ORAL ARGUMENT – 2/23/00
99-0728
RESENDEZ V. JOHNSON & WOOLERY

MOLBERG: This case involves the alleged arbitrary and capricious punishment of school children at the Comstock middle school in Dallas, Texas. Our petition presents two points: 1) the appeals court erred in holding that the plaintiffs have no substantive due process right under the Fourteenth Amendment to be free of unreasonable punishment at the hands of the two respondents...

GONZALES: Can you describe the punishment? What was unreasonable about the punishment here?

MOLBERG: We never got to the level of the punishment. This is a *Mitchell v. Forsythe.* And the fact that the respondent has said, Well it just wasn't bad enough. They said that on appeal. If you go back and look the clerk's record, the *Mitchell v. Forsythe* type of appeal looks only to the allegation as to whether or not you've alleged a deprivation of a recognized constitutional right.

HANKINSON: Assuming there is the possibility of a deprivation of a right in the context of corporal punishment as you've alleged and you claim the CA was wrong, what was the basis for the summary judgment motion on behalf of these defendants? Wasn't it based on qualified immunity that their conduct had not risen to the level where there would be a violation and they were therefore immuned from the suit?

MOLBERG: No, they did not obtain summary judgment. It was the appellate court that reversed the TC on that issue.

HANKINSON: I understand but they moved for summary judgment on the grounds of qualified immunity on the federal claim. Right? Or was it on the underlying merits of the claim?

MOLBERG: In the TC when I say *Mitchell v. Forsythe*, if you will look at the clerk's record at page 112, they admit the law is crystal clear that until the court has ruled on the motion regarding federal immunity, discovery cannot even be had. The whole motion was premised on *Mitchell v. Forsythe*. There were no facts involved in this case, and as you note, the appellate court really looked at none in its two-point analysis.

PHILLIPS: What were your allegations because most surely they have to rise to some level?

MOLBERG: We have to allege under federal law the deprivation of a clearly established constitutional right.

PHILLIPS: And you have to give some facts of that allegation.

MOLBERG: Well that's not what this went to, but yes we do at some point. Keep in mind that the _____ pleading requirement has been discarded in many respects. This was not what this turned on. The error of the appellate court was saying that we had not alleged a recognized clearly established constitutional right, which is simply not the law. The right to be free from arbitrary or capricious punishment, corporal punishment, has been the law in every circuit that I know of for years and years. There is no question about this.

GONZALES: Is that law as clear in the fifth circuit?

MOLBERG: It's very clear en banc in the fifth circuit in a case that I had pointed out to the court that they never cite. The *Doe v. Taylor* case says, a school child has a substantive 14th amendment due process right to be free from arbitrary and capricious invasion of their personal privacy. The *Woodward v. Los Fresno* case established that.

GONZALES: Which includes paddling?

MOLBERG: Which includes corporal punishment.

ABBOTT: What's the statute of limitations on that?

MOLBERG: I think two years. But again, keep in mind, I'm not here dealing with philosophical or political issues about corporal punishment in general. There are some underlying facts here that are certainly egregious and people lost their jobs over. But that is not what the AC turned on.

ENOCH: Are the federal cases saying that corporal punishment is the deprivation of a constitutional right, or do they say that the punishment at some point could rise to the level of being a deprivation?

MOLBERG: The latter.

ENOCH: So if that's the standard, does that necessarily mean that your allegation can't merely say this is corporation punishment, but your allegation has to demonstrate that the punishment exceeded what otherwise was permissible before you were able to state a claim for a deprivation?

MOLBERG: Yes. That's the point. And our pleadings clearly stated that exact phrase out of every case that's dealt with this.

GONZALES: What is a proper test in terms of - what makes corporal punishment unreasonable?

MOLBERG: Let me just read it right out of the case law. "Corporal punishment is a deprivation of substantive due process when it is arbitrary, capricious or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." That is the text.

ENOCH: That would require you to state sufficient facts in the pleading to demonstrate that you meet what you say that?

MOLBERG: No. I've got to prove that.

ENOCH: Because the threshold of determining whether or not a cause of action exists, could you not be required to allege sufficient fact to determine whether that cause of action was _____?

MOLBERG: If that were the case, I guess in theory in the Texas practice that could arise in the special exception context. But keep in mind the procedural posture that the attack here was one where - I keep saying *Mitchell v. Forsythe,* and quite clearly the opposition stated that that's what they relied on. Their attack was simply that I did not allege a constitutional violation. And the DC rejected that because our allegation is right out of the case law and reached the standard.

BAKER: Are you saying then that if you just make that statement that you just read, that's enough to keep you in court, period?

MOLBERG: Yes.

BAKER: Without any underlying aspects or any other subfactors to look at to determine?

MOLBERG: Perhaps if we had gone on further and done a fact-based determination, had discovery about - now keep in mind the respondent in the federal context does not have to actually hit these kids. If they are deliberately - indifferent to someone else doing so, they can be liable. So there are a whole array of facts that could come out later on that might make that appropriate. So the answer is yes, but not at this time.

BAKER: So your argument is that by that one allegation you can always meet the threshold question and you're in court?

MOLBERG: You always meet the...

BAKER: After that allegation is made you are not permitted as a court to make any assessment of whether that was unreasonable. You just have to sit on that definition and the case goes on.

MOLBERG: No. Not at all. And I don't want you to misunderstand me here. This is a federal immunity question. In order to overcome the official immunity of the individual you have to allege a violation of a clearly established constitutional right; otherwise...

BAKER: And so the threshold inquiry is, have alleged a clearly defined constitutional right? And your answer is, as long as I make this statement I just read to you, I have already met the threshold and we move on?

MOLBERG: In the procedural context of this case. That does not prevent however somewhere down the line, I suppose after sufficient discovery, for another motion - in fact...

BAKER: Well do we have a complete record of what the facts are that led the TC to make its decision and the CA to look at it?

MOLBERG: No, we do not have that factual record. We have a record that says that we essentially clearly alleged a recognized right, the violation of a recognized right. There was an immediate interlocutory appeal, and that's where we are today.

ENOCH: You have all the information that you need to respond. If your position is correct that they bring summary judgment claiming you have failed to raise a constitutional deprivation and you're saying, Well this is a factual inquiry about what the punishment was that was assessed, then since it was your client's children that were punished, you have that information, so you would file your affidavits demonstrating the punishment that was assessed and we would have a record because we would accept your facts and the inferences in your favor on this summary judgment record?

MOLBERG: And there is some of that in here. But again, I'm saying the procedural posturing, you have to remember that once this appeal was filed, everything was stayed.

ENOCH: I'm not talking about discovery. Your clients had the information. You didn't need anything from the school district to determine how severely punished your child was. Your child could tell you that.

MOLBERG: You're assuming that severity makes a difference at the outset. And it certainly doesn't. The SC has rejected the application. In an 8th amendment context it might. It's like asking, well how bad was the child molested to determine whether or not there had been an invasion of the substantive due process rights of a child.

ENOCH: Maybe I misunderstood. I thought that it is in fact the excessiveness of the punishment in a minor child circumstance that creates the constitutional deprivation.

MOLBERG: No. I think it is the reasonableness of the punishment within the context of

which it's administered. I don't think you line up students in the cafeteria and beat them routinely every morning just because you want to, or order other children to beat them for you.

ENOCH: Your child could tell you what they thought they were punished for. And your child could tell you what the punishment was. What other facts would you need from the other side to defeat a summary judgment as you envision it should have been handled?

MOLBERG: I need to know, for example, what input that the principal in this case had in the design of this particularized policy for this one school to alter the corporal punishment guidelines of the Dallas ISD and why the authority was given to the teacher or the coaches to direct other children in violation of that policy to beat children when they told them to.

ENOCH: But I thought you said this was solely decided on the *Mitchell v. Forsythe* factors, which was whether or not you had alleged that there's was a deprivation of constitutional right. What the principal knew or didn't know has to do with the nature of the punishment that was imposed.

MOLBERG: By the same token what the punishment imposed was in the *Mitchell v. Forsythe* context given the allegation really doesn't have anything to do with it either in the posture that this case is in.

GONZALES: You have mentioned several times the word 'beating'. And I'm curious. You said earlier we shouldn't get into the facts of the scope of the corporal punishment. Were these beatings?

MOLBERG: We contend once we get there, they were. I think that anytime that you line school children up in the morning and run them through the cafeteria as a matter of routine, and subject them to whatever you want to call it, corporal punishment, and it becomes just a routinized act, I can't consider that anything but that. And when you particularly take a child and direct other children to hit that child, I don't think that that is what I consider would be reasonable corporate punishment.

GONZALES: But you do believe that there can be corporal punishment that is reasonable and constitutional?

MOLBERG: Under the constitutional standard, I agree.

OWEN: With respect to _____ defendants Johnson and Woolery, did they file special exceptions to any of your pleadings?

MOLBERG: I do not recall that they did.

OWEN: But the allegations as I read them in your third amended petition don't particularly focus - don't allege that either Johnson or Woolery directed children to hit one another or that they engaged in excessive corporal punishment.

MOLBERG: Under §1983 they need not have done that. And I believe that's what I was inarticulately trying to point out. If they were aware of it and were consciously indifferent to it, that in itself would give rise to liability on their part.

Here is the real error of this. We ought to go back and start it the right way. The real error here is that the 5th CA has engrafted a procedural due process component on to substantive due process. They have said that because the state has post-deprivation remedies, then there is no substantive right under the constitution for my clients. That is not the law. In a substantive challenge that is constitutionally based, it doesn't matter what process precedes, accompanies or follows the action. They did not cite the cases that I cited to them out of the US SC or the 5th circuit directly on point nor was the opinion reconsidered. So I don't know how else to say it. We had this oddball opinion sitting out here that regardless of your decision on what you've been asking me about, I'm asking you to fix that because it is so strange.

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RESPONDENT

HANKINSON: Mr. Eichelbaum tell us about procedurally how the immunity question was raised on the federal claim?

EICHELBAUM: There was an immunity issue and it's clearly established right under *Harlow* that these individuals had and because they were denied their immunity we were entitled to an immediate appeal.

HANKINSON: This was a motion for summary judgment based on immunity with a 1983 claim?

EICHELBAUM: Yes.

HANKINSON: And was it based on the merits of whether or not there was a claim, or was it based on a threshold inquiry about whether or not the pleadings rose to a level that would have alleged a constitutional violation?

EICHELBAUM: That's a very fair question. And the truth is, it was both. We brought it under both allegations. We brought it under the merits. And if you look at the record, page 157...

HANKINSON: On the merits of the immunity defense or on the merits of the alleged 1983 claim?

EICHELBAUM: On the alleged 1983 claim.

HANKINSON: So you were denied a summary judgment in the TC on the merits of the 1983 claim?

EICHELBAUM: That's correct.

HANKINSON: Then how did that get up on appeal on an interlocutory appeal since the denial of a summary judgment on the merits is not subject to review on appeal?

EICHELBAUM: Because they were entitled to immunity. The immunity is something that can be appealed.

HANKINSON: I understand that, but that's why I was trying to distinguish whether or not the grounds for your summary judgment were on immunity grounds or whether or not - your briefing reads like - you talk about there were two licks and two licks don't rise to the level of being unreasonable and arbitrary. And so your brief reads like you were going to the underlying factual inquiry on whether or not this particular conduct did rise to the level of a substantive due process violation that could give rise to a 1983 claim. Is that what you're summary judgment did?

EICHELBAUM: It's both. What we said was, they are entitled to immunity because the allegations and we even brought forth evidence and they had the opportunity and did bring forth evidence to show whether or not the immunity was pierced; whether it was clearly established. And what really happened was, the CA looked at - let's look at the other cases and based upon these facts was there a clearly established right at that time.

OWEN: Did you move based solely on their petition or did you also move on the facts that have been brought out in discovery?

EICHELBAUM: We did both. We waited until after discovery was in and we included facts in our motion.

GONZALES: Do you agree with Mr. Molberg that he merely had to have the proper allegations in order to prevail?

EICHELBAUM: No. For a different reason. I cite it in my brief: *Angel v. the City of Fairfield*. In that SC case, they said you must allege facts, not conclusions. If you look at his petition, all he ever does is say conclusions. There was beatings. There was systematic this. There was arbitrary that. He doesn't specifically say - and when you look in the record, there is nothing.

HANKINSON: You say there are not factual allegations in the petition? Why isn't it a factual allegation to say that someone nearly on a daily basis has struck and assaulted the minor plaintiff

with a school paddle, kept in the possession or substantive control of the defendant?

EICHELBAUM: When you look at the two defendants, Ron Johnson and Chad Woolery who are before you, they don't allege that those individuals did any of those things. He's incorrect about his 1983 analysis using *Doe v. Taylor*.

OWEN: What about the tardy freeze that they alleged that Johnson engaged in?

EICHELBAUM: The tardy freeze, the allegation of what he did does not violate a clearly established right. It is not a substantive due process violation.

HANKINSON: Is it because the alleged conduct is not a violation or are you saying that never under any circumstances could conduct associated with corporal punishment rise to the level of a substantive due process violation?

EICHELBAUM: I believe it is possible for that to happen. Certainly. In *Doe v. Taylor* clearly, that was a sexual abuse case. And of course that rises to a substantive due process. I think if you were to go further and say that if they alleged that the paddlings were not on the behind, but on the head, then it's possible that that could have been a substantive...

OWEN: They alleged that defendant Johnson implemented and enforced through himself and other school officials a policy whereby a multitude of children were subjected to mass beatings in the school cafeteria. What was the evidence on that point?

EICHELBAUM: The evidence was that no plaintiff ever received any more than two swats of a paddle the entire time. And that the only alleged injury of all the plaintiffs is that one student said at some point he received a blister as a result of a paddling. But he didn't say that the paddling, and the record is clear on this, came from Ron Johnson or Chad Woolery. And I think it's so obvious on Chad Woolery. There is nothing in the record whatsoever that says Chad Woolery knew about it. In fact the only thing in the record is at page 129, an affidavit from Chad Woolery saying, I didn't know what was happening at Comstock, no one ever made me aware of it, I never paddled him.

HANKINSON: I keep hearing you talk about whether or not on this summary judgment record this punishment was reasonable or rises to the level of arbitrariness, which seems to me to go to the underlying merits of the 1983 claim. I'm just having a hard time connecting with you. It sounds like you're arguing whether or not they have developed sufficient facts to state a violation of the constitution and bring it under 1983 as opposed to claiming immunity.

EICHELBAUM: To look at whether or not there was a clearly established right at that time, and whether they were entitled to immunity.

HANKINSON: Alright. Do you disagree with the Dallas CA when it says that there can be

no substantive due process violation on a corporal punishment claim?

EICHELBAUM: I don't disagree as to whether or not at the time these two individuals, Chad Woolery and Ron Johnson were acting, that there was a clearly established right that corporal punishment violated the constitution.

HANKINSON: So you disagree with the Dallas CA then?

EICHELBAUM: No. I think I'm saying I'm consistent with it.

GONZALES: Do you agree or disagree with the CA's analysis of violation of substantive due process, ie, if there is appropriate state remedy safeguard?

EICHELBAUM: I agree with that analysis but I don't think that's what the Dallas CA did. The Dallas CA goes through the entire explanation of *Fee v. Herndon* in saying how this is not a statement of a substantive due process violation. And then they add a sentence afterwards. But the court then basically in citing *Fee v. Herndon* then went further and said, that if you do name a substantive due process claim, we then look at whether or not there are adequate state remedies. But then they come back and say, nonetheless, we did not find a substantive due process claim in the first place. So they didn't get to the test. Clearly we do have the adequate state remedies. But you've got to get to that first test there.

Now if this were an issue of the - the Dallas ISD is up here and you're deciding do we want to say corporal punishment violates substantive due process? That might be a different story. But we're not. We're here on the two individuals and whether it was clearly established at the time. And it clearly isn't because even today there are students who are receiving licks in schools from corporal punishment, and we're not saying it's a constitutional violation. So how would they have known 5-years ago. If you look at *Ingram v. Wright*, 20 swats. No constitutional violation according to the 5th Circuit. Substantive due process. You look at *Cunningham v. Beavers*, 5 swats of a paddle. No constitutional violation.

HANKINSON: But no constitutional violation verses talking about immunity. *Mitchell v. Forsythe* says that whether the punishment involved is reasonable or rises to the level of arbitrariness are not questions involving federal immunity. They go to the merits of whether there's an actual violation. Do you disagree with that?

EICHELBAUM: No. But I still think you have to look at *Angel v. Fairfield*, and I still propose that you're looking at conclusions.

ENOCH: Let's assume everything you say. It would seem to me that whether or not Johnson and Woolery committed the acts, did the physical hitting of the children or whether or not they condoned the physical hitting of the children is a merits question. It's not an immunity

question. The immunity question is, was whatever happened a deprivation of constitutional right? Mr. Molberg says if that's the question, then all the pleading has to say is that an act violating a significant of a constitutional right occurred and he gets past immunity. Your argument seems to be that well the facts don't rise to the level of deprivation. Which may be the case. So let's look at this summary judgment. You come in and say they have not pierced immunity, you use that word, because they don't show that the punishment that occurred rises to the level of a deprivation of a constitutional right. It seems to me in that posture then, the court has to determine the facts. You say the other case says you've got to allege facts. We're already in summary judgment posture. So on behalf of his client Mr. Molberg comes back with a response to the summary judgment, either in the response or by affidavit pointing out the punishment that was imposed. The court it seems to me has a decision there. And the decision is either that punishment doesn't rise to the level of deprivation, therefore immunity is not pierced, and therefore judgment, or it says the punishment that was imposed based on this record does rise to the level of constitutional deprivation, in which event immunity is pierced and now we go to the other questions: Did Woolery do it? did Woolery know about it? Did Johnson do it? You go to those other questions at the other end. It seems to me the posture of this case simply is the merits of whether immunity has been pierced. Either it has been pierced or it hasn't been pierced. And so what is the evidence of punishment that's in this summary judgment record that occurred?

EICHELBAUM: And I agree with you. It is the first. And that is what the Dallas CA held. The evidence here before you is that students received no more than 2 swats and the only claim of any injury whatsoever was 1 student claimed at one point he received a blister. That's the entire injury. That's the entire record of how many the maximum number of swats any single plaintiff received.

ABBOTT: And if we conclude as a matter of law that that is not unconstitutional punishment, what is the next step we go to?

EICHELBAUM: The next step I say is 101.106, because that's the next part of the argument. I think that you're done with it.

GONZALES: If we reach that conclusion, immunity has not been pierced?

EICHELBAUM: Yes. And then we move on.

ABBOTT: I would like to take that next step. Because guess where I have the biggest problem? If we assume that this is not unconstitutional corporal punishment as a matter of law, you say we get into what ch. 101 of the Civil Pract. & Rem. Code?

EICHELBAUM: You could.

ABBOTT: Where do you say we go?

EICHELBAUM: There is 22.051 of course of the education code for the individuals. That's the most obvious.

ABBOTT: That was my concern because it seems like we had ships passing in the night. It seems like based upon the allegations we have in this case, you don't go under the tort claims act, you go solely under the education code.

EICHELBAUM: Well you can try to go under the tort claims act. But as we know from the second part of this case, you can't. You go under 22.051.

If I may turn to the second issue which is 101.106 that's before you, I think that that case is already - if there is anything that's clearly established 101.106 should be. This court has already held in *Thomas v. Olden* that what the Dallas CA basically did is wrong.

ABBOTT: Let's take a step back. How do you get there - don't you agree that that applies only to claims brought under the tort claim's act?

EICHELBAUM: 101.106 says, if the claim against the government is brought under the tort claim's act. That's correct. If that is, and there is a judgment against or for the government from that time on there is a bar against the employees. Or as this court said in *Newman v. Obersteller*, an immunity, an unequivocal granting of immunity. So if your question is, was the original case against the government brought under the tort claim's act, it had to be. *Ervin v.* _____ said it had to be. And in essence *Newman v. Obersteller*, although it doesn't address it indicates it had to be.

ABBOTT: Doesn't 101.106, which is what you're talking about, read "a judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of a governmental unit, etc.?" Has the words under this chapter.

EICHELBAUM: Yes.

ABBOTT: And it says, the judgment in an action or settlement of the claim under this chapter, we don't have a judgment or settlement of claim under this chapter.

EICHELBAUM: Actually you do. The question of 22.051 refers to only the employees. So if your question is how do you bring a cause of action against the government, the Dallas ISD in this case? The only way you can ever bring a tort against the government as we all acknowledge is through the tort claim's act.

ABBOTT: I don't see anywhere where they brought a claim under the tort claim's act in their petition.

GONZALES: Doesn't .051 say, except as to motor vehicles, this chapter does not apply to a school district?

EICHELBAUM: Yes it does. And that's why we win. The fact is, plaintiffs bring suits against school districts all the time that are tort claims, and they get thrown out all the time. But the fact is, you can't plead out and say, oh no, we're saying common law. And that's what plaintiff did. *Ervin v.* _____ specifically said, that doesn't work. What happens if you bring a tort it automatically comes under the tort claim's act. It's like an enabling act to bring causes for a tort claim. And then what happens is, we turn to .051 and we say, Nope, we're out. And it's over with. In *Newman v. Obersteller*, if you look at that case, what y'all did was you took a case up that was intentional infliction of emotional distress. Clearly another thing that was against a school district, and that was immuned from tort. But you said, 101.106 could apply to the employee. So you've had this case before.

GONZALES: Is it your position that .106 applies here?

EICHELBAUM: To the state claims, absolutely for these two. It does and the court was incorrect in ruling that it did not. There are two issues before you. The second one - what the Dallas CA said was, wait a minute, there is still plenary power. It has to be a final judgment. The statute, 101.106 doesn't say anything about final. And we know the legislature is familiar with the term because in 101.108 they used the word final judgment.

ABBOTT: I want you to walk me through this one more time. 101.106 specifically says that it applies only to claims brought under this chapter. Do you agree with that?

EICHELBAUM: Yes.

ABBOTT: Would you agree also that they have not brought any claims under the tort claims act?

EICHELBAUM: No.

ABBOTT: Where in their petition did they bring a claim under the tort claims act?

EICHELBAUM: They claimed in their petition assault and battery against the Dallas ISD. That is a tort.

ABBOTT: Do you recall in which particular paragraph or section?

EICHELBAUM: They alleged intentional infliction of emotional distress, assault and battery, all those things...

ABBOTT: Well here's what bothers me. I'm looking at it right now. Under the assault and battery section it said, the actions are actionable under common law and under the waiver of immunity found in the Texas Education Code. So they brought it under the Education Code not under...

EICHELBAUM: They brought it under common law also. And that's what happened in *Ervin v. Canada*, and clearly that must be what happened in *Newman v. Obersteller*. Any time you bring any tort it doesn't matter - let's say you think it's coming under the education code. The only way you can bring a tort is under the tort claims act against the government. And so you can call it whatever you want, but if it quacks like a duck it comes under the tort claims act.

ABBOTT: Can't you bring it under the education code?

EICHELBAUM: The education code isn't an enabling act.

ABBOTT: What about the bus case?

EICHELBAUM: *LoLow(?)* was the one exception under - well they thought it was under .051, because they thought it was the use of a motor vehicle. So they brought it that way. But the court didn't look at 101.106 because apparently they never raised it as a defense. There is nothing in the record that shows they ever used that as a defense. The Dallas CA tossed out our 101.106 argument for the reason that they said there is plenary power still. And because the judgment was not final. Clearly that is not the same - I mean what's different between *Thomas v. Olden*? Contemporaneous judgments are still plenary power for the TC. If you accept the Dallas CA's reasoning in 101.106, *Thomas v. Olden* is wrong. And that is not the idea. The idea of 101.106 is that you have to make a choice. It is a choiced statute. You want to go and sue the school district? Go ahead. You want to sue the employee? Go ahead. If you are not sure what you want to do sue them both, do some discovery, and at some point if there is a judgment for the government, according to 101.106, when there is a judgment, the decision is made for you. You are stuck with the government. Whether it's for or against the government you are stuck and all of the employees are entitled to that immunity from that time on.

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REBUTTAL

MOLBERG: Justice Hankinson to answer you question, this was an immunity matter; otherwise we could not be here. And 2 swats I think that is stretching the evidence to some extent, to the extent that any evidence is in the record. The tort claims act doesn't belong in this case for a very simple reason. The tort claims act says it doesn't belong in this case.

GONZALES: Where is that?

MOLBERG: I don't see anything in the pleadings that say that our children were beating with a _____. And it is very precise that...

HANKINSON: Where else do you look for a waiver of immunity then to be able to sue a school district?

MOLBERG: Frankly you probably don't have it.

HANKINSON: Don't you have to have it to be able to sue the school district because it's a subdivision of the state?

MOLBERG: Yes and no. Because we know immunity is two prongs. If you look at all these creatures of state government like school districts, let's take Dallas Area Rapid Transit or even the Austin Metro System, what you typically find is a waiver of immunity from suit because you have the provision that entity is subject to being sued and should. I think there is school district language like that. But this is just an example. So to answer this question, you certainly could in a context where that language is there.

OWEN: But you didn't allege that?

MOLBERG: No, we didn't allege that. Then your immunity issue becomes one of affirmative defense.

OWEN: You've got to get over the threshold. Where do you have the authority to get in the courthouse door against the Dallas ISD unless it's under the tort claims act?

MOLBERG: The tort claims act doesn't create the cause of action.

OWEN: No, but it only waives immunity with respect to certain things. And unless you can fit yourself in those things, doesn't the DISD have immunity?

MOLBERG: That, I don't know.

HANKINSON: Well the tort claims act applies to school districts. It is defined as a governmental entity in the tort claims act. And then the education code limits the applicability of other provisions. But the only waiver of immunity as to school districts in Texas law is the waiver under the tort claims act for the operation of motor vehicles. Isn't that correct?

MOLBERG: That is correct.

HANKINSON: So the only place we have a waiver of immunity for school districts is in the tort claims act for waiver for operating motor vehicles?

MOLBERG: That's the only one I know of.

OWEN: So if you can't fit yourself in one of the exceptions of the tort claims act, there is no waiver as to the Dallas ISD?

MOLBERG: There very well may not be. And let me tell you why that is more important now than it was. There were many of us out there who thought that immunity was not a jurisdictional matter to begin with and that it was simply an affirmative defensive matter in both contexts to sue to _____ liability. You've made it clear now as of two months ago that _____.

OWEN: So when a TC renders judgments for the school districts saying the school district is immunized, doesn't that kick in the moot or _____?

MOLBERG: No. Because that only applies to where the Texas tort claims act applies. And in 101.106 says it applies to claims arising under this chapter. This claim could not possibly have arisen under this chapter. You would have to rewrite the *LaLow(?)* decision to get there. But it goes even further in the case of a school district. It says not only does it apply in certain situations, in the school districts the waiver of immunity applies only in case of motor vehicles.

HANKINSON: So it even limits the applicability of the tort claims act further as to school districts than as to other governmental entities?

MOLBERG: Yes. And I think there is one other in that same category but I don't recall which _____. I think it was junior colleges.