This is an unofficial transcript derived from video/audio recordings
Supreme Court of Texas
Travis Central Appraisal District, Petitioner,
v.
Diane Lee Norman, Respondent.
No. 09-0100
December 16, 2009

Oral Argument

Appearances:Jennifer A. Powell, Schwartz & Eichelbaum Wardell Mehl and Hansen, PC, Austin, TX, for petitioner.
Adam W. Aston, Office of the State Attorney General, Austin, TX, for amicus curiae, State of Texas, for petitioner.

R. Scott Cook, The Cook Law Firm, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 09-0100, Travis Central Appraisal District vs. Diane Lee Norman.

MARSHALL: May it please the Court, Ms. Powell will present argument for the Petitioner, Mr. Aston will present argument for Amicus, the State of Texas. Ms. Powell has reserved -- I'm sorry. Ms. Powell will open with the first ten minutes, and she has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JENNIFER A. POWELL ON BEHALF OF THE PETITIONER

ATTORNEY JENNIFER A. POWELL: May it please the Court, the court of appeals' decision in this case should be reversed for two different

reasons. First, and as a threshold matter, the legislature has never used clear and unam-biguous language to waive political subdivisions' immunity from suit under Chapter 451 of the Texas Labor Code, also known as the Anti-Retaliation Law.

JUSTICE HARRIET O'NEILL: We would have to overrule Barfield to reach that result?

ATTORNEY JENNIFER A. POWELL: Well, Your Honor, we do believe that Barfield's analysis is no longer good after the enactment of 311.034 of the Government Code, however Barfield only dealt --

JUSTICE HARRIET O'NEILL: But the law before enactment of that statute was the same. That just really codified what we had said, was that it had to be a clear unambiguous waiver.

ATTORNEY JENNIFER A. POWELL: Well, I disagree to the extent that prior to the enactment of 311.034, although the Court used the words that “a clear and unambiguous language was required,” the Court did not stop there. The Court used other construction aids to determine whether or not the legislature intended to waive immunity from suit and --

JUSTICE NATHAN L. HECHT: But the question was did 311.034 change the rule?

ATTORNEY JENNIFER A. POWELL: I believe that it did. I believe it indicates that you stop at the language of the statute.

JUSTICE NATHAN L. HECHT: Well, isn't that what we said in Barfield, that that was the rule?

ATTORNEY JENNIFER A. POWELL: Yes, Justice Hecht, your opinion did say that that was the rule, however as the analysis proceeded it looked beyond the language.

JUSTICE NATHAN L. HECHT: But the question is, did 311.034 change something or was Barfield just wrong, and I wonder what 311.034 changed?

ATTORNEY JENNIFER A. POWELL: It's our position that 311.034 changed to say you stop at the language and you don't use the other construction aids, and the legislative intent is therefore expressed in 311.034 in and of itself and you don't look beyond that. In Barfield the section of Chapter 504 of the Labor Code where the waiver was ultimately found was the Election of Remedies Provision. And in that case, in the Barfield opinion the language was that we basically find a suggestion of waiver. We think that the legislature must have intended to waive. It was not a clear and unambiguous language. And let me point out that although it is not in our brief, there is even more recent enactment in Section -- I'm sorry, Chapter 504 of the Labor Code that indicates that immunity is not waived, and that is specifically Section 504.053, and it's on the last page of the handout I provided the Court as an exhibit. 504.053(e) now states since 2005 nothing in this chapter waives sovereign immunity or creates a new cause of action. It doesn't say “nothing in this section,” but it says “nothing in this chapter.” And as you know, the only way that Chapter 451, which provides a cause of action for retaliatory discharge, applies to political subdivisions

is through Chapter 504. So this language that indicates that nothing in this chapter waives sovereign immunity I think trumps the suggestion of waiver that was found in Barfield. The other language in the statutes at issue also clearly show that there has been no clear and unambiguous waiver. First, Chapter 451 in and of itself, which is on the first page of the handout, has no waiver language whatsoever. The definition of who is prohibited from discriminating is a person, and as we know from Section 311.034 of the Government Code that cannot waive immunity, that cannot be construed as a waiver. So you have to look to Chapter 504 of the Labor Code to find a waiver. Now that chapter does make certain provisions of the Workers' Comp Laws applicable to political subdivisions, but there's no clear and unambiguous waiver language anywhere in Chapter 504, and as I said we have a fairly new provision that says there is no waiver. If you look at 504.002(a), it actually says that the provisions of 451 apply but only to the extent they're not inconsistent with this chapter, 504. And then when you go down to 504.002(c), that language says that nothing in this chapter authorizes a cause of action or damages beyond that authorized by the Tort Claims Act. And as we all know, the Tort Claims Act does not authorize a cause of action for wrongful discharge. So right there you have inconsistency between 451 and 504, and because of the inconsistency you cannot have a clear and unambiguous waiver of immunity from suit. Then turning to the Election of Remedies Provision, 504.003, this we recognized was what the Barfield Court ultimately found resulted in a waiver because it made little sense to construe an election of remedies between a claim that was barred with one that was not barred. However, that in and of itself, this suggestion of waiver or this inference of waiver is not enough to meet the standard in 311.034. So that language is not waiver language. Moreover, we don't believe that you have to read 504.003 as essentially meaningless because we've seen, for example, in the Mission vs. Garcia case that the legislature isn't necessarily offended by the notion of there being an election of remedies between something that is viable and something that's not viable.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, that's not an election of remedies though, really.

ATTORNEY JENNIFER A. POWELL: Well, but as the Court noted in Mission, you can have an election, for example, in 101.106(b) where you have a choice, a plaintiff has a choice between something that is barred and something that isn't barred, and again, the legislature and this Court did not seem to be offended by that notion, so I --

JUSTICE HARRIET O'NEILL: Well, that's an election of parties; it's not really an election of remedy.

ATTORNEY JENNIFER A. POWELL: Well, that is true, and actually to give meaning to 504.003 you could view it as an election of parties because you could read it as, a person may not bring an action for wrongful discharge under 451, if there's a waiver, if there's immunity protecting the government, you could bring that claim against the individual supervisor, employer that discriminated against you. That would be your remedy or your claim against an individual. Under 451 it would be an election between that and a claim against the political subdivision under the Whistleblower Act, which as we all know does contain clear and unambiguous waiver language. The point of 504 is that

there is internal inconsistency, which was noted as early as Barfield in that statute, and that inconsistency simply doesn't survive 311.034, the clear and unambiguous standard enunciated there. And I would also point out that after this Court's decision in Tooke, the legislature would have had an opportunity to see that this Court was in fact construing the statutes very strictly in accordance with that language. And if you will recall in the opinion in Tooke, the Court mentions that the court of appeals had looked at the factors outside of the clear and unambiguous language, but the Court itself did not rely on the factors in the analysis, and so the legislature could see that that was what this Court was doing and they could have gone back and changed 311.034 to expand on what "clear and unambiguous" means, but they have not done that. Instead what they've done is they've taken the opportunity to go back and look and see where they need to clearly waive immunity for certain types of suits. For example, the contract cases against local governmental entities and the Local Government Code, and so they haven't done that in this case. So I think the Court needs to continue on the path of looking at the language to see if the legislature has waived immunity because the legislature clearly knows how to waive it when it wants to, especially now and especially in light of 311.034. And in this case, they simply have not waived immunity for these types of claims for retaliatory discharge against political subdivisions. As a result of that, the trial court in this case had no jurisdiction over Ms. Norman's retaliatory discharge claims, and this Court should reverse the court of appeals and dismiss for want of jurisdiction. Does the Court have any questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any questions? Thank you.

ATTORNEY JENNIFER A. POWELL: I'm out of time, thank you.

ORAL ARGUMENT OF ADAM W. ASTON ON BEHALF OF THE PETITIONER

ATTORNEY ADAM W. ASTON: May it please the Court, Section 311.034 of the Government Code is a specific mandatory provision for interpreting statutory waivers of sovereign immunity. Courts shall not construe a statute as a waiver of sovereign immunity unless the waiver is affected by clear and unambiguous language.

JUSTICE HARRIET O'NEILL: How is that different from the standard we had always applied?

ATTORNEY ADAM W. ASTON: Your Honor, the question that you and Justice Hecht asked, whether or not 311.034 codified the Barfield in the previous approach, the answer to that question is no, it did not codify that ap-proach. Barfield recognized the statute was ambiguous. It did so when it said that the statute was internally conflicting, and it did so when it said that the literal reading of provision C would be that there would be waiver of immunity outside that authorized in the Tort Claims Act. So in Barfield, it was recognized, the ambiguity, but then looked to what it believed to be the almost certain legislative intent to find a waiver of immunity, but almost certain falls short of clear and unambiguous --

JUSTICE NATHAN L. HECHT: Well --

ATTORNEY ADAM W. ASTON: -- and legislative intent.

JUSTICE NATHAN L. HECHT: Barfield does say, “It is a well-established rule that for the legislature to waive the state's sovereign immunity, it must do so by clear and unambiguous language.” And it cites a 1980 case and two 1941 and '42 cases out of this Court, and it doesn't seem like that's any different from 311, the statute.

ATTORNEY ADAM W. ASTON: Well, Your Honor, Barfield does quote the language from Dewhart [Ph.] saying “clear and unambiguous language,” but then it looked beyond the language to legislative intent and --

JUSTICE NATHAN L. HECHT: Well, but I'm just trying to be sure I understand the argument. The argument is that Barfield just didn't do what it said it was going to do. It said this is the rule and we're not going to follow it.

ATTORNEY ADAM W. ASTON: Well, Your Honor, 311.034 does one more thing in addition to codifying the language -- I'm sorry -- clear and unambiguous language. Pre 311.034 the Court looked to other construction aids in addition to legislative intent, legislative history and the like to determine what an ambiguous statute means. Under 311.034, because it uses the words “shall not,” whereas the other statutes describing construction aids uses words like “may.” Under 311.034 you do not look beyond clear and unambiguous language to discern a waiver. What the legislature has provided in 311.034 is that when you're construing purported statutory waivers, you look to what the legislature said, not what they meant to say or not what they tried to say, and that is a different, that is the change that 311.034 affects that did not predate it. Another question that might be posed is why didn't the legislature faced with Garfield, faced with this ambiguity, why didn't they just amend 504 to take out the provision that it didn't want? Well, there are two reasons that 311.034 is a more efficient fix than it would have been to just amend the Labor Code. First, amending the Labor Code would have fixed only that statute, whereas 311.034 operates to resolve ambiguities in all purported waiver statutes. And secondly, resolving the ambiguity by removing one provision would provide courts no guidance as to how to interpret ambiguous statutes in the future. 311.034 provides that direction. And so when the legislature was faced with the Court language saying clear and unambiguous language is required, but then courts looking beyond the language to legislative intent or legislative history and the like, what the legislature responded with was, you do not look beyond clear and unambiguous language to discern a waiver.

JUSTICE NATHAN L. HECHT: Well, a third reason may be that they thought it would be anomalous that the only people that could fire somebody for filing a workers' compensation claim was the government.

ATTORNEY ADAM W. ASTON: Well, it's not true that they could fire someone because you would still import to the “you are not permitted to discharge.” Now you could not sue, if there's no way to remediate, you cannot sue for a retaliatory discharge.

JUSTICE NATHAN L. HECHT: Well, it's going to count against the government in heaven some day, but I mean you couldn't do anything about it down here, right? I mean there's no way, there's no recourse.

ATTORNEY ADAM W. ASTON: Well, that may be true, but again if we're looking at, well, do we want to have meaningless -- do we want to read a statute to where there is a meaningless provision? The answer of course you try not to. But if you accept the Barfield premise that this statute is ambiguous, you have a provision that suggests a waiver and an election of remedies provision, and then you have provision C that the literal reading of is there no waiver, what you would do under this Court's guidance and under what the legislature has said in the past, is we resolve ambiguities in favor of a waiver, and the reason for that is because we're talking about sovereign immunity is the public fisk at risk, and so --

JUSTICE NATHAN L. HECHT: What about 504.053(e)?

ATTORNEY ADAM W. ASTON: That certainly would seem to operate as another clear direction that there is no waiver of immunity in this chapter.

JUSTICE NATHAN L. HECHT: But it's not addressed in the briefing?

ATTORNEY ADAM W. ASTON: It is not addressed in the briefing, no, Your Honor.

JUSTICE NATHAN L. HECHT: Ran across this, I guess.

ATTORNEY ADAM W. ASTON: My time has expired. If there are no further --

JUSTICE NATHAN L. HECHT: Does the State have a position on the exhaustion question?

ATTORNEY ADAM W. ASTON: The State has not taken a position and is not prepared to do so in argument.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Cook will present argument for the Respondent.

ORAL ARGUMENT OF R. SCOTT COOK ON BEHALF OF THE RESPONDENT

ATTORNEY R. SCOTT COOK: Good morning, and may it please the Court. Today Petitioner asked this Court to take two extraordinary steps in contravention to the principles of this Court. First, the Petitioner asked this Court to overturn some precedent, specifically the Barfield decision. Second, Petitioner asked this Court to create new legal requirements for suing a governmental entity, requirements that have never existed before. Because Petitioner's arguments are contrary to the law stated by this Court, they should be rejected and the court of appeals' decision should be affirmed. I'd like to begin with addressing the Petitioners' argument that the Travis Central Appraisal District and political subdivisions in general are immune from suit. As has already been discussed today, this has been addressed by this Court on several occasions. It was first addressed by this Court in the Barfield decision, and in that opinion this Court found that Section 504 of the

Labor Code waived immunity for political subdivisions as to the Anti-Retaliation Statute. In doing so it relied on the election-of-remedies language which made a plaintiff choose between suing under the Anti-Retaliation Law and the Texas Whistleblower Statute.

JUSTICE NATHAN L. HECHT: Have you seen 504.053(e) before today?

ATTORNEY R. SCOTT COOK: Your Honor, I had a while back. I hadn't thought of it in a long time to be candid. I'll take up that issue right now. 504.053 speaks specifically to sovereign immunity, which both this Court has rec-ognized as a distinct concept from governmental immunity. The second issue I will make is that if immunity is waived for this entire chapter, basically the chapter is meaningless in itself. My understanding of this chapter is that it applies workers' compensation to political subdivisions. And specifically, if you look at some of the sections that the Petitioner was speaking to, 504.002(c) which talks about limiting damages to the limits of the Texas Tort Claims Act, that section would be meaningless as well. So I think the legislature was speaking to sovereign immunity which would prevent taking this section and applying that to the state, but governmental immunity is a distinct concept which applies to political subdivisions, cities and other such entities. Now after this Court decided the Barfield opinion, which was on the 1981 version of the Political Subdivisions Law, the Court revisited the opinion in the Kuhl vs. City of Garland case. It applied the logic and the holding of Barfield to the 1989 version of the Political Subdivisions Law, which is essentially the same as today. Now five years after the Barfield and Kuhl case, this Court came back to the Barfield decision again, and that was in the Kerrville State Hospital vs. Fernandez case. This Court used Barfield in its decision and Justice Hecht in dissent provided another detailed logical analysis for the holding in Barfield.

JUSTICE PHIL JOHNSON: Well, that was what he said first time, right?

ATTORNEY R. SCOTT COOK: Since Fernandez this Court has repeatedly cited to Barfield in numerous opinions, including for the very proposition stated today that waiver may only be accomplished by clear and unambiguous language. Stare decisis and the fact that the legislature has had almost 15 years to come and overrule this decision and has not, to compel this Court to follow its previous precedent. Now I would like to address some of the Petitioners' arguments. One argument that was made in the briefing is that there is a distinction between immunity from suit and immunity from liability. These are clear distinctions; this Court has made that known in several opinions. However, in the context of the Barfield opinion, those distinctions make absolutely no difference and that is because the Barfield decision was based on election-of-remedies language. This Court found that there would be Hobson's choice between a viable cause of action and one that was barred. The reason why distinguishing from suit and immunity from liability makes no difference in this context is because if political subdivisions were immune from suit, there would still be a Hobson's choice in the Political Subdivisions Law.

JUSTICE NATHAN L. HECHT: The parties both reference the drawing of the distinction between immunity from suit and immunity from liability to a 1970 decision, the Brownsville Navigation District decision, and

neither cites anything earlier. I guess nobody has found anything before that?

ATTORNEY R. SCOTT COOK: I went back, Your Honor, and looked at some of the cases that I know it was in the Courts as early as then. It popped up a few times after that, and now for this Court the distinction is very clear.

JUSTICE NATHAN L. HECHT: And for that distinction Justice Walker relied on a law review article, but don't we have anything before that that we know about?

ATTORNEY R. SCOTT COOK: Not that I know about, Your Honor. In fact, as far as the Political Subdivisions Law, I think the Political Subdivisions Law, if you look carefully, it talks about a person may not bring an action for wrongful discharge. So I think in the context of immunity from suit, when it's talking about bringing a suit, that the holding in Barfield is even stronger as to immunity from suit. Petitioner also has argued in general that the landscape has changed necessitating a rejection of Barfield. However, the landscape on the very issue before this Court has not changed. Specifically, I think as this Court recognized before, the standard used by the Court in Barfield, clear and unambiguous language, is the exact same standard used by this Court today. In fact, it's the exact same standard that the State and the Petitioner asked this Court to use today.

JUSTICE NATHAN L. HECHT: Let me ask you about the exhaustion question.

ATTORNEY R. SCOTT COOK: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: The District characterizes its grievance procedures as sort of an ADR process. Why isn't it a good thing for employees to have to exhaust those kinds of procedures in an effort to try to get the matter resolved before suit is filed?

ATTORNEY R. SCOTT COOK: Your Honor, I may agree that it is a good policy, however the courts have not required it and the Legislature has not required it. Moreover, I think in this case one of the issues is whether or not the client even knew about the policy existing.

JUSTICE NATHAN L. HECHT: All right, but apart from that, apart from your case, it seems like it would be good policy if for government agencies to have these kind of procedures and for personnel to have to use them to avoid having to go to court.

ATTORNEY R. SCOTT COOK: Your Honor, I would agree in general. I think that it would be best done through the Legislature however, because some problems can come by giving unlimited authority to local entities to create these kind of procedures. For instance, without guidance from the Legislature, a local governmental entity could create a four-year system where you had to appeal 20 times before you could ever get to district court. And so there's a safety mechanism in allowing the Legislature to choose which entities have jurisdiction. Moreover, I think there's an expertise issue. And as far as exclusive jurisdiction, this Court has only found that exclusive jurisdiction exist where there is a pervasive regulatory scheme. And I think what the Legislature and

the courts are concerned about is making sure that the first person making the decision is the right person to make the decision.

JUSTICE NATHAN L. HECHT: A lot of times in government agencies like this, a personal action is taken that somebody higher up the chain might want to rethink, and that would be a good idea generally.

ATTORNEY R. SCOTT COOK: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And you distinguish between, you say that these -- this exhaustion requirement is not necessary unless the administrative jurisdiction is exclusive, but why shouldn't a trial court abate at least if the agency or the administrative part has primary jurisdiction?

ATTORNEY R. SCOTT COOK: Your Honor, I think that this Court has found that when an agency does have primary jurisdiction, the action should be abated. However, for primary jurisdiction to exist, I think that there has to be more of a system in place and the legislature frankly has to give primary jurisdiction to an entity. I'd like to go back and briefly address one point on Section 311.034, which was raised by the State on Amicus. This Court has said that that section of the statute is a -- that that statute is ratification of this Court's language. The Court has said that. As to limiting it specifically to the language, I think that 311.034 actually supports the Respondent's argument. And that is because if you look closely at 311.034, it actually talks about looking at things in context. It says the person cannot -- the use of the word “person” --- cannot lead to a waiver of immunity unless the context makes it clear that that can happen. So actually 311.034 if anything, I think says that Barfield got it right. The Petitioner also points to the Tooke case. I think that case is distinguished because that one had to do with “sue or be sued” language. That is not what we have here today. Moreover, the Court was addressing a change in the landscape in the context of breach of contract actions against the government, which is not the case here today. As to the exclusive jurisdiction argument and the Petitioners' argument that plaintiff was required to exhaust her administrative remedies, it is black letter law from this Court that when a legislature grants an administrative entity the sole authority to make an initial determination in a dispute, that administrative entity has exclusive jurisdiction. If an administrative entity has exclusive jurisdiction, a party must exhaust all administrative remedies before proceeding in district court. The reason for that rule is because exhaustion of administrative remedies is a corollary of an entity's exclusive jurisdiction. Conversely, if exclusive jurisdiction does not exist, a party is not required to exhaust all administrative remedies. Now this Court has looked on several occasions and many cases to see was exclusive jurisdiction present, and this Court has found that exclusive jurisdiction will only exist where a pervasive regulatory scheme indicates that the legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.

JUSTICE NATHAN L. HECHT: But if your conversely is true, why did we leave the issue open twice in McCarty and the Sullivan cases? Why wouldn't we just go ahead and say, “Well, it's clear as day”?

ATTORNEY R. SCOTT COOK: I'm not sure, Your Honor, I know. I don't think in those cases that the issue was raised. I think it may have been conceded by the parties and so this Court did not need to reach that. I know in a lot of the lower court opinions on exhaustion of administrative remedies, both sides will just simply agree that that's the role and we need to fight on other issues. So there is a number of courts that have accepted that principle without looking at it very closely. I want to note that in this case the Petitioner has admitted that the Travis Central Appraisal District does not have exclusive jurisdiction over Respondent's claim. And moreover, the Petitioner cannot cite to any pervasive regulatory scheme indicating such exclusive jurisdiction. Now I think that the admission that they don't have exclusive jurisdiction should end this argument based on the case law. But I will address a couple more of the points raised by the Petitioner. Petitioner cites to two vague statutes in support of its argument. One is the right to petition the government, one is the right to bring grievances to public employers. These statutes, first of all, do not provide a pervasive regulatory scheme required to give the Travis Central Appraisal District exclusive jurisdiction, nor do they even refer to exclusivity. Lastly, I will say that if these statutes do convey exclusive jurisdiction, there would be a dramatic sea change. From now every governmental entity in the state will have exclusive jurisdiction over any complaint and any claim against it. Petitioner in the exhaustion argument also relies on two cases from this Court which Justice Hecht mentioned. One is McCarty and one is Wilmer-Hutchins. The Petitioners' reliance on these cases is misplaced because those Courts did not address the issue of whether administrative remedies had been exhausted, again, that was set aside for a later determination. Moreover, those cases are distinguishable because they dealt with school employees. School cases are different because the legislature in some instances has granted exclusive jurisdiction to either the school district or the commissioner of education. These cases are different because of the grant of exclusive jurisdiction not because they simply involve governmental employees in general.

JUSTICE NATHAN L. HECHT: But that jurisdiction doesn't apply to all disputes, just some.

ATTORNEY R. SCOTT COOK: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: It might not have applied in McCarty and Sullivan.

ATTORNEY R. SCOTT COOK: Yes, Your Honor. And a recent opinion out of the Houston Court of Appeals, the Fourteenth District that came out after the briefing in this case and Petitioner mentions it in the letter brief to the Court. It is called, it's the Larson opinion, it goes into detail as to when school employees must exhaust administrative re-medies. It reaches a different conclusion in general than the Dallas Court of Appeals, and in that case it said that the school employee at issue did not have to exhaust administrative remedies as to its claim under the Anti-Retaliation Statute. Petitioner also relies on --

JUSTICE HARRIET O'NEILL: Let me just ask you a quick question. Even if a governmental entity can impose administrative procedures that are required, which sounds as though it would be the administrative entity

deciding that it had exclusive jurisdiction, but presuming that the entity could do that, it would have to be fairly clear what the exhaustion procedure would be. And this one seems very loose to me. It says, “An employee that is dismissed may file a complaint.” So it seems by its own terms, even if it applied, to be wholly permissive.

ATTORNEY R. SCOTT COOK: Yes, Your Honor, I think that's a good point, and it also goes to the other points I've made regarding whether these provisions are even applicable to my client in this case. There are a number of facts issues throughout out the record as to whether these procedures were applicable and available to the Respondent in this case.

JUSTICE HARRIET O'NEILL: But even if they were, when I read it, it just says you can. So it could be that the entity wanted to create a voluntary sort of ADR procedure but not a mandatory one. It seems to me to read that way.

ATTORNEY R. SCOTT COOK: I know it makes sense in the context of the current law because it wouldn't be required under laws that didn't have exclusive jurisdiction, but governmental entities certainly can create these pro-cedures which may be a good idea, however they would be permissive. I want to touch briefly on three cases that Petitioner cites to in support of its exhaustion argument coming out of the Dallas Court of Appeals. First off, these cases did not spend really any time examining this issue of when you have to exhaust administrative remedies. Moreover it appears in those cases that the plaintiffs did not even raise that issue. The first published case Petitioner relies upon is Dallas County v. Gonzalez. That case rested solely on this Court's opinions in McCarty and Wilmer-Hutchins for the proposition that administrative remedies must be exhausted by all governmental employees. Now, that reliance is flawed of course, because this Court did not reach the issue. So the Dallas Court of Appeals was relying on a proposition of law that had not been reached by this Court. The second published case Petitioner relies upon, the Davis vs. Dallas County Schools case relies on the other Dallas Court of Appeals case which relied on this Court's case for the other flawed proposition. It's basically bootstrapping through that case a proposition that didn't exist from this Court. Finally the third case the Petitioner relies upon is an unpublished decision, and that's the Grayson County vs. Webb case. That case also relied upon this Court's decision in Wilmer-Hutchins. I should also note that county cases can be distinguished because in some instances the legislature has granted exclusive jurisdiction to counties over matters involving their employees. A similar grant of jurisdiction, of exclusive jurisdiction, does not exist as to appraisal district employees. In conclusion, because this Court should follow Barfield and its progeny, as well as its cases on exclusive jurisdiction, this Court should affirm the court of appeals' decision.

JUSTICE PAUL W. GREEN: Okay, let me ask you a question here and make sure I understand this. It's your position that the appraisal district in this case, has a political subdivision in following Barfield that there is a waiver of immunity here, but that if, as I understand in reading the materials here, that if the appraisal district had chosen as a self insured for comp, that under the statute it makes clear that there is no waiver. Is that the way you understand it?

ATTORNEY R. SCOTT COOK: I'm not sure that's the way I understand it, Your Honor. I haven't looked at the -- in regard -- I haven't distinguished between whether -- how the appraisal district is insured. I'm not sure I exactly understand your question.

JUSTICE PAUL W. GREEN: Well, I mean under 504.053 a political subdivision that self insures, that doesn't go out and buy comp insurance, and at the end of that statute under (e), as Justice Hecht was talking about, it says, “Nothing in this chapter waives sovereign immunity or creates a new cause of action.” So there it seems pretty clear the legislature said, “Well, if you're a political subdivision and you self insure, there is no waiver.” But Barfield says there is, and so for a retaliation claimant under Barfield would have a cause of action, but perhaps not under 504.053.

ATTORNEY R. SCOTT COOK: Your Honor, again the way I read this is its talking specifically to sovereign immunity, which is a distinct concept. I mean maybe that's the distinction that can be made. I think that what it's talking about is this section of the code can't be used as far as state agencies or the state in general.

JUSTICE PAUL W. GREEN: So you think there's a way to reconcile that?

ATTORNEY R. SCOTT COOK: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

JUSTICE HARRIET O'NEILL: Let me ask you about the grievance procedure itself. What do you make of the permissive nature of the procedure?

REBUTTAL ARGUMENT OF JENNIFER A. POWELL ON BEHALF OF PETITIONER

ATTORNEY JENNIFER A. POWELL: Well, grievance procedures oftentimes will say “may file” simply because you don't require as a condition of continued employment for someone to file a grievance any time they have, because it always talks about things other than discharge. So you don't require everyone whose been passed over for promotion.

JUSTICE HARRIET O'NEILL: Well, this says an employee that is dismissed.

ATTORNEY JENNIFER A. POWELL: Yes, it says that too.

JUSTICE HARRIET O'NEILL: “May file.”

ATTORNEY JENNIFER A. POWELL: May file. And that is true, they don't have to file, but if they're going to sue --

JUSTICE HARRIET O'NEILL: But it doesn't say that. It just says they “may file,” and then it says, “The com-mittee “may” issue a recommendation,” and it doesn't say if the committee issues a recommendation what the ap-pellate rights or decision tree would look like after that. And it seems to me like we've clearly said that if there's going to be a mandatory sort of administrative procedure, it

has to at least be clear. This is equally consistent with a permissive sort of dispute resolution procedure. Wouldn't you agree with that?

ATTORNEY JENNIFER A. POWELL: Well, Your Honor, the way I read the grievance procedure in the last paragraph of 1(a), it does say, “The grievance committee “will hear” and recommend a solution. The committee “will prepare” a recommendation to the chief appraiser who “will make” a final disposition of the grievance.” So I think the resolution of the grievance is mandated, which is actually in keeping with the constitutional requirement and the requirement in 617.005 of the Government Code that someone that has the power to remedy the complaint actually hear the complaint. So the fact that they are requiring themselves to render a decision, I think --

JUSTICE HARRIET O'NEILL: But again, the first part is entirely permissive for the employee.

ATTORNEY JENNIFER A. POWELL: Correct, and I do think the same thing would be true though with respect to Whistleblower claims. You revert to the entity's grievance procedure and the grievance procedures will say “you may file,” but nevertheless under the Whistleblower Act, you are clearly required to exhaust -- or excuse me -- initiate a grievance there before you can bring suit. And that leads me to one of the points that Mr. Cook was making that the discussion about exclusive jurisdiction I think is apples and oranges with what we're talking about here. As he said, we've conceded the exclusive jurisdiction issue. What we're arguing is that, yes, trial courts do have exclusive juris-diction as a general matter, however that doesn't mean that there aren't jurisdictional prerequisites to suit, and that's all we're claiming that the exhaustion requirement is.

JUSTICE NATHAN L. HECHT: But Mr. Cook is concerned that all of the various agencies of the state should not have unlimited latitude to impose jurisdictional prerequisites to go on to court, and how does your argument keep that from happening?

ATTORNEY JENNIFER A. POWELL: Well, Your Honor, I think that the recent case out of the Corpus Christi Court of Appeals, the Yarborough vs. Kingsville A&M case addresses what happens when you don't have an adequate grievance procedure.

JUSTICE NATHAN L. HECHT: Oh, but his concern is that the grievance procedure will say, “Well, before you can go to court, you have to do A, B C, D and E,” which are so hard that the person will never get there.

ATTORNEY JENNIFER A. POWELL: And again I think that because the procedure is constitutionally required, the entity will have -- or excuse me -- the plaintiff will have a remedy to claim that the grievance procedure doesn't give them the opportunity for redress that's contemplated by the Constitution and the Government Code. So I think that is taken care of, and you don't -- when you look at what happens when people use grievance procedures, oftentimes things are resolved and you never get to a situation like we have here where things have drug out for years and years.

JUSTICE HARRIET O'NEILL: Well, why don't we just leave that to the legislature and let the legislature decide what is conducive to that sort of grievance procedure?

ATTORNEY JENNIFER A. POWELL: Well, Your Honor, we think the legislature has spoken in 617.005, but the legislature also knows about this Court's opinions in Wilmer-Hutchins and Van where it says there's a requirement to exhaust, as well as the Dallas Court of Appeals in Davis, which by the way was an en banc opinion finding that there is a requirement to exhaust. If they disagreed with the way that the requirement was being interpreted, they certainly could have indicated that. And so in general it is good public policy to require exhaustion.

JUSTICE NATHAN L. HECHT: You don't think we reserved the issue in Wilmer-Hutchins?

ATTORNEY JENNIFER A. POWELL: Well, in the original Wilmer-Hutchins case I think the language is a little stronger, but then in Van v. McCarty you did come back and say, we assumed without deciding. So I think there is an argument that initially you did decide the issue. But I'd like to turn very quickly to your concern, Justice Hecht, that this, our reading of the immunity issue, the waiver issue, would mean that only people that work for the government could be fired for retaliation or in retaliation. But that is the legislature's policy choice to make because it's the same as the Tort Claims Act. There only people that have been injured by the use of personal property by the government or by the nonuse of personal property by the government are precluded from bringing claims. And the same with school districts where the limitations are even greater on what persons can sue for. So I think again that's the legislature's role.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. Are there any further questions? Then that cause is submitted and that concludes oral arguments for this morning, and the Marshall will please adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Travis Central Appraisal District, Petitioner, v. Diane Lee Norman, Respondent.
2009 WL 5113432 (Tex.) (Oral Argument)

END OF DOCUMENT