Had Judge Stump had a case ad he appointed a guardian--

Q Did he have jurisdiction to appoint a guardian ad litem?

MR. FINLEY: Yes. If he had assumed it in a judicial manner, ultimately he would have gone far enough down the road to have had jurisdiction to appoint--in fact, not only jurisdiction, the responsibility to appoint a guardian ad litem. But he avoided all this.

Q Is not your response equivalent to saying that he made a judicial error in not appointing a guardian ad litem?

MR. FINLEY: No, because I do not think he got far enough down the road, Mr. Chief Justice. He did nothing from the very beginning in order to assume jurisdiction. I do not think that a court--

Q He signed an order.

MR. FINLEY: He did not sign, Your Honor, an order.

Q You call it a piece of paper. He signed something approving or else if he did not sign anything approving it, then he should not be in this case at all.

MR. FINLEY: That is right. I agree with that, Your Honor. But to logically follow--if I understand where you are getting now--to logically follow that would be to say that any judge of a court of general jurisdiction can do through an approval--not a court order or call it a court order if you want--can do absolutely anything without denying himself immunity. He need not open a case. He need not file stamp anything. He need not appoint a guardian ad litem. He can do it in secrecy and he can do it with intent to deprive the person whose rights he is considering the right to appeal.

Q Is there any Indiana statute accompanying the one that you have been referring to in the arguments here that provides that if the interests of the minor child are adverse to those of the parents or the parents to the minor child, then the statute is not applicable and the guardian ad litem must be appointed? In other words, is there any law of Indiana that

required him to appoint a guardian ad litem?

MR. FINLEY: I would say that Trial Rule 17 required him to appoint a guardian ad litem if he had a case in front of him that showed a litigant's rights were being challenged.

Q Was that not the A.L. case or whatever it was?

MR. FINLEY: I think A.L. v. G.R.H. clearly--it did not address itself to that question because it met it in the proper manner to begin with. It did appoint a guardian ad litem to represent the interests of the child. And I think that that is the only way a court can properly act. Otherwise I can imagine no instance, no matter how gross you want to make it--the amputation of one's head is not within the arguable general jurisdiction of a court or subject matter jurisdiction of a court.

Q We are talking about something quite different from that. Suppose it was a 17-year-old girl who was a Christian Science convert and protested against surgery. Could the parents consent to having her appendix removed?

MR. FINLEY: I would think that the court would have jurisdiction to hear that case, look at--getting back to Mr. Justice Blackmun's questioning--look at the reasons behind the request, determine if, under the Indiana statute of a parent having the power to consent to necessary surgery, to look at it and look closely; and if he made an error, he is still entitled to immunity. There is no question because he

has done something that a judge does after he has assumed jurisdiction in a judgelike manner. But comparing it again with the fact situation that we have got, that analogy does not even come close because--

Q Did he not think he was doing judge's work?

MR. FINLEY: No. I do not--

Q This is a judge in a rural community, is that not right?

MR. FINLEY: You have heard--

Q And is it not true that in most rural communities--I do not know about Indiana, but I have been in quite a few--that people just drop in out of the street and chat with the judge? Is that not right?

MR. FINLEY: Yes, Your Honor, they do.

Q In in this, in order for him to lose his immunity, does he have to say, "I am acting as a judge" or "I am not acting as a judge"?

MR. FINLEY: He has to act as a judge in order to protect--

Q I mean, is it not in his mind? It is he that is the one that is seeking the immunity.

MR. FINLEY: Mr. Fruechtenicht began at the very beginning explaining that Judge Stump is an experienced judge. He has been there a heck of a long time, and he had been. He knew--

Q There are plenty of experienced judges who have made mistakes.

MR. FINLEY: Your Honor, if this were a simple mistake after had assumed jurisdiction or if there had been arguably subject matter personal jurisdiction--

Q Did he not think he had assumed jurisdiction?

MR. FINLEY: I do not think he thought he had jurisdiction.

Q You do not know one way or the other though.

MR. FINLEY: I know Judge Stump fairly well, and I doubt very seriously if he thought he had jurisdiction. I think he probably thought that this girl should be sterilized.

Q Why did he sign and say that he was a judge? Does it not say that?

MR. FINLEY: He did not type that.

Q But he signed it, and I assume he read it. And nothing you say will contradict my assumption he read it.

MR. FINLEY: I assumed he read it also. And I assumed that when he read it, he saw that the right to procreate in this girl, one of our basic constitutional rights, was being taken away. And he as a judge knew that the statutes of the State of Indiana required him to do lots of things if he was going to act as a judge. And he did not do one of those things that the statutes of the State of Indiana require him to do.

Q You would make that argument, I take it then,

whether he had jurisdiction to enter this order or not.

MR. FINLEY: Yes, Your Honor, I would because I think--

Q Judge Eschbach said he had jurisdiction, but you would say that even if he did, he did not act as a judge: He did not do any of the things that a judge would do.

MR. FINLEY: Your Honor, as a predicate to the doctrine of judicial immunity--as this Court has always stated it, as it was stated in England in the 1600s--it must be a judicial act taken within the judge's jurisdiction.

Q And you also say he had no jurisdiction.

MR. FINLEY: I also say that he had no jurisdiction. I agree with the Seventh Circuit's analysis.

Q Would you say--just so I get your position--suppose the statutes of Indiana said, "No district judge shall have any jurisdiction whatsoever to approve or purport to approve a sterilization."

MR. FINLEY: Yes.

Q And then a petition is filed with a judge. The judge looks at it. He gives it a number. And he approves it. It is utterly wrong, and he should have known he was wrong. Immunity or not?

MR. FINLEY: No immunity. That would be Wade v. Bethesda.

Q Yes.

MR. FINLEY: I think clearly it is in violation of a subject matter jurisdiction, as most liberally defined, and no immunity. But here that question need not be reached. If it were reached, I would still say that all three of the Supreme Court cases previously decided would deny immunity. If not, then, as I said earlier, any judge of general jurisdiction can do anything. And that cannot be justified with the previous rationale granting immunity.

And if I may say one further thing, the last case that this Court decided I think in giving blanket immunity to prosecutors in Imbler v. Pachtman is not contrary to what I am saying because again the Court was very careful in pointing out that what that prosecutor did was within his prosecutorial function. And what Judge Stump did was in no way within his judicial functioning. He completely overlooked--and intentionally so--his judicial functions. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

[The case was submitted at 1:29 o'clock p.m.]

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