

ORAL ARGUMENT - 11/28/95

95-0084

ESTES V. AKINS

LAWYER: May it please the court. As a prefatory matter I think it is important to distinguish the Boy Scouts from the entities who are defendants in this case. I represent a corporation called The Boy Scouts of America, but I will use the term "National Council" to refer to my client. And I may occasionally use the term "Local Council" to refer to Mr. Peterson's client.

In deciding whether the National Council or the Local Council can be liable for the criminal conduct of the scoutmaster I think it is important for this court to understand the purpose, and structure of the boy scout program. Congress chartered the Boy Scouts of America as a corporation in 1916. The congressional charter states: That the purpose of the corporation shall be to promote the ability of boys to do things for themselves and others, to train them in scout craft and to teach them patriotism, courage, self reliance, and kindred virtues.

To fulfill this congressional mandate, the National Council has developed a program, the boy scout program. This program is a set of ideas, a set of principles, a set of guidelines, a set of goals, a system by which boys earn badges and move up the ladder of rank. And hopefully this will instill the qualities that congress asked the Boy Scouts of America to instill.

But the National Council does not operate this program. This program is offered to local groups who wish to help boys in their local community to obtain these virtues and these characteristics. These local groups are churches, PTAs, and other charitable community organizations. But it is important to know who is behind these local organizations. It's the parents of these boys. It's the mothers and the fathers who wish to see boy scout principles instilled in their boys.

So what the National Council does is they say: "Here is this program. If you take this program and you implement it we think your boys will benefit. But it's your job to pick the leaders that you want to lead your boys. And it's your job to pick which portions of this program you want to emphasize, which portions you want to focus on. Now we expect you to run this program consistent with boy scout ideas, but it is your program to run. We do not control your program for you."

GONZALEZ: If that's the way it is, why does the Boy Scouts National Organization keep a list of people who should not be scoutmasters?

LAWYER: The purpose of that your honor is to provide a central registry so that the local organizations have a place where they can go for information. The name of this service it's called The Registration Service. It's a program resource that the National Council provides so that the local people, the moms and dads in the communities, have a place to go to get information where it's been determined

that a particular person is unfit.

PHILLIPS: Can a local organization hire one of those people anyway and still be affiliated with the boy scouts?

LAWYER: The answer to that question your honor is no. The congressional charter states that the Boy Scouts of America has an exclusive right to use the program, the emblem, the designations, etc. Given that exclusive right the National Council has to have some control over how the program is used. An example would be if a parent group got together and was given a charter and it turned out that this parent group was all Nazis, and they started running a little nazi troop. That is not consistent with the congressional mandate. It's not consistent with boy scout ideas. And the National Council would have the right to withdraw the charter from that troop and say: If you want to be Nazis that's fine you can go be Nazis, but just don't call yourselves boy scouts when you do it.

PHILLIPS: And the same would have been true if Estes had been on this National Registry list?

LAWYER: Yes your honor.

GONZALEZ: So if Estes had been on the list, that scout troop would have been defunct or no longer affiliated with the boy scouts? If the church had hired Estes knowing that Estes was on this list?

LAWYER: If the church had hired him knowing he was unqualified and insisted that he be the scoutmaster, the National Council would be within its rights to ultimately withdraw that charter.

HIGHTOWER: Does the National Council or the local council issue the troop charter?

LAWYER: It's a two-step process. It first goes through the local council; and then to the national council.

HIGHTOWER: But the national council does issue the troop charter?

LAWYER: That's correct your honor.

HIGHTOWER: And at the time the troop charter application it indicated the person's name on that list was there, then that charter would have been denied, or rather not issued?

LAWYER: Ordinarily the charter is issued first. So then the registration form would come through for the particular leader that that chartered organization wanted to use. The form is simply passed through the local, and then passed to the national. At neither stage does the local or the national approve of that leader. That leader is chosen by the parents and the community leaders who run that...

HIGHTOWER: You say they don't approve, but they do disapprove if they choose to do so?

LAWYER: They do tell the local organization this person is on the ineligible list. They provide that service.

HIGHTOWER: Does that pull their charter then at the same time?

LAWYER: No your honor. Unless the organization decides that they are going to ignore the fact that this person is on the ineligible list and does not meet the moral qualifications set forth in the congressional charter, and they insist that they want to run their organization that way they may do so, but not under the name Boy Scouts.

HIGHTOWER: Under the name Boy Scouts my question was do they lose their national charter if they choose to do that?

LAWYER: Yes.

HIGHTOWER: So that's not what you said just a moment ago. You said they could go ahead, but not with their approval.

LAWYER: No, they can go ahead and run a program if they want with that particular person leading. But they can't call it a boy scout program and they cannot use the boy scout program.

HIGHTOWER: And their charter is cancelled?

LAWYER: That's right.

OWEN: What duty if any do you say your organization would have if your organization learned that a troop leader was in fact a pedophile?

LAWYER: If the National Council learned that, that person would go on the ineligible list and his commission or his registration would be withdrawn.

OWEN: Do you think that you should have any other duty under law?

LAWYER: No, I don't. Because the person, the troop leaders are selected by the moms and dads, by the parents. It is geographically and socially infeasible for the national council to be in the business of screening, retaining and selecting scoutmasters. There are thousands of scouting units in this country. There are over 4 million boy scouts, and some 1 million adult volunteer leaders. This is a locally driven program and it is a volunteer driven program.

If the court would examine the annual reports that the national council sends to congress there are typically around 3,800 professional paid scouters, that's all at the national and local level combined. These scouters cannot possibly geographically screen and retain control over these scoutmasters all across the country.

OWEN: If you were to get information that a potential scoutmaster was in your view unqualified, would you give out information as to why the scoutmaster was unqualified in the view of your organization?

LAWYER: The way the registration service works your honor is it's simply reported that he is on the ineligible list.

OWEN: And no details are given?

LAWYER: That's correct.

OWEN: What if an inquiry is made?

LAWYER: It's my understanding it's simply reported that that person is ineligible.

CORNYN: What if hypothetically we are talking about big brothers and sisters, and a person applies for approval as a big brother, and the organization staff for big brothers and sisters fails to do a reasonable investigation to determine whether this person has a criminal record for pedophilia is there any duty owed when that pedophile ultimately assaults a little brother in the organization?

LAWYER: That's where it gets to the fact that the program is locally driven, locally controlled and volunteer driven. The church in this case chartered the troop. Is the organization responsible for screening and selecting the scoutmaster and that's where the ultimate responsibility would lie.

CORNYN: So in my hypothetical there would be a duty of ordinary care under those circumstances, but it would only be as against the organization who actually has the right of control?

LAWYER: That's correct your honor. And the example I would give is in the Doe v. Boys Club of Greater Dallas case. The volunteer in that case was retained by the organization that ran the club. That would be analogous to the corresponding organization in this case is the church that ran the troop.

PHILLIPS: The CA opinion as I read it held that a fact issue had not been negated as to your client solely on the issue of respondeat superior in regard to your responsibility for what the local council did. And as I see the argument from both sides as to why that's right or wrong goes off on procedural more than substantive; is that correct? You have an appendix of a number of cases about your lack of liability for what a local council does, but none of those cases from other states go to your liability or lack of liability

for...I mean your cases are to what the local chapter does, the church, or the school, not to your responsibility on the council. And you say that this respondeat superior was not pled. The respondents say that it was your burden to negate on summary judgment. It was purely a defensive issue on your part and you didn't bring it up and negate it, and so it's still in the case. Are we going to be left to deciding this critical issue purely on who's right procedurally?

LAWYER: No, there is also a substantive basis your honor. At least one of the cases I cite in the appendix, and I can't remember which one it is, or maybe it's a case cited in the brief itself, but it's a case where the court held that the national council was not liable for slander committed by an official of the local council. Precisely because the local council was not the agent of the national council. The second reason I would say that there is a substantive basis is I think this is akin to a parent corporation and a subsidiary corporation. The parent is not responsible for the conduct of the subsidiary just like the national here is not responsible for the conduct of the local council.

CORNYN: If the national organization had learned that a pedophile had indeed become a troop leader of a local troop, and even though they learned of that information and maintained his name on the list and had not undertaken the next step, that is to disenfranchise the local organization, and a parent perceiving that this was a boy scout sponsored troop would there be any liability under those circumstances? Would you have breached any duty?

LAWYER: If it came solely to the national's attention and no one else's, and the national therefore took no further steps?

CORNYN: Right. If you knew that this was a pedophile who was a troop leader, and you didn't act, would you have breached any duty to the child?

LAWYER: In that instance arguably there would be a duty because the national was the only party holding that information.

OWEN: What in your view gives rise so that you can put someone on an ineligible list? What kind of information would you have in your view would rise to the level where you say this person is ineligible?

LAWYER: There are a few certain instances where something flagrantly against the boy scout principles comes to the attention of somebody at the local level, and it's transmitted to the national, or somehow through the organization and it gets transmitted to the national. An example would be someone who is an avowed atheist. The boy scouts is based on the principle that a scout has reverence toward God. Another example would be an avowed homosexual. As the court is probably aware there are cases in other court systems where this is an issue that is arising and the boy scouts unashamedly say we have the right to exclude someone like that from this particular organization.

OWEN: Do you think that your organization has a duty to investigate if facts put you on notice that there is some question about a potential scoutmaster as to whether they are a pedophile? In other words if you had received the same information directly that's in the record in this case, that this gentleman was messing with boys, do you think you would have a duty to investigate under those circumstances to determine whether this person should go on the ineligible list?

LAWYER: Ordinarily not your honor. The information would go down to the local level to be investigated at that level. That's my understanding how the program would work.

OWEN: Do you have a duty to follow-up and find out what the outcome is so you could determine whether that person stays on or off the list?

LAWYER: I don't think so your honor. It's the troop's responsibility to select and monitor and retain and screen its own leaders.

GONZALEZ: You're making argument with regards to the national organization, but does your argument also extend to Golden Spread Council, or do you differ from Golden Spread Council?

LAWYER: The argument is the same essentially your honor that the local council is not the one that retains the control over the details of the work of the local troops.

GONZALEZ: But how can that possibly be defended? Here we have an individual who had molested boys while the boys were in a boy scout troop. The matter was investigated by the Golden Spread Council, albeit perhaps shotty investigation, but at least they were on notice. Are you taking the position that neither the national organization nor Golden Spread Council owed any duty to the parents or to the church that sponsored this boy scout troop to let them know that the person they were about to hire as scoutmaster was a pedophile, or there were complaints that he had molested boys; is that your argument?

LAWYER: In this case it is your honor. And I've got several points to make on that. First of all there is no evidence in the record that the Golden Spread Council undertook to supply information to the church about the candidate.

GONZALEZ: They didn't volunteer the information that Mr. Estes, the person you are about to hire as scoutmaster has a series of complaints that they didn't tell them about; and you are saying that they had no duty to tell them that?

LAWYER: No, and the reason I say that your honor is that the district council that offered Mr. Estes's name to the church, at least two of the members of that council were initially the ones who brought the allegations to the attention of the Golden Spread Council. So it was two members, two volunteers on the district council who originally raised the allegations and it was that district council that then offered his

name to the church.

ENOCH: You say the district council. This was a subdivision of the local council. This is one of the districts within the local council that has their own governing board?

LAWYER: That's correct your honor.

ENOCH: And the discussion here about who was making the recommendation, it was this district level that made that recommendation; and on that board served two of the people who had made the complaints to their council?

LAWYER: Yes, your honor.

GONZALEZ: You are saying then that nobody had a duty to the parents of these boys; at least none of the people that were sued had a duty?

LAWYER: That's correct your honor. I think another factor that has to weigh in this is Justice Gammage's statement in Bird v. Webster that false accusations of child abuse, sexual abuse, can be devastating. The local council official did look into this. And took it as far as he could without...well in balancing I think he took it as far as he could.

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GOLDEN SPREAD COUNCIL

LAWYER: May it please the court. Just two quick points that I want to make. And that is first of all in this factual scenario neither the Boy Scouts of America nor the Golden Spread Council introduced the scout to the scoutmaster. The facts in the case establish that they had had a relationship for several years before either one of them became involved in the scouting program. And in fact the illicit sexual relationship occurred more than 18 months before either one of them ever became a member of the Boy Scouts of America.

GONZALEZ: But they continued in the scouting program?

LAWYER: They both happened to join the scouting program, but the sexual relationship had occurred 18 months before.

GONZALEZ: But there was an incident?

LAWYER: There was one incident after they joined a new scout troop when the scoutmaster walked up and touched the young man and said he was going to have to get a physical and the doctor was going to touch him there. That was the only incident that occurred after they were in the scouting program.

The facts in this case do not support a cause of action to recover monetary damages for sexual molestation. The respondent in this case is simply trying to take the facts that exist and use them to their advantage or mold them to create a cause of action for sexual molestation because the molestation had nothing to do with the scouting program.

The second point is, and Mr. Stoley's touched on it, that for the scouting program to work we've got to rely on the grass root system. You would not want a national council in Irving, Texas to dictate how the programs are going to be operated across the United States. We have scout troops from Anchorage, Alaska to the Florida Keys, from Maine to Hawaii. And for the people in Irving to sit there and dictate as to telling people in Anchorage Alaska as to whether the scouts have to earn a merit badge in sailing is not appropriate.

GONZALEZ: That's not this case. This case is about who has a duty if anyone of screening people like Mr. Estes?

LAWYER: And that duty lies with a sponsoring organization which sponsors the unit, the scout troop in this case. And in this case it's the Methodist Church in Amarillo, Texas which was granted the charter to sponsor a new troop, that had the duty to screen the applicants for their adult leadership positions.

GONZALEZ: There were people in the entity that you represent, Golden Spread Council had information that Mr. Estes had had a serious complaint with regards to sexual molestation. Is that correct?

LAWYER: This information was brought to an employee of the Golden Spread Council by two scouting coordinators: a lady name Mrs. Charles Hearn, and a lady named Marilyn Reynolds. They were the scouting coordinators which they are people who operate in a liaison capacity between the Golden Spread Council and the troop to see if there is anything the council can do for the troop, or anything the troop needs from the council. They are volunteers. They are adult volunteers. In this situation they happen to be women. These two women Mrs. Marilyn Reynolds and Mrs. Charles Hearne heard rumors that there had been inappropriate activity between the scout and the assistant scoutmaster at that time. They took that information to the Golden Spread Council, the council tried to gather additional information to support the rumors; could not develop any additional evidence, and decided there was nothing to it and let it drop.

CORNYN: Did they have a duty to investigate the allegations?

LAWYER: They tried to investigate.

CORNYN: No I am asking more generally did they have a legal duty to investigate?

LAWYER: I think after the information was brought to them that certainly they had a duty to investigate it because they didn't want any activity going on in a troop that conflicted with the principles of

the Boy Scouts of America.

CORNYN: Your argument is then that they discharged what legal duty they had by conducting the investigation?

LAWYER: They tried to gather additional evidence to support it and nothing was presented. They invited the parents of the scout troop to come forward with the evidence. In fact several appointments were made with some of these parents and they never kept the appointments.

CORNYN: So legally, and I am not talking factually about your case, but you would say then they discharged whatever legal duty they had to investigate...

LAWYER: They conducted an investigation. They invited the people who supposedly had the...

PHILLIPS: Well we are not really interested in the facts here. As a matter of law you say they had a duty once this information came. So if they had done nothing, if nobody at the Golden Spread Council had done anything after this information had been transmitted to them, then you would say that the plaintiff would have made out a case?

LAWYER: At that point in time. But the point in time that the plaintiffs are complaining about came...

PHILLIPS: Okay let's set the _____ problems as well. Just in the abstract in another part of the country if information of a problem with a local scoutmaster or assistant comes to the attention of the council and they do absolutely nothing, and then later an injury results, then that does make out...that would state a factual claim against the council?

LAWYER: In all situations your honor they are relying upon the sponsoring organization to conduct that investigation to determine whether the individual is fit or unfit and to pass that information onto the council. So the council is still relying upon the adult volunteers out there in the field who are...

PHILLIPS: So your answer is no, the council doesn't have any duty once it receives such information to do anything?

LAWYER: And in this situation it passed it back to the adult. It does not have a duty your honor.

PHILLIPS: You are saying that they if got information like this and done nothing, they got information that a scoutmaster was a potential murder and they passed that along to nobody, and then a murder results, you cannot state a cause of action in a court against that council?

LAWYER: In that situation, I think you could state a cause of action your honor.

PHILLIPS: But not a pedophilia? I am just very confused. I am just trying a very basic question whether you can have any duty at all under any circumstances.

LAWYER: When that information is brought to them they rely upon the volunteers back in the field and they have a duty to do that, and they did that in this case.

PHILLIPS: They have a duty to report it back to the volunteers?

LAWYER: To complete their investigation yes your honor. They have a duty to complete their investigation.

HIGHTOWER: Well if they complete the investigation but they decided there wasn't anything to it.

LAWYER: Exactly.

HIGHTOWER: They took the volunteer information and decided there wasn't anything to it and that is what ended it?

LAWYER: Yes, sir and invited additional evidence to be presented if they could come up with anything. And it was these same two volunteers who initially came to them with the information who ultimately when Estes made application to become scoutmaster of the new troop had responsibility for passing upon Estes' qualifications at that time. And Estes application for a scoutmaster of the new troop, troop 223 is in the record and you will see on the face of that application it is signed by Marilyn Reynolds, the scouting coordinator who was one of the two women who first took these rumors to the district council. She ultimately when the burden was placed back on her to approve or reject Estes as a scoutmaster of the new troop, equipped with the information that she had about these rumors, found Estes to be a suitable applicant and approved his application and passed it onto the council for his approval.

OWEN: Was she the liaison?

LAWYER: She was the liaison. She signed it as the scouting coordinator. She is an adult volunteer.

OWEN: She was a volunteer but for GSC?

LAWYER: She is a volunteer in the Golden Spread Council within the council.

OWEN: So she was your agent?

LAWYER: No she's a volunteer.

OWEN: She was carrying out the activities of GSC?

LAWYER: And the local troops as well.

OWEN: What is GSC's duty if they are told unequivocally that this person has molested a child but you can't get any further details; what is your duty under those circumstances?

LAWYER: The Golden Spread Council has an obligation to pass that information onto the chartered organization who has initially had responsibility for their approval of that individual to investigate the situation. And I think the council would also have the obligation to pass that information onto the national council so that if the council finds that the evidence is substantiated he may be listed on the list of ineligible volunteers. But again the council's got to rely upon the parents and the adults back there in the field and so I think it's their responsibility to share that with those people out there to investigate it.

OWEN: You just said the parents. Doesn't the Golden Spread Council have an obligation to the parents of the children in the troop to give them the same information that you have and let them make their own investigation?

LAWYER: And in this situation they were inviting those parents to come forward with the evidence and there was no evidence to substantiate it. And as Mr. Stolley has said...

OWEN: Which parents? Were the parents of the scouts themselves in this troop advised that...

LAWYER: Charles Hearn, the scoutmaster of 22, is the one who...it occurred on a camp out that Charles Hearn overheard some boys talking that the assistant scoutmaster and the scout had been messing around. Charles Hearn took this information back to his wife, who was the scout coordinator, who in turn then took the information to the Golden Spread Council. So it came from the top authority in that particular scout troop.

OWEN: Did it go back down the chain to the parents of the scouts in the troop?

LAWYER: And the Golden Spread Council conducted an investigation to see if there was evidence to substantiate it. And they relied upon the people out in the field to gather that information for them.

ENOCH: Following up on that. Let's talk about this district. Did the sponsoring group propose Mr. Estes as a scoutmaster that was then not rejected by the council, or did the district provide Mr. Estes's name to the sponsoring group as one person recommended to be their scoutmaster? What

happened?

LAWYER: It was not one person recommended. When the sponsoring organization was looking for a scoutmaster of the new troop that they were forming, the district commissioner introduced Mr. Estes to the chartered organization, which was the Methodist Church. And they relied upon the Methodist Church then it was the church and the minister of that church who had to sign Estes application approving him. So there was no recommendation...

GONZALEZ: No one from your organization sounded the alarm or put them on notice that there might be a possible problem. And you are saying you had no duty to do so.

LAWYER: The people that he was introduced back to were the same people who had come to us with the rumors in the first place. It was Marilyn Reynolds and Mrs. Charles Hearne were two of the people that the introduction was made back to for Estes to be considered as a candidate for scoutmaster of the new troop.

GONZALEZ: Is your argument that you had no duty to share that information with the pastor who was looking for a scoutmaster for them to make their own investigation and make a judgment?

LAWYER: It was the duty of the pastor and the church troop committee and the scouting coordinators to investigate the qualifications of this individual. And two...

GONZALEZ: I am focusing on what was your duty to share the information with the people that had some responsibility to the parents of getting a scoutmaster who was not a pedophile?

LAWYER: Two of those people who were investigating Estes's qualifications to serve as scoutmaster were...

GONZALEZ: Were your agents?

LAWYER: Were the two people who came to us with the information. They had as much information if not more than we did.

GONZALEZ: I understand. They were your agents were they not?

LAWYER: No, they acted as...they are volunteers who act in a liaison position conduit of information between the council and the chartered organization and the scout troop. We have no right to control those people in the details of their work.

GONZALEZ: But you could have black-balled Mr. Estes if you wanted to?

LAWYER: We could not blackball Mr. Estes...

GONZALEZ: Put him on that registry list, put him on the list of unacceptable persons. You could have done that.

LAWYER: The Boy Scouts of America could have put him on the list of ineligible volunteers...

GONZALEZ: On your recommendation?

LAWYER: No. The information from the council is passed onto the Boy Scouts of America, and whether the Boy Scouts of America chooses to put him on their list of ineligible volunteers or not is up to the boy scouts, and their criteria is to who ends up on that list.

GONZALEZ: But they don't do an investigation. They rely on the local authorities as you are saying that they should?

LAWYER: Everybody is relying upon the parents out there in the field who have direct access to the applicant, to interviewing, to conduct whatever investigation they feel is appropriate to determine his qualifications.

OWEN: Do you think you had a duty to tell your liaisons to share what information they had with the sponsoring organization?

LAWYER: No. The liaisons knew and if they were concerned about his qualifications then we feel that they should not have approved him for scoutmaster of a new troop. They had as much information as we did if not more.

HIGHTOWER: But the bottom line is after these liaison people made their report, and no further information came in, then nothing was done to send to the national council any information that would have caused them to put him on the list?

LAWYER: For the very reasons Mr. Stolle is quoted from your recent case, that innuendos of this that are not substantiated or supported can have devastating effects on that adult for the remainder of his life. And there was no evidence to support it so the information was not passed on.

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RESPONDENTS

LAWYER: May it please the court. I must confess to considerable puzzlement. Petitioners' brief takes the unqualified position that they have no duty to these respondents. Today in argument under intense questioning from this court both have admitted they may have some duties, in fact do have some

duties, but they just don't have any duties under this situation.

Now here's what they argued in their brief. In essence what they were telling this court, what they are telling this court in their briefs is it's better to have a child molester in your organization than it is a drunk. Because if you send a drunk out in public you may have a duty that may end in a very substantial judgment against you. But if you send a child molester out in public, that's just okay because we don't have any duty and we don't have any responsibility for what happens. That's what they argue in their briefs when you examine those briefs. But what you heard today I think is what the law is, and where this case must go.

HIGHTOWER: Isn't it a little easier though for a group to determine whether or not whether someone is a drunk than just whether or not they are a pedophile?

LAWYER: I don't know. Certainly there are some obvious signs of drunkenness that may not be present with a pedophile. But investigation is the key to it of course. And if the information is there that would indicate the danger, then the red flag is waving and it's time to look into it.

OWEN: What exactly do you think the duty should be and how far should the investigation should extend? Because I think that we all recognize that there is a balancing problem here between slandering or libeling someone unjustifiably, labeling the pedophile on sketchy information, balancing these things what specifically do you say the duty should be, how far should it extend, on what kind of information is someone obligated to act?

LAWYER: Let me say first that had a proper investigation been conducted in this matter, there would have been no liable and slander because Mr. Estes is in the penitentiary for the things he did in connection with this situation and others. So that would not have been a concern with a proper investigation. Now what is the duty?

HECHT: Just to stop you right there. Does that mean they have to conduct the same kind of investigation as the police department and the DA, because that's what put him in the pen, not somebody who was a volunteer walking up and down the street asking questions?

LAWYER: Yes. And I think when you are talking about something this serious it requires an intense investigation.

HECHT: Well the difference though is that the police can compel you to answer questions, or take you before a grand jury and require you to answer questions, whereas a volunteer for a do good organization really can't.

LAWYER: Yes, that is correct. But a report to the police had that been done, then that would have allowed the police to go ahead. Mr. Roseberg could have called the police department and said we have this report, we don't have any idea whether it's true or not, please investigate it and let us know.

HECHT: So this tails back into the question which is how do you balance that with the liability for defamation?

LAWYER: The only thing that I know that can be done is that it be investigated. And this was not investigated. Now I know of no liability that will result if I as a scoutmaster or a scout executor am told by someone: Well you've got a scoutmaster out there who is a pedophile...

PHILLIPS: Well liability might not result but you might have the honor of a trial.

LAWYER: Well I guess we all face that possibility in everything we do your honor. But as a scout executive I think the first step I would take is to talk to the people involved. If I determine that there is any possibility that this may have some merit, then I would take it to the police department and proceed from there. Now look carefully at the record on the investigation that was conducted here, because counsel would have you believe that some sort of thorough investigation was made. And as a result of that everything was okay. Well a thorough investigation was not made because in fact the illegal activities were occurring - they were not uncovered. I think what you will discover is that Mr. Roseburrow told one of his employees to whom this was first reported: Go back and talk to the people and see if you can get any details and then we will make a full investigation. And that's quoted directly from his affidavit that is attached to one of the briefs.

His employee went back and talked to the people and they were not particularly cooperative. They did not seem to want to talk about it. Perhaps for the very reason Justice Owen that you are suggesting.

OWEN: So at that point given the state of the record they were told that this person was messing with some boys; they go and try to get names, more information, so at that point what further duty if any do they have?

LAWYER: Well the only thing that was done as I understand the record was that this employee went back to these people and said give me some names, tell me what you know in detail, and they wouldn't give him any names. He reports this back to the head executive, the GSC head executive in that area. The GSC executive decides well this is just a feud between the families so I am not going to investigate it any further.

OWEN: What further should they have done? That's my specific question. Given these facts what further steps should have been taken in your view?

LAWYER: He could have first called the people in himself and said: Look I am the head executive here. You've made a very serious accusation, I want to know the facts. Are you going to give me any facts? Do you have any facts to support this?

OWEN: Assuming they got no additional facts what else?

LAWYER: Then the next step could have been to either hire a private investigator or go to the police department and say Look these accusations have been made; I am dealing with young boys and I cannot afford to take any chances; I would ask that the police dept. investigate him. That was an additional step. I mean this is going to be a situational thing depending on the circumstances. But remember that we are dealing with a summary judgment. Remember that these petitioner's duty was to negate as a matter of law negligence.

OWEN: Under the state of this record are you advocating given what GSC knew at that point, that it had some duty to the parents of the child in this case, at that point in time what did duty do you say they had?

LAWYER: Their duty was to conduct a complete investigation, not just to send one employee back to the people say: Tell me what you know? And when they say: Well we can't talk about it, we are not going to talk about it, we won't tell you anymore.

OWEN: I take it you are not advocating they go directly to the parents of this child and say we've got information. Here's what we have.

LAWYER: They didn't know at that point which children were involved. They simply had the general...

OWEN: They went to all the parents. Do you think they would have been justified at that point in time to going to the parents of the scouts and the troop and saying we don't know if this is true or not, we can't substantiate it but here's what we've been told. Would that have been justified?

LAWYER: Yes, I think it would have. I think that given the kind of conduct we are talking about, that a proper investigation very well could involve a conversation with the various parents saying do you have any indication that anything improper is occurring at these scout meetings?

PHILLIPS: And you would not be interested in taking a case of a potential scout leader who had been falsely accused...who had ultimately it turned out was falsely accused under such a scenario?

LAWYER: Well again we are talking about the fact specific situations. There will be circumstances where it may be proper to go a long way, there will be circumstances where it may be proper to go a short distance, but the fact remains...

PHILLIPS: Well here there's a report that is pretty devoid of details and you are saying that the minimum duty, the duty to escape a summary judgment extends to a new _____ what they should have done?

LAWYER: Yes.

PHILLIPS: And I am asking you if that same duty that you say is a minimum duty had been done in another situation where it ultimately turned out the person wasn't in prison, he was in fact somebody who was the victim of a vendetta or family feud would there not be a possibility of this organization exposing itself to a liability?

LAWYER: Yes we think there is certainly that possibility. But this is where we get into the balancing.

PHILLIPS: But isn't that a balance we are supposed to do in setting out this standard? And that's going to lead me to my next questions which is what are you looking at for the erection of this duty? Are you looking at restatement in areas that we haven't specifically adopted but have touched on?

LAWYER: Yes I think perhaps your...well it depends on which standard you are referring to.

PHILLIPS: I think that Justice Owen's question we are just looking at Golden Spread Council.

LAWYER: I understand that. And my concentration also is on Golden Spread Council your honor. Certainly I am not conceding anything on the other defendant, but I think certainly the strongest case.

BAKER: How do any of the arguments you are making about the council apply to cause the BSA to have liability under this same scenario with absolutely no knowledge of what happened at the local area? What is the theory that you would say causes them to be liable?

LAWYER: If BSA is liable it is under some kind of respondeat superior theory.

BAKER: And what evidence if any is there that was in the response to show that there's enough connection between the national organization and the council to make them an agent? Aren't you arguing that there is no principal agent relationship whatsoever in this case?

LAWYER: We are not relying on a principal agent relationship.

BAKER: What else can they be then? There is no alter ego is there?

LAWYER: No, no alter ego.

BAKER: So how does the boy scouts get involved under your argument?

LAWYER: What was pled was that the Golden Spread Council is controlled by the Boy

Scouts of America, that it's a conduit through which the information is passed on to the Boy Scouts of America.

BAKER: But they didn't pass it on.

LAWYER: I realize that, but they had the responsibility to pass it on.

BAKER: GSC did?

LAWYER: Yes.

BAKER: And so they failed in their duty then that makes BSA liable?

LAWYER: Yes, sir.

BAKER: Because what they didn't know hurts them?

LAWYER: That is the theory that was pled, and that's the theory that was adopted by the CA. As far as summary judgment proof..

BAKER: I thought the CA kind of said well we think it's really kind of analogous to a negligent hiring situation and, therefore, if you've got a bad apple your real duty is you have to get rid of them. So the question there is how can they get rid of a bad apple if they don't know about it?

LAWYER: Well they used that analogy on one aspect of the case, but they came back to the respondeat superior and what they said was if GSC is liable...

BAKER: Now they say that wasn't pled.

LAWYER: No, it was pled. It was pled that GSC was a creature, or a creation, or element of the boy scouts. And consequently that the boy scouts were responsible for anything that GSC did. That's what the pleading was. It didn't use the word respondeat superior. But the facts were pled in such a way that that conclusion was present, or could be drawn. Now as I understand summary judgment law it was the movants duty to negate the respondeat superior language, that is to negate the allegation that GSC was controlled by the boy scouts.

What you will find when you look in the record is a lot of discussion about how these various organizations are chartered. But I have not seen any evidence that negates the nature of the relationship in that context. If it's there I certainly have not seen it. So that's the theory as far as the boy scouts are concerned.

SPECTOR: Is the scoutmaster always a parent?

LAWYER: Not as far as I know. I am not aware of any requirement of that nature. I am sure opposing counsel is more...

SPECTOR; Is it usually a parent?

LAWYER: Usually a parent I think yes.

OWEN: Getting back to the balancing duty that you say is owed by Golden Spread Council, you were about to get into that's where the balancing comes in. And obviously what we're trying to decide is is any duty owed and if so how do you do balance these competing interests? Let's assume that we have essentially the facts here that an allegation as Chief Justice Phillips said a sketchy one. What duty is there from that point? And let's assume that some investigation is made that no further facts are uncovered, where do you go from there?

LAWYER: Well the problem is always what is a sufficient investigation?

OWEN: Do they go to the parents and suggest that this person has been accused of pedophilia and they have no concrete facts?

LAWYER: Well I think that as part of the investigation they can inquire. They don't have to suggest. They can simply inquire.

OWEN: How do you inquire without suggesting?

LAWYER: Certainly it's a delicate thing. But you've got to remember what's at stake here. You've got young men who could be damaged for life. Certainly the balance on the other side is the scoutmaster can be damaged for life. So it calls for intelligence, it calls for discretion, it calls for a lot of very careful things that were not done in this case.

HECHT: What kinds of things should be investigated? Suppose some allegation that the troop master had used drugs in the past?

LAWYER: Well you can investigate by observation.

HECHT: Should you investigate that?

LAWYER: Certainly. Certainly. I think you should investigate anything that is reported that is contrary to the charter of the boy scouts

HECHT: If he said he believed in not paying federal income taxes because we weren't on the gold standard anymore should you investigate that? It is a felony.

LAWYER: If that's what the scoutmaster is advocating to his charges, yes.

HECHT: If he were living with someone without benefit of marriage, that might be something?

LAWYER: Again that's a violation of the basic charter.

HECHT: If he had done it in the past, but wasn't doing it now?

LAWYER: Perhaps if it's being advocated to the young men as a proper moral standard.

ENOCH: We've been talking about this duty to investigate. One of my concerns is regardless of the investigation the council for the Golden Spread council apparently had at least a red flag waved and that the people that were bringing forth this allegation on behalf of the council to make a recommendation to the sponsoring group if not an outright recommendation at least a introduction of the potential scoutmaster to them, knowing that these complaints had been made about that individual, you've been focusing on this duty; is it your position that the posture of this case is that there was a duty to investigate which was negligently performed and that was the causation? Is that really what your case is?

LAWYER: Yes Justice Enoch I think that's where this case goes.

ENOCH: In that regard, you have a circumstance where the child already knows about the propensities of this assistant scoutmaster, what duty is there on behalf of the council to investigate these allegations in order to develop information that they can convey to someone who already knows it? What duty is there for Golden Spread Council to advise the person who's attending the scoutmaster that there is an event going on here of which that child already knows? I mean the child was invited by Estes to join the troop that Estes went to. The child was 10 years old at the time. What duty does the council have to find out facts that the child already knows?

LAWYER: Well the duty is to get the scoutmaster out of the environment with the children if in fact the scoutmaster is a pedophile. Certainly in the weighing process in front of a jury those prior incidents are going to be a factor. The very thing that you are concerned about is going to be a factor in front of the jury. But at least 2 events occurred as a direct result of this man being scoutmaster. They would not have occurred if the investigation had been made and his application to be a scoutmaster had been rejected. Because the investigation had revealed those prior incidents had in fact occurred.

OWEN: You say that. You are assuming that. Again my question is given the real world situation we don't know that an investigation would have turned up anything. And there are situations where the investigation itself can cause irreparable harm to someone who is not a pedophile. You just keep

saying duty to investigate, but you don't see any parameters around that for us to do what you admit must be done and that's balance and respect of lives?

LAWYER: And I guess I don't know how to answer the question. Because there must be a duty to investigate. Even opposing counsel admits that once information comes to their attention they have some kind of duty to do something. They obviously don't go as far as I do.

PHILLIPS: The only case you cite to us specifically for this is a dissenting opinion from an intermediate court (an appellate court) from a state smaller than Texas. I think we are all struggling on how we articulate the duty. Can you give us a little more help because this does not fit into, and you admit, it doesn't fit into any of the areas you have analogized like negligent hiring?

LAWYER: And my response is when the event is brought to the attention of someone in responsibility, wherever it is, the duty arises. That's the first step. There is a duty to investigate that something may be going on.

GONZALEZ: What is the basis of that duty given the general law that there is no responsibility to third parties absent a special relationship, how do we get over that hump?

LAWYER: And Justice Gonzales I think that your opinion in Greater Houston Transportation is the guideline for that. In two paragraphs you outline the parameters of this duty area. You do the balancing factor. You look at the risk, foreseeability and likelihood of an injury weighed against _____ utility, magnitude of the burden, consequences of placing the burden on the defendant. Then you move down and you talk about the general rule: No duty to control the conduct of third persons, unless there is a special relationship. There is a special relationship here. It's created by the Charter of these various organizations. The Boy Scouts of America in their charter say that they are going to investigate and they specifically say in affidavit that they have the right to approve and that they are going to approve or disapprove scoutmasters. And we heard counsel say no question about it. If you've got a bad person wanting to be a scoutmaster that person will not be approved. And the same of course with Golden Spread Council. So you've got the special relationship. That to me is where the duty comes from, within the parameters that you outlined in the Greater Houston case.

Now what this court keeps coming back to me on is what kind of duty is it, or what kind of investigation is to be conducted? And the difficulty is in my answering that is that it depends on the circumstance. It is a situational event. If I am the Golden Spread chief executive for Amarillo, and someone comes to me and says: This scoutmaster out here is messing with the boys; then I have a duty and that duty is to pursue that until a reasonable person would be satisfied that there is no merit to the allegation, or that there is merit.

CORNYN: And your contention is only a jury can decide that?

LAWYER: Yes.

GONZALEZ: And you're saying that in summary judgment context sufficient facts have been pled for a fact finder to make that determination as to whether or not there was a breach of that limited duty?

LAWYER: Yes your honor that is correct. And the record itself indicates what was done. And a reasonable person could conclude that what was done was not sufficient.

HECHT: And when you say boy scouts or wherever you mean the boys and girls clubs and the YMCA?

LAWYER: Yes.

HECHT: And churches?

LAWYER: It makes me nervous to venture beyond my own case, but I understand you are writing a law for the state.

HECHT: The same rule would apply to churches who had camps where kids went, and schools, little leagues, wherever you have this situation arise that would be the duty?

LAWYER: I would have to give a general and qualified yes to that.

HECHT: Well we can't write a rule just for the boy scouts.

LAWYER: I understand that.

* * * * *

REBUTTAL

LAWYER: I came here today expecting difficult questions because it's a difficult issue. And I think the way out of this dilemma is to look at it like this: In a series of cases Union; Comp(?) v. Albritton and the Doe(?) case, the court has talked about the fact that proximate cause can sometimes be a too attenuated to constitute legal cause. In another case Centex Realty v. Siegler this court talked about the fact that duty can sometimes be too attenuated to create a legal duty.

GONZALEZ: Counsel you did not bring any points on that. The CA held against you on those points and you did not preserve error on those points. Is that correct?

LAWYER: Yes your honor. And I am not arguing proximate cause. I am just talking about the progression on the idea of attenuation. And that idea has moved into the duty cases as well, the Centex

Realty case. In that case the real estate management company unqualifiedly had the ability to control security and they wanted to elect a majority of the board members of that condominium association. They could have done anything they wanted to. But this court said that that power, that ability was too attenuated to create a duty. The similar situation here is the National Council has a congressional mandate to protect the boy scout program, to protect that emblem and the exclusive right to use the program. But that power is too attenuated to create a duty at the local level to screen and retain troop masters.

An example I would give, and I think this rebuts Mr. _____ answer that there is a special relationship. An analogous situation would be the board of medical examiners does an investigation of the qualifications in the moral background of a candidate for a medical license. And they miss something. They miss someone who is a pedophile or a sexual abuser. That person gets a license; later goes out and does something immoral, illegal. The board of medical examiners is not responsible for what that person did just because the board of medical examiners has certain criteria for the granting of a license to that person. Similarly the boy scouting program contemplates that scoutmasters and volunteers throughout the whole system will have certain criteria and meet certain guidelines. But that doesn't make the boy scouts of America, the national council responsible when that person later goes on and does some self gratifying immoral conduct.

What the boy scouts program is is a blueprint. The national council has provided a blueprint that parents and local organizers can use to try to instill these values in boys. But it's up to those local organizations to decide exactly how to use that blueprint. The national council has the right to expect a certain end product but does not control the details of how the local organizations get to that end product.

ENOCH: If the local council receives a report that admittedly raises concerns for the local council, does the local council have any duty with respect to that report? Does that create any duty on the part of the local council to do anything with that information?

LAWYER: I believe it would create the duty on the part of the local organization to have the local group that sponsors the troop to look into this. At least pass on that information so that they can look into it.

ENOCH: When you say the local group, does that go beyond simply the district board that is affiliated with the council? Does that mean you go to the Methodist church that sponsors them, and say you look into this?

LAWYER: Yes I think it does your honor.

ENOCH: Having gotten this information there is some duty to do something, and that is to go to the sponsoring group and have them deal with it?

LAWYER: Unless as in this instance the local council did the investigation itself and dealt with

it.

ENOCH: Then do you not agree with Mr. Countess that having had a duty come into play then what we measure is the reasonableness of the conduct having had that information?

LAWYER: Once the duty is created the question becomes breach of the duty. Yes your honor. But it all goes back to the parameters of that duty.