

ORAL ARGUMENT – 3/21/01
00-0277
COLLINS V. ISON-NEWSOME

MARTIN: We are here today representing four professional educators employed by the Dallas ISD that have been sued by another high level administrator of the district for slander, slander per se, and civil conspiracy.

The defendants below pled the immunity defense provided by the education code. The TC denied the application of immunity. _____. That was appealed on an interlocutory basis to the Dallas CA. That court affirmed the denial of immunity, and the petitioners are here civil serving their right to immunity.

The only question involved here is on the scope. The other elements of the education code immunity have been met and are conceded to, and have gone except the scope question.

PHILLIPS: Do you think it would be better for your argument to talk about the merits first, and then go back and try to establish a conflict _____?

MARTIN: I will. The conflict is clear.

PHILLIPS: Some of your cases are unpublished, which have never really that I can find granted a case based on a conflict or a case that nobody gets _____.

MARTIN: But there's no reason not to. You're trying to get cases consistent. You want justice in every case. An opinion is an opinion.

PHILLIPS: But if you can't cite it in your brief it can be kind of hard to _____.

MARTIN: It shows the conflicts are there. It shows it's needed. If every court wrote in this area and never published an opinion, we would never have a consistent rule of law.

HANKINSON: Would you tell us what published case you contend conflicts with the CA's decision in this case?

MARTIN: The Williams case.

HANKINSON: And why does it conflict?

MARTIN: It applies the immunity as we say it should be applied. As this court applied in the Chamber's case. The functional test that doesn't look at the intent, or it doesn't look at the

good faith element.

HANKINSON: But all the CA held in this case was that the affidavits were conclusory and didn't meet the requirement under rule 166a. So how does that create a conflict? That's the basis for the court's decision.

MARTIN: That is not all they held.

HANKINSON: But isn't that the basis for the court's decision?

MARTIN: No. The basis is first, that there is other elements written into the education code. The elements of good faith, which the legislature refused to write into it. And it reads, paragraph on page 4, this is where we contend the court below made 3 errors. It says the education code provides little guidance for determining what acts are instant to or within the scope of the employee's duties. That we say is wrong. Because the education code provides guidance. It says that there is no good faith element written into that provision. And it wrote in good faith in other instances. For example...

HANKINSON: But that's not a holding of the case that under our jurisprudence in which we determine when a conflict exists, how does that type of statement in this case mean that it would overrule Williams?

MARTIN: Because if it held like Williams...

HANKINSON: And that is not a holding in the case either.

MARTIN: That is part of the court's analysis that leads to the holding. If the court did not make that analysis...

HANKINSON: Applying the Coastal test would you please tell me why there is a conflict applying the specific holding of Coastal to Williams and this case and tell us how the conflict is there?

MARTIN: The Williams case says that you don't look to any kind of subjective intent. You look to see if it was within the duties that they were generally required to perform. You look to those duties. You don't read in other elements. The court below read in the elements of you've got to show us you were in good faith when you were doing what you were doing.

The statute says 1) we look at what school officials can do to hurt people. They can drive cars and hurt people. We won't give them immunity for that. They can also hurt kids when they discipline them. We won't give them immunity for that. But, otherwise, we're going to let them as long as they are within the general scope of their duty...

HANKINSON: So why is it an intentional tort if it's committed within the scope of one's duty? Under what law can you cite to us in which committing an intentional tort is ever within the scope of one's duty?

MARTIN: There are cases that say just because you committed an intentional tort - the _____ v. Mateo case is an intentional tort. He slandered that employee - Salazar. The court's facts say that Salazar was specifically authorized to do what he did. The AG comes out and says in a press release he wasn't ever authorized, and slandered him in his professional career as a lawyer. That was an intentional tort. Immunity was applied there.

ENOCH: But this provision is only implicated if the actions is the result of judgment or discretion. I don't know how the statute doesn't apply when an intentional act on the part of the actor, because one of the elements could give the immunity.

MARTIN: And conducting investigations, talking to the press. Those things are what we did here. Now what we are accused of in the affidavits they say they heard it in the newspapers - that's what Dr. Ison-Newsome said: she heard television reports that she'd been slandered. Matthew Hardin says, I was surprised to learn that Robby Collin said something. That's all he said. And that's supposedly the intentional tort there. That's supposedly the slander.

If you look at it, that's what they were doing - their job. The point I think was made by the legislature in 1973 when they wrote this statute. I think they wrote it with Barr v. Mateo in mind. Just like the court in 1995 in Salazar said Barr v. Mateo starts this _____. This is where we come from. They said any act that's within scope and _____ of discretion is immuned. It says any act. It doesn't say an intentional act. It doesn't say a negligent act.

HANKINSON: So what is the test under the scope provision of the statute?

MARTIN: The test is whether it's within the general nature of the duties assigned to them. Just like Chambers. Just like Mateo.

HANKINSON: Regardless of whether in anyway even though it's within the scope if it's done for their own interests as opposed to the interest of their employer. So if I were a teacher and it didn't benefit my school district to do this, but it benefitted me personally because it was in my general duties, then I get the immunity for my personal act as opposed to my act on behalf of the school district. Is that right?

MARTIN: No. If you go steal money from the cash register, that's your personal act. That's not part of your general duties.

ABBOTT: What if your general duties are cleaning up the classroom, and in the course of cleaning up the classroom you totally destroy somebody's property on purpose, because you're very angry at them, or even worse, you physically injure somebody, - you're moving desks around

in a classroom and you literally mow a child over because you're very angry at the child and you want to personally injure the child.

MARTIN: That's a little farfetched. But I think the legislature determined that this is not going to happen...

ABBOTT: Hold on one second. First of all, it's not farfetched to have teachers get angry at students and want to personally take physical action against them because we read about it in the newspapers. So assuming that that happens, if a teacher decides to purposefully injure a child, what you're saying is that that teacher has immunity.

MARTIN: No. Not at all.

ABBOTT: Then tell me how consistent with the theory you are espousing that teacher could be subject to a lawsuit?

MARTIN: Injuring a child was not part of a teacher's duties.

ABBOTT: You're moving desks around the room...

MARTIN: The other alternative given to me at the CA was that if you are said to keep order and you don't like somebody, you shoot him while you are keeping order, is that in your duties? Of course, those kind of outrageous situations aren't within their duties. But what was meant to be here was any act that is within this general nature of your duty. And we want to keep the educators out of the courtroom. That's what immunity is about isn't it.

HANKINSON: The examples that Judge Abbott just gave you are the kinds of things that seems to me would result from your definition of stopping at - is within your duties. Because I could do something as a teacher that was within my duties that really was outside what anyone ever expected me to do or the district to do. The examples he gave it seems to me are what would result from what the test that you would have us apply. And I know that you say well that's outrageous, it's not going to happen, but we have to be concerned about what the consequences of our decisions are.

MARTIN: The question of exercise of discretion - moving a desk around, I don't think you get to the situation of running over somebody is an exercise of discretion. I think the legislature clearly wrote that requirement in there, that certain acts - conducting investigations, talking to the press, that's all we did here.

PHILLIPS: Do you disagree on page 34 of the respondent's brief in any of the hypotheticals they said would be immuned under your test - intentionally serving tainted food?

MARTIN: You have to be a professional educator first.

PHILLIPS: So intentionally submitting false grades?

MARTIN: And I think that intentionally submitting false grades would come within immunity. Now why? Because there are other provisions in the education code. They are professional educators. They can be stripped of their license. There are other things that the legislature was aware of in 1973 that when they put the whole educational code in place that would take care of that.

ABBOTT: But the person injured would have no recourse. It may be fine to remove the teacher from that situation, but the person injured would be _____.

MARTIN: And the legislature made that decision. They thought it would be better for the school system of this state if there were no individual redress. And that's what these other immunity cases are about.

HANKINSON: How many cases do we have to overrule to interpret the education code the way you would have us do since the weight of authority seems to go against you?

MARTIN: I haven't tried to count them up. But 2 or 3 that come to mind are Stimson(?), Gallegos(?), Gallegos was one where they said a superintendent couldn't give information to the school board member.

HANKINSON: You can think of at least 3. The weight of authority goes against you on this argument.

MARTIN: No. We've got several cases. We've got the most recent case, the Enriques(?) case is right with us.

HANKINSON: Enriques does not provide conflict jurisdiction.

MARTIN: No, it did not come before. It is directly opposed to the Dallas court. It just happened to come down latter. It's not a prior decision.

HANKINSON: But there are several cases that are contrary to your position in terms of interpreting the education code.

MARTIN: A handful, but the discussion is confusing. That's what the problem is.

HANKINSON: Can you turn to the affidavits, and looking at the affidavits the CA determined that the whole stack of affidavits that were submitted that the affidavits were conclusory. And that is basically, that is the ultimate decision that the CA reached and the basis for reversing.

MARTIN: Yes.

HANKINSON: Show us why these affidavits are not conclusory? Like looking at Mr. Collin's affidavit.

MARTIN: Mr. Collins says I conduct investigations. That's part of my job.

HANKINSON: Where does it say in his affidavit that he conducts - he says we are continually conducting investigations?

MARTIN: He has a department that's been doing that since 1983. That 5th circuit case showed him relating to the press. Robert Johnston's affidavits with the attachments show the duties that the school district imposed on these people to meet with the press. Mr. Collins' job was to conduct investigations.

HANKINSON: Most of the affidavits seem to be geared towards denying any wrongdoing in response...

MARTIN: No, not at all. If you read them carefully. We did not think that fair. We could have had Mr. Collins say I did not say that I slandered her. But that's not fair because they can't discover that. And that's not the issue. The issue is not whether he might have inadvertently or advertently said Dr. Ison-Newsome wanted bathrooms when she _____. I mean that's what this comes down to.

HANKINSON: So what paragraphs are the various affidavits you contend meet the burden under the statute?

MARTIN: If you read them all together, Dr. Gonzales starts out saying she wanted an investigation to be held. And said for Robby Collins to do it because he's her chief investigator. The one guy that's in charge of the public relations department, Hinkle, was kind of out of the picture. In fact, he got sued in this case and there's not anything that he did that you can see except being named to this lawsuit, that he should be in the suit. But he said I've turned over to John Dahlander, reacting to the press. And here Dahlander's statement is very clear that the press started this. The press wanted to come in and look at the bathrooms. They wanted to look at the open records. It was the press that was there and John Dahlander was trying to do his duty to control it. The only thing he is accused of in the petition of doing is conducting the press on the tour of the building. That's all he did to slander Gonzales.

And Payton talked to the press. He said they asked him whose fault it was and Payton said I had to talk to the press because I am supposed to. And he said I didn't say it was her fault. So none of them are conclusory. And particularly if you add the non-main defendant, the secretary of the board that sets out all of the duties and the powers there.

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RESPONDENT

HERSHMAN: I would like to make three brief points that I believe respond to your questions that remain unanswered, and I also will address what all the issues that counsel has raised.

Point number 1, this court can either deny jurisdiction or simply affirm an evidentiary ruling, and go no further than that. That evidentiary ruling is that there was no _____ in the summary judgment evidence negating as a matter of law every genuine issue of material fact as to whether the _____ and complaint of was within the scope of defendant's authority.

One thing that counsel is not able to point to was, where in Mr. Collins' affidavit, and Mr. Collins is the person who allegedly made the defamatory statement, it's my job to talk to the press. It doesn't say that in there. And his affidavit can be found at 325-327 in the court record. Nor does it say in the written position description, which is at 383 attached to Mr. Johnson's affidavit, that it's Mr. Collins' job to speak to the press. Nor does it say in any other affidavit or any other evidence before the court that it was Mr. Collins' job; it was in the scope of his employment to speak to the press.

PHILLIPS: One of the affidavits said that the press officer ask you to talk _____?

HERSHMAN: Correct. But someone asking you to do something doesn't mean that becomes automatically your job or that it was within the scope.

PHILLIPS: It's a very hard place to work if people ask each other to do something, and they say well I can't do it; it's not in my job description.

HERSHMAN: I believe that the DISD instructed just like that, and I don't think that if you're asked to do something necessarily makes it within your job description. But even if it does, I believe there's a genuine issue of material fact as to whether the request to do something falls within your scope.

What's important to note though is what evidence is here. Because this case is unique in that without the benefit of any discovery, we presented prima facie proof of intentional tort. And respectfully all the other cases, whether they hold intentional torts are still within the scope or whether they say no intentional torts can't be within the scope of one's employment, there's no evidence, nothing other than allegations that there was something wrong committed. Here, we have Mr. Hardin's affidavit at 439-442 that says he, Mr. Collins and others, met, discussed the Ison-Newsome matter, determined that she did nothing wrong, concluded their investigation only to have Mr. Collins literally step from that meeting, have a press conference and says there's an ongoing investigation. It looks like Ison-Newsome did something wrong, and disciplinary actions are forthcoming. That's puzzling by itself, but then when you add the fact that testimony also was that Mr. Collins' boss was concerned about - Ms. Gonzales was concerned about media attention to her, wanted to redirect that to Ison-Newsome and said if I go down, I'm taking Ison-Newsome with me. Reasonable inferences can be made of conspiracy and wrongful conduct there at a minimum

ENOCH: The statute that provides immunity is fairly clear, that if this is a function that's _____ to their job, and it involves the exercise of discretion or judgment, they have immunity unless it involves discipline of a child or something to that nature. The argument that's made is the Dallas court applies a kind of a respondeat superior gloss to this. But respondeat superior has to do with negligence. It doesn't apply to intentional torts. This statute doesn't make a differentiation between negligence and intentional tort, but can you be negligent in the exercise - can you commit a negligent act and that still be a discretionary act?

HERSHMAN: Yes, I believe that's the case. I think you can commit a negligent act and still have that within the scope. And I think those are types of acts typical...

ENOCH: Isn't it as likely or more likely that the discretion is you determine to do an act, you intend to act, you just use faulty judgment in determining what act you are going to commit. Isn't it more likely that it was designed to protect administrators from a decision they make on how best to do their job?

HERSHMAN: Yes.

ENOCH: So respondeat superior doesn't really fit very well because respondent superior one of its thresholds is that you're negligent and therefore we want to make an employee liable because they must accept the risk that employee doing their job will cause negligence, which in not intention to do, not a judgment issue, it's just simply is they are negligent in how they perform their functions. This case says can do _____. We don't want them sued. How does respondeat superior help us evaluate whether or not immunity applies or doesn't apply?

HERSHMAN: Because it helps to draw the bridge between whether you can hold the principal liable for the agent's actions. What we want to determine is - we're not trying to add here a good faith...

ENOCH: A discretion implies that they are acting on their own. Judgement implies they are acting on their own. You say well unless DISD said, Mr. Collins you can talk to the press, then he's not immuned. But he's immuned if he's exercising his discretion even if his discretion is wrong, which implies that he's exercising some function that he's not directed to do by his superior.

HERSHMAN: I agree with you. But my concern is that once he then decides to intentionally lie and say something that is completely false of what was determined minutes before, then that is no longer within his scope, because he's not acting on behalf of DISD, for DISD or his role as a DISD employee. We are not trying to add a good faith or intentional tort requirement to the statute. We're not saying one must act within the scope and act...

ENOCH: But you are arguing that that put some gloss on the discretion. You're saying that he can exercise discretion, which is independent of what he's assigned to do by his superior, or otherwise it wouldn't be discretionary. But he can only exercise the discretion properly. Meaning

my discretion is I've got to go talk to the press. What I tell them may or may not be true. And you're saying if it's not true, then I don't have the discretion to talk to the press and, therefore, I don't have immunity. So basically it depends on what you're able to prove as to whether or not you _____.

HERSHMAN: That's partially correct. And I think what we're saying is if he tells the press something wrong, uses his discretion and he just blows it because he misspoke, that's probably within the scope of his employment to allow him to misspeak, to make mistakes. But if you go to the press deciding one thing of dissolving Ms. Ison-Newsome of wrongdoing, and then a minute later tell the press not only was there no resolution here, but that you're implicating her wrongdoing and disciplinary actions are going to follow, that's a completely different act.

You have to decide what does it mean to be within the scope. What is the test? It can't simply be as counsel would like if it's within the generic description of your job duties it's within the scope or else you get what he claims are far fetched possibilities. Well look at farfetched, nothing is farfetched nowadays respectfully. But things that even might be farfetched are not.

HECHT: Well it won't take much for a plaintiff to allege that you didn't just misspeak, you should have know better than to say what you said. So there won't be any immunity. You will be in court every time.

HERSHMAN: Perhaps. But the plaintiff has to do more than that. Because remember the statutory scheme now is that you file suit, the defendants can immediately serve a summary judgment motion based on this one immunity, the plaintiff gets zero discovery, and the plaintiff must now come forward with proof that there was an intentional act or something else that would take it out of the scope of one's authority.

HECHT: I know that the opportunity to go to the Texas SC to get issues resolved may not seem like much of a burden in some cases. But if the legislature intended to keep teachers out of the courtroom this doesn't seem to accomplish that. It looks to me like it would be very easy to put your case in a position where you say it's over the line.

HERSHMAN: Respectfully that's not what the legislature intended, because they could have written a statute that said no suit shall be filed if the TC does not have jurisdiction to hear such suits.

HECHT: Does it make any difference that Collins talked to the press as opposed to somebody else?

HERSHMAN: Only to the extent that you can affirm or deny jurisdiction based on the fact that there was no evidence that that was Mr. Collins' job, or that that was within the scope of his employment.

HECHT: But suppose he just reported to someone else that he thought there was a

problem here. Suppose one teacher in a classroom reports to the principal that she thinks there's a problem in some other classroom. In your analysis all of those situations there might not be immunity?

HERSHMAN: Assuming that you get over all the other hurdles of what defamation is and slander and etc., yes, I believe that an intentional wrongdoing can be but it's not necessarily outside the scope of one's employment.

OWEN: How about intentional infliction of emotional distress?

HERSHMAN: I think that falls under the same guidelines.

OWEN: Do you have immunity or not?

HERSHMAN: No, it would not. If it was an intentional act and you prove all the elements and establish a _____ of material fact without discovery as soon as the defendants file motion to _____, I believe that motion should be denied, discovery should go forward and the parties can then proceed to see whether there was really an act that was an intentional infliction of emotional distress.

I would think and hope that we place teachers and those in charge of our children with a higher burden, not with immunity. Now there's a countervailing concern there...

HECHT: But isn't that argument addressed across the street?

HERSHMAN: Absolutely.

HECHT: We didn't write the statute. Whether it's good policy or not it's not up to us.

HERSHMAN: Absolutely. But I would hope to think that the legislature took into account and I think they did by not granting absolute immunity and by not saying courts don't even have jurisdiction to hear these cases.

OWEN: But in a tort claims act for example they specifically addressed intentional torts did they not, and they haven't done that here.

HERSHMAN: Yes, and no they have not. But that could go either way. One could argue that that is because they don't want intentional torts to be covered, or that because intentional torts are not within the scope of one's employment as a matter of law. As the Rosa(?) H. case. Rosa H was a wrongful touching, a sexual harassment type case of a child. The court held under no means could that possibly be _____ in the scope. Well what happens if you're a school doctor or school nurse or even a school trainer? Certainly within the scope of your job is to touch people, that would otherwise be inappropriate if it wasn't in that context. Well that does mean that a doctor or nurse or

trainer gets to sexually molest children? I think not.

ABBOTT: Where do you draw the line though? What kinds of cases would teachers be entitled to a summary judgment on?

HERSHMAN: I don't know where you draw the line, but I do know that the fact of drawing the line what is intentional and what is not, is not _____. You can't just say something is so extreme that it can't be within the confines of the scope of one's authority, because then you have to say well what's so extreme.

ABBOTT: Well it does seem like the position you're staking out does seem to undermine one of the key purposes if not the primary purpose of this statute, which is to keep teachers out of the courtroom.

HERSHMAN: I think the primary purpose is to get teachers out quickly if there is no reason for them to be in there, not to keep them out. It would have been very easy for the legislature to say no jurisdiction. What they said is you need to jump over the initial hurdle of immunity, and if you beat that hurdle, then move forward, and there's nothing preventing the district or these individuals from filing a summary judgment motion after discovery saying you haven't met your burden. To say that it's too difficult to draw a line saying because the statute doesn't say except in extreme circumstances. It says within the scope. Well what is that test? Respectfully, the only possible test is the agency test or restatement of agency and all the other cases that address the scope within the confines of employment.

Speaking to the Justices' questions as to what cases you would have to overrule. There are a number of cases which whether or not they find you grant summary judgment or not grant summary judgment at least implicate the issue of respondeat superior and whether intentional torts can take something out of the scope of one's employment. Those include, but aren't limited to, the Bates case, Pierson, Chesser, which specifically adopts the restatement of agency, Stimson, Foster, Galegos(?), and Rosa H., which specifically holds that sexual molestation of children certainly cannot be within the scope.

HANKINSON: Is it your position then that although we have not ruled on this issue, that in fact, the interpretation of the statute applying principles of agency to the definition of scope of duties is well established in the CA?

HERSHMAN: Yes.

HANKINSON: And in fact, if we make this decision we are going to essentially effecting a change in the way this issue has been treated by the courts in Texas over a significant period of time?

HERSHMAN: I'm not sure, because I know that all the cases that I've been able to find, and I think I will speak directly to this point, say in dicta, unless of course there's an intentional tort or

words to that effect. And I think there aren't any cases that say if you have proof of an intentional tort it's necessarily within the scope because the statute doesn't.

HANKINSON: My point is is that because of the language in those cases and the number of cases that there are and the number of years that it has been the practice or at least it has been the assumption that that is the way that this particular immunity provision works.

HERSHMAN: I believe that's correct.

ENOCH: Your view is immunity would apply if what he was (Mr. Collins) was assigned officially to talk to the press, or does the immunity apply if what he said to the press was true? Tell me specifically why it is you say the element that's missing from the affidavit that says he didn't establish that this was within his scope.

HERSHMAN: Because he doesn't establish that, this court has the power to deny writ and grant, and then to say there's no jurisdiction. Because it can simply affirm the lower court's ruling that there was no competent summary judgment evidence establishing that it was within his scope. Regardless of what the statute does. Why is DISD and these folks submitting affidavits saying I was acting in the best interest of the DISD if they are now saying that well whether I'm acting in the best interest, or my purpose or my _____ intent is irrelevant. But they submitted affidavits. Not just Mr. Collins, but other affidavits that say at all times we were acting in the best interest of the DISD. Mr. Collins says that.

ENOCH: The affidavit should say that I was assigned the task to talk to the press? I mean I'm trying to figure out just what it is the element you say well it was within in my scope and my duties but I don't - it's a discretionary - do you the discretion to talk to the press it seems to me is the question. And so if I don't reach the question of whether or not I was - my duty was to talk to the press. I look to see if it's within my discretion to talk to the press. So is it because he failed to say that one of his discretionary duties was to determine whether or not to talk to the press, or it's not sufficient that I was asked to talk to the press by the media person, or what is it you said was the minimum that had to be in the affidavit to establish what you say was the scope?

HERSHMAN: The threshold would be not just a conclusory statement that it's my job, or within the scope of my duties to talk to the press, but a little bit more. A written statement of his duties that was created before the lawsuit. A affirmation that that's what the normal practice is. Some sort of rebuttable proof other than a self-serving allegation that that's my job.

HANKINSON: Would you take a minute and address the jurisdictional question please, and why you don't believe there's a conflict with Enrique or any of the cases cited by the petitioner?

HERSHAMN: The cases cited by the petitioner fall under 2 categories. One, it says in which the plaintiff actually admits judicially in the pleadings or in deposition that the conduct was within the scope. Two, they are negligent cases - non intentional tort cases. There's a third category, and

that would be where there's been an allegation of intentional tort, but no proof of that at all.

And that gets to your point, that you simply cannot allege an intentional tort and hope to get anywhere.

PHILLIPS: The Williams case does not involve an intentional tort, but there's nothing in the analysis that show the court cared one way or the other is there?

HERSHMAN: I don't believe so.

PHILLIPS: So why can't that establish a conflict if the analysis was critical to the court's revolution there and that analysis was contrary to what the CA did?

HERSHMAN: I don't think that the court addressed the issue respectfully, and be not addressed or specifically rule on it, I don't think it's going to form the basis of conflict jurisdiction.

* * * * *

REBUTTAL

MARTIN: Judge Hankinson, if you would add the Andrews v. Blankenship case. A case that is on our side. It's a Houston DC case that's cited in the amicus brief. There a baseball coach wrote a letter to the editor, and it's published in the paper defaming another baseball coach. An intentional tort. And it was held that there was immunity and applied. And on the last questions of the cases that we cited, we cited a number of cases - Enriquez, Anderson, that involve intentional torts, defamation, intentional infliction of emotional distress. That's involved here. It was involved in the Enriquez case. And the court held immunity because it looked to the purposes of the act.

O'NEILL: In the CA's opinion they pose the issue that we're arguing here today. They pose what you're arguing...

MARTIN: Posed what?

O'NEILL: The issue that you are claiming that intentional and all the elements of truth. What they conclude is, the _____ analysis below which is the insufficiency of the _____ proof, we do not reach the issue on whether the education code provides absolute immunity for any act...

MARTIN: But in that last paragraph there they say we'll assume that they have all these general duties. We will assume that they were - where we say they would have been, and we will assume that. But we're going to apply this extra requirements on the _____ respondeat superior type analysis. I do not believe there is one other case involving the education code of immunity where the court deliberately and emphatically cited only respondeat superior cases to make their point. They talk about it within the scope, and many of the cases that counsel alluded to talk

about when the scope of employment or like that, but that doesn't mean they are talking about agency law. They could be talking about this statute, which talks about scope.

PHILLIPS: But if the statute uses the word 'scope' why shouldn't you go _____. Where else should we go?

MARTIN: It doesn't say scope of employment. Scope of their duties, their employee's position or something like that. They draw it out. But you can go to Barr and Mateo. That's where I think the legislature was coming from. That's a scope question.

One of the little minor points made, we say best interest in the affidavits, well that was a discretionary judgment that had to be met there. And we thought that that would show that they were meeting that - by saying we thought they were trying to act in the best interest of the district.

ABBOTT: Why is it that Collins didn't say that this was within the scope of his employment?

MARTIN: I think he did. I don't think he had to. He said what he did, the Dahlander affidavit says I asked him to do that. I continuously ask people to do it. The Johnson affidavit says, we ask all to interrelate with the press. I don't know why Collins had to say it if the rest of them had to say it. It's there.

HANKINSON: Where is it you say in the affidavit proof that all the employees were asked...

MARTIN: If you look at Robert Johnstons's affidavit.

HANKINSON: You agree that the attachments do not reflect that dealing with the media is part of the responsibilities of any of the people except the media director, Mr. Dahlander?

MARTIN: No, I don't.

HANKINSON: I'm just saying do those documents specifically reference that part of their job is dealing with the media?

MARTIN: No. But for Dahlander and Hinkle they would.

HANKINSON: I understand for Dahlander. Then if we don't find the job descriptions speaking to the media in the attachments, where do we find that for all these people who provided their own affidavit proof in which they make no mention of the fact that it was within their job duties to talk to the media, proof that it was within their job description?

MARTIN: In Dahlander's affidavit. You can go find it in the 5th circuit case of Henry

_____ that we cite which said in 1983 that Robby Collins did not have to not respond to the press.

HANKINSON: But all the did was ask Robby Collins to speak to the press. He didn't ask anybody else to speak to the press.

MARTIN: But he asked Robert Payton. Payton says he was asked Dahlander. Here's a guy that's coordinating the press and he asked these people to help him out.

HANKINSON: Is there anything else we should look at in the proof?

MARTIN: Yes. Look very carefully at the 2 affidavits presented by the respondents. Matthew Hardin did not say that Robby Collins stepped right out of a room and said the investigation was over when he didn't. He said he was surprised to learn that. That's the language in there. I was surprised to learn. It didn't say how he learned it. It didn't say where he learned it from. It's paragraph 9, page 3.

The other question was in the _____ affidavit, where she says "I heard it on the radio."