

ANALYSIS OF QUALIFIED IMMUNITY FOR TEXAS PUBLIC SCHOOL

PROFESSIONAL EMPLOYEES AS INTERPRETED

BY THE TEXAS COURTS

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This dissertation analyzed Texas appellate court decisions relating to whether educators' actions were incident to or within the scope of duties and involved the exercise of judgment or discretion in cases involving defamation, motor vehicle exceptions, and excessive force in discipline exceptions. The questions addressed were: (1) How have the Texas appellate courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators for defamation? (2) How have the Texas appellate courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators for injury to students when plaintiffs have sued Texas educator under the motor vehicle exception to the educator immunity law? (3) How have the Texas appellate courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators under the excessive force in discipline exception to the educator immunity law?

This dissertation utilized legal research as its methodology. Chapter 3 examines literature with regard to qualified immunity for Texas public school professional employees and discusses the limitations placed upon qualified immunity. Chapter 4 is a comprehensive study of the cases decided by Texas courts involving alleged defamation of students or others by teachers and school administrators. Chapter 5 is a comprehensive study of the cases decided by Texas courts involving the alleged negligent use of motor vehicles by professional public school employees. Chapter 6 is a comprehensive study of the cases decided by Texas courts involving the alleged use of excessive force in disciplining students. Chapter 7 discusses the findings of the analysis of cases as well as the implied limitations regarding qualified immunity of teachers and school administrators.

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CHAPTER 1

INTRODUCTION

Texas public school employees enjoy significant protection from litigation involving tort liability arising from their performance as professional employees. Texas public school professional employees are protected by qualified immunity as outlined in the Texas Education Code, Section 22.0511, which states: “(a) A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee’s position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students. (b) This section does not apply to the operation, use or maintenance of any motor vehicle” (Texas Education Code, 22.0511, 2009). The law contains two significant exceptions. First, professional education employees can be sued for excessive use of force in carrying out corporal punishment. Second, the law does not immunize school employees who are sued as a result of injuries arising from a motor vehicle accident (Texas Education Code, 22.0511(b), 2009).

Historically, the courts have been very sympathetic to public school employees in the area of qualified immunity. However, the qualified immunity afforded to teachers and administrator is not as comprehensive as the sovereign immunity applied to school districts. Due to this protection for school districts, injured parties sometimes sue individual employees of public school districts. The rulings by the courts have led school administrators and others interested in Texas school law to consider the interpretations of these cases and their application to situations involving public school employees and their students. With the number of potential situations in public schools that could lead to litigation, the interpretations and limitations of

qualified immunity for professional employees remains in question. This dissertation proposes to analyze how the Texas courts have interpreted Texas Education Code, Section 22.051 in three specific areas: 1) lawsuits against teachers and school administrators for defamation, 2) lawsuits in which plaintiffs claim that the educator is not immune from being sued because of the motor vehicle exception, and 3) cases in which educators are sued for excessive use of discipline.

It is important to note that in some instances, Texas educators who have been accused of truly egregious misconduct have been sued in federal courts for constitutional violations, even though the educators were immune from suit in the Texas courts under common law tort theories. Plaintiffs who are barred from suing educators under Texas Education Code Section 22.051 can still proceed in federal court against Texas educators who have committed acts of misconduct connected with their professional responsibilities even though the alleged misconduct is a violation of a clearly established constitutional right (*Jefferson v. Ysleta Independent School District*, 1987).

Chapter 3 will examine literature with regard to qualified immunity for Texas public school professional employees and discuss the limitations placed upon qualified immunity. It is against this background that the following research questions will then be addressed: 1) How have the Texas courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators for defamation? 2) How have the Texas courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators for injury to students when plaintiffs have sued Texas educator under the motor vehicle exception to the educator immunity law? 3) How have the Texas courts interpreted Texas Education Code Section 22.051 in litigation against teachers and school administrators under the excessive force in discipline exception to the educator immunity law?

Chapter 4 will be a comprehensive study of the cases decided by Texas courts involving alleged defamation of students or others by teachers and school administrators. Chapter 5 will be a comprehensive study of the cases decided by Texas courts involving the alleged inappropriate use of motor vehicles by professional public school employees. Chapter 6 will be a comprehensive study of the cases decided by Texas courts involving the alleged use of excessive force in disciplining students. Chapter 7 will discuss the findings of the analysis of cases as well as the implied limitations regarding qualified immunity of teachers and school administrators. Chapter 5 will be enlightening to Texas teachers and administrators in terms of the protection afforded to them along with the limitations that exist with regard to qualified immunity.

Legal cases will be purposefully selected, based on their pertinence to Section 22.051 of the Texas Education Code. Three types of purposeful sampling will be implemented: sampling extreme or deviant cases, sampling typical cases, and sampling critical cases. A search of defamation, motor vehicle, and excessive force in discipline cases involving Texas Education Code, Section 22.051, as well as the previous Texas Education Code, Section 21.912, will be conducted using LEXIS/NEXIS. The inclusion of the former Texas Education Code and the incorporation of a Boolean search will ensure the comprehensiveness of the search so that all related cases are included and may be examined.

The data analysis procedure selected for this study is pragmatic sequential mixed method design. A legal analysis of qualified immunity cases decided under Texas Education Code Section 22.051 and its predecessor will be conducted to identify critical attributes used to determine the outcome of the cases in the areas of student defamation, motor vehicle exceptions, and excessive force in discipline. These critical attributes will then be analyzed via qualitative

case study research. Case studies provide an opportunity for a researcher to identify and relate to the reader an in-depth description of the study.

Using LEXIS/NEXIS, I have identified every published Texas court decision that is relevant to the research questions of the study. This study was not conducted based upon any assumptions regarding the desirability of qualified immunity for teachers and school administrators. It is, however, based on the premise teachers and administrators should have a clear understanding of the limitations of qualified immunity in order to understand their personal exposure to litigation. The lessons learned from this research could aid teachers and school administrators as they work within the limitations of the law in the state of Texas to better meet the growing needs of their students.

CHAPTER 2

BRIEF OVERVIEW OF METHODOLOGY

This dissertation utilizes legal research as its methodology, the same research method that attorneys and judges use to determine answers to legal questions. As explained in the introduction and literature review sections, Texas Education Code Section 22.051 is a Texas statute that grants Texas educators immunity from suit for discretionary actions taken pursuant to their official duties. The law applies to a variety of causes of action, including lawsuits for defamation. The statute has two major statutory exceptions; the law does not protect educators from suits arising from injuries involving a motor vehicle, and the law does not immunize educators from suits alleging injuries that were caused by excessive force in administering discipline.

The study seeks to determine how the Texas courts have interpreted Texas Education Code Section 22.051 and its predecessor statute Texas Education Code Section 21.912 with regard to three areas. First, how have the courts interpreted Texas Education Code Section 22.051 and its predecessor with regard to lawsuits against Texas educators for defamation? Second, how have Texas courts interpreted the motor vehicle exception to Section 22.051 and its predecessor? Third, how have the courts interpreted Section 22.051 and its predecessor statute with regard to the exception for injuries caused by excessive force in administering discipline?

When conducting legal research, researchers commonly begin their research by consulting secondary authorities such as a legal treatise or law review articles. This gives the researcher a general overview of the legal issue. Second, the researcher consults the primary sources—usually federal or state statutes, federal or state court decisions, or a combination of statutes and court decisions. All federal and state statutes are accessible on the LEXIS/NEXIS

database, and all published federal and state court decisions are accessible on LEXIS/NEXIS as well. This database is available to University of North Texas faculty members and students via the University of North Texas Library homepage.

To answer the three research questions of this study, I needed to identify and analyze all published Texas court decisions that interpreted how Texas Education Code Section 22.051 should be applied with regard to defamation suits against Texas educators and with regard to disputes about the application of the immunity statute's two statutory exceptions. First, I consulted Walsh, Kemerer & Maniotis (2005), the most respected and current treatise on Texas school law. This review provided the background on the Texas courts' interpretation of Section 22.051 and its predecessor, Section 21.912, which is virtually identical to Section 22.051. I also visited the legal periodical database of LEXIS/NEXIS to determine whether any law review articles discussed Section 22.051 in detail. This examination identified no legal periodical article that was devoted to an analysis of the research questions of this study.

Next, I conducted three Boolean LEXIS/NEXIS searches designed to identify all the published Texas court decisions that pertain to the three research questions of the study. I went to the database that is limited to Texas published court decisions in the state and federal courts. After selecting this database, the instructor conducted a Boolean search that contained these search terms: "22.051 and immun! and defame! or libel! or slander!" This search identified all published Texas court decisions that discuss the Texas educator immunity law and which contain variations on the words defamation, libel or slander. After identifying the Texas cases that contain these terms, I reviewed each case individually, discarding cases which did not directly relate to the relevant research question and identifying all published Texas court decisions in

which the court applied the Texas educator immunity law in a lawsuit in which a party or parties had sued a Texas educator for defamation.

Once all the relevant cases were identified, I analyzed each case individually to determine the outcome of the case and the manner in which the court applied Texas Education Code Section 22.051 to the facts of the case. The analysis of the individual cases is set forth in Chapter 2 of the study.

I utilized a similar process when conducting research to answer the second and third research questions. With regard to Research Question 2, I constructed a Boolean search in the Texas cases database that contained these terms: “22.051 and immun! and “motor vehicle.” This search produced all the published court decisions that applied the motor vehicle exception to Texas Education Code Section 22.051. After reviewing each case individually and discarding any cases that did not directly deal with the motor vehicle exception to the educator immunity law, I analyzed the relevant cases for answering Research Question 2. This analysis is set forth in Chapter 3 of the study.

Finally, with regard to Research Question 3, I constructed a Boolean search containing these terms: “22.051 and immun! and “excessive force.” After reviewing the cases and discarding those cases that did not directly address the application of the excessive force exception to the immunity law, I analyzed all the relevant cases. This analysis is set forth in Chapter 4 of this study.

I am confident that the legal research process described above identified all published Texas court decisions that are relevant to answering the three research questions of this study.

CHAPTER 3

REVIEW OF LITERATURE

This chapter gives an overview of the existing literature concerning qualified immunity for public school professional employees. It begins with an introduction to qualified immunity and the specific Texas statutory provision, Texas Education Code Section 22.051. This is followed by a review of litigation that has surrounded qualified immunity and tort cases involving public school professional employees in Texas. Following this review, the focus of this chapter shifts to the limitations placed upon qualified immunity. As will be seen, there are specific limitations for public school employees, as outlined in Texas Education Code Section 22.051 and interpreted through the indicated litigation.

School districts are protected from liability in Texas as they are provided with sovereign immunity. “As a general rule, governmental entities, such as school districts, are immune from liability due to the doctrine of sovereign immunity....[W]ith regard to school districts and community colleges, liability can be imposed only when the injury arises from the negligent use or operation of a motor vehicles operated by a school officer or employee within the scope of employment. Hence, unless motor vehicles are involved, a school district is shielded by Texas law from tort liability” (Kemerer, Walsh, & Maniotis, 2005, p. 378). “Common law asserts that government is inherently immune unless the legislature specifically abrogates the privilege” (Alexander & Alexander, 2005, p. 632).

Due to the protection that school districts enjoy from being sued, parties have often sued individual school employees. The Texas Education Code, however, provides professional school employees with qualified immunity from tort liability. This provision provides that a professional employee of a school district is not “personally liable for an act that is incident to or

within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students" (Texas Education Code Section 22.0511(a), 2009). The Texas Supreme Court determined that the only exception to immunity for professional employees under the statute relates to the use of excessive force in disciplining students or being negligent in disciplining students so as to cause an injury (Kemerer et al., 2005).

Only professional employees are covered by this provision. This statute (T.E.C. Section 22.051(a), 2003), however, defines this term to include the following: superintendents, principals, teachers, substitute teachers, supervisors, social workers, counselors, nurses, teacher's aides, student teachers, DPS-certified bus drivers, school board members, teachers employed by a third party that contracts with the school district, and anyone else whose employment requires certification and the exercise of discretion.

One case that exemplifies the notion of qualified immunity for school professionals is *Barr v. Bernhard* (1978). In this particular case, Mark Bernhard, a student at Tivy High School of the Kerrville Independent School District, was enrolled in a vocational-agricultural course in which he was raising a calf. Kerrville ISD maintained a 73-acre facility where the students in the course could keep or raise their animals. It was not required that the students keep their animals there, but they were allowed to do so with permission from their instructors.

On a Saturday, Mark was at the Kerrville ISD facility with his parents and some friends and was caring for his calf. There were no school personnel present. After weighing his calf, Mark led his calf back into an old army barracks that was used as a barn. The calf hit a metal pole that supported the roof. The pole got knocked over and the roof collapsed. Mark was

pinned underneath the debris and was severely injured. Bernhard sued the Kerrville ISD and individual employees for negligence related to: failing to inspect the facility properly, failing to maintain or supervise the facility, and negligently allowing the facility to be used while in a condition of disrepair.

The suit against the district and all employees was dismissed by the trial court due to sovereign immunity. The appellate court affirmed summary judgment for the school district but reversed judgment for the employees. The Supreme Court of Texas reversed the decision of the appellate court regarding the employees. As part of the decision, the court commented on the wording of the statute. The phrase in question from T.E.C. 21.912(b)(now T.E.C. 21.0511), was: “except in circumstances where professional employees use excessive force in the discipline of students or negligence resulting in bodily injury to students.” The Texas Supreme Court concluded that the Texas Legislature intended this clause to be limited to certain acts related to the disciplining of students as it was the only way the entire section as a whole could be reasonably interpreted. This interpretation and ruling have been applied repeatedly in civil suits against public school employees since that time.

A case that helped define negligent discipline as well as the limitations regarding use of a motor vehicle is *Hopkins v. Spring Independent School District* (1987). Celeste Hopkins, a student at an elementary school in the Spring Independent School District, suffered from cerebral palsy. It was alleged that while students were left unsupervised Celeste was pushed into a stack of chairs and suffered a head injury. She had mild convulsions and was dazed and incoherent. The teacher did not call for help or send her to the nurse. An occupational therapist later took her to the nurse, who kept Celeste at school for the day and did not contact the parent or Celeste’s doctors, even though the school knew the names of the doctors. At the end of the

school day, Celeste rode on a school bus to her day care center. She suffered severe convulsions while on the bus, and the bus driver contacted a supervisor and requested a nurse at the next stop. No nurse was provided and the driver was told to take the student to her day care center. At the day care center, Celeste finally received medical attention.

Two years later, Celeste's mother sued Spring ISD, the bus supervisor, the school principal, the school nurse, and the teacher. She claimed gross negligence for failing to provide adequate care, which dramatically decreased Celeste's life expectancy. Summary judgment was rendered for the school district and the employees based on immunity granted the school district under the Tort Claims Act and the employees under the Texas Education Code. The Texas Supreme Court was asked to reverse this decision for the employees and overrule *Barr v. Bernhard*. She contended that the district employees' actions constituted negligent discipline since her child was disciplined by submitting to the authority and control of these employees. She also argued the school district and bus supervisor were not immune from liability because the child's injuries were aggravated when she had seizures on the bus and the defendants were negligent in failing to provide adequate medical care. She claimed that, due to these particular circumstances, the injuries that Celeste sustained arose from the use or operation of a motor vehicle.

The court ruled that since no legislative definition of discipline was provided, that its ordinary meaning must be applied. Discipline refers to some form of punishment. Negligent discipline as punishment involves no force but involves some action by the student of which the student suffers bodily injury – as in ordering a student to run laps. The court held that negligent discipline was not involved in this particular case, as there was no punishment to the student. This court also held that since the injuries were not “the proximate result of the use or operation

of the school bus, but the bus provides the setting for the injury, the actions do not fall within the section 101.051 exception to immunity” (*Hopkins v. Spring ISD*, 1987, p. 619).

While the Texas Supreme Court upheld this lower court’s decision, three justices dissented. Included in the dissenting opinion was an argument for overruling *Barr v. Bernhard*, specifically that part of the decision that interpreted the Texas qualified immunity statute. The Texas Supreme Court justices in the majority opinion pointed out that the Texas legislature had had ample time to change the statute if the interpretation of the earlier Supreme Court’s decision was inaccurate in the view of the legislature. The dissenting justices found that reasoning to be faulty. In addition, the dissenting justices stated that the bus supervisor did not meet the conditions required to be a professional employee as his position did not require any certification as mandated by the immunity statute. However, this court’s ruling gave a good description of what is required for negligent discipline to be found by a court and supported earlier court decisions related to injuries occurring on a school bus as compared to arising from the use or operation of a school bus.

Another case that helps interpret scope of employment for the purposes of applying the Texas educator immunity statute is *Schumate v. Thompson* (1979). In this case, Cary Schumate was a student at a school for mentally retarded students in Cypress Fairbanks School District. Cary’s teacher directed the teacher’s aide, who was a mentally handicapped person, to take the class outside to play. The aide was given the discretion to choose the activities for the students. The aide directed Cary to high jump a stick that was held by the aide and another student. Cary tripped over the stick, his head hit the ground, and he received a fractured vertebra in his neck. Cary’s mother sued the teacher, Katie Thompson, for negligence resulting in bodily injury to her son.

The trial court in this case granted immunity to the teacher. Mrs. Schumate appealed the decision, claiming Section 21.912 of the Texas Education Code was unconstitutional as it violates Article 1, Section 13 of the Constitution of the State of Texas and the Fourteenth Amendment of the United States Constitution. The appellate court upheld the lower court's decision in finding that the injury was not due to discipline and that the teacher was acting within her scope of employment and exercising judgment in allowing her aide to supervise the playtime. The court went on to state that a desirable purpose of section 21.912 (now 22.0511) of the Texas Education Code is "providing teachers limited protection and freedom from being placed in the position of insurer against injury of each child directly or indirectly placed in their care" (*Schumate v. Thompson*, 1979, p. 49).

Another example of an interpretation of acting within the scope of employment as well as exercising discretion and judgment comes from the ruling in *Wagner v. Alvarado Independent School District* (1980). In this case, students in a Physics class taught by Arthur Rasmussen were given the opportunity to tour a new science building that had been completed and would be used the following school year for classes. All of the science equipment and supplies had been moved over to the new building, with the exception of twelve bottles of acid. Mr. Rasmussen suggested that the students help by carrying these bottles over to the new building. All but one student agreed to do so. The students were told to be careful and were supervised as a group by Mr. Rasmussen in carrying the bottles to the new building. All students and bottles arrived safely to the new building. Susan Wagner and a friend decided, without requesting or getting permission, to return to the classroom for two remaining bottles of acid. On the return trip, Susan fell on the stairs, which resulted in a bottle of acid breaking. Susan received injuries from the acid.

Susan's father filed a civil suit against Alvarado I.S.D., Arthur Rasmussen (Susan's Physics teacher), Jay Martin (Alvarado High School Principal), and David Wilkinson (Superintendent of Alvarado I.S.D.). The trial court granted Alvarado I.S.D. summary judgment based on sovereign immunity and granted the three employees summary judgment based on qualified immunity under the Texas Education Code. Mr. Wagner appealed the lower court's decision regarding the immunity of the employees. He stated that to apply immunity in this case would establish a policy that "when we send our children to school for purposes of education, we submit them to any and all acts, however dangerous or irresponsible, and however unrelated to the purpose of education, that any teacher or administrator may decide upon" (*Wagner v. Alvarado I.S.D.*, 1980, p. 53). The appeals court upheld the lower court's decision and explained that the law does not create an absolute immunity for educators, as indicated by Mr. Wagner. Instead, the qualified immunity of educators is determined by three factors: the acts are not acts of discipline, which through the use of excessive force or negligence, resulted in bodily injury; the acts fall within the scope of employment; and the acts involve the exercise of judgment and discretion of the employee (*Wagner v. Alvarado I.S.D.*, 1980). This ruling clearly helped establish the guidelines for determining qualified immunity for Texas professional educators.

Some cases have questioned the constitutionality of this statute. A case that exemplifies the court's stance is *Stout v. Grand Prairie Independent School District* (1988). In this particular case, Sherry Stout, a cheerleader in Grand Prairie I.S.D., sustained serious, permanent injuries after falling during cheerleading practice. Sherry and her parents filed suit, alleging that her injuries were caused by the negligence of the school district and of her cheerleader sponsor, Elizabeth Gomez. The trial court granted summary judgment for Grand Prairie I.S.D. as well as for Gomez. The Stouts appealed the decision, questioning the court's interpretation of the Texas

Education Code and the constitutionality of section 21.912(b), and contending that the doctrine of sovereign immunity “should be finally rejected as antiquated, anachronistic and unjust” (*Stout v. Grand Prairie I.S.D.*, 1988, p. 292).

The court of appeals upheld the lower court’s decision. In so doing, the court held that a professional educator is immune “except when disciplining a student the employee uses excessive force or negligence which results in bodily injury to the student” (*Stout v. Grand Prairie I.S.D.*, 1988, p. 292). Additionally, the court addressed the due process and equal protection claims of the Stouts. “We hold that the legislative basis for section 21.912(b) is rationally related to the goals sought to be achieved by the legislature, and ...does not violate article I, section 19 and article I, section 13 of the Texas constitution, nor does it violate the due process clause of the Fourteenth Amendment of the United States Constitution” (*Stout v. Grand Prairie I.S.D.*, 1988, p. 295). The court also went on to rule that section 21.912(b) of the Texas Education Code did not violate the equal protection clause of the fourteenth amendment. Regarding the Stouts’ statement regarding sovereign immunity being “antiquated, anachronistic, and unjust,” the court ruled that “since the school district was exercising a governmental function when Sherry Stout was injured during cheerleading practice, the school district was entitled to rely on the common law doctrine of governmental immunity” (*Stout v. Grand Prairie I.S.D.*, 1988, p. 296).

Even when a case involves a tragic outcome, the courts have consistently applied qualified immunity to public school employees in a way that generally favors school employees. One such case that helps interpret negligent discipline is *Fowler v. Szotek* (1995). During the 1992-93 school year, two male students were found in possession of marijuana at Cypress-Fairbanks Junior High School. They stated that they had purchased the marijuana from Brandi

Nelson. An assistant principal and nurse questioned and searched Brandi, but they did not find any marijuana, and she denied selling the marijuana. Assistant Principals Robert Fowler and Charles Vick, along with Principal William Martin, talked with all three students and their parents. Based on the information obtained, they agreed all three students should be disciplined. Based on the school district's student code of conduct, both boys were assigned to the district disciplinary alternate education program, and Brandi was recommended for expulsion for the remainder of the school year. Fowler told Brandi and her mother, Mary Ann Szostek, that the administrators believed Brandi had sold marijuana to the two students on campus. Fowler went on to tell Mrs. Szostek that the decision was not final and that she was entitled to a hearing before a discipline review committee. He then explained that the committee's decision could be appealed to the school board. At Mrs. Szostek's request, Fowler telephoned Mr. Szostek and explained the hearing and appeal process to him.

Mr. Szostek called Charles Goodson, the associate superintendent for administration in C-FISD, based on the call from Mr. Fowler. Mr. Goodson explained the hearing process to Mr. Szostek again and scheduled an expulsion hearing on January 5, 1993. A hearing notice letter was sent by express mail that day from Mr. Goodson's office with the date and time of the hearing included. Meanwhile, Mrs. Szostek took Brandi home and left her to run an errand. Brandi fell asleep. Mr. Szostek left work early, came home, woke Brandi up, and questioned her about selling drugs at school. She denied having done so. Mr. Szostek then went to the store. While both parents were gone, Brandi shot herself in the abdomen with Mr. Szostek's gun. When Mr. Szostek arrived back home, he found Brandi and called 911. Brandi died hours later at the hospital. The police found a note that read: "I lied. I love you" (p. 340).

Mr. and Mrs. Szostek sued Fowler, Martin, and Vick for wrongful death. Fowler, Martin, and Vick filed a motion for summary judgment, asserting immunity under Texas Education Code, Section 21.912(b). The trial court denied the motion for summary judgment and the appellants appealed that decision. The Szosteks contended that the defendants were negligent in expelling Brandi from school and that their negligence was the proximate cause of her suicide; therefore, immunity did not apply. Since the defendants used no force in disciplining Brandi, the court had to determine whether negligent discipline was involved. The court found that the defendants did not use negligent discipline in this case. The administrators used the information from two students' sworn statements before recommending expulsion for Brandi. The court went on to say, "After a student has been removed from school, it is the responsibility of the parent or guardian to provide adequate supervision for the student during that time" (*Szostek v. Fowler*, 1995, p. 341).

A case that looks at whether a teacher is using discretion, as applied to qualified immunity, is *Downing v. Brown* (1996). The facts of the case are as follows. Teresa Gutierrez was a sixth grade student in Ophelia Herrera's classroom in Lubbock Independent School District. In October 1991, another student, Leslie McDade, and some of Leslie's friends made threats towards Teresa. Teresa's mother, Ruby Lee Downing, instructed Teresa to tell her teacher. Teresa complied on October 10th by telling Ms. Herrera. Ms. Herrera responded by keeping Teresa and one of Leslie's friend's, Tamasha Green, after class to attempt to settle their differences. Mrs. Herrera believed the problem had been resolved; however, Teresa thought the situation was made worse by this conference and stated that Mrs. Herrera had refused her request to speak to the principal, Lucy Brown, about the threats.

Six days later, Leslie threatened to assault Teresa. Teresa wrote about the event to Mrs. Herrera in a class writing assignment. Mrs. Herrera's response in the margin was that Teresa should get new friends. On the way home from school that day with her younger brother, Leslie attacked Teresa. Leslie beat Teresa's head against a concrete sidewalk and kicked her several times. Tamasha and other students were present but did not participate in the assault. A teacher who was leaving school saw the attack and intervened. He took Teresa to Ms. Brown's office. Ms. Brown "observed no outward signs of major physical injury on Teresa" (*Downing v. Brown*, 1995, p. 318). She suspended Leslie, Tamasha, and the other students for three days. Teresa asserts that she spent ten days in the hospital and underwent multiple surgeries due to the injuries stemming from this attack.

Teresa didn't return to school until May 1993. While her mother was enrolling her, the school counselor at Hutchinson Junior High informed Mrs. Downing that Leslie was a student at Hutchison and offered to enroll Teresa at another school with similar programs. Mrs. Downing declined, due to the special programs at Hutchison. Teresa's first day of class was May 10, 1993. On that day, Tamasha allegedly told Teresa that "she would not get out of the hospital this time" (*Downing v. Brown*, 1995, p. 318). On May 12, Teresa was pushed into a stairwell wall. She said this aggravated her previous injuries. She could not identify who pushed her, but Leslie and Tamasha were both present when she was pushed. Teresa reported this to the principal, Neal Logan, who asked his assistant principal, Mr. Edwards to investigate. Mr. Edwards interviewed Leslie, Tamasha and other students, who all denied the incident. Teresa withdrew from Hutchison on May 17, 1993.

Teresa's mother, Mrs. Downing, filed suit against Brown, Logan, Herrera, and LISD for the negligent failure to discipline Leslie. She claimed that their actions deprived her of her

constitutional rights as well as her due process rights under the Texas Constitution. The trial court granted summary judgment for all defendants, based on immunity granted under Texas Education Code Section 21.912. The appeals court upheld this judgment for everyone excluding Ms. Herrera. This court reversed the lower court's decision stating that the teacher had not posted a set of classroom rules, as she was required to do. Since she was required to do so, it was a ministerial act, not an act of discretion, based on her judgment. The Texas Supreme Court, however, reversed the court of appeals decision regarding Ms. Herrera and stated "In our view, maintaining classroom discipline involves personal deliberation, decision, and judgment" (*Downing v. Brown*, 1995, p. 321). Based on this ruling, the teacher was exercising discretion so was entitled to qualified immunity.

A case that considers scope of employment, even when the employee is wrong, is *Choctaw Properties, L.L.C. v. Aledo Independent School District* (2003). Superintendent, Allen Norman, sent a letter to a Choctaw builder representative, Beau Duncan, in 1996, assuring the builder that a subdivision would be in Aledo I.S.D. The Cunninghams purchased a lot from the builder and built a residence on the lot after receiving confirmation from Duncan that they would, indeed, be in Aledo I.S.D. Norman was wrong in stating the subdivision was within Aledo I.S.D. and the Cunningham children were denied admittance to Aledo I.S.D., however. The Cunninghams sued Choctaw for misrepresentation of the school district in which their lot is located.

Choctaw, in turn, filed a suit against Aledo I.S.D. and Mr. Norman. Choctaw alleged that an agreement had been breached. Mr. Norman and Aledo I.S.D. filed for summary judgment. The summary judgment was granted under the immunity provided under Texas Education Code Section 22.051. The appeals court upheld the lower court's decision stating that Mr. Norman

was acting within his scope of employment when he wrote the letter to Mr. Duncan. “The fact that he turned out to be mistaken was legally irrelevant” (Kemerer et al., 2005, p. 387.)

A case that determined a school employee was not acting within his scope of employment is *O’Haver v. Blair* (1981). A fifteen-year-old high school student, Shawn O’Haver, and other teenagers were playing football on a school practice field on a Sunday afternoon, October 7, 1979. The football coaches for Madison High School in San Antonio were attending a coaches meeting. Two of the coaches, Burkholder and Leonard, went to the field to move the water sprinklers. Coach Burkholder told the group of teenagers on the field to leave. They refused; so coaches Burkholder and Leonard returned to the field house to call the police.

When coaches Burkholder and Leonard told the other coaches in the meeting about the group of teenagers playing on the field, they got into a pickup truck and drove to the practice field. One coach, Tommy Blair, jumped out the truck and pushed Shawn O’Haver to get him to leave. Shawn shoved back and Coach Blair hit Shawn in the mouth, knocking out two teeth and loosening others. Shawn and his father, Donald O’Haver, filed suit against Tommy Blair. Coach Blair filed a motion for summary judgment based on immunity under T.E.C. section 21.912. The trial court granted this motion. Upon appeal, however, the motion for summary judgment based on immunity was overturned. The appeals court based their decision on their conclusion that Coach Blair was unable to establish all the essential elements required for immunity. The first element under question was whether Coach Blair was acting within his scope of employment. The court of appeals determined that he was not. The opinion of the court was that the facts did not indicate that Coach Blair was acting with judgment or discretion when he tried to remove Shawn from the practice field. Finally, the court could not determine that Coach Blair was not disciplining Shawn.

Another case that was determined based on the “scope of employment” element of the Texas Education Code is *Stimpson v. Plano Independent School District* (1987). A teacher, as compared to a student, brought this suit but the basis of the decision by the court is whether the administrators were acting within the scope of their employment. Ammie Stimpson was hired by Plano I.S.D. in 1961 to teach elementary students with reading disabilities. She was initially hired by Superintendent Hendrick. In 1974, Martha Hunt became the principal at the elementary school where Ms. Stimpson was employed. Ms. Stimpson claimed that Ms. Hunt and Dr. Hendrick conspired against her to wrongfully force her out of the Plano school system.

She claimed that in 1985 Ms. Hunt demoted her by reassigning some of her duties in the reading program to an instructional aide, which Hunt did with Dr. Hendrick’s approval. Ms. Stimpson also claimed that in March, 1986, she requested a letter of identification from Ms. Hunt that was necessary for her to take her TECAT test, which was required in order for her to maintain her employment. Ms. Stimpson claimed that Ms. Hunt, with Dr. Hendrick’s approval, refused to provide her with the necessary letter. Ms. Stimpson described several other incidents that took place between her and these two administrators during the school year, which ultimately led to Ms. Stimpson submitting her letter of resignation on March 11, 1986. She claimed that the defendants embarrassed, harassed, and emotionally abused her in these other incidents, which included moving her to a smaller classroom and placing obstacles in the entrance and hallway to obstruct her as Ms. Stimpson was confined to a wheel chair due to a physical handicap.

Ms. Stimpson filed suit in court against Plano I.S.D., Ms. Hunt, and Dr. Hendrick for damages arising from their interference with her teaching contract. The court granted summary judgment for the district under the Texas Tort Claims Act and for the two administrators under

the immunity portion of the Texas Education Code section 21.912. Ms. Stimpson conceded the judgment for the district but appealed the summary judgment for the two administrators by claiming that they were not acting within the scope of their employment. Ms. Hunt and Dr. Hendrick claimed that Ms. Stimpson had resigned under her own will due to health concerns, and had presented a letter from her doctor indicating medical concerns as a possible reason for resigning. The two educators also claimed statutory immunity for their actions. Ms. Stimpson claimed that she noted her health in her resignation letter to avoid a conflict with Ms. Hunt. The appeal court reversed the lower court's decision by determining that Ms. Hunt and Dr. Hendrick were not acting within the scope of their employment when they "willfully and intentionally" interfered with Ms. Stimpson's contract. In a dissenting opinion, Justice McCraw noted that "Stimpson's case theory as pleaded, places Hendrick and Hunt's actions within the scope of their employment. Stimpson's original petition pleads...tortiously destroyed by the Defendant Plano Independent School District by and through the intentional and willful actions of Defendants Hendrick and Hunt" (*Stimpson v. Plano I.S.D.*, 1987, p. 949). Based on this petition, Justice McCraw believed that Ms. Stimpson's own petition showed that Hendrick and Hunt had been acting within the scope of their employment. This was not the majority opinion, however, but it demonstrates the fine line that exists in determining whether a school employee is acting within the scope of employment.

A case that demonstrates loss of immunity due to the act being ministerial and not discretionary is *Myers v. Doe* (2001). On January 7, 1999, Mary Doe, a seventeen-year-old special education student was involved in a sexual encounter with another special education student, "Mad Dog," in the school elevator. This was brought to the attention of the special education diagnostician, Christy Hackett. Ms. Hackett had known Mary for eleven years and

spoke with her about the event. Even though Mary told Ms. Hackett that the encounter had not been consensual, Ms. Hackett believed it was. Ms. Hackett discussed the situation with the school's principal, Keith Burgett, and vice-principal, Norma Nardone. Mr. Burgett notified the superintendent, Terry Myers. Ms. Hackett was in charge of disciplining special education students. She contacted Mary's mother and discussed the situation with her. Mrs. Doe did not believe the sex was consensual but reluctantly agreed that both students needed discipline in order to stop the incident from being repeated. Ms. Hackett disciplined both students by reprimanding them.

The day after the incident, Mary told another teacher that the incident had not been consensual. The teacher sent a memo to Ms. Hackett, Mr. Burgett, and Ms. Nardone. Policies were set to help stop a sexual encounter from happening again. These policies included a rule that the elevator door was to remain locked, with only teachers having keys to the elevator; a mandatory tardy policy for the two students requiring immediate notification to the office if either student was tardy or absent; and a directive that was issued to the effect that the students were not permitted to be alone together and were not to be allowed access to the elevator. These policies were not carried out, however. On January 27, Ms. Nardone learned of two more incidents involving the two students. "Mad Dog" was removed to in-school suspension. Mary's parents brought suit against Myers, Nardone, Burgett, and Hackett, claiming that their failure to perform ministerial acts and their negligent disciplining of Mary led to her injuries.

The school officials moved for summary judgment based on immunity under T.E.C. section 22.051(a). The trial court denied the motion stating that the acts were ministerial and not discretionary. Additionally, the court ruled that this case involved negligent discipline as Mary had been disciplined, leading to her fear to report the subsequent incidents. The school officials

appealed the decision, stating they should be protected by immunity. Their testimony contained contradictions, however. For example, Hackett testified that Burgett was to talk to the teachers about the measures to be taken while Burgett testified that it was Hackett who was to talk to the teachers. Hackett and Burgett testified that they contacted Myers and were waiting on Myers to decide what to do with the students. Myers testified that Burgett and Hackett were not waiting for any direction from his office regarding this situation. The appeals court upheld the ruling of the trial court.

While the Texas Education Code Section 22.0511 provides immunity for professional school employees, it is not absolute. “To be protected, professional employees must be acting in the scope of their duties, must be exercising judgment or discretion, and must not be using excessive force in disciplining students or have been sufficiently negligent in disciplining student to cause bodily injury” (Kemerer et al., 2005, p. 385). There are examples of court cases dealing with each of these limits cited as part of this review. One additional limitation to the immunity defense is that it does not apply to the operation, use, or maintenance of motor vehicles. School employees can be held liable for negligent use of a motor vehicle.

It should also be pointed out that school officials cannot shield themselves from suit in a federal court if their conduct involves the violation of a clearly established constitutional right, even if they are immune from suit under Texas Education Code Section 22.051. For example, in *Jefferson v. Isleta Independent School District* (1987), a teacher allegedly tied an elementary school student to a chair for protracted periods of time over a period of two days, denying her access to the bathroom. The student sued, alleging a violation of her constitutional right to bodily integrity. The teacher denied that their action was done to punish the student; rather her actions were an “instructional technique” (Walsh, Kemerer, & Maniotis, 2005, p. 410). She claimed

qualified immunity from suit on the ground that the constitutional right she allegedly violated was not clearly established. The Fifth Circuit rejected her immunity defense, however, stating that the teacher had violated a clearly established constitutional right and that a reasonable teacher would have known that tying a child to a chair and denying her access to the bathroom was a constitutional violation.

Likewise, in *Doe v. Taylor Independent School District* (1994), a student sued a Texas school district, a school principal, and the superintendent, alleging that she had been in an abusive sexual relationship with a teacher/coach in violation of her constitutional rights. The Fifth Circuit ruled that the student's suit could move forward against the principal, because there was evidence that he had known about the sexual relationship between the student and the teacher and had been intentionally indifferent to her constitutional rights. As to the superintendent, however, the Fifth Circuit ruled that he should be dismissed from the student's lawsuit because no reasonable jury could conclude that the superintendent knew about the sexual relationship and had failed to take action.

Note that in both *Jefferson v. Ysleta Independent School District* (1987) and *Doe v. Taylor Independent School District* (1994), the students sued in federal court, charging violations of their constitutional right to substantive due process under the Fourteenth Amendment. It seems probable that the students sought a federal remedy rather than a state remedy because the Texas educator immunity law would likely have shielded the school officials from the plaintiffs' tort claims had they been brought in a state court.

CHAPTER 4

DEFAMATION

I will investigate public school employees who have claimed immunity from liability in lawsuits where defamation is claimed. There are two torts that make up defamation: libel and slander. Libel consists of written defamation, while slander is defamation that is conveyed orally. “Defamation is that which tends to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him” (Keeton, Dobbs, Keeton, & Owen, 1984, p. 773). However, it should be remembered that truth is an absolute defense to a defamation claim. A true publication, even though negative, is not defamatory.

As explained by Alexander and Alexander (2005), American courts have distinguished between two types of defamation. “Words that in and of themselves, without extrinsic proof, injure a person’s reputation are actionable *per se*. . . The words ‘actionable *per se*’ means that the publication is of such a nature as to make the publisher liable for defamation, regardless of whether special harm is attributable to the publication . . . (Alexander & Alexander, 2005, p. 597). On the other hand, defamation *per quod* is defamation that is not actionable unless the plaintiff can show actual damages.

Alexander and Alexander set forth the types of communications that constitute defamation *per se* under the common law:

[A]n action for defamation *per se* will lie without proof of special harm (damage) where (1) words impute (a) a criminal offense punishable by imprisonment or (b) that plaintiff is guilty of a crime involving moral turpitude; (2) words impute to

the plaintiff an existing venereal or other loathsome or communicable disease; (3) words impute to the plaintiff conduct, characteristics, or a condition incompatible with proper conduct of his or her lawful business, trade, or profession, or a public or private offense; and (4) words impute unchastity to a woman. (p. 597).

There have been seventeen published Texas appellate court opinions that have brought into question the immunity of public school professional employees under Section 21.051 of the Texas Education Code (Previously Section 21.912) for defamation. Of these seventeen cases, there are four in which the public school employees were not granted immunity. In the other thirteen cases, the public school employees were granted immunity. In all of these thirteen cases, immunity was granted based on the protection provided in Section 22.051 (previously Section 21.912). The remaining four cases involved motions by the public school employees to grant immunity under Section 22.051 but were unable to meet the statutory requirement for immunity. These public school employees were not immune from liability as they were found not to have been acting within the scope of their employment.

The first defamation case in which a public school professional employee was found to be immune from liability under the protection of Section 21.912 of the Texas Education Code is *Rudisill v. Cooper* (1986). Kay Rudisill was employed as an educational diagnostician by the Spring Branch Independent School District during the 1979-1980 school year. Dorothea Cooper was employed by the district as a certified psychologist. Rudisill was assigned to two elementary school campuses as part of her duties. The principals of the two elementary schools and parents of students from the two campuses filed complaints concerning Rudisill's work. Ms. Cooper's supervisors directed her to review Ms. Rudisill's work to determine if there were errors made in the psychological evaluation of students. Ms. Cooper completed her review and

prepared a report on her findings. She sent copies of her report to her supervisors, to the two complaining principals, and to Ms. Rudisill. Ms. Rudisill's contract was not renewed at the end of the school year by the district.

Ms. Rudisill filed suit against Ms. Cooper, "alleging that the contents of Ms. Cooper's report were libelous and malicious in character" (*Rudisill v. Cooper*, 1986, p. *2). Ms. Cooper filed for summary judgment based on the immunity protection provided under Section 21.912 of the Texas Education Code. The trial court granted the summary judgment and Ms. Rudisill appealed. The Court of Appeals of Texas upheld the lower court's ruling, indicating she had met the requirements of Section 21.912 for immunity. Ms. Cooper was employed as a professional employee, was acting incident to or within the scope of her employment, and was exercising discretion; and her actions did not involve the discipline of students.

The second case involving the application of Section 21.912 to a defamation suit was *Hammond v. Katy Independent School District* (1991). The facts of the case are as follows: Polly Hammond was employed as a special education teacher by the Katy Independent School District on a one-year contract, starting January 1986. Ms. Hammond was assigned to Opportunity Awareness Center, a school for troubled children. Dr. James Romero was the principal and Dr. Deidra Dempsey was employed as a psychologist. After disagreements between Ms. Hammond, Dr. Romero, and Dr. Dempsey over Hammond's methods for disciplining a disruptive student, Hammond voluntarily resigned her position with Katy ISD on December 31, 1987. Her resignation became effective January 16, 1987. Hammond delivered her letter of resignation to the Katy ISD Board of Trustees in December. In the resignation letter, Hammond stated: "It will be necessary for me to resign my teaching position at the end of this semester because of a change in my living arrangement. Over the holidays I have found

property that interests me, and it is too far from Katy to commute” (*Hammond v. Katy Independent School District*, 1991, p. 177).

On March 17, 1988, Hammond filed suit against Katy ISD, Romero, and Dempsey. Her allegations against the district included claims for breach of contract, deprivation of property rights, and violations of 42 U.S.C.A. Sections 1983 and 1985. Hammond sued Romero and Dempsey for defamation, intentional infliction of emotional distress, and violations of 42 U.S.C.A. Sections 1983 and 1985. Katy ISD, Romero, and Dempsey filed for summary judgment and the trial court granted summary judgment. Hammond appealed the decision to the Court of Appeals of Texas. Romero and Dempsey maintained that they were immune from liability as outlined in Section 21.912 of the Texas Education Code. In deciding whether to uphold the summary judgment, the court determined that Romero and Dempsey were public school professional employees. Hammond claimed that Romero’s letter of reference sent to the Alief Independent School District, calling her insubordinate and unprofessional, was libelous. The court determined that Romero was acting within the scope of his employment in writing the letter “and is, consequently, not subject to a libel action by virtue of Section 21.912 (b) unless such statements are false statements of fact or are libelous per se” (*Hammond v. Katy Independent School District*, 1991, p. 180). The allegation that the letter interfered with Hammond’s ability to find meaningful employment was contradicted by the fact that she was employed by Houston ISD in February, 1987. In fact, Houston ISD offered to renew her contract at the end of the school year but Hammond declined. Finally, there was no evidence to suggest that Romero or Dempsey were acting as the direct result of an official policy of the school district so their actions were found to be discretionary. The court of appeals upheld the lower court’s ruling for summary judgment.

In *Williams v. Conroe Independent School District* (1991), bus driver Marvin Williams brought suit against Conroe ISD, Doris Like, and Stan Lilley for wrongful termination, defamation, intentional infliction of emotional suffering, intentional racial discrimination, and deprivation of civil rights under color of law. While employed as a bus driver, Williams was accused of soliciting sex from a white female student. Williams was suspended with pay for the remainder of the year and his employment was not renewed for the following year. Stan Lilley, assistant coordinator of transportation for Conroe ISD, made the decision not to rehire Williams. Assistant Superintendent Doris Like officiated the post-termination hearing that was held at Williams' request. Williams requested a continuance so his attorney could attend. Williams did not appear at the administrative hearing and the hearing was not rescheduled, leading to Williams filing suit.

Conroe ISD, Lilley, and Like filed motions for summary judgment. The court granted summary judgment in response to all motions. Williams appealed the court's decision to the Court of Appeals of Texas. Regarding the state tort claims, Conroe ISD, Lilley, and Like argued their immunity under Section 21.912 of the Texas Education Code. The court of appeals determined that Lilley and Like were professional employees, acted with the scope of their employment, and acted with discretion. Therefore, the court of appeals upheld the lower court's decision to grant summary judgment for the state tort claims.

The next case involving immunity under Section 21.912 of the Texas Education Code in terms of defamation is *Anderson v. Blankenship* (1992). Ronald Anderson was employed as the head baseball coach at West Orange-Stark High School. Marcus Blankenship was the head baseball coach at Westbrook High School in Beaumont Independent School District. Following a series of articles in the Port Arthur News that claimed Anderson recruited athletes in violation

of the University Interscholastic League Rules, Anderson filed suit against the newspaper, sports columnist Will Wright, Anderson as the indicated source, and Beaumont ISD. Anderson alleged that Blankenship was acting within the scope of his duties as a Beaumont ISD employee when he allegedly defamed Anderson.

Beaumont ISD and Blankenship filed motions for summary judgment. Blankenship claimed that he was protected by the immunity under Section 21.912. The court determined that Blankenship was acting incident to or within the scope of his employment and was acting with discretion. Since no exceptions to Section 21.912 were applicable, Blankenship's motion for summary judgment was granted. Anderson was permitted to pursue his suit against the newspaper and Will Wright.

A case that considers scope of employment of a public school employee as it relates to a defamation case is *Jones v. Houston Independent School District* (1992). The facts of the case are as follows: Stewart Jones was employed as a substitute teacher in Houston ISD in 1989 and 1990. Jones was assigned to Jackson Middle School in the spring semester of 1989. Jones alleged that he had discipline problems with the students at Jackson. Sonia Saenz, principal at Jackson, sent a memorandum to the Houston ISD director of the substitute bureau, Walter Forster, complaining about Jones' behavior. "Saenz wrote that 'there were several complaints from parents and students about Mr. Jones cursing, pinching, and yelling at students'" (*Jones v. Houston Independent School District*, 1992, p. 1005). Saenz noted in her memorandum that administrators at Jackson had attempted to correct Jones but there was no change in his behavior. Forster asked Jones about the contents of the memorandum in October 1989, at which time Jones denied any wrongdoing.

In the fall of 1989, Jones applied for a position with the Houston Police Department (HPD). Jones signed a form, authorizing HPD to obtain his employment record and freed anybody who provided information to HPD from liability. HPD obtained Saenz's memorandum even though, according to Jones, Forster denied having sent the memorandum to HPD.

Jones next alleged that he caught a student cheating on a test during the summer of 1990 at Lamar High School. The student's mother asked the Lamar principal, in Jones's presence, whether the principal was aware that Jackson Middle School had experienced problems with Jones. Jones alleged that he learned during that meeting that the student's mother knew about Saenz's memorandum to Forster.

Jones was assigned to Madison High School in September 1990. On September 17, 1990, the Madison Dean of Instruction, David Alexander, called Jones aside to tell him that some female students had accused Jones of making statements of a sexual nature. Alexander then asked Jones to leave Madison. Alexander wrote a memorandum to Bonnie Collins, who had replaced Forster as director of the substitute bureau. In the memorandum, Alexander wrote "that he possessed two letters from students that cast serious doubts on whether Mr. Stewart Jones should continue to be employed as an HISD substitute teacher. We are certain that he is no longer welcome at Madison High School. We view the alleged comments of Mr. Jones as being totally unprofessional and dehumanizing to our female students" (*Jones v. Houston Independent School District*, 1992, p. 1106). Madison Principal Ada T. Cooper approved the memorandum.

Jones alleged that Collins fired him shortly afterwards. Collins told Jones that Jackson Middle School, Madison High School, and Sharpstown High School had all complained about Jones and had made it clear he was no longer welcome at any of those schools. Jones protested

his firing as unfair due to its basis on unsubstantiated information. Collins refused to write a letter stating her reasons for firing Jones.

Jones filed a complaint in state court. He alleged that Saenz and Forster violated his right to substantive due process and had libeled him. Jones alleged that Alexander, Cooper, and Collins had defamed him and violated his right to procedural due process and his rights under the Texas Constitution. The defendants moved for summary judgment against Jones. The district court granted the defendants' motion for summary judgment. Jones appealed to the United States Court of Appeals for the Fifth Circuit. Jones argued that Saenz and Forster published Saenz's memorandum to individuals outside of Houston Independent School District, citing the Houston Police Department and the parent of the Lamar student. He stated "A Texas school official loses his immunity when 'the official abandons his official duties and becomes a mere intermeddler' acting outside the scope of his employment" (*Jones v. Houston Independent School District*, 1992, p. 1007, internal citation omitted). The court of appeals upheld the lower court's judgment, however. In so doing, the court determined that all of the school employees were acting within the scope of their employment and all acts involved the exercise of judgment and discretion. Additionally, Jones presented no evidence to support his allegation that Saenz or Forster released the memorandum outside of Houston ISD.

Jackson v. Dallas Independent School District (1998) is another defamation suit in which the immunity under Section 22.051 of the Texas Education Code was sought. Jackson was a warehouse employee with Dallas ISD. Over a period of years, Jackson was transferred back and forth between two warehouses and placed on suspension in 1996 and 1997 for insubordination.

Jackson filed a lawsuit against Dallas ISD, Superintendent Yvonne Gonzalez, Robbie Collins, Curtis Smith, Robert Gordon, Johnny Holt, Paul Snelus, Dennis Eichelbaum, Gary

Lloyd, and William Cotton. She alleged violations of Sections 1981 and 1983 of 42 U.S.C. for violating her First Amendment right to free speech and for creating a racially hostile work environment. She also alleged state torts of defamation, both slander and libel. Regarding the state torts, the court found that Gonzalez, Smith, Holt, Snelus, and Eichelbaum were professional employees, as identified in Section 21.051 of the Texas Education Code. Only Gonzalez, Smith, and Eichelbaum were shown to be responsible for the reassignments and suspensions of Jackson. Additionally, they were acting within their scope of employment and exercised discretion in the reassignments and suspensions. Therefore, summary judgment was granted for these three professional employees under the immunity provided under Section 21.051.

Another case involving an employee filing a defamation suit against a former supervisor is *Outman v. Allen Independent School District* (1999). Robert Outman was the Adult Education Director for Allen Independent School District. In the fall of 1994, the superintendent of Allen Independent School District, Barbara Erwin, recommended to the Allen ISD board of trustees that “Outman’s contract be terminated for insubordination, for signing various documents without authorization, and for signing contracts for materials and services without authorization or funding to pay for them” (*Outman v. Allen Independent School District*, 1999, p. *4). Glen Andrew, president of the Allen ISD board of trustees, sent Outman a list of the charges against him and advised him of his due process rights. A public hearing was held on October 28, 1994, by the board of trustees at which time board members voted unanimously to terminate Outman’s employment contract. Outman appealed the Board’s decision to the Commissioner of Education. The Commissioner held a hearing on May 31, 1995.

Outman filed a lawsuit on August 29, 1995, before the Commissioner issued his decision. Outman’s lawsuit was filed against Allen ISD, Andrew, and Erwin. He alleged breach of his

employment contract, libel and slander, interference with contract, and intentional infliction of emotional distress. The Commissioner confirmed the board of trustees' decision on November 15, 1995. Allen ISD, Andrew, and Erwin moved for summary judgment, which the trial court granted; and Outman appealed the court's decision. One of the grounds for summary judgment was that Andrew and Erwin were immune from liability, as provided by Section 21.051 of the Texas Education Code. The court of appeals found that their actions were within the course and scope of their positions with the school district, involved the exercise of judgment or discretion, and were objectively reasonable. Therefore, the court of appeals upheld the lower court's decision to grant summary judgment.

Upshaw v. Alvin Independent School District (1999) involves an employee's lawsuit regarding slander. Barbara Upshaw was employed by Alvin ISD as a classroom teacher from 1992 to 1997. From her hiring through March 25, 1996, Upshaw taught English at Harby Junior High School. From March 25, 1996 to April 22, 1997, she was assigned to Alvin High School in the Alternative Education and Student Suspension Center. In January 1997, Upshaw took a medical leave of absence with an unknown anticipated date of return and tendered her resignation on April 22, 1997.

While employed with Alvin ISD, Upshaw and her husband filed numerous complaints with the district regarding the education of their son. When Virgil Tiemann was hired as the Superintendent in July 1995, he was made aware of the complaints. Tiemann met with the Upshaws and requested they communicate regularly with Ella Rodgers, the Assistant Principal at Harby, regarding any concerns they might have about the education of their son and about conditions at Harby. However, Upshaw continued to make formal complaints. She sent copies to the Alvin ISD Board of Trustees. Typical complaints included unlocked classroom doors and

an occasional misplaced student file. While the complaints were not substantial, Alvin ISD administrators spent an inordinate amount of time responding to them. In fact the “defendants allege that ‘although many of Plaintiff’s complaints were completely unfounded, she pursued them in a highly accusatory and hostile manner’” (*Upshaw v. Alvin Independent School District*, 1999, p. 556). In December 1995, Upshaw filed a grievance that she was being retaliated against for being a “whistleblower.” Tiemann assigned Clark Roberts, the Executive Director of Secondary Education, to visit with Harby staff to determine if there was any evidence of retaliation. Roberts reported that no staff member validated Upshaw’s allegations. Many staff members indicated a high level of stress with Upshaw as the cause. Tiemann then decided to reassign Upshaw to Alvin High School in the Alternative Education and Student Suspension Center. Upshaw received notice on February 27, 1996 that she would be reassigned starting March 25, 1996.

Upshaw filed a grievance against Tiemann and Roberts. She alleged that being reassigned was a demotion for her filing grievances. Her new position was not a teaching position, had decreased duties, required no certification, and caused her to lose her position as Chair of the Harby English Department. Prior to the hearing, Tiemann agreed that Upshaw would keep her stipend she had been receiving as chairperson. Upshaw continued to file grievances and filed a complaint with the Texas Education Agency, seeking to revoke the professional certifications of a dozen school employees. Upshaw took medical leave in January 1997 with an unknown date of return. She claimed she was forced to take leave because the retaliatory conduct caused her to suffer from clinical depression. In March 1997, Tiemann notified Upshaw that no action had been taken to extend her two-year contract due, in part, to the school’s inability to evaluate Upshaw while on medical leave. No action was taken to non-renew

her contract and Upshaw still had one year remaining after the end of the 1996-1997 school year. She subsequently resigned on April 22, 1997.

Upshaw filed a lawsuit against Alvin ISD, Tiemann, Rodgers, Wanda Howard, and Phillip Brunson. She alleged violations under 42 U.S.C.S, Section 1983, retaliation for exercising her rights under the First Amendment, denial of due process, and slander. The defendants filed a motion for summary judgment. Regarding the state tort claim of slander, the court was only able to find one alleged instance. Wanda Howard allegedly told a parent during a parent-teacher conference that Upshaw had been fired. The court found that, even if this incident took place, Howard was acting within the scope of her duties as Assistant Principal at Alvin High School and exercised discretion in making such a statement. The court granted the defendants' motion for summary judgment on all causes.

A case that considers the extent of a discretionary decision in determining immunity under Section 22.051 of the Texas Education Code is *Deaver v. Bridges* (2000). Loretta Bridges was employed as a special education teacher in Menard Independent School District for eleven years. While under a two-year contract from August 1997 through May 1999, allegations were made against Bridges that she used a racially derogatory comment about a student. In March 1998, Menard ISD recommended that Bridges' contract be terminated. Bridges appealed the recommendation and requested an administrative hearing. An independent hearing officer appointed by the Texas Education Agency found the Menard ISD's proposed termination of Bridges' contract was arbitrary, capricious, and not supported by the evidence. On August 10, 1998, Bridges and Menard ISD entered into a settlement agreement under which Bridges agreed to resign and was paid her salary for the school year.

The agreement included the following per *Deaver v. Bridges* (2000):

Bridges will direct any and all employment inquiries to the Superintendent's Office...Superintendent will respond to all inquiries about Bridges from prospective employers or other persons by providing only dates of Bridges' employment by the MISD, the capacity in which she was employed, the fact that she resigned, and a copy of the reference letter evidenced by Exhibit 'C' hereto. The MISD further specifically agrees that no other information and no negative comments concerning Bridges or her performance for the MISD will be provided to anyone requesting this information through the Superintendent's Office" (p. 551).

Deaver did not attend the August 10 Board of Trustees' closed session meeting in which the agreement was negotiated but was provided a copy of the agreement. Deaver participated in a telephone interview with a newspaper reporter for the San Angelo Standard-Times on August 11, 1998. An article, based on the interview, ran in the paper on August 13. In the article Deaver was quoted as saying that Bridges had resigned with one year's pay, investigations showed Bridges had used a racial epithet, and that the book was closed on a disturbing six months. Deaver also met with representatives of the League of United Latin American Citizens and told them he was required to give Bridges a good recommendation.

Bridges sued Menard ISD for breach of contract and Deaver for defamation. Deaver filed for summary judgment under Section 22.051. The court denied his motion and Deaver appealed to Court of Appeals of Texas. In order to be immune from liability, Deaver was required to demonstrate he was a professional employee, which was not contested. He showed that his actions were incident to or within the scope of his employment, which was not contested. Deaver stated that his acts were discretionary, to which Bridges argues the acts were ministerial, based on the agreement negotiated with Menard ISD. Deaver argued that Menard ISD did not

give him guidelines on how to interpret a contract and that he read the agreement to mean that he was only restricted from releasing negative information regarding Bridges to prospective employers. The court of appeals agreed that Deaver's actions were discretionary: "Like maintaining school discipline, the responsibility to interpret contracts or communicate with the media and other interested third parties is rife with judgment and personal deliberation. And, it being discretionary, we find that Deaver was entitled to summary judgment on his claim of immunity under Section 22.051" (*Deaver v. Bridges*, 2000, p. 556).

Enriquez v. Khouri (2000) is a defamation case that involves Texas public school employees at an Education Service Center. Blanca Enriquez was the Director of Head Start for the Region 19 Education Service Center. On August 14, 1998, Enriquez terminated approximately fifty people from their jobs as family service workers in the Head Start Program. That same day, Enriquez gave a television interview in which she was quoted as saying, "plaintiffs and other employees were terminated 'because they lacked the proper skills and training' and because they 'were responsible for poor performance of delivering services to Head Start recipients'" (*Enriquez v. Khouri*, 2000, p. 460).

Twelve of the terminated employees, including Maria Khouri, filed suit-alleging defamation. Enriquez filed a motion for summary judgment, relying on qualified immunity, based on Section 22.051 of the Texas Education Code. The trial court denied Enriquez's motion for summary judgment and Enriquez appealed that decision. The plaintiffs contended that Enriquez was not acting within the scope of her employment by taking part in the interview and that her conduct was ministerial and not discretionary. The appeals court found that Enriquez was acting within the scope of her employment as the Executive Director of Region 19 Education Service Center, James Vasquez, instructed Enriquez to respond to the media's

questions on behalf of Region 19 ESC. Additionally, the court of appeals found that Enriquez was acting with discretion, as she was not provided with any rules or guidelines about the content of her statements. The act of choosing what to say was left to her individual judgment and discretion. Based on these findings, the requirements of Section 21.051 were met. Therefore, the court of appeals reversed the lower court's decision and granted Enriquez's summary judgment motion.

In *Kobza v. Kutac* (2003) a student filed a defamation suit against a public school employee. The facts of the case are as follows: Aaron Kutac was a student enrolled in Elizabeth Kobza's class during the 1999-2000 school year. Kobza taught word-processing, computer classes, business law, and accounting at Schulenburg High School in Schulenburg Independent School District.

In February, 2000, Kutac participated in a stock show in Houston. He met a girl who was also a participant and became infatuated with her. The girl's father saw Kutac looking at her allegedly and asked Kutac to keep his eyes off his daughter. This event was eventually retold to Ms. Kobza. Ms. Kobza saw Kutac a few days later and told him she had heard what happened. When he asked her how, she joked that she saw it on the news. Over the next couple of weeks, Ms. Kobza would jokingly call Kutac a stalker and he would laugh. Ms. Kobza discussed creating a gag newspaper article with another teacher, Ms. Beyer. Ms. Beyer created the fake article and Kobza gave the article to another student, informing him they were playing a joke on Kutac and asked the student to take the article to him. The article indicated that a formal investigation and charges were pending against Kutac for harassing the girl at the stock show. Kutac believed the article was real, became upset, and showed the article to his mother. Mrs. Kutac contacted the police to determine if the article was true and then took up the matter with

Ms. Kobza, who informed her that the fake newspaper article was only a joke. Ms. Kutac filed suit against Ms. Kobza in state court, claiming slander, negligence, and libel. Ms. Kobza filed a motion for summary judgment but the trial judge denied the motion.

Ms. Kobza appealed the lower court's decision to the Court of Appeals of Texas, claiming she was immune under Section 22.051 of the Texas Education Code. Kobza claimed she was acting within the scope of her employment. She stated that "one of the things teachers do to improve the learning environment at a school is attempt to make the school experience positive for the students by establishing rapport with and attempting to enhance the students' self-esteem by doing things that let the students know that the teacher has an interest in him or her as an individual" (*Kobza v. Kutac*, 2003, p. 93). Her intention, Kobza claimed, was to make him laugh, build rapport with him, and make him feel good about himself. Kutac argued that Kobza was acting outside the scope of her employment because Kobza's employer and the state board found that she violated its code of ethics. The appellate court ruled that Kobza's act was incident to her duties as a teacher, even though she may have exercised poor judgment in this instance.

Regarding whether the act was ministerial or discretionary, Kutac argued that three departmental policies were violated by Kobza. Due to these violations of policies, her act was ministerial, not discretionary. The court found that "there is not a prescription or definition of exactly what a teacher must do to establish rapport with a student. It is left to the individual teacher's discretion. The fact that she violated several ethical policies is not dispositive" (*Kobza v. Kutac*, 2003, p. 95). Thus, the court found that the conditions of Section 21.051 were met, overturned the lower court's ruling and granted Kobza's motion for summary judgment.

The findings in this case help provide limitations as to what is deemed to be incident to or within the scope of employment as it relates to Section 21.051 of the Texas Education Code. The appellate court has interpreted the discretionary acts of teaching very broadly, as demonstrated by this case.

A case that involves a vendor filing a claim of defamation against a public school employee is *Chavez v. Brownsville Independent School District* (2005). In this case, Brownsville ISD offered an optional cafeteria plan for school employees through which they could purchase insurance policies with pre-tax income. Dino Chavez administered the plan each year, starting in 1998. In the fall of 2001, Brownsville ISD issued a Request for Qualifications for a Third Party Administrator to service its cafeteria plan. Chavez submitted an AFLAC proposal to the district's insurance committee. Chavez was worried that a competing company, National Plan Administrators, would receive the bid. Subsequently, Chavez met with the insurance committee and spoke at meetings of the Brownsville ISD Board of Trustees to encourage them to select AFLAC. Based on these excessive communications, Brownsville Superintendent, Noe Saucedo, contacted AFLAC and stated he would not allow it to submit a bid if Chavez stayed as the representative to the district, citing unprofessional and unethical behavior. AFLAC used a different agent to present its bid to the insurance committee, which accepted the bid by a vote of 44-1.

Due to the communication between Saucedo and AFLAC, Chavez contended that Saucedo caused AFLAC to terminate him. He filed a lawsuit against Brownsville ISD, Saucedo, and several school board members. He alleged violations of his constitutional right to free speech under the First Amendment and his right to due process under the Fourteenth Amendment. He also filed state tort claims against Saucedo. Separate motions for summary

judgment were filed by Brownsville ISD, Saucedo, and the school board members and were granted by the district court. Chavez appealed to the Court of Appeals of Texas. Regarding the state claims, Saucedo sought immunity under the protection of Section 22.051 of the Texas Education Code. In reviewing this argument the appellate court determined “it is hard to imagine that one could seriously argue Saucedo’s actions with regard to Chavez were not at least incident to his duties. ‘Whether one is acting within the scope of his employment depends upon whether the general act from which injury arose was in furtherance of the employer’s business and for the accomplishment of the object for which the employee was employed’” (*Chavez v. Brownsville Independent School District*, 2003, p. 681). Similarly, the court determined that Saucedo’s actions were discretionary, and not ministerial, as related to contract renewal decisions and employee evaluations. The court of appeals upheld the district court’s decision to grant summary judgment.

The most recent case involving immunity from a defamation case provided under Section 22.051 of the Texas Education Code is *Lane v. Young* (2007). In this case, the Board of Trustees of the West Hardin Consolidated School District voted to accept a \$50,000 gift to be used for a scholarship in memory of Zach Wright, the deceased son of the board president, William Wright, and Bridgette Wright. The acceptance of the gift for scholarship purposes was part of the December 2001 board meeting. Brad Lane was hired as superintendent on July 1, 2002, and was not present at the meeting.

After being hired, Lane was asked by a board member to look into the transfer of the \$50,000 to the Wrights’ personal bank account. Lane found that the district’s business manager, Sharon Young, had transferred the money out of the West Hardin account and into the Wright’s account on the same day it arrived. Dan Doyen, who was the acting superintendent at the time,

gave Young permission to do so. Young and Wright testified that the school board approved this as part of the December 2001 board meeting. The only related motion in the minutes of that meeting indicates that the board only approved to accept the donation into the school district's account. The board meetings were normally recorded but six months of tapes, including tapes for this meeting, were missing. Four of the board members informed Lane that the board only approved to accept the money into the district's account, as indicated in the minutes. Further, Lane discovered there was no written authorization for the transfer. Since there was no written documentation to support the transfer, Lane contacted legal counsel at the Texas Association of School Boards and financial legal counsel of the Texas Education Agency. Both informed Lane that once the school board voted to accept the money, they would have needed to approve the transfer out of the district. Lane then took the information to the school's attorney. Lane testified that law enforcement officials contacted him but Wright argued that the school board directed Lane to turn the investigation over to the sheriff's office. Lane terminated Young's employment as an at-will employee, and turned over the information he possessed to the District Attorney's office.

Subsequently, the Wrights and Young filed a lawsuit, suing for defamation and malicious prosecution. Lane filed a motion for summary judgment, based on the immunity afforded him under Section 22.051. The 356th District Court of Hardin County denied Lane's motion and he appealed. The appeals court determined that Lane's investigation was within the scope of his duties. Furthermore, the court held that his actions were discretionary: "Inherently, an investigation involves the exercise of personal judgment and personal deliberation – including the initial decision to investigate, the methods of investigation, persons to investigate, and employment and banking decisions flowing from the results of the investigation" (*Lane v.*

Young, 2007, p. *7). The court additionally found that Lane qualified as a professional employee, even though he was not employed by the district at the time the transfer of money took place. The court of appeals reversed the lower court's decision and granted summary judgment.

The first defamation case in which summary judgment was not granted in consideration of Section 21.912 of the Texas Education Code is *Gallegos v. Escalon* (1996). Enrique Gallegos was the superintendent of Donna Independent School District. Gallegos was questioned about the use of a credit card in the school district's name in a public meeting with the school board. In response to a question by a school board trustee, Gallegos stated that two former school board members, Lilly Escalon and David Rodriguez, gave him permission to procure the credit card in the school district's name.

Based on these public statements, Escalon and Rodriguez filed a lawsuit against Gallegos, alleging slander. Gallegos filed a motion for summary judgment, declaring his right to immunity under Section 21.912. The district court denied his motion and Gallegos appealed to the Court of Appeals of Texas. Gallegos claimed: "Providing information to members of the Board of Trustees in response to their questions was part of my duties as superintendent" (*Gallegos v. Escalon*, 1996, p. 64). The appellees claimed that the Texas Education Code requires school board trustees to adopt policies specifying the duties of each of its professional positions and that Gallegos failed to provide proof of his official duties or proof that his actions fell within such duties. The appellate court agreed with this and affirmed the district court's denial of Gallegos' motion for summary judgment.

The next defamation case in which immunity from liability under Section 21.912 of the Texas Education Code did not protect public school employees from a lawsuit filed by a student

is *Schrum v. Land* (1997). Justin Kelly was enrolled at La Porte Junior High School during the fall of 1994. He alleged that his homeroom teacher and junior high football coach, Michael Kluck, had subjected him to harassment and had engaged in sexual misconduct. Law enforcement investigated the allegations against Kluck. Ultimately, Kluck resigned in April 1995 and pleaded guilty to the charge of criminal indecency with a child. His teaching certification was revoked on January 7, 1997. During the investigation, however, George Land and Kathleen Anderson, fellow teachers of Kluck's, allegedly held a teachers meeting at the school and called for teachers to band together in support of Kluck. It was alleged that they "called Kelly an illegal drug user and a gang member, and also claimed that Kelly had recanted his testimony and had lied to law enforcement authorities about Kluck's sexual abuse...Kelly also alleged that Land and Anderson informed teachers that they had heard that Kelly's mother, Schrum, had been married several times, and that Kelly's family was 'so messed up' that her current and former husbands were working at the same chemical plant" (*Schrum v. Land*, 1997, p. 579).

Kimberly Schrum, as Kelly's mother, filed a lawsuit against Land and Anderson, alleging slander. Land and Anderson filed a motion for summary judgment, citing Section 21.912. The district court denied their motion and they appealed. The court found that Land and Anderson's actions were not within or incident to their scope of employment as teachers, even though both claimed to be acting on behalf of the Texas State Teachers Association. There was no evidence to support this claim so the court upheld the district court's decision.

Another defamation case between employees that looks at scope of employment in regard to the immunity provided under Section 22.051 of the Texas Education Code is *Gonzalez v. Ison-Newsome* (1999). In this particular case, Dallas Independent School District

administrators Lauren Yvonne Gonzalez, Robby Collins, Robert Hinkle, Jon Dahlander, and Robert Payton all made published statements to the press regarding the construction of Shirley Ison-Newsome's restroom in her office. These statements included "that she 'committed serious errors in judgment, was involved in wrong doing and was subject to disciplinary action for her role in the bathroom construction'" (*Gonzalez v. Ison-Newsome*, 1999, p. 4).

Ison-Newsome filed a lawsuit claiming slander against the five district administrators. All of them filed a motion for summary judgment in the district court, based on their immunity provided under Section 22.051. The district court denied their motion and the district administrators appealed to the Court of Appeals of Texas. Ison-Newsome argued that the comments were made to gain support for Gonzalez's decision to demote her from a district superintendent to high school principal and to deflect attention away from Gonzalez's own bathroom construction. Gonzalez and the other administrators argued that their comments were made within the scope of their employment and, therefore, they were immune from liability. The court determined "the record is devoid of any evidence that their acts were in furtherance of DISD's business and accomplished an objective for which the appellants were employed" (*Gonzalez v. Ison-Newsome*, 1999, p. 6). Thus the court upheld the district court's ruling in denying the motion for summary judgment.

The most recent defamation case involving a denial of immunity under Section 22.051 of the Texas Education Code is *Hinterlong v. Clements* (2003). This case provides further insight into the courts' interpretation of scope of employment as it relates to Section 22.051. The facts of this case are as follows: Matthew Hinterlong was enrolled as a senior at Arlington Martin High School (AMHS) in October, 1999. On October 25, 1999, a student informed an AMHS teacher, Rynthia Clements, that Hinterlong had drugs or alcohol in the trunk of his car on school

property. Clements wrote a note to an assistant principal, Mr. Henson, advising him of the student's statement. Clements got permission from another teacher, Meredith Hightower, to sign her name to the note to help protect the identity of the student who tipped her off. AMHS had a crime stopper program, overseen by Dr. Terri Lindsey, an assistant principal. Students were told regularly in announcements that they could simply report a tip to someone in authority. Typically, a teacher would, in turn, forward the tip to Dr. Lindsey. In this case, they not did not go to Lindsey or Henson, as the crime stopper program provided, but instead, to assistant principal, Sherion Clark.

Clark went to the tennis courts to find Hinterlong. She explained the tip that had been received and that she was required to follow up. Hinterlong agreed and voluntarily handed over his keys. Hinterlong then accompanied Clark to his vehicle and she proceeded to go through the back of his SUV. Clark found an Ozarka water bottle with a small amount of brown liquid that barely covered the bottom of the bottle. She opened it and smelled what appeared to be alcohol. The AMHS tennis coach arrived, smelled the liquid, and agreed it smelled like alcohol. Hinterlong and Clark then went to Clark's office. Clark contacted Hinterlong's parents and the school resource officer cited Hinterlong for minor in possession of alcohol.

Two days later, Clark conducted an informal disciplinary conference. Hinterlong's parents explained that they believed their son had been set up by upset students. They went on to relate an incident from July 1999. While the Hinterlongs were out of state in July, a friend of Hinterlong's who had a key to the Hinterlong home allowed several other students to trespass and party at the house. When the Hinterlongs returned home, they filed a police report, leading to thirteen AMHS students being ticketed or reprimanded by the police. Clark recommended that Hinterlong be placed in an alternative school through the end of the semester, based on the

zero tolerance policy of the school. The Hinterlongs appealed the decision to the AMHS principal, Mr. Jacoby, who upheld the placement.

Hinterlong was prosecuted in municipal court for his citation of minor in possession of alcohol. He was acquitted because the prosecution failed to produce the expert who tested the contents of the Ozarka bottle. Hinterlong then filed a lawsuit against Arlington Independent School District, Clements, and unnamed students, claiming defamation. Hinterlong sought to discover the identity of the students by filing a motion to compel discovery. He claimed the crime stoppers privilege does not apply because AMHS's crime stoppers is not a crime stoppers organization, that the tip was not a true crime stoppers tip, and that the statutory crime stoppers privilege unconstitutionally violates the Texas Constitution's open courts provision.

Regarding the defamation claim, Clements filed a motion for summary judgment, based on the immunity provided under Section 22.051. The district court granted the motion for summary judgment and Hinterlong appealed. The court of appeals determined that Clements acted outside of her scope of employment and that her actions were ministerial, not discretionary, in that procedures for reporting tips to crime stoppers were not followed. The court reversed the lower court's ruling and did not grant summary judgment, allowing for the case to proceed, related to the Hingerlong's defamation claim.

Of these seventeen cases involving defamation claims, public school professional employees were protected from liability for defamation by the immunity provided under Section 22.051 of the Texas Education Code, previously Section 21.912, in thirteen of the cases. Eleven of these cases involved defamation allegations by employees, one by a student, and one by a vendor. Of the four cases in which the school employees were denied immunity, two involved students, one involved an employee, and the remaining case involved school board members. In

each of the four cases in which immunity was not granted, the employees were found not to be acting incident to or within the scope of their employment.

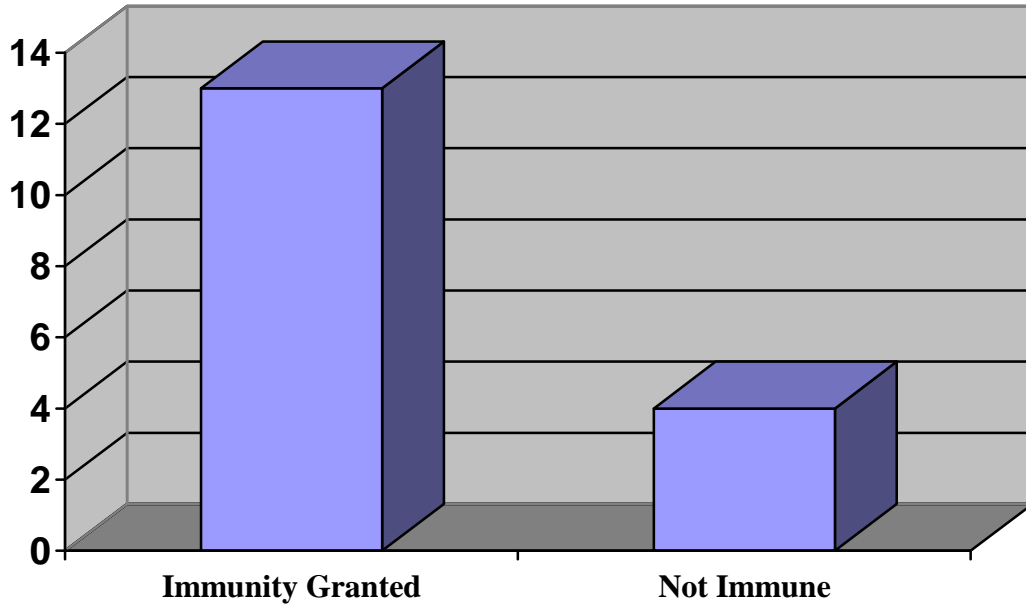


Figure 1. Immunity of public school employees in defamation cases.

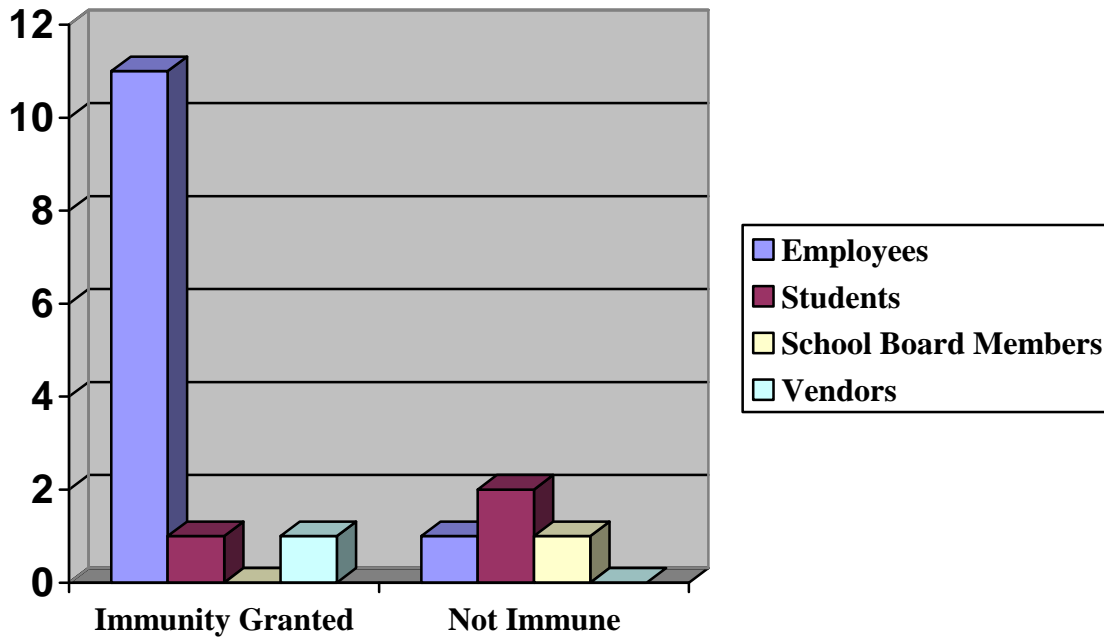


Figure 2. Immunity in defamation cases by classification of plaintiff.

These cases have shown how the courts have interpreted whether educators' activities are within the scope of employment, in regards to Section 22.051 of the Texas Education Code. Activities directly related to the supervision and evaluation of employees have been found to be within the scope of employment. Appropriate published statements that are directly related to the employee's position were found to be within the scope of employment (*Anderson v. Blankenship*, 1992) while statements made that were not directly related to the position have been found not to be incident to or within the scope of employment (*Gonzalez v. Ison-Newsome*, 1999). Statements and a fake newspaper article have been accepted by the one Texas appellate court as actions related to developing a rapport between a teacher and a student (*Kobza v. Kutac*, 2003). However, seeking teacher support of a teacher who was found to be guilty of sexual misconduct (*Schrump v. Land*, 1997) and not following procedures for submitting a crime stoppers tip were found to be outside the scope of employment (*Hinterlong v. Clements*, 2003).

In all these cases, the court's decision depended on the answer to one of two questions: 1) Was the employee acting within or incident to the employee's scope of employment when the allegedly defamatory statement was made? 2) Was the employee's allegedly defamatory statement a discretionary act or was it more properly considered a ministerial function?

CHAPTER 5

MOTOR VEHICLE EXCEPTIONS

There have been five cases tried at the state level that have addressed the motor vehicle exception to the Texas immunity law for public school professional employees: “This section does not apply to the operation, use or maintenance of any motor vehicle” (Texas Education Code, 22.0511(b), 2009). Each of the cases involved motor vehicles and has helped provide clarification as to the application of this exception as well as to providing working definitions of the words “operation,” “use” and “maintenance.”

The first published case that interpreted the motor vehicle exception to Section 21.912 of the Texas Education Code was *Pierson v. Houston Independent School District* (1985). The facts of the case are as follows: Robert E. Lee High School, a school in Houston Independent School District, organized a homecoming parade on October 19, 1979. Student members of the Lee chapter of the Texas Association of Future Farmers of America (FFA) assembled a float for the homecoming parade. Appellants William Pierson and Teresa Holland were two of these student FFA members. The Lee FFA float was approved by Lee principal L.J. Bergen and teacher/FFA sponsor Roy Sheffield. The float was designed to be a mock Apollo space capsule. A part of the capsule included a small amount of black powder, designed to emit smoke when ignited. The float was carried on a long-bed trailer pulled by a truck owned by Health Care Services, Inc., and driven by the owner’s son, Stephen Smith. The smoke device did not ignite as planned during the parade so Pierson picked up the device and lit it with a cigarette lighter. The device exploded and injured Pierson and Holland, who was standing nearby.

William Pierson filed suit against Houston ISD, FFA, Sheffield, Bergen, the Smiths, Health Care Services, Inc., and Kevin Shook, another Lee student who designed the smoke

device. Teresa Holland and her mother filed suit against Houston ISD, FFA, Sheffield, the Smiths, and Health Care Services, Inc. Pierson's suit was consolidated with the Holland's'. Motions for summary judgment were filed by Houston ISD, FFA, Sheffield, and Bergen. Summary judgment was granted for Houston ISD, FFA, Sheffield, and Bergen.

Pierson and Holland appealed the trial court's ruling, citing the motor vehicle exception of section 21.912 of the Texas Education Code. They claimed the injuries arose from the operation and use of a motor vehicle. Therefore, Sheffield and Bergen should not be immune from liability. The court of appeals upheld the trial court's ruling, stating "the motor vehicle exception does not apply to Bergen and Sheffield for the same reasons it did not apply to HISD; that is, the injuries were not caused by the operation or use of the motor vehicle, but by the acts of Pierson" (*Pierson v. Houston ISD*, 1985, p. 381). The event took place on a motor vehicle but the trailer was merely the site, not the cause of the accident. Since the motor vehicle exception did not apply, Sheffield and Bergen were professional employees acting within the scope of employment, and they exercised judgment or discretion, Sheffield and Bergen were granted summary judgment. This case illustrates the court's interpretation of Section 21.912 of the Texas Education Code, now Section 21.051, in terms of applying the motor vehicle exception when motor vehicles are the site of an injury but the use of the motor vehicles did not cause the injury.

A case that helped define the limitations regarding use of a motor vehicle is *Hopkins v. Spring Independent School District* (1987). Celeste Hopkins, a student at an elementary school in the Spring Independent School District, suffered from cerebral palsy. It was alleged that while students were left unsupervised Celeste was pushed into a stack of chairs and suffered a head injury. She had mild convulsions and was dazed and incoherent. The teacher did not call for

help or send her to the nurse. An occupational therapist later took her to the nurse, who kept Celeste at school for the day and did not contact the parent or Celeste's doctors, even though the school knew the names of the doctors. At the end of the school day, Celeste rode on a school bus to her day care center. She suffered severe convulsions while on the bus, and the bus driver contacted a supervisor and requested a nurse at the next stop. No nurse was provided and the driver was told to take the student to her day care center. At the day care center, Celeste finally received medical attention.

Two years later, Celeste's mother sued Spring ISD, the bus supervisor, the school principal, the school nurse, and the teacher. She claimed gross negligence for failing to provide adequate care, which dramatically decreased Celeste's life expectancy. Summary judgment was rendered for the school district and the employees based on immunity granted the school district under the Tort Claims Act and the employees under the Texas Education Code. The Texas Supreme Court was asked to reverse this decision for the employees and overrule *Barr v. Bernhard* (discussed in Chapter 1). She contended that the district employees' actions constituted negligent discipline since her child was disciplined by submitting to the authority and control of these employees. She also argued the school district and bus supervisor are not immune from liability because the child's injuries were aggravated when she had seizures on the bus and the defendants were negligent in failing to provide adequate medical care. She claimed that, due to this, the injuries arose from the use or operation of a motor vehicle.

The court ruled that since no legislative definition of discipline was provided, that its ordinary meaning must be applied. Discipline refers to some form of punishment. Negligent discipline as punishment involves no force but involves some action by the student of which the student suffers bodily injury – as in ordering a student to run laps. The court held that negligent

discipline was not involved in this particular case as there was no punishment to the student. This court also held that since the injuries were not “the proximate result of the use or operation of the school bus, but the bus provides the setting for the injury, the actions do not fall within the section 101.051 exception to immunity” (*Hopkins v. Spring ISD*, 1987, p. 619).

While the Texas Supreme Court upheld this lower court’s decision, three justices dissented. Included in the dissenting opinion was an argument for overruling *Barr v. Bernhard* with regard to the *Barr* decision’s interpretation of the wording of the Texas Education Code. The Texas Supreme Court justices in the majority argued that the Texas legislature had had ample time to change the statute if the interpretation of the earlier Supreme Court’s decision was inaccurate in the view of the legislature. The dissenting justices found that reasoning to be faulty. In addition, the dissenting justices stated that the bus supervisor did not meet the conditions required to be a professional employee as his position did not require any certification as mandated by the immunity statute. However, the *Hopkin* ruling gave a good description of what is required for negligent discipline to be found by a court and supported earlier court decisions related to injuries occurring on a school bus as compared to arising from the use or operation of a school bus.

Another case that pursued the motor vehicle exception to immunity for a professional public school employee as outlined in Section 21.912 of the Texas Education Code was *Naranjo v. Southwest Independent School District* (1989). Joe Naranjo, Jr. was a student in an auto mechanics class taught by Ben Lopez. Students in the class worked on privately owned automobiles. Lopez instructed Naranjo to begin work on the carburetor of a Ford Mustang, which had been brought in for repair. Subsequently, Lopez went into another room. The engine failed to start for Naranjo so he and two other students attempted to prime the carburetor by

pouring gasoline directly into the carburetor prior to cranking the engine. As Naranjo was pouring gasoline into the carburetor, another student turned the ignition. The result was an explosion that ignited the gasoline and spilled onto Naranjo's face, neck, chest, and arms causing severe burns.

Joe Naranjo, Jr., and his parents filed suit against Southwest ISD and Ben Lopez. The appellees moved for summary judgment, based on sovereign immunity for Southwest ISD and qualified immunity for Lopez under Section 21.912 of the Texas Education Code. The trial court granted summary judgment. Naranjo appealed the trial court's decision to the Court of Appeals of Texas, based on the motor vehicle exception. The court of appeals upheld the trial court's decision to grant summary judgment. The court stated that it "is necessary to distinguish between events taking place as a result of the negligent operation or use of the motor vehicle itself and those allegations related to the direction, control and supervision of students, holding that summary judgment is proper where the claims relate to the latter" (*Naranjo v. Southwest Independent School District*, 1989, p. 192).

In order to distinguish between events taking place as a result of the operation or use of the motor vehicle and those related to supervision of students, the court referred to definitions of operation, use, and maintenance. Since the legislation did not define the pertinent phrases, the ordinary meanings must be applied. From this, *Naranjo v. Southwest Independent School District* (1989) noted the following:

Operation refers to a doing or performing of a practical work and use means to put or bring into action or service; to employ for or apply to a given purpose...The transportation of a person from one place to another, and such transportation necessarily includes the act of stopping the vehicle when one has reached one's destination. It also includes the act of leaving the motor

of the car running in order that one may make a more rapid exit...The ordinary meaning of the term ‘maintenance’ in this context means the upkeep of a motor vehicle. In that regard the motor vehicle must be utilized to transport persons and the statute contemplates a ‘running’ or road-worthy vehicle. We hold that a teaching tool or teaching equipment, as was this immobilized Ford, is not such a ‘motor vehicle’ as would trigger the application of the subsection (c), thereby resulting in waiver of immunity pursuant to section 21.912(c) (p. 192-193).

A case that challenged the immunity of Texas school district employees due to the motor vehicle exception and forced the courts to look at a school bus as the setting for an injury is *LeLeaux v. Hamshire-Fannett Independent School District* (1992). Monica LeLeaux was a sixteen-year-old junior at Hamshire-Fannett High School. Monica and other band members traveled in school buses to another school to compete in a marching contest. After finishing, Monica and some of her fellow band members, along with the band director, stayed to watch the performances of other schools’ bands. Monica returned to the bus she had ridden to the contest. The bus was parked, empty, and the rear emergency door was open. She claimed that she did not open the door and did not know who did. She sat on pillows in the rear doorway with a friend, J.R. Thompson, with their feet dangling out of the back of the bus. There was no one else on the bus while they were there.

Monica and J.R. jumped to the ground when they heard students coming toward the bus. J.R. went to the front of the bus to meet the other students. Monica’s pillow had fallen to the ground when she jumped down so she picked it up and threw it back in the bus. She grabbed the seats at the rear of the bus and jumped back into the emergency doorway in order to be able to close the door as she could not reach to close the door from the outside. There was nobody else

on the bus and the engine was not running. Monica stated that her purpose for jumping back into the bus was to close the door, not to take her seat. Monica had gotten in and out of the emergency door on prior occasions and knew how tall the doorway was. She had never hit her head before. On this occasion, Monica thought she was inside the door, stood up, and hit her head on the doorframe. She bent over in one of the seats, laughing. J.R. heard her and ran back to where she was. During this time, the bus driver got on the bus and started the engine. A buzzer signaled that the back door was open. The driver told Monica to close the door. She reached out to do so and passed out. J.R. carried her to the front of the bus, where she tried to stand up and again passed out.

Monica and her mother, Joyce LeLeaux, sued the school district and the bus driver, Darrell Bill, for damages. The trial court granted summary judgment for the defendants and the plaintiffs appealed. The court of appeals upheld the trial court's ruling and the plaintiffs challenged the decision to the Supreme Court of Texas. The court affirmed the judgment of the court of appeals. "The court stated that when plaintiff injured hit her head she was not being loaded or unloaded, or returning to her seat or preparing to leave the bus...The court ruled that the injury did not arise out of defendant bus driver's negligence in failing to instruct the students under the Education Code as to the correct procedures for closing the emergency door because as a professional employee he was under no obligation to do so" (*LeLeaux v. Hamshire-Fannett Independent School District*, 1992, p. 49).

In this case, the court considered the following: The bus was not in operation. The bus was parked, empty, the motor was off, and it was not doing or performing any practical work. The bus was not being put into action or service and it was not being applied to a given purpose. The driver was not aboard and there were no students aboard. The court referred to *Hopkins v.*

Spring Independent School District: “When an injury occurs on a school bus but does not arise out of the use or operation of the bus, and the bus is only the setting for the injury, immunity for liability is not waived” (*LeLeaux v. Hamshire-Fannett Independent School District*, 1992, p. 52). Therefore, since Monica’s injury was not a result of the operation or use of a motor vehicle, Section 21.912 of the Texas Education Code is applicable, and Darrell Bill is not liable to Monica as he was a professional employee exercising discretion within the scope of his employment. This case reinforces the concept that a school vehicle as a setting of a student’s injury is not sufficient to qualify as an exception to qualified immunity.

The most recent case that challenged the immunity of Texas school district employees due to the motor vehicle exception is *Paris Independent School District v. Cieminski* (1996). Michael Cieminski, Jr., was a student in Paris ISD. He attended a school-sponsored field trip to the Dallas Museum of Art. The school bus was driven by T.V. Roberts, and Gail Hogue was the teacher in charge of the field trip. The bus arrived safely at the Dallas Museum of Art; and the students, along with the teacher, entered and toured the museum. While at the museum, Cieminski became separated from the group. He went outside of the museum to look for the other Paris ISD students. At that time, he saw a school bus leaving the parking lot. Cieminski ran after the bus. “He ran across the museum parking lot and an adjacent parking lot, and then jumped over a wall. He fell twenty-five feet onto a concrete underpass, injuring himself. Cieminski’s parents filed suit against PISD, Hogue, and Roberts alleging negligence and gross negligence” (*Paris Independent School District v. Cieminski*, 1996, p. *4).

Paris ISD, Hogue, and Roberts filed a motion for summary judgment. Their claim for summary judgment was based on the grounds that Hogue and Roberts were entitled to immunity under section 21.912 of the Texas Education Code because Cieminski’s injuries did not arise out

of the use or operation of motor vehicle. The trial court denied Hogue and Roberts' motion for summary judgment. PISD, Hogue, and Roberts appealed the trial court's decision, citing four points of error. First, the trial court erred in failing to grant the motion for summary judgment. Second, the trial court erred in failing to grant the motion for summary judgment because Hogue and Roberts were professional employees who exercised their discretion. Third, the incident did not involve the operation or use of a motor vehicle. Finally, the school district should have been granted summary judgment because Hogue and Roberts established qualified immunity, therefore, the school district cannot be held liable.

The appellees' contention was that Cieminski's injuries were proximately caused by the negligent use of the school bus. Their argument is that the appellants breached their duty to make certain Cieminski was safely aboard the school bus and transported home. The failure to make certain Cieminski was on the bus qualifies as negligent operation of the school bus by PISD, Hogue, and Roberts, according to the appellees' argument.

Appellants contend that the complaint is actually one of negligent supervision. "Appellees' complaints are related to the direction, control, and supervision of Cieminski, not to the negligent use of the bus itself," The Texas appellate court said "We agree. Appellees' claims of liability stem from Hogue's failure to make sure Cieminski was on the bus before it left the museum. This is a complaint of negligent supervision, not a complaint about the negligent use of the bus itself" (*Paris ISD v. Cieminski*, 1996, p. *5). Additionally, Hogue and Roberts are professional employees for purposes of section 21.912 of the Texas Education Code. Since Cieminski's injuries were not due to the actual use of the bus itself and there is no claim that disciplining caused Cieminski's injuries, immunity was not waived for professional employees Hogue and Roberts. Therefore, Hogue and Roberts were protected from liability under section

21.912 of the Texas Education Code. The Texas Court of Appeals reversed the trial court's order denying appellants' motion for summary judgment and rendered judgment that appellees take nothing from appellants.

All five of these cases resulted in summary judgment for the public school professional employees. In all published cases in which public school employees have argued that the motor vehicle exception does not apply to the facts of their cases, the employees have been successful.

It is important to note that each of these cases involved a motor vehicle as the site of an injury to a student but all were dismissed as they did not involve the operation, use, or maintenance of a motor vehicle, as determined by ordinary definitions. The courts have shown that it is not enough for a motor vehicle merely to be involved in an incident leading to the injury of a student in order for the motor vehicle exception to be applied. The courts have provided guidelines, as indicated in the case summaries above, as to the criteria that must be established in order to qualify for such an exception. Ultimately, each of these cases were decided as negligent supervision cases, which allows for qualified immunity of professional public school employees as long as they are acting within the scope of their employment and exercising judgment or discretion.

CHAPTER 6

EXCESSIVE FORCE IN DISCIPLINE

Ten published cases have considered whether a public school employee may be sued for using excessive force in discipline. Texas Education Code, Section 22.0511(a) (2008) specifically permits lawsuits “in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.” Of these ten cases, there are two in which the public school employees were not granted immunity due to this exception. In the other eight cases, the public school employees were granted immunity. Six of these eight cases in which immunity was granted were based on the protection provided in Section 22.051 (previously Section 21.912). The remaining two cases involved motions by the public school employees to grant immunity under Section 22.051 but were unable to meet the requirements. These public school employees still were immune from liability, but under different statutes.

The first published case that was tried regarding the excessive force in discipline exception to Section 21.912 of the Texas Education Code was *O’Haver v. Blair* (1984). The facts of the case are as follows: Shawn O’Haver, a fifteen year old high school student, was playing football on the San Antonio Madison High School practice football field with a group of people on Sunday, October 7, 1979. The Madison High School football coaches were holding a coaches meeting at the high school at the same time. Two of the Madison coaches, Burkholder and Leonard, left the meeting and went to the practice field to move the water sprinklers. Coach Burkholder told the group playing football to leave the field and they refused to do so. Burkholder and Leonard returned to the coaches meeting to contact the police.

Burkholder and Leonard informed the other coaches in the meeting about the group playing football on the practice field. The other coaches got into a pickup truck and drove over to the practice field. Once at the field, the coaches jumped out of the truck. Coach Tommy Blair pushed Shawn O'Haver to get him to leave the field and O'Haver started pushing back. There was a struggle between Blair and O'Haver and, ultimately, "Tommy Blair struck Shawn O'Haver in the mouth, knocking out two of his teeth and loosening several others" (*O'Haver v. Blair*, 1984, p. 467). Shawn O'Haver and his father filed suit against Tommy Blair, seeking judgment for damages. Blair alleged that under Section 21.912 of the Texas Education Code, he was immune from liability and filed a motion for summary judgment. The trial court granted the motion for a summary judgment.

The Court of Appeals of Texas reversed the trial court's ruling, noting that summary judgment was improperly granted as Blair did not establish all the essential elements required for immunity under Section 21.912 of the Texas Education Code. The court of appeals identified three key elements that Blair did not establish as a matter of law. First, Blair did not conclusively establish that he "was acting incident to or within the scope of the duties of his position of employment" (*O'Haver v. Blair*, 1984, p. 468). Blair also failed to demonstrate that he was exercising judgment or discretion in attempting to remove O'Haver. Finally, Blair did not establish as a matter of law that he was not engaged in disciplining O'Haver at the time of the incident.

The court of appeals noted that the facts of this case were clearly distinguishable from other cases where summary judgment had been granted under Section 21.912 of the Texas Education Code. "None of the cases involved a teacher striking a student and in all of the cases there was no question the teachers' acts were within the scope of employment, involved

judgment or discretion, and were not acts of discipline” (*O’Haver v. Blair*, 1984, p. 469). The fact that Blair struck O’Haver raised the question of a disciplinary act in this case. This is the first of two cases in which immunity was not granted to the public school professional employee due to the excessive force in discipline exception.

The second case in which immunity was not granted to the public school professional employees is *Spacek v. Charles* (1994). Larry Spacek and Steve Ramsey, coaches at New Waverly High School, called Joshua Maxey, a fourteen-year old junior high student, into the coaches’ office during school hours to talk to Maxey about improving his grades so that he would be eligible to play sports when he entered high school. Maxey alleges that while in the office, Spacek threatened to hang Maxey if his grades didn’t improve. At one point, Spacek allegedly reached for a white extension cord and reached for Maxey. Ramsey allegedly grabbed what Maxey believed to be a handgun, put Maxey in a headlock, pointed the gun at Maxey’s head, and threatened to kill him if his grades didn’t improve. Thea Clark Charles, as next friend to Maxey, brought suit against both coaches and the school district. The school district and both coaches filed motions for summary judgment. The trial court granted the district’s motion but denied the coaches’ motion for summary judgment.

Spacek and Ramsey appealed the trial court’s decision to the Court of Appeals of Texas. Spacek denied threatening to hang Maxey and stated that Ramsey never threatened to shoot Maxey. They both denied disciplining Maxey. Spacek admitted to playfully responding to Maxey’s dare that he couldn’t catch him by telling Maxey he could catch him and would tie him up and whip him. Ramsey admitted to displaying a starter pistol in the coaches’ office at the time of the alleged incident but denied threatening Maxey with the pistol. “The coaches further assert that none of the exceptions to immunity within Section 21.912 apply to the facts of this

case because they did not use excessive force in disciplining Maxey. The coaches contend that Charles did not allege the use of excessive force in her petition, but merely alleges the coaches threatened to use force” (*Spacek v. Charles*, 1996, p. 94).

The court of appeals disagreed with the coaches’ claims and upheld the trial court’s decision to deny a summary judgment based on immunity. In so doing, the court noted that the legislature did not define excessive force in terms of Section 21.912 of the Texas Education Code. However, the court pointed to Section 9.62 of the Texas Penal Code as the common law majority rule that public school teachers standing in loco parentis may use reasonable force to discipline their charges. “Consistent with the public policy of Texas to give teachers the necessary support to enable them to efficiently discharge their responsibilities, teachers may use reasonable force not only to punish wrongful behavior, but also to enforce compliance with instructional commands...however, ‘a teacher may not use physical violence against a child merely because the child is unable or fails to perform, either academically or athletically, at a desired level of ability, even though the teacher considers such violence to be instruction or encouragement’” (*Spacek v. Charles*, 1996, p. 95). Even though this case did not involve paddling or spanking or other physical force normally associated with corporal punishment, the alleged restraint of a student in a headlock, placing a weapon against the student’s head, and threatening to hang a student with an extension cord, raises a question of excessive force. Since there is a fact question related to the use of excessive force, the coaches failed to show that they were entitled to qualified immunity.

A case that has helped define discipline in the context of Section 21.912 of the Texas Education Code is *Doria v. Stulting* (1994). On March 10, 1989, Michael Doria was a student in Don Stulting’s history class. Doria threw a piece of fruit at another student. The second student

threw the fruit back at Doria but, instead, hit his girlfriend. Doria began to use profanity, which Stulting overheard. Stulting directed Doria to stop using profanity several times but Doria continued to do so. Stulting next directed Doria to go to the vice-principal's office. Doria refused and Stulting subsequently told him again to go to the vice-principal's office. Again, Doria refused and Stulting informed Doria that if he did not leave, Stulting would be forced to remove him. Doria responded that if he was going to leave, Stulting was going to have to physically remove him from the classroom. Stulting then removed Doria by holding onto his hair and his arm and escorted him to the vice-principal's office. Vice-principal Dewey Smith administered discipline by placing Doria in the district's Disciplinary Alternative Education Placement for the remainder of the semester. While there, Doria was suspended from school for the remainder of the year for drawing obscene pictures.

Michael Doria and his parents filed suit against Don Stulting seeking damages allegedly suffered by Michael. The trial court granted Stulting's motion for summary judgment under Section 21.912 of the Texas Education Code. Doria appealed the trial court's decision, citing "whether or not Stulting's actions constituted discipline is a material fact issue in the case which was unresolved" (*Doria v. Stulting*, 1994, p. 566). The Court of Appeals of Texas upheld the trial court's decision to grant summary judgment and concluded that Stulting had immunity from personal liability to Doria. In their ruling, the court of appeals determined that Stulting was not exercising discipline when he forcibly removed Doria from the classroom and escorted him to the Vice-Principal's office. The court of appeals from *Doria v. Stulting* (1994) determined the following regarding discipline:

Stulting acted only to protect the school learning process from disruption by a wrongdoer by physically removing the wrongdoer from the classroom and thereafter escorting the

wrongdoer to the public official designated by rule, regulation or law to impose the necessary and proper ‘discipline-punishment’ – the Vice-Principal. We reason that Stulting no more imposed ‘discipline-punishment’ on the wrongdoer than does the police officer who acts to protect the banking process from disruption by a wrongdoer by physically removing the wrongdoer from the banking floor and thereafter escorting the wrongdoer to the public official designated by rule, regulation or law to impose the necessary and proper ‘discipline-punishment’ – the judge (p. 567).

This ruling clearly expresses a judicial view that a teacher is acting within the scope of his employment when removing a disruptive student from the classroom and that the action of physically removing a student is not considered discipline.

A second case that has helped to provide limits to negligent discipline in the context of Section 21.912 of the Texas Education Code is *Davis v. Gonzales* (1996). Joey Davis was a first grade student at Wilson Elementary in Corpus Christi. During recess, Joey was either hit or pushed down by another student. Joey informed his teacher, Frances Gonzales, that he had been hit in the cheek. Ms. Gonzales provided Joey with a wet paper towel to hold against his cheek but did not take him to the school nurse. “Ms. Gonzales stated that she did not notice any problems with Joey at that time and that he attended to his school work with no sign of pain or trauma” (*Davis v. Gonzales*, 1996, p. 16).

Ms. Gonzales’ class later went to physical education. There, Joey complained to the PE teacher, Bea Alvarado, that his arm was hurting. Ms. Alvarado allowed Joey to sit out from the activities for that day but did not take him to the school nurse. After going home that day, Joey complained of severe pain to his parents. Joey’s parents were unable to get an appointment with

their physician that day but took him to see his doctor the next morning. Joey was diagnosed with a fractured collarbone.

The Davises filed suit against Ms. Gonzales, Ms. Alvarado, and Mr. Cadena, the principal of Wilson Elementary. Gonzales, Alvarado, and Cadena claimed immunity under Section 21.912 of the Texas Education Code and filed a motion for summary judgment. The trial court granted the motion for summary judgment and the Davises appealed.

The appellants claimed that by denying Joey Davis access to the school nurse after he informed them he was hurt, his teachers had negligently disciplined him by causing his suffering to be prolonged unnecessarily. Thus, the appellants believe the school personnel should not be granted immunity, due to the negligent discipline exception to Section 21.912 of the Texas Education Code. The Court of Appeals of Texas affirmed the trial court's ruling in granting a summary judgment for the public school employees. In making its determination, the court noted that Joey did not receive his injuries at the hands of the two teachers or the principal, but by another student. Additionally, there was no punishment administered to Joey, which is required in order to apply the negligent discipline exception. Therefore, "none of the actions alleged by the appellants to have been committed by appellees amounted to negligent discipline" (*Davis v. Gonzales*, 1996, p. 17).

A third case that has helped define discipline in the context of Section 22.051 of the Texas Education Code is *Beresford v. Gonzalez* (1999). Additionally, this case offers a definition of bodily injury as it applies to this section. Tammy Beresford was employed by the Pharr, San Juan, Alamo Independent School District as a basketball coach at LBJ Junior High School. Team members were given ten minutes to suit out into practice attire, immediately before practice. The girls dressed out in an area of the locker room referred to as the cage. The

cage was separated by a chain link fence from the rest of the dressing room and was used to store the students' valuables and personal items during practice. On August 31, 1995, two team members, Marlen Gonzalez and Iliana Figueroa, remained in the cage after the allotted ten minute period. When Beresford noticed that Marlen and Iliana were not present for the exercise, she sent two other team members to tell them they had one minute to finish dressing and join the team. The other team members locked the cage door while Marlen and Iliana were still inside. It is unclear as to whether Beresford authorized this action. "The student who locked the door maintains that she asked Beresford if she could lock Marlen and Iliana in the cage, and Beresford replied affirmatively, but didn't appear to be paying attention" (*Beresford v. Gonzalez*, 1999, p. *4). Beresford claimed that when the girls told her they had locked the cage door that she gave the girls her keys to unlock the door, and instructed them to tell Marlen and Iliana they had thirty seconds to join the team.

After the team finished stretching, the girls went outside to run laps. Marlen and Iliana still had not joined the team. Beresford asked another coach if she should leave them or take them and the coach replied she should leave them to think about it. Beresford then went outside with the team to run laps. Marlen was upset while in the cage and did not understand why she had been locked in. Another coach walked by and asked the girls why they were locked in but did not unlock the cage. There were no bathroom facilities in the cage. After fifteen to thirty minutes elapsed, the door was unlocked. Marlen and Iliana were directed to run a "Texas lap in a square" by Beresford, which was slightly longer than the lap run by the rest of the team. "Marlen testified she suffered no physical or bodily injury as a result of this incident, and Beresford never touched her. Marlen stated she had trouble sleeping for about two weeks following the incident, suffered a loss of appetite, and would cry to her mom about it. Marlen

indicated she was upset because the incident happened unexpectedly and it made her ‘disappointed’” (*Beresford v. Gonzalez*, 1999 p. *4). Marlen’s mother, Rosa Gonzalez, sued Beresford, alleging excessive force or negligent discipline resulting in bodily injury. The appellants filed a motion for summary judgment based on immunity provided under Section 22.051 of the Texas Education Code but the trial court denied the motion. Beresford appealed the trial court’s decision and the Court of Appeals of Texas overturned the trial court’s ruling and granted the motion for summary judgment.

The court determined that discipline involving force requires physically touching or striking a student. Negligent discipline under Section 22.051 does not involve force but requires some action on the part of the student from which the student suffers bodily injury. In order to establish negligent discipline under Section 22.051, the student is required to show the punishment resulted in bodily injury. Thus, the court found it necessary to identify a definition of bodily injury. “The term ‘bodily injury’ is not defined in the statute, thus, we must determine its meaning. It is a basic rule of statutory construction that when a term is not defined in a statute, courts are to give words their ordinary meaning...The commonly understood meaning of the term ‘bodily injury’ implies a physical rather than a mental or emotional harm” (*Beresford v. Gonzalez*, 1999, p. *6). The court determined that, in this case, Beresford was not engaging in any form of discipline as she never caused the door to be locked. Furthermore, even if Beresford was disciplining Marlen, the evidence does not show the use of either excessive force or negligence resulting in bodily injury. Marlen testified that she never suffered any physical or bodily injury as a result of this incident. Marlen never visited a doctor or psychologist because of the incident. Marlen stated the incident upset her, caused her to cry and feel disappointed, and

made her not want to attend school. As a matter of law, the court found that Marlen did not suffer bodily injury.

Doe v. S&S Consolidated Independent School District (2001) is the most recent case involving the excessive force in discipline exception to Section 22.051 of the Texas Education Code. It provides insight into the interpretation of physical restraint as compared to discipline. Jane Doe's home life and behavior were far from ideal and apparently were pertinent to her behavior at school. "Mrs. Doe acknowledges that prior to attending school, Jane Doe was sexually abused by one of her former boyfriends...Jane Doe apparently endured abuse at the hands of family members too" (*Doe v. S&S Consolidated Independent School District*, 2001, p. *2). She behaved violently and suicidally at home. Statements from Mrs. Doe indicate that Jane Doe "would lay out in the road and tell people to drive by. She wouldn't move...She became very explosive, and she was screaming. The neighbors down the road could hear her screaming" (*Doe v. S&S Consolidated Independent School District*, 2001, p. *2). According to *Doe v. S&S Consolidated Independent School District* (2001), Jane Doe wouldn't go to sleep until 3:00 or 4:00 in the morning. She would sneak out into the yard. Jane Doe reportedly bit herself and would threaten to jump up on the house and jump off the house, hanging herself (p. *3). Jane Doe experienced two hospitalizations during the 1997 and 1998 summers outside of school. During her first ten-day stay, hospital personnel recommended to Mrs. Doe that Jane Doe needed long-term hospitalization but Mrs. Doe rejected their advice. Before the second stay, Jane Doe reportedly came up behind Mrs. Doe with a knife stuck to her chest and told her mother that she just didn't care.

Jane Doe first enrolled in kindergarten in S&S Consolidated Independent School District at Sadler Elementary School for the 1996-1997 school year. She was not advanced to the first

grade for the 1997-1998 school year. She entered the first grade in the 1998-1999 school year. It was during this year that Jane Doe's problems and the school's response to her problems intensified greatly. "Jane Doe's first grade teacher, Connie Mitchusson, recorded 'difficulties' Jane Doe began to have in class at the start of such academic year...Jane Doe's writing on furniture, making paper messes in the classroom and not cleaning them up, cutting her tongue with scissors, defying the teacher, shouting curse words at the teacher, 'exposing' herself to her teacher and fellow students, refusing to do schoolwork, and accosting other students (*Doe v. S&S Consolidated Independent School District*, 2001, p. *6).

The first major single incident pertaining to this case took place on November 9, 1998. Jane Doe was assigned to In-School Suspension for her behavior in her classroom. While there, she became "noncompliant" and then began being "rageful." Jane Doe allegedly screamed obscenities that SS CISD employees reported were not to be expected from the average first grader. Mrs. Doe reported that two SS CISD women sat on Jane Doe to control her until Mrs. Doe arrived to pick her up. Upon releasing her, Jane Doe hit Mrs. Doe in the mouth with her head while Mrs. Doe was trying to calm her down. Jane Doe was transported to a hospital via an ambulance. Mrs. Doe had Jane removed from the first hospital to a second hospital where she was admitted. Mrs. Doe removed Jane from the second hospital and transported her to a third hospital that would not admit her so she had her transported to a fourth hospital that finally admitted her. Hospital personnel at all four hospitals used restraints on Jane Doe.

Jane Doe returned to SS CISD after Thanksgiving. Ms. Mitchusson described Jane Doe's behavior as out of control. Ms. Mitchusson sent Jane Doe to Principal Imbert's office. Ms. Imbert then escorted her to school counselor Tim Kemp's office. While there, Jane Doe began throwing things, yelling, and kicking. Kemp reported having to hold Jane Doe after she picked

up a paperclip and began to bend it so that he feared she would stab herself or someone else. When Imbert entered the room, she suggested that Jane Doe be “wrapped” in a sheet or blanket for her and others safety. Jane Doe repeatedly broke out of her wrap so a safety pin and then duct tape were used to secure the wrap. Jane Doe continued to spit and yell obscenities after being wrapped so Imbert tried to shut her mouth by taping gauze or placing bandages over it.

On December 3, 1998, an ARD (Admission, Review & Dismissal) Committee meeting was held. In this meeting, a psychological report and Comprehensive Individualized Assessment were reviewed. An Individual Education Plan as well as a Behavior Management Plan were developed in this meeting. The notes from the meeting showed that wrapping was discussed as a strategy for dealing with Jane Doe. Mrs. Doe insisted that she never knew or agreed to tape being used with a wrap. Imbert recalled no discussion of taping. Three additional occurrences of wrapping took place after this meeting, during January 19 - 22, 1999. Following a wrapping incident on January 20th, a meeting was held in which school personnel decided Jane Doe should not be wrapped anymore but instead should be placed in a timeout room. Imbert also placed a call to the Texas Department of Protective and Regulatory Services (CPS). The CPS person Imbert spoke to Kristy Douglas, reportedly advising Imbert that the school did not need to be wrapping the child or taping her to a bed. Imbert also called Dr. Stuart Samson, a therapist who had treated Jane Doe. Samson testified that wrapping a child in a sheet was better than allowing the child to bang herself off walls but had no knowledge of using tape.

On January 22, 1999, Jane Doe was again out of control. Because she became difficult, she was placed in timeout. During the thirty minutes in the timeout room, Jane Doe was allegedly spitting, hitting, biting, cursing, kicking, and scratching. Reportedly, she tried to destroy property in the room and attempted to stick her fingers into electrical sockets. A “two-

man hold” was used to restrain her. School personnel called Mrs. Doe to let her know that Jane Doe had to be wrapped. Mrs. Doe did not object. Mrs. Doe claimed that the two-person hold was used even though Jane Doe said that her arm hurt. The school personnel agreed that Jane said her arm hurt but that any pain was caused by her resistance and was part of the reason they decided to wrap her. This time, Jane Doe was wrapped with tape and taped to a cot since she had apparently bumped her head on a wall. Mrs. Doe removed Jane Doe from school until mid May, 1999 and filed suit on September 8, 1999 against S&S CISD, superintendent Joe Wardell, and principal Missy Imbert. Mrs. Doe’s assertion was that excessive force in discipline was used. The school district filed a motion for summary judgment based on sovereign immunity. Wardell and Imbert filed a similar motion based on immunity granted under Section 22.051 of the Texas Education Code. The trial court granted summary judgment to the defendants and Mrs. Doe appealed.

The United States District Court for the Eastern District of Texas upheld the trial court’s ruling, stating that there was no real fact issue about discipline as there was no fact issue about punishment in this case. *Hopkins v. Spring Independent School District* (1987) was cited for the definition of discipline: “Discipline in the school context describes some form of punishment” (*Doe v. S&S CISD*, 2001, p. *64). As such, this court determined that the use of physical force in restraining Jane Doe was not punishment. Therefore, Jane had not been disciplined.

There are two cases in which public school employees were granted immunity through different means, after filing for summary judgment based on Section 21.912 and then Section 22.051 of the Texas Education Code. The first of these cases is *Newman v. Obersteller* (1997). Kurt Obersteller was a former student at Flour Bluff High School in Flour Bluff Independent School District. During the 1992 - 1993 school year, Obersteller participated in athletics under

coach and athletic director, Ronnie Newman. During the off season training in the spring semester of 1993, Obersteller claimed he was locked in the locker room, berated by members of the athletic department, treated in a different manner than other students and disciplined differently from other team members. Obersteller also claimed that a concerted effort, led by Newman, was made to harass and intimidate him by the coaching staff and students. Obersteller also claimed that a letter to the editor was submitted to the local newspaper by Newman's secretary and that his grade was lowered to a 70 for the six weeks after withdrawing from athletics.

Obersteller and his parents filed suit against FBISD and Ronnie Newman, claiming state and federal tort claims, including negligent discipline. The school district and Newman both filed for summary judgment on the federal claims on grounds that the student failed to allege violations of a constitutional right. The United States District Court for the Southern District of Texas granted the motion for a summary judgment and concluded that the student's claim of deprivation of a liberty interest was frivolous. The state law claims were remanded to the state courts. In a state trial court proceeding, FBISD and Newman filed a motion for summary judgment under Section 101.106 of the Texas Civil & Remedies Code and Section 21.912 of the Texas Education Code. The trial court granted summary judgment for both FBISD and Newman but later vacated the judgment for Newman after a motion to reconsider was filed. Newman appealed but the lower court declined jurisdiction since the appeal was from the grant of a motion to reconsider rather than a denial of a summary judgment motion. Newman then appealed to the Texas Supreme Court, arguing that he was entitled summary judgment, citing immunity under Section 101.106. The Supreme Court agreed and ruled that Newman was entitled to summary judgment based on statutory immunity.

The public school employee in this case was ultimately granted a summary judgment, based on immunity. However, in terms of this study, it is important to note that he was not found to be immune under Section 21.912 of the Texas Education Code.

In the second case, *Grimes v. Stringer* (1997), a public school employee filed for a summary judgment in an excessive-force-in-discipline suit, based on the immunity afforded him by Section 22.051 of the Texas Education Code and was ultimately granted immunity for a separate cause. In this case, Matt Grimes was a student at Grand Saline High School. Grimes went to Stringer's tutorial class and Stringer directed Grimes to go to the tutorial class that he was scheduled to be in. Grimes stated that the teacher in that tutorial class would not allow him to enter because he was late. Stringer escorted Grimes to the other tutorial class and the teacher refused to allow Grimes to enter. Grimes then said something that Stringer found disrespectful. Stringer struck the right side of Grimes' chest with his index finger and knuckles of this closed fist. Grimes was born without a right pectoral muscle, but Stringer and other GSISD officials were unaware of this fact.

Grimes and his parents filed suit against GSISD and Stringer claiming Grimes was injured as a consequence of the discipline administered by Stringer. GSISD and Stringer both filed a motion for summary judgment based on sovereign immunity, immunity under Section 22.051 of the Texas Education Code, and a failure to exhaust administrative remedies. The trial court granted summary judgment for both GSISD and Stringer. Grimes petitioned to remove GSISD as a party, which was granted. Grimes then appealed the court's granting of summary judgment to Stringer, citing the use of excessive force in discipline. The Court of Appeals of Texas agreed that the necessary elements of Section 22.051 were not met in order to grant immunity. Specifically, Stringer did not claim that he was not disciplining Grimes, that he was

not negligent, and that the use of excessive force did not cause an injury. However, the court upheld the summary judgment because Grimes did not exhaust all administrative remedies as required by Section 11.13 of the Texas Education Code. In terms of this study, immunity was not granted in this excessive force in discipline suit due to Section 22.051.

There have been two cases in which the immunity of public school employees has been challenged under the negligent discipline exception of Section 21.051 (previously Section 21.912) of the Texas Education Code for a lack of discipline leading to bodily injury. The first of these two cases is *Pulido v. Dennis* (1994). Jose Pulido was enrolled in a vocational education class at La Porte High School, taught by James Fairleigh. While in class, Pulido was allegedly assaulted by another student, Billy Collins, suffering a broken jaw as a result of the alleged assault. Pulido sued James Fairleigh and Jerry Dennis, principal of La Porte High School, for negligence leading to his injuries. Pulido claims Farleigh and Dennis “knew or should have know that Collins was a delinquent minor with a known propensity for violence and assaultive behavior, and that their failure to discipline Collins was the proximate cause of Pulido’s injuries” (*Pulido v. Dennis*, 1994, p. 519). Farleigh and Dennis filed a motion for summary judgment, based on the immunity provided under Section 21.912 and the trial court granted their motion.

Pulido appealed the trial court’s decision to the Court of Appeals of Texas. Pulido argued that Section 21.912 only provides immunity from acts, and not omissions. He believed that Farleigh and Dennis’ failure to discipline was negligent and their negligence resulted in bodily injury to the student. The court of appeals upheld the lower court’s decision to grant summary judgment to Farleigh and Dennis. “The court held that the word ‘negligence’ encompassed both acts and omissions, and that the immunity granted to school district employees for their negligent acts and omissions was waived only with respect to disciplinary

acts involving excessive force” (*Pulido v. Dennis*, 1994, p. 518). Therefore, Pulido’s argument that the failure of Farleigh and Dennis to discipline Collins did not qualify for immunity under Section 21.912 was not accepted by the court. Based on this ruling, even if the omission of an act by a public school employee leads to bodily injury of a student, the public school employee is still immune from liability.

The second case that examines whether the negligent failure to discipline leading to bodily injury allows for immunity of public school employees is *Johnson v. Calhoun County Independent School District*, 1997. The facts of the case are as follows: Sheryl Hall, Cle Archangel, and Owen Dorsey were students at Calhoun High School in the spring of 1991. Hall and Archangel both sought Dorsey’s affection, which led to several altercations over the week of spring break. After classes resumed on April 2, Archangel’s grandmother and custodian, Marlene Archangel, went to the school and told the principal, Jim Collins, about the problems between the two girls. Jim Collins passed along the information to Vice-Principal, Ettie Kana, who spoke with the two girls separately and then sent them back to class. In between classes, the two girls had a verbal confrontation that was broken up by the school security guard. Archangel threatened to kill Hall during the confrontation. While walking to class after the confrontation, Archangel told Dorsey she had a knife in her purse. Dorsey testified that he thought a teacher overheard him ask Archangel to give him the knife. Kana polled the teachers after the incident and stated that none of the teachers knew about the knife. During lunch that day, Hall and Archangel again confronted each other. Archangel fatally stabbed Hall with the knife she had in her purse.

Hall’s mother, Olivia Johnson, filed a wrongful death suit against Calhoun CISD, Kana, and Collins. CCISD filed for summary judgment under sovereign immunity. Kana and Collins

filed for summary judgment based on the immunity provided under Section 21.051 of the Texas Education Code. The trial court granted summary judgment for all parties. Johnson appealed the lower court’s decision, stating that the negligent failure to discipline Archangel led to her daughter’s fatal stabbing. “The issue here is whether the negligent failure to discipline is actionable to the same degree as negligent discipline. The supreme court has answered this question in the negative” (*Johnson v. Calhoun CISD*, 1997, p. 499). This court’s ruling demonstrates that if a public school employee is negligent in failing to discipline a student, which leads to bodily injury of a student, that employee is still immune from liability under Section 21.051.

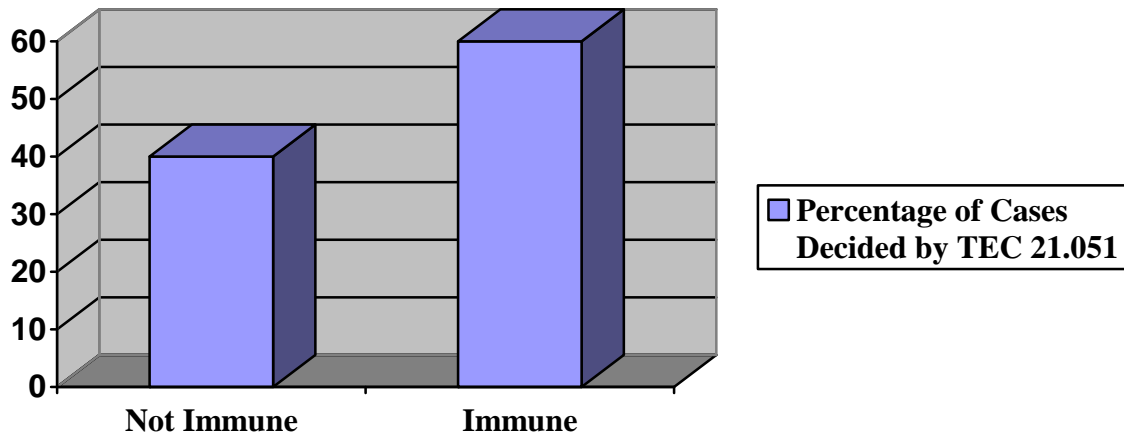


Figure 3. Percentage of cases for excessive force in discipline or negligent discipline cases decided by TEC 22.051.

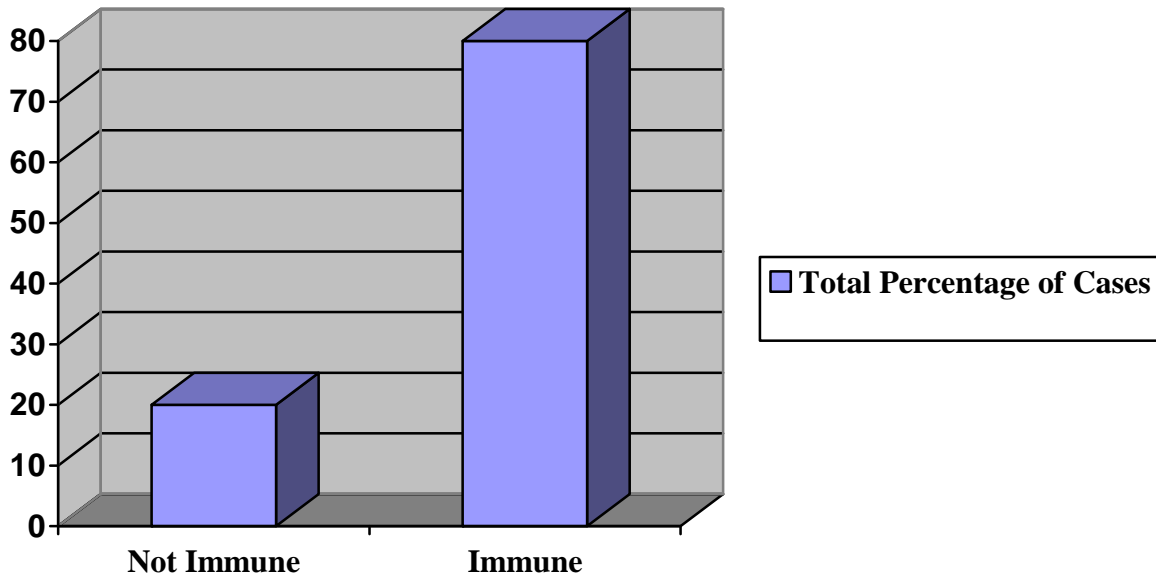


Figure 4. Total percentage of cases for excessive force in discipline or negligent discipline cases.

The cases in which immunity for public school employees under Section 21.051 of the Texas Education Code was challenged by the excessive-force-in-discipline were resolved by the courts as follows: Immunity has been granted to public school employees in 60 percent of the cases, under Section 21.051. A total of 80 percent of these cases resulted in immunity for the public school employees.

A Texas appellate court did not support an educator who physically struck a student with a closed fist when he was not clearly acting within the scope of his employment and there was a fact issue regarding discipline (*O'Haver v. Blair*, 1984). An appellate court did not grant immunity in *Spacek v. Charles* (1994) for public school employees who allegedly threatened to use excessive force by hanging or shooting a student while holding the student in a headlock because the student failed to perform and they believed they were motivating the student.

There have been two cases in which public school employees were not held to be immune from liability due to the excessive-force-in-discipline or negligent-discipline exception to Section 21.051, but the courts found them to be immune for other reasons. The court did not allow immunity under this section for a coach as there was a fact issue regarding negligent discipline, even though there was no specific bodily injury in *Newman v. Obersteller* (1997). A court also did not allow immunity under this section in *Stringer v. Grimes* (1997) for a teacher who struck a student in the chest because there was a fact issue regarding discipline even though there was no evidence of bodily injury.

Even though the two public school employees listed above were not granted immunity under Section 21.051, they were still immune from liability. The remaining court decisions help point to the strength of the immunity from liability for Texas public school employees. In *Doria v. Stulting* (1994), a Texas appellate court supported a teacher who used physical force to remove a disruptive student from the classroom, indicating that the courts did not view such an act as discipline. Refusing to allow an injured student to see the nurse was not viewed negligent discipline by a court in *Davis v. Gonzales* (1996). In *Beresford v. Gonzalez* (1999), a court supported a coach when two of her team members were locked in a part of the locker room, giving a definition of bodily injury in terms of this section. In *Doe v. S&S Consolidated Independent School District* (2001), restraining a child by wrapping the child in a sheet and securing with duct tape was not viewed by the court as discipline. Therefore, immunity under this section still applied. The courts were clear that the negligent failure to discipline or the omission of an act does not waive the immunity under Section 21.051.

CHAPTER 7

CONCLUSION

Overall, 32 cases involving an educator's qualified immunity from legal liability under Section 22.051 of the Texas Education Code (formerly Section 21.912) were researched and analyzed in this study. Seventeen cases related to defamation, five cases related to the motor vehicle exception, and ten cases related to excessive force in discipline exception. Of these 32 cases, public school employees were granted summary judgment 26 times. The public school employees in 24 of these cases were immune due to the protection provided in Section 22.051 or its predecessor while the remaining two employees were found to be immune under separate statutes. Of the six cases in which the public school employees were not granted immunity, five were determined not to be acting within or incident to their scope of employment and one case involved a fact issue related to whether discipline was applied.

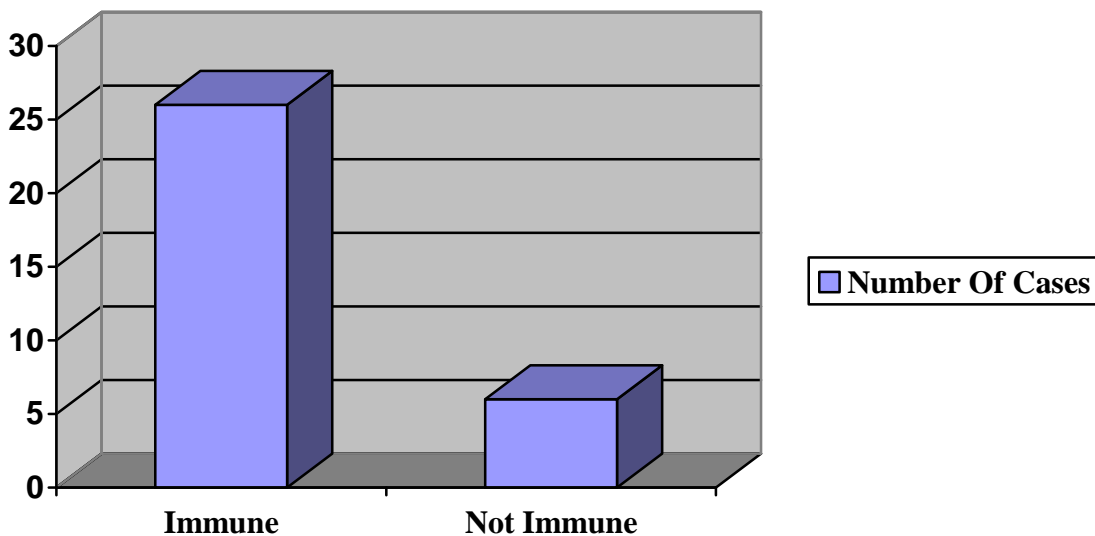


Figure 5. Immunity of public school employees in all cases.

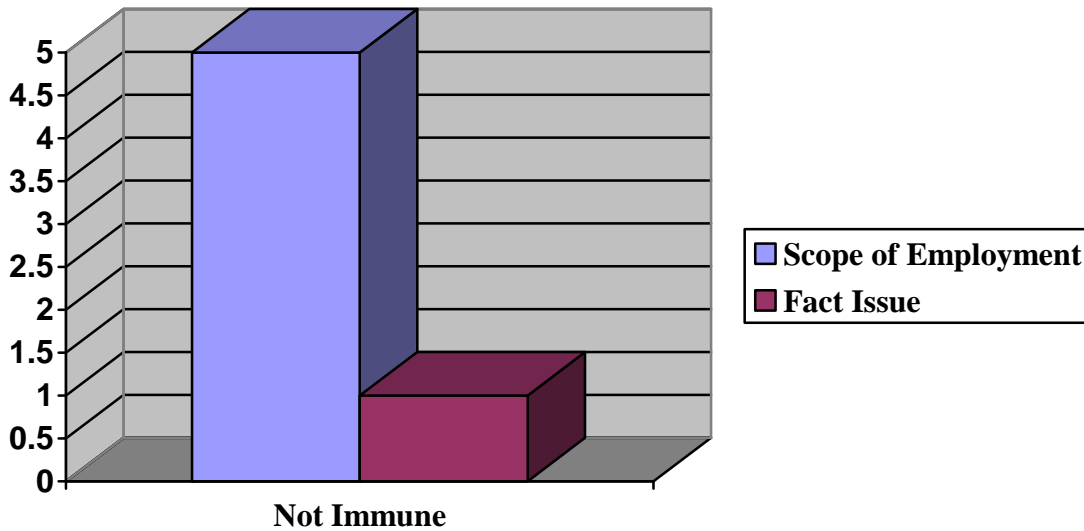


Figure 6. Breakdown of cases in which public school employees were not granted immunity.

I found that of the 17 cases involving defamation claims, public school professional employees were protected by the immunity provided under Section 22.051 in thirteen of the cases. Eleven of these cases involved defamation allegations by employees, one case involved a student’s defamation claim and one case involved a defamation claim brought by a vendor. Of the four cases in which the school employees were denied immunity, two involved students, one involved an employee, and the remaining case involved school board members. In each of the four cases in which immunity was not granted, the employees were found to not be acting incident to or within the scope of their employment.

Regarding the motor vehicle exception to Section 22.051, I found that public school employees prevailed in all five cases in which the employees argued that the motor vehicle exception did not apply to them. Since the adoption of Texas Education Code in 1971 by the 62nd Legislature, there have been no successful civil suits at the appellate level against public school professional employees who claimed that the motor vehicle exception did not apply to them. It is important to note that each of these cases involved a motor vehicle as the site of an injury to a

student but all were dismissed as they did not involve the operation, use, or maintenance of a motor vehicle, as determined by ordinary definitions. The courts have shown that it is not enough for a motor vehicle merely to be involved in an incident leading to the injury of a student in order for the motor vehicle exception to apply.

The courts have provided guidelines, as indicated in the case summaries in Chapter 3, as to the criteria that must be established in order for a plaintiff to qualify for the motor vehicle exception. Ultimately, all of these cases were decided as negligent supervision cases, which allow for qualified immunity of professional public school employees as long as they are acting within the scope of their employment and exercising judgment or discretion.

It should be noted that there has undoubtedly been litigation brought against Texas public school employees resulting from motor vehicle accidents, in which the employees conceded that the motor vehicle exception did apply and that a suit could go forward based on allegations of negligence in the operation of a motor vehicle. But in cases in which school employees argued that their statutory immunity was not removed by the motor vehicle exception, the employees have prevailed in every published Texas case.

I found that the cases in which immunity for public school employees under Section 21.051 was challenged by the excessive-force-in-discipline exception have revealed the following conclusions: Immunity has been granted to public school employees in 60 percent of the cases under Section 21.051. A total of 80 percent of these cases resulted in immunity for the public school employees.

The courts did not support an educator who physically struck a student with a closed fist when he was not clearly acting within the scope of his employment and there was a fact issue regarding discipline in *O'Haver v. Blair* (1984). In *Spacek v. Charles* (1994), the courts did not

grant immunity for public school employees who allegedly threatened to use excessive force by hanging or shooting a student while holding the student in a headlock because the student failed to perform and they believed they were motivating the student.

There have been two cases in which public school employees were not immune from liability due to the excessive force in discipline or the negligent discipline exception to Section 21.051, even though they were immune for other reasons. The court did not allow immunity under this section for a coach as there was a fact issue regarding whether negligent discipline was imposed, even though the student's case failed because there was no specific bodily injury in *Newman v. Obersteller* (1997). A Texas court also did not allow immunity under this section for a teacher who struck a student in the chest because there was a fact issue regarding discipline even though there was no evidence of bodily injury in *Grimes v. Stringer* (1997).

Even though the two public school employees listed above were not granted immunity under Section 21.051, they were still immune from liability. The remaining court decisions help point to the strength of the immunity from liability for Texas public school employees. In *Doria v. Stulting* (1994), the court supported a teacher who used physical force to remove a disruptive student from the classroom, indicating that the courts did not view such an act as discipline. Refusing to allow an injured student to see the school nurse was not viewed as negligent discipline by a Texas appellate court in *Davis v. Gonzales* (1996). In *Beresford v. Gonzalez* (1999), an appellate court supported a coach when two of her team members were locked in a part of the locker room, giving a definition of bodily injury in terms of Section 22.051. Restraining a child by wrapping her in a sheet and securing the sheet with duct tape was not viewed by the court as discipline in *Doe v. S&S Consolidated Independent School District*.

Therefore, immunity under this section still applied. The courts have been clear that the negligent failure to discipline or the omission of an act does not waive the immunity under Section 21.051.

The analysis of these cases revealed that the courts have consistently tried to determine if the public school employees were acting within or incident to the scope of their employment, if they used discretion, and if there was a fact issue regarding whether there was a statutory exception to Section 22.051 or its predecessor. Furthermore, the analysis of these cases has revealed the types of activities the courts have interpreted as being included within the scope of employment, as it relates to Section 22.051. Activities directly related to the supervision and evaluation of employees have been found to be within the scope of employment as in *Rudisill v. Cooper* (1986). Appropriate published statements that are directly related to the employee's position were found to be within the scope of employment in *Anderson v. Blankenship* (1992) while statements made that were not directly related to the position have been found not to be incident to or within the scope of employment as in *Gallegos v. Escalon* (1996). In *Kobza v. Kutac* (2003), false statements about a student and a fake newspaper article about the student, even though inappropriate, were accepted by a Texas court as communications intended to develop rapport with a student and thus found to be within the scope of employment. However, seeking teacher support for a teacher guilty of sexual misconduct and not following procedures for submitting a crime stoppers tip were found to be conduct that was not within the scope of employment for purposes of the establishing immunity in *Schrum v. Land* (1997).

Further research could address the six cases in which the court did not grant immunity to the public school employees. Even though courts found the employees not to be immune from liability, these employees' cases could be analyzed to determine whether they were ultimately

found to be liable. If found to be liable, further research could investigate the monetary amount of liability in those cases.

Additional research could also look into the immunity of public school employees under Section 101.106 of the Texas Civil Practice & Remedies Code. In *Bell v. Love* (1996) and *Johnson v. Resendez* (1999), the immunity provided under this section was applied.

In conclusion, this study supports the conclusion that the Texas appellate courts have interpreted Texas Education Code Section 22.051 in ways that have favored public school employees and have limited the employees' exposure to civil liability. In defamation actions, the courts have given public educators immunity from suit so long as the employees were found to have been acting within their discretion in connection with their employment at the time they made the defamatory statement. In addition, the courts have resisted efforts by plaintiffs to persuade the courts to interpret the motor vehicle exception broadly in order to remove immunity protection for school employees. This narrow interpretation denies plaintiffs the opportunity to hold school employees liable under this exception unless there is actual use of the motor vehicle as the primary component in the incident. Finally, although school employees remain vulnerable to suit for bodily injuries resulting from excessive discipline, the courts have interpreted discipline narrowly in ways that are favorable to Texas public educators who are defendants in civil lawsuits. The courts have also defined bodily injury in terms of this section in a manner that provides protection to school employees under the excessive force in discipline exception. These findings suggest that instructors in graduate level school law classes should emphasize the significant protection that Texas educators have from civil liability for actions that are taken in connection with their professional duties. In addition, these findings indicate that Texas

educators should familiarize themselves with the significant protection they possess from civil liability for actions taken in connection with their professional duties.

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