ORIGINAL

In the

# Supreme Court of the United States

ROBERT MICHAEL FUNGAROLY,

APPELLANT

V.

JUDITH DIANE FUNGAROLI,

APPELLEE

No. 79-492

Washington, D. C.
April 16, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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| ROBERT MICHAEL FUNGAROLI, Appellant | : | |
| v. | : | No. 79-492 |
| JUDITH DIANE FUNGAROLI, Appellee | : | April 16, 1980 |

The above-entitled matter came on for oral argument at 10:13 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
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:

JOHN F. MORROW, ESQ., Suite 325, NCNB Plaza, Winston-Salem, North Carolina, 27101; on behalf of the Appellant

B. ERVIN BROWN, II, ESQ., Suite 315, NCNB Plaza, Winston-Salem, North Carolina 27101; on behalf of the Appellee

C O N T E N T S



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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Fungaroli v. Fungaroli.

Mr. Morrow, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN F. MORROW, ESQ.,

ON BEHALF OF THE APPELLANT

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

We are here this morning arguing a case to the effect that a North Carolina alimony-type Statute, specifically stating in the Statute that notice to the defendant is not required of temporary alimony hearings, is unconstitutional.

QUESTION: Mr. Morrow, may I ask you, your Opponents claim that you did not raise that as a Federal Constitutional Fourteenth Amendment claim in the North Carolina Courts; and my own reading of the Opinion of the Court of Appeals for North Carolina indicates that they say you said it was invalid, as not giving notice of the hearing; they don't mention any federal case or federal constitutional provisions.

Did you before them or before the Trial Court put an issue on federal constitutional grounds of this provision?

MR. MORROW: Now of course, we were not before the Trial Court because there was no notice of the hearing. I was not the counsel at that time by the way.

QUESTION: OK, how about the --

MR. MORROW: But yes, we did raise it on appeal, I think that our assignments of errors and our Brief before the North Carolina Court of Appeals will clearly show you that. The Court of Appeals, I simply contend to you ignored the issue, as did the Supreme Court of North Carolina, when they ruled it to be a frivolous appeal.

In North Carolina, of course, if you have a constitutional issue, you supposedly have an appeal as a matter of right to our Supreme Court.

QUESTION: -- is a frivolous issue, or is it that the appeal raised no constitutional questions. Which was their holding?

MR. MORROW: The way I understand the ruling is that it was a frivolous issue. The question was there. But as they looked at the case, the question really wasn't there.

QUESTION: Is there a time limit, either under the Rules of the Court or the Statute for the period in which that temporary order can be extant, without notice?

MR. MORROW: For a period of -- I'm sorry.

QUESTION: Is there a time limit? Thirty days?

Sixty days?

MR. MORROW: As to how long the order is good?

QUESTION: That's right.

MR. MORROW: Absolutely not. In other words --

QUESTION: Many courts, for example on temporary restraining orders have a return day when it must be returned or the court imposes a return day.

MR. MORROW: We try to discuss that in some detail in our Brief; to point out to you that the order is entered; and then at that time, whenever the defendant is notified, it's up to him as to whether or not to go to court; and with the burden of proof to try to set that order aside; that is, the order issued under the Statute which we are attacking.

QUESTION: For our purpose, we really needed to know, I suppose, the contents of your Brief before the North Carolina Court of Appeals. Is that in the record here?

MR. MORROW: Yes, it would be in the jurisdictional statement. It is not in our Appendix, but it is in the jurisdictional statement, I believe.

QUESTION: Well, but that simply contains your naked assertion, your jurisdictional statement. Doesn't it? I mean it -- or does it contain -- I didn't find in it a quote from your Brief to the North Carolina Court of Appeals.

QUESTION: Normally in a record that's sent up

here from the State Court, it might not even contain the briefs.

QUESTION: That isn't the question--wasn't the question in the Court of Appeals that you raised, "Did the Court err in conducting an alimony pendente lite hearing as the Plaintiff Appellant did not have notice of said hearings?"

MR. MORROW: That is the way the question was presented in the Brief.

QUESTION: Was there anything else presented to the Court?

MR. MORROW: Well, the assignment, the specific assignment of error.

QUESTION: Well, where is that that says it is a federal question:

MR. MORROW: It's in the specific assignment of error.

QUESTION: Well, I'm asking for it. Where?

MR. MORROW: That would also be what would be in the Brief as well as in --

QUESTION: In the Brief to the North Carolina Court of Appeals?

MR. MORROW: Yes, and to the Supreme Court.

QUESTION: And both of those are here in the record somewhere else.

MR. MORROW: It is clearly my understanding that

they were forwarded to the Court. I have not personally gone to --

QUESTION: Do you have it with you?

MR. MORROW: No sir, I don't.

QUESTION: Well, what do we know -- how can you tell me what you presented to the Court of Appeals?

MR. MORROW: Well, I --

QUESTION: Do you want me to go and look for it?

MR. MORROW: I --

QUESTION: It's OK. I'll do it.

MR. MORROW: No, sir. I will certainly furnish it to the Court. I'm sorry I do not have it with me.

When we appealed unto this Court, initially the North Carolina Supreme Court was thinking that they were to forward the record, as the Court of Last Resort. Then they called me up, and said that we are not forwarding that record because we did not rule on it. The Court of Appeals will be forwarding the record to the Supreme Court of the United States. And actually, the record that you have in file was forwarded to the Supreme Court of the United States -- by the Court of Appeals of North Carolina.

Now, I would further point out to the Court with reference to questions as whether or not the appeal has been properly raised and has been properly brought before this Court; that as I understand it, under your Supreme Court

Rules, Rule 16(b) is where the motion to dismiss should have been raised by the Appellee in this case and heard on motion prior to raising that issue in the Brief on the merits.

QUESTION: It is a jurisdictional question?

MR. MORROW: Yes, it would be a jurisdictional question.

QUESTION: I have -- is the Plaintiff Appellant's Brief -- is that the Brief that was filed in North Carolina Court of Appeals. I just got the record.

MR. MORROW: That is it right there. Now the front of it will tell you whether it is the Brief I filed in the Court of Appeals or the Supreme Court.

QUESTION: It's North Carolina Court of Appeals.

You can go ahead.

MR. MORROW: To specifically go into the Statute, I think that it is of course a short statute and one that I can read to you in a short amount of time. As I read the Statute, I would ask you yourself to say, does this sound fair? Does this sound like the way that we have trials in the United States?

Now specifically, subsection (e) states:

QUESTION: -- trials --

MR. MORROW: -- or hearings.

QUESTION: But, we often have hearings without any notice to anyone. And a restraining order can be

obtained under limited circumstances by walking into the court with the papers without any notice to anyone. Isn't that true in your state:

MR. MORROW: Under very limited circumstances. Normally upon allegations of irreparable damage.

QUESTION: It can in a divorce then? An ordinary routine divorce case. Can the State Court enter a temporary order for temporary alimony and custody of children pending a return date?

MR. MORROW: We cite to you in our Brief. We try to go over the Statutes of all of the states.

QUESTION: Well, now, just confine ourselves to that one question, if you will.

MR. MORROW: In North Carolina, the answer is clearly yes. That's what the Statute says.

QUESTION: Yes, but is that the common practice?

MR. MORROW: The common practice in North Carolina?

QUESTION: Yes.

MR. MORROW: No. The common practice in North Carolina is to normally serve everybody involved, and you go to court and you have a hearing.

QUESTION: For temporary alimony?

MR. MORROW: Yes, for temporary alimony. And custody.

QUESTION: Well then, you're quite different from

almost all the other states where that can be done routinely with a prompt return date.

MR. MORROW: I, of course, do not practice in the other states. I would wonder if we're that different from the other states, as I review the Statutes of the other states, beginning on page 33 of my Brief.

Now, the way a case normally comes on in North Carolina, whether it's the alimony complaint or the alimony counterclaim, a notice of hearing of the temporary hearing is served; and a hearing date is set. In our city of Winston-Salem, a city of approximately 170,000 people, there will be approximately 20 hearings a week, exactly of this nature. We have a special so-to-speak court -- heard in our district courts, but we have a judge assigned to hear these cases 3 days a week, and that's all that that district court judge does. It is the extremely rare case, I would say to you -- or circumstances I would say to you where that Statute is used. I might say to you I've been practicing 15 years, and I've never seen the Statute used before it was used in this case.

Now, a temporary alimony order in North Carolina is a very significant part of the alimony case. In our district, and there are approximately 40 districts in North Carolina covering the 100 counties that we have. Our district only covers one county because we are one of the

larger counties. But in our district, it is normally 12 months or longer before you can receive your jury trial; and therefore, whatever is ordered, whether it is $5.00 a week or $5,000 a week or nothing, at the temporary alimony hearing, it has a rather long-lasting effect on the amount of moneys that are paid on settlement negotiations and so on over the next 12 months or what have you until the trial is reached. It is not an order that normally lasts a week or ten days or what have you. In fact, it is quite to the contrary.

QUESTION: If you went into the Court and moved for hearing following the entry of the order, would the Court grant you a hearing?

MR. MORROW: We try again to discuss that in our Brief. Now, there is a part of the Statute, North Carolina General Statute 50-16.9, that states: "Upon a showing of substantial change in material circumstances, a party may move the Court to modify or vacate an order."

Now, what that, number one, would do in this case, assuming that the defendant desired to try to take advantage of 50-16.9, he would have to be the moving party that has filed his motion in court, so notified the other side, and go to court. He, and most importantly, I say to you -- would have the burden of proving that there has been a substantial change in material circumstances since the date of

the hearing, the date that the order was entered for him to pay alimony without notice.

Now, we strongly contend to you that under the law and rationale of numerous cases cited, beginning on page 43 and 44 of our Brief, that the shifting of the burden of proof would not allow what I call bootstrapping or stating that there is inability of the person who has been deprived of due process to come back to court and rectify through his own proof the situation.

The case of Armstrong v Manso, I believe, is the leading case in that area. That is an adoption case where the father was not notified. He did have a right to come into court under statutes claiming that the adoption shouldn't have gone through once he found out about it. But he had the burden of proof.

Now, our alimony statutes are exactly like that in North Carolina. At the initial hearing, the wife has the burden of proving basically two things: One is fault. We are a fault state. There are 10 grounds for alimony for everything from adultery to excessive use of alcohol to abandonment, indignities, what have you. She has to prove, number one, fault; and number two, need. And then the judge goes into not only her needs, but of course, the abilities of the husband to provide. Those are all things that are supposed to be heard. The wife, well, defendant spouse, as

our Statute reads; but usually the wife has the burden of proving all of those things. Fault, need, and ability. She has to prove the husband's ability. He can come to that hearing with affirmative defenses such as her own adultery. Or that she is not a dependent spouse; in fact, she's a multimillionaire or what have you.

Now, those are all things that are heard at that hearing, and those are who the burden of proof is on. The wife having the burden of proof of fault, her need and ability; and the husband having the burden of proof on his affirmative defenses at that hearing.

QUESTION: I'm not sure I followed your response to Mr. Justice Powell.

Was there anything to prevent your client from moving the court as soon as he became aware of the entry of this order and asking for a hearing?

MR. MORROW: Well, the only way I know he can do it would be under 50-16.9.

QUESTION: Well, can he move in the court to get a hearing on the issues?

MR. MORROW: Well, that is actually a move to modify based upon a substantial change in circumstances.

QUESTION: Whatever you call it, can he get into the court to have these issues examined?

MR. MORROW: He can get into the court, and he has

the burden of proof.

QUESTION: And if he has the burden of showing that the circumstances have changed under the statutory language, doesn't he?

MR. MORROW: And the circumstances have changed.

QUESTION: Now that I've interrupted you, your client initiated this litigation, didn't he?

MR. MORROW: A suit for straight custody of the child.

QUESTION: So he submitted himself to the jurisdiction of the court?

MR. MORROW: That is correct.

QUESTION: So there is no constitutional question, at least with respect to the jurisdiction of the court over him?

MR. MORROW: No body has ever questioned jurisdiction.

QUESTION: And therefore, we don't have the constitutional question that would be presented if a court purported to exercise personal jurisdiction over somebody outside the jurisdiction of the court?

MR. MORROW: That is not the question at all.

QUESTION: All right. Not here at all. This is just a notice and burden-of-proof problem. Right?

MR. MORROW: Well, burden of proof ancillary to

the notice. It is a very basic due process problem.

QUESTION: Because, unlike Armstrong, he was not -- he didn't initiate any litigation.

MR. MORROW: No.

QUESTION: The husband and father in that case. The former husband and father. The petition in that case didn't initiate any litigation. He was a stranger to the adoption proceedings, and the first he learned about them was when the adoption was a fait accompli. In that respect, quite different from this case.

MR. MORROW: Well, I don't think it's different when you get --

QUESTION: In other words, he didn't initiate anything. He was not under the personal jurisdiction of the court.

MR. MORROW: That's correct. Yes. But when you get to the remedy, I think the remedy is very, very similar; that is, that he would have to initiate the action to correct, and he would have the burden of proof.

QUESTION: To undo a fait accompli?

MR. MORROW: Right.

QUESTION: Although he was the father of the adopted child.

MR. MORROW: Right.

QUESTION: Right.

MR. MORROW: Now --

QUESTION: Mr. Morrow, could I ask you a question? This is an unusual situation because we've got a counter-claim in effect. If you had a case in which the moving party was also the plaintiff; and say the wife is the plaintiff, and the husband had left the state and was not represented by counsel, and you had any of the other conditions set forth in subparagraph (e), would you contest the constitutionality of the statute in those circumstances?

MR. MORROW: I certainly would.

Now, in this case, we contest it as applied in the case as well as on its face.

QUESTION: Because of the fact he was represented by counsel.

MR. MORROW: Yes. He was of course.

QUESTION: But how would you deal with -- if you say the filing of a brand new law suit, and the husband is departed for parts unknown or is about to remove property, what would you say the statute should require to satisfy due process?

MR. MORROW: The statute --

QUESTION: -- ample notice --

MR. MORROW: I'm not saying that this type of statute could not be constitutional. What I'm saying the statute as drawn; it could not be more broad I contend to you.

It's clearly unconstitutional. Now, there're basically three things in the statute, and they're not in the conjunctive. You show anyone of these three, and supposedly you can just forget serving that husband even if he's standing right there in the courthouse.

QUESTION: Not if he's standing in the courthouse; because if he shall have abandoned the dependent spouse and left the state by hypothesis, he's not standing in the courthouse. Or shall be in parts unknown. By hypothesis there he's not standing in the courthouse. In the third situation, he's about to remove all his property and leave the state, but you might give him notice and be sure he can get away before the papers are served. That's the problem there.

MR. MORROW: You can give proper notice in that situation.

QUESTION: Could it be accompanied by a restraining order forbidding --

MR. MORROW: Restraining order --

QUESTION: Ex parte.

MR. MORROW: Yes. I think ex parte. Under that third section, you may be properly alleging some type of irreparable damage where due process may not be violated under the law as I understand it and contend it to this court. And I don't quite frankly concede that as I read the

due process cases on those.

QUESTION: How does irreparable damage tie in with notice and hearing in the due process? I had always thought of irreparable damage as being an element that you have to show in order to obtain a permanent injunction or perhaps a temporary injunction, and that due process notice and hearing requirements were not necessarily tied into irreparable damage.

MR. MORROW: Like I said, I don't concede that even if they allowed or alleged some type of irreparable damage if they could not get away with -- you know -- without giving notice. I don't concede that. In most of your TR -- temporary restraining orders, cases, what the plaintiff is trying to do when he is trying to get his restraining order is maintain some type of status quo. In this case, in your alimony cases, you're going to court for affirmative action to take money out of that man's pocket. Give it to me. Let me do whatever I want to with it. Then he may come to court some later day. How does he get his money back? In other words, we're dealing with something much more, I contend to this Honorable Court, than somebody trying to maintain a status quo without actual notice to the other person.

Now, our statute says that if one of these three things exists, then you go to court, and you get your order,

and that's all the statute says.

QUESTION: Well, isn't it part of the status quo the normal support which a husband is lawfully required to give to his wife? And temporary alimony maintains the status quo in some form.

MR. MORROW: Well, then, if that were a proper hypothetical; then every case, why give the man notice? Just let the one side go to court --

QUESTION: Tell me why it is not an analogous case.

MR. MORROW: In the due process of all cases dealing with notice, the right to be heard, the right to know that the case is pending and go into court and defend yourself. In those cases, the court I contend to you has always held that unless there is some extraordinary situation usually dealing with a very important public or governmental interest, that you just can't do it. It is a violation of fairness. It is a violation of due process of law.

QUESTION: Typical service by mail statute or substitute service statute frequently requires 30 days return date, 20 days return date. Now, if your opposing counsels move that this man had removed himself to Fairfax County, Virginia, and went about serving him under the notice that permanent alimony order would be requested on such-and-such a date, would you say that a court could not in the interim

even before he received the notice in Fairfax County, Virginia, order temporary alimony?

MR. MORROW: I certainly would.

QUESTION: So a man can simply move away 3,000 miles; and until you can somehow get personal jurisdiction over him, he's home free so far as his duty to support is concerned.

Well, you have personal jurisdiction over him because he came in here as a plaintiff and submitted himself to the jurisdiction of the court.

MR. MORROW: And the next thing you know, the court's entering orders, and he doesn't know a thing about it.

QUESTION: When you come in as a party to the court and submit yourself to its jurisdiction, then there's no question of the personal jurisdiction of the court over you. Is there?

MR. MORROW: Absolutely not.

QUESTION: That's constitutional power to issue orders that personally involve your liability. Is there? There's no constitutional question.

MR. MORROW: No constitutional question.

QUESTION: Aren't you on notice in effect once you file a law suit of proceedings that take place in that court?

MR. MORROW: I contend that you certainly are not. That you are required to notice, some type of notice, under due process of law, as to when your case is going to be heard.

Now, I simply note the diversity, or ask you all to, between the statute as drawn, and drawing a narrow statute to where the legislature says: Now we see that this -- something could happen, where real lack of notice would be proper. I would contend to you, and I don't have the statistics, but at least 50% of the people in North Carolina live within 30 minutes of the border. Charlotte's clearly in Mecklenburg County within 30 minutes of South Carolina. The Triad Area, Winston-Salem-Greensboro-High Point's within 30 minutes of Greensboro. We actually have, you know, people who work and live in different states, and so on.

Now the statute says, abandonment and that he has left the state. All right. Now abandonment's going to be one of her allegations in most alimony cases. That's one of your grounds. That's one of the things that's supposed to be contested at that hearing. The fact that he has left the state -- this statute doesn't say he left the state to avoid service; he left the state to hide; left the state -- the fact that he has left the state, in, of, and by itself, is not dealt with in that statute, except to say, that if she says here he abandoned me, and if she says he has left the

state, she doesn't have to say why. And the court's not interested in why. And the legislature wasn't interested in why. But they can go to court without notifying the man.

QUESTION: Is this alimony order still in existence.

MR. MORROW: Yes.

QUESTION: In force? Is it a permanent order or is it still --

MR. MORROW: It's still a temporary order.

QUESTION: Still a temporary order, but you say it lasts a long time in any event.

MR. MORROW: Yes. In any event it would.

QUESTION: Could I ask you, while I've got you interrupted. Your client was also held in contempt for violating a visitation order.

MR. MORROW: Ex parte.

QUESTION: And you raised some objection about notice in connection with that, but I take it that that issue is not here before us.

MR. MORROW: That issue is not here. That's correct.

QUESTION: OK. Thank you.

MR. MORROW: It should have been. But it's not.

QUESTION: Mr. Morrow, I have in my hand a document, Plaintiff Appellant's Brief signed by John F. Morrow.

That's your brief, isn't it?

MR. MORROW: Yes.

QUESTION: And I read you the question presented. Did the court err in conducting an alimony pendente lite hearing as the plaintiff appellant did not have notice of said hearing? Question mark. Is that correct?

MR. MORROW: Yes, sir.

QUESTION: That's your brief?

MR. MORROW: Yes, it is.

QUESTION: So you didn't raise it, did you?

MR. MORROW: I'm sure that I did. If you will read my argument, you will see --

QUESTION: I find two cases, federal cases. I don't find the statute in the brief at all. I don't find a single word which says that you attacked the statute. The only thing you've got is on page 4. You cite the statute. And then you leave it right there. And the case that you cite is Truax against Corrigan. And that bears on this?

And why do you say that this statute, on its face and as applied, violates the United States -- the Constitution of the United States?

MR. MORROW: I'm sorry I don't have a copy of that brief with me. And I can just simply contend to you, certainly the very best I recollect writing that brief that we raised the constitutional issue in that brief.

QUESTION: When last did you see this brief?

You knew you were going to argue this case, didn't you?

MR. MORROW: Yes, I did, Your Honor.

QUESTION: And didn't you know this point would come up?

MR. MORROW: I do not feel that it is properly raised under Rule 16 at this time.

QUESTION: Who raised it?

MR. MORROW: It is raised in the brief. It is not raised --

QUESTION: -- and I didn't need any rule to raise it.

MR. MORROW: Yes. And you raised it, and --

QUESTION: I don't need any rule to raise a jurisdictional point. Do I?

MR. MORROW: I concede that you don't, Your Honor. Finally, if I might, I would like to try to address the application of the statute in the instant case.

QUESTION: We have only about three minutes left so you'd better bear that in mind.

MR. MORROW: I feel that it is very clear in the record and is actually found by the court order of the district court judge that number one, of course, they knew counsel of record.

And number two, they knew where the defendant was exactly. Now, what had happened, what the record clearly shows is, he had left the state; he had gone to his home in Fairfax; and he had filed a further custody hearing in the State of Virginia; and had personally served those papers on the wife who was in North Carolina. He was exercising the jurisdiction at that time down in the North Carolina courts, but attempting to exercise the jurisdiction of the Virginia courts. That was the reason that he had left the state. And that's why I say that's one of the things primarily wrong with this statute. All it says is left the state. For whatever reason, good reason or bad reason, they say that you do not have to give notice in that statute.

MR. CHIEF JUSTICE BURGER: Mr. Brown.

ORAL ARGUMENT OF B. ERVIN BROWN, II, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BROWN: Mr. Chief Justice, may it please the Court, I happened to bring with me today 9 copies of the relevant section of Mr. Morrow's brief, as well as 9 copies of his direct appeal to the North Carolina Supreme Court. If the Court didn't have those available, I'll be glad to pass them up.

QUESTION: You may lodge them with the Clerk.

MR. BROWN: Several questions are presented here today, of course, for the Court's consideration; and the

primary one I am concerned with, of course, is the one that's already been raised; and that's whether the appellant has met his burden under Street v New York and other established decisions of this Court; to raise the issue timely and in a timely fashion, and a clear fashion in the courts below; to give those courts, to give opposing counsel an opportunity to respond to those questions.

Appellee submits that that question has never been properly presented; that the burden hasn't been met here today; that indeed, it cannot be met. Rule 10(c) of the North Carolina Rules of Appellate Procedure provides that each assignment of error shall, so far as practicable, be confined to a single issue of law and shall state plainly and concisely and without argumentation the basis upon which error is assigned; and the exceptions not thus listed will be deemed abandoned.

Now, in the grouping of exceptions and assignments of error, the appellant simply stated that the trial court committed prejudicial error in conducting a hearing upon the defendant's motion for temporary alimony in that the defendant had not properly served the answer and counterclaim upon the plaintiff; and in that the plaintiff was not given notice of this hearing. That assignment of error so worded, appellee would contend to the Court, was abandoned or did not raise the constitutional issue of this statute. And at

that point, the issue was abandoned. Furthermore, Rule 28(a) of the North Carolina Rules of Appellate Procedure, dealing with the function and content of briefs, states that the function of all briefs required and permitted to be filed is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective position thereon. Review is limited to questions so presented in the several briefs.

Now as Mr. Justice Marshall has pointed out, the brief in this case simply said: Did the court err in conducting an alimony pendente lite hearing as the plaintiff appellant had no notice of said hearing.

QUESTION: Well, what if in the first paragraph after that assignment of error, the brief had argued: And the reason this was our error was that it violated the due process clause of the Fourteenth Amendment? And cited federal cases for it. Would that have been an adequate raising of it, or not?

MR. BROWN: I think it would be gray; and the reason I say that, this statute -- I think -- it would certainly be better. I'd be more on notice that something was coming up. And this case really didn't get to be a federal question, it seems to me, until the jurisdictional statement was presented to this Court.

QUESTION: Later in the brief, the federal constitutional rulings by this Court were cited in support of the assignment of error.

MR. BROWN: That's correct.

QUESTION: It was just later, a few paragraphs down --

MR. BROWN: -- in the brief. In fact though in the jurisdictional statement. He didn't even say in the jurisdictional statement: This statute's unconstitutional. In fact, if you look at page 15 of the jurisdictional statement, appellant says the paramount point sub judice is that this husband had an attorney who if had been given notice could have gone --

QUESTION: It may be that's a valid observation with respect to whether this is a proper appeal or not, but that would just mean it might be a certiorari question rather than an appeal question.

MR. BROWN: I agree with that.

Mr. Justice White, what I think the question I asked in response very simply is: Is it too much to ask for someone who's going to take a case up on appeal and ultimately, supposedly challenge the constitutionality of the statute to say at some initial point in the appellate process: This statute's unconstitutional.

QUESTION: Well, that may be so, but how about a

claim that he had been denied due process in these proceedings?

MR. BROWN: I think that really goes -- that would be sort of an as-applied argument; and because of the peculiar nature of this statute -- in other words, this statute mandates a certain procedure. This statute, if you will, in effect says: Under certain limited situations, you don't have to give notice. So I can't see how you could argue that anything's unconstitutional unless the statute's unconstitutional. In other words, if you say: I've been denied due process simply because I don't have notice; unless the statute's unconstitutional, that argument seems to me to be irrelevant.

QUESTION: Well, if that's true, Mr. Brown, one could construe the statute as only applying in cases where there's no counterclaim; where the plaintiff goes in, and the defendant is not yet represented by counsel; and that's quite a different problem.

You ask if it's too much for the jurisdictional statement to identify the problem better. Couldn't one also ask whether it's too much for the response to the jurisdictional statement to identify the jurisdictional problem if it's so obvious? You can see the jurisdiction.

MR. BROWN: I can only make a heart-felt apology about that, and I have what I think is some justification;

and that is, it wasn't until the brief was filed that the statute was laid on the line. In other words, at the point the jurisdictional statement was filed, it seemed to me that all the appellant was saying was: I've been denied due process because --

QUESTION: That may have been right that you could have moved to dismiss the appeal, but that wouldn't necessarily mean it was not a certiorari question.

MR. BROWN: Well, I don't --

QUESTION: If he had raised a federal constitutional question in the state courts properly; and that in the course of these proceedings, had been denied federal due process because I wasn't given notice that I was entitled to. Now you can --

MR. BROWN: I think --

QUESTION: That may or may not involve the statute, but it certainly is a federal question.

MR. BROWN: Well, I know that in that whole line of cases there, I cite the Charleston Federal Savings and Loan case versus Alderson. That talks about a timely, insistent planned raising of the constitutionality of the statute as applied. That seems like to me not to be a lot to ask of someone to do that, so that you're on notice exactly what it is we're dealing with here. And I quite frankly didn't know -- I had some suspicion because my own

belief --

QUESTION: He really is complaining though that he was denied due process of law for failure to be given notice. For failure of notice.

MR. BROWN: That's right. But the statute seems to answer that. In other words, the statute says it's permissible. Unless the statute's unconstitutional, I can't see that he's been denied due process. And I think --

QUESTION: I find it somewhat ironic that you're claiming lack of notice of the issue in the case, and you fail to give counsel notice of a motion in a trial court; and I don't understand why you wouldn't give notice regardless of what the statute says. If your opponent is represented by counsel -- what is the normal practice in North Carolina?

MR. BROWN: As to notice for temporary --

QUESTION: For anything. If you're going to contest a matter of any kind and your opponent's represented by counsel, why in the world wouldn't you give your opponent notice?

MR. BROWN: Well, you're on your word, Your Honor. And in this case --

QUESTION: Does the record here explain why it wasn't done here?

MR. BROWN: It explains it as best I think -- my

brief explains it as best as it can be explained. And I think that is -- I didn't even know of the existence of this statute until I was into this case.

QUESTION: Whether the statute's there or not, you did know your opponent was represented by counsel and didn't serve him.

MR. BROWN: Well, what I also knew was --

QUESTION: That wouldn't happen very often in the places I used to practice.

MR. BROWN: Mr. Justice, what I did know was this: I knew that he'd gone to Virginia. I knew that by his own pleading that he served on my client in North Carolina, and I also knew, because his business partner called me up on the phone and said: He's attempting to transfer his business interests, which is the only asset he has in North Carolina.

QUESTION: Is all this in the record?

MR. BROWN: No, sir. It's not.

QUESTION: You'd better confine yourself to what's in the record, Counsel, unless we specifically ask for you to go outside.

Why didn't you raise this question about his not having raised this point in North Carolina in response to his jurisdictional statement? I have here a motion to dismiss. You never mentioned it.

MR. BROWN: I concede that. I concede that, and all I can say is --

QUESTION: Because it was important?

MR. BROWN: If I -- Mr. Justice Marshall, I didn't know -- what I'm saying is -- the reason I didn't raise that response to his jurisdictional statement. I mean my argument is: He's never raised the constitutionality of this statute on its face. I didn't know until he filed his brief that he was raising that. In other words, it's only in the brief for the first time that he comes out clearly and unequivocally and says, in the first heading under the argument section: This statute's unconstitutional.

QUESTION: But he still said he'd been denied due process.

MR. BROWN: Yes, sir. Yes, sir.

QUESTION: And you knew that. And do I understand the -- excuse me. Go ahead.

You argued in here that it was constitutional. You argued it.

MR. BROWN: Yes, sir. Yes, sir.

QUESTION: You admit it on the merits.

MR. BROWN: I--

QUESTION: And now you say we shouldn't meet the merits.

MR. BROWN: I don't think you should, Your Honor.

I don't think the -- because not until he filed his brief did we know that that constitutionality of the statute on its face was being tested. And certainly, he had a duty, I think, to adequately inform not only me, but the appellate courts of North Carolina -- that's -- you're looking at the decision. You're looking at the decision of the North Carolina court of appeals. It's understandable why the constitutionality of this statute or the constitutionality of anything isn't discussed. It's not mentioned there at all.

QUESTION: If I understand the decision below correctly, is it -- was it held that as long as it's alleged in the alimony request that the person has abandoned and that he has left the state; and the court finds that he has abandoned and left the state, that you never need to give him notice?

MR. BROWN: Did the court of appeals discuss that?

No, sir. I don't think it does.

QUESTION: Why did it excuse notice in this case?

MR. BROWN: Because it said in this case, the statute provides, what it provides; and the facts in the record were sufficient for the trial judge to make a finding --

QUESTION: To find that he had abandoned.

MR. BROWN: And had left the state.

QUESTION: And had left the state.

So I will ask you again. As long as you make

those two findings, no notice is ever necessary.

MR. BROWN: That's correct. Although I read the statute -- the statute says notice is unnecessary. I don't necessarily contend --

QUESTION: I asked you what the court held. As far as I can see what the court held was if you find abandonment, and he's left the state, no notice is required.

MR. BROWN: That's correct.

QUESTION: No matter whether they know where he is. No notice. Not even -- no publication, no mail, no nothing. Even if you know exactly where he is.

MR. BROWN: That's right, Your Honor.

QUESTION: Even though you know he's represented by counsel.

MR. BROWN: Well, I knew that. But there is a section in the statute, in the opinion where the court of appeals says this appellant brought on this situation by his own actions. And I don't believe the court of appeals opinion, and I don't read the statute to mean that even if he'd left the state, and even if he'd abandoned his wife that the trial judge is bound to give no notice. I think it's in the trial judge's discretion.

QUESTION: But you say he's not required to give notice. And I take it you could enter a final decree of divorce without notice to him.

MR. BROWN: You certainly couldn't under this statute because this statute's narrowly drawn and is just applied to temporary alimony situation. And that, I think, in light of some of the questions asked of Mr. Morrow might bear some clarification.

Temporary alimony, however entered, is good only during the pendency of the case in chief. That is, once you have a hearing, a trial on the case in chief on alimony, then all sorts of things can happen. I mean, if you -- if the wife had been given alimony, and you're the husband, and you go to trial, and you win, alimony ceases at that point. If you go to trial and you lose, the court could order you to pay an amount less than what you've been paying under the temporary alimony order. So that the temporary alimony is certainly a -- the ultimate judicial determination is made by trial on the merits involving the alimony question.

And I might also point out that in some ways, a supporting spouse who has been ordered to pay alimony, either with or without notice, is to some extent better off in terms of remedies available to him than, for example, Miss Fuentes was in Fuentes versus Shevin. All he's got to do, if he is ordered with or without notice to pay temporary alimony, is take final notice of appeal to the North Carolina court of appeals, post a $200 appeal bond; and during the pendency of that appeal, the trial court is entirely

functus officio as to any enforcement capabilities. That is, he can go without paying anything he's been ordered to pay. Now, the risk he runs, if he does that, if he loses on appeal then the trial court could, if it so chose, hold him in contempt for not having made the payments during the course of the appeal. If he wins the appeal, of course, he's lost nothing. So there's a good deal of protection.

QUESTION: Mr. Brown, perhaps you've already answered this when Mr. Justice Stevens asked you the question.

You knew he was represented by counsel didn't you?

MR. BROWN: That's correct, Your Honor.

QUESTION: And you knew who the counsel was?

MR. BROWN: That's correct.

QUESTION: Personally?

MR. BROWN: That's correct.

QUESTION: I'm puzzled, too. Before you went in to apply for the order on temporary alimony, why didn't you call up the lawyer and just tell him you were going to do it?

MR. BROWN: I've got an answer for that, but I'm told it's outside the record, and I can't tell you. I had some knowledge that was available to me at that time, but it's not in the record.

QUESTION: I think you mentioned earlier, didn't

you, that this particular statute was not in your mind at the time.

MR. BROWN: It was not in my mind until -- we had a series of events that sort of coalesced here at one time. I mean --

QUESTION: You didn't file, as I understood you earlier, perhaps I'm wrong, your motion for temporary alimony thinking you were doing it pursuant to this statute. Am I right?

MR. BROWN: No. When I did get to file my motion for temporary alimony, by that time, I was cognizant of the existence of this statute; and when I presented the motion to the trial judge, I of course brought to his attention --

QUESTION: -- section (e) --

MR. BROWN: And the documents we submitted along with the motion --

QUESTION: And specifically this subparagraph (e) of the statute.

MR. BROWN: That's correct. That's correct.

You will note in the order, the order itself awarding the temporary alimony, he makes a finding of fact there in the first paragraph of that order, that no notice was given and none is required pursuant to the provisions of 50-16.8(e). So the trial judge knew that. He also knew by documents submitted to him at the time the motion was made

that Mr. Fungaroli left the state because we submitted the pleadings, verified pleadings he filed in Virginia.

QUESTION: Well, did the trial judge make an express finding of any kind that he was acting pursuant to subdivision (e) having found that he'd left the state?

MR. BROWN: The trial judge, Mr. Justice, sir, went and made an express finding -- the only express finding if I understand your question as to the statute was because he left the state. He had abandoned his wife. No notice was required under this statute, and he mentioned the statute expressly. Now, that motion is supported by the record of course in the trial court and the record in this Court. That in fact he was gone, and the appellant makes no assertion here today, nor has he ever made an assertion other than the fact that he hadn't abandoned his wife. He's never claimed that he didn't leave the state. He's never claimed that he provided any support to her since December 21st when he took out the complaint and had her involuntarily committed to a mental hospital. He's never claimed that he was incapable of making any support payments that were ordered.

QUESTION: You really are arguing that as long as he's abandoned and has left the state, that that automatically terminates any obligation which respect to notice.

MR. BROWN: The very wording of the statute --

QUESTION: I don't care whether you rely on the

statute or what you're relying on, but that's what you're arguing. And that that's constitutional.

MR. BROWN: I think -- I've got to make a distinction between as-applied and on its face. If you're asking me if this ever came up again, would I give notice, and I would say --

QUESTION: That isn't what I'm asking you. I'm asking you whether or not you are saying that it's quite constitutional to dispense with notice simply on the grounds of abandonment and leaving the state.

MR. BROWN: I think so. I think so.

QUESTION: You have to say that. Don't you?

MR. BROWN: I do have to say that. And I say it because of the cases of this Court whether it's Fuentes or Mitchell or whatever it is.

QUESTION: We are confining that, I take it, to the temporary alimony.

MR. BROWN: That's correct. We're not talking about anything else.

QUESTION: Not to the granting of the divorce.

MR. BROWN: Right. Right. Nothing but the temporary alimony. And whether you look at Fuentes or Mitchell or Di-Chem, what you find in every single one of those cases whether it requires prior notice or it doesn't, is some

discussion about the legitimate protection of the creditor interest. That seems to me what the legislature was trying to do here. The legislature said -- and they've done it not only in this statute, they've done it in other statutes we cited there in the brief. They've given the dependent spouse creditor status for purposes of collection and enforcement of temporary alimony. And what they were doing here, whether it was wise or unwise, was attempting to provide some sort of protection; and I submit to you that the very wording of the statute makes it clear that that's what they were concerned with. It was a -- in the words of Mitchell -- debtor acting in bad faith. Whether he was secretly destroying and concealing his assets or whether he was fleeing to Virginia and leaving his wife with no means of support. Whichever one of those things he was doing -- what the legislature in its wisdom or not in its wisdom thought it was doing, was trying to provide some means of protection for a dependent spouse who was dealing with a supporting spouse who was acting in bad faith.

I submit to you the facts in this case, the record in this case -- I can't conceive of an individual ever having acted in more bad faith throughout the entire course of litigation than the appellant has in this case. He's simply thumbed his nose at the courts and disregarded court orders, and simply in effect said: I'll do what I want to do.

I think not even a close reading -- just a cursory reading of the record, in my opinion, leads one or should lead one to that implication.

QUESTION: Counsel, there's an order in the appendix, at page 35, by Judge Freeman, who I take it is the presiding judge of the superior court, authorizing the appellant's counsel of record to withdraw. Is that something in connection with the contempt order?

MR. BROWN: Yes. Yes, that was in connection with the contempt order. Not -- it was a contempt order that had nothing to do per se with this alimony. It had to do -- it was a motion for contempt for his failure to provide his wife visitation with the child. Right about the point that motion was coming up, the appellant fired his attorney who's mentioned in this order, a Mr. Parker, who had been his attorney -- I personally know him -- had been Mr. Fungaroli's attorney all along. He fired that attorney and, at that point, hired, retained Mr. Morrow, or had his father retain Mr. Morrow. He was in town, the father was in town, but the appellant was not. He sent his father down to the show-cause hearing; retained Mr. Morrow, and the court granted Mr. Parker's motion to withdraw, and Mr. Morrow then became the appellant's retained counsel at that point.

I think just to reiterate quickly on Mr. Justice Marshall's observation, there's not a single reference in the brief

here on the jurisdictional question, not a single reference to a federal case. I in fact made a mistake in my brief in saying that Morrow cited Mullane v. Central Hanover Bank and Trust Company. He in fact didn't. What's cited is the 1951 state court case of McLean versus McLean, and there's a lengthy quote from that case in the brief, and the last portion of that quote happens to be a quote within a quote citing Mullane. So at the point we went to the court of appeals, and as I said before, up really until Mr. Morrow filed his brief with this Court, what we were dealing with there was three -- he cited three North Carolina domestic cases and the citations of Strong's Index. Now, literally, I feel like this case contained a federal question once it was filed in the United States Supreme Court.

In summary, I think, it's our contention that (1) of course that the issue has not been properly presented; and for that reason, should be dismissed.

And that (2), if the Court feels otherwise about that, then the state has reached a perhaps not perfect, but a fair constitutional accommodation of the competing interests of dependent and supporting spouses as well as the legitimate interest of the state; and that the statute for that reason should be sustained.

If there are no other questions, I really won't take up any more of the Court's time.

QUESTION: Do you have anything further, Mr. Morrow:

MR. MORROW: No, I don't, Your Honor.

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

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

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