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SAN ANTONIO ISD V. MCKINNEY

HEIDELBERG: May it please the court. I am here this morning to discuss with you the implications of the doctrine of res judicata on the case that has been in our state courts for some years, and before that in federal courts. This case arose in San Antonio, Texas, in 1988 when Mr. Charles McKinney, the respondent, who was a band director at a high school within the San Antonio ISD, was terminated by a vote of the board. Mr. McKinney exercised his rights to appeal that decision to the Texas Education Agency, which he did, and at the same time he filed a lawsuit in federal court in San Antonio contending that his termination had been race motivated in violation of Title 7 of the 1964 Civil Rights Act.

The case proceeded forward administratively and before the TEA where Mr. McKinney contended that there had been a violation of a provision in the Education Code requiring that a majority of the elected members of a board must vote to terminate a continuing contract teacher, which he was at the time. The vote of the Board was 3 to 2 rather than 4 to 2, and therefore he formulated that as his point of appeal.

The federal lawsuit proceeded forward; depositions were taken; written discovery was undertaken. Finally a motion for summary judgment was filed, and ruled upon by Judge Prado dismissing his case arising under Title 7 of the 1964 Civil Rights Act. During the course of the proceedings before the district court in the federal proceedings Mr. McKinney had made statements and representations to that court through his counsel that there was this action pending before the Texas Education Agency, which involves as I pointed out in my brief the same facts as those presently before the federal court. And in one document a representation was made that there would be an amendment of that pleading in federal court to bring in that cause of action once it was appropriate. Meaning once the TEA had finished with the matter.

During the course of Mr. McKinney's deposition he testified as to his belief that the application of §13.114 of the Education Code, which is the provision requiring a vote of the majority of the elected board, served the purpose of supporting his claim of race discrimination. In addition to that in the pre-trial order that was submitted to the federal court there was a provision in that order contending that the violation of §13.114 of the Education Code or its alleged violation was in fact evidentiary of his claim of race discrimination.

As indicated your honors the federal lawsuit was dismissed. But prior to its dismissal there was the instant case filed in Bexar County in district court contending that the failure of the district to abide by 13.114 constituted a breach of contract and also Mr. McKinney sued in his words to enforce the decision of the commissioner. The commissioner of education had made a prior ruling supporting his position. That ruling was not appealed by either side. It's in Travis County DC. And Mr. McKinney as stated later filed his action to contend there was a breach of contract.

Prior to the disposition of the state court case the federal court case was disposed of by entry of a final order on summary judgment. That case was not appealed. Thereafter there were motions filed at the trial court in this case at which time initially Mr. McKinney filed a motion for partial summary judgment which was denied by the TC. Thereafter a motion for summary judgment was filed on behalf of the school district, and the trustee defendants which was granted.

The 4th court it was granted based upon arguments that were made relating to the issue before this court, and that is whether the doctrine of res judicata where claims preclusion should

apply, and that Mr. McKinney should have brought his lawsuit relating to his claim of contractual breach and other matters before the federal court.

The CA concluded that the TC had erred and held that Mr. McKinney would have been unable to bring his action in federal court because of the fact that the federal court would not have had jurisdiction due to the imposition of the 11th amendment to the US Constitution.

SPECTOR: There never was another vote of the board other than the 3-2 vote?

HEIDELBERG: No your honor there was not. There was an agreement between counsel for both parties to hold that matter in advance rather than to conduct another hearing. There was an agreement that was entered into to hold that in advance pending the resolution of the matter before the TEA and any related litigation. That matter is still in _____.

SPECTOR: But I understood that the commissioner found that it should have been 4 to 2 or a majority vote?

HEIDELBERG: Yes your honor the commissioner found in favor of Mr. McKinney.

SPECTOR: So now why would it still be in _____?

HEIDELBERG: Well because at that time it was agreed that Mr. McKinney would have another hearing, that the school board would reconvene and conduct another hearing. And rather than do that the parties agreed for their mutual convenience not to do that but rather to await...by that time we had litigation pending, to wait until there was a determination of the outcome of the litigation.

SPECTOR: The federal litigation?

HEIDELBERG: Yes at that time it was the federal litigation. But there was an agreement to withhold the conducting of another hearing before the board.

BAKER: So is it then a correct statement that after the commissioner rendered the decision to require the district to reinstate Mr. McKinney the trustees have never held another meeting to reinstate him or not reinstate him?

HEIDELBERG: Your honor in accordance with the agreement that I set forth that is correct.

BAKER: Can we characterize that agreement as one that circumvents the commissioner's order for purposes of the parties continuing the litigation?

HEIDELBERG: It certainly delays the implementation of that order your honor.

BAKER: So is it a correct statement that the school board has never had the opportunity on its own to follow the commissioner's order, or have another meeting and take a vote to see whether they still adhere to the same position?

HEIDELBERG: Your honor the board has not reconvened and heard that matter because of the stipulation between the parties that that would be done at the...

BAKER: And your statement was the stipulation between the parties was for their convenience to conclude the federal litigation visa vis the Race Discrimination Act?

HEIDELBERG: It's the federal race discrimination statute your honor. Yes, that is correct. The parties agreed not to...this hearing took 8 days before the school board. And it is my belief although I was not a party to that agreement it is my understanding because of the projected fact that there would be an additional 6 or 7 or 8 day hearing because of the number of witnesses that were called, that both parties made that agreement.

BAKER: And no further agreement was made after the federal court litigation was terminated adverse to Mr. McKinney?

HEIDELBERG: No your honor. By then we had this state court case moving forward. And I assume the parties were under the impression that...

BAKER: So there is no court that knows whether the school board would adhere to the commissioner's order to reinstate Mr. McKinney?

HEIDELBERG: Your honor that depends upon this court's ruling. If in fact this court rules favorably to the petitioner's position, that is correct. If however this case is sent back, then under the terms of the agreement between the parties we will convene another hearing. There will be another board hearing.

BAKER: Are you then asking this court for an advisory opinion about the implication of the law to this set of facts when there is already an order in place that would require the school board to reinstate that's never been appealed from?

HEIDELBERG: No your honor. What I am asking the court to do is to make a determination that the respondent should have litigated the issues in his state court case in the federal court proceeding, and that based upon this court's teachings in Barr v. Resolution Trust and other cases that he is barred by res judicata from maintaining his action in state district court for breach of contract, which is the substance of the case before this court.

HECHT: If the CA was wrong about the 11th amendment as it applies to the school district, you still have to show that res judicata is valid don't you?

HEIDELBERG: That is absolutely correct your honor.

HECHT: Something that you've not really argued here in this court is that right, or have you?

HEIDELBERG: Your honor I would suggest that the representations that were made by counsel in the federal court case are crystal clear.

HECHT: We would have to determine whether a US District Court would have taken jurisdiction of the claim?

HEIDELBERG: That's correct your honor.

HECHT: And since there is no federal jurisdiction I take it?

HEIDELBERG: No original jurisdiction.

HECHT: So there would have to be pendent jurisdiction?

HEIDELBERG: Yes sir.

HECHT: So the issue boils...even if you are right about not being a state, the question is whether the district court would have exercised pendent jurisdiction over this claim?

HEIDELBERG: That's correct your honor. In regard to that in Pennhurst which is a case relied upon by the CA, there the SC clearly was dealing with state officials to the extent that it dealt with some county officials. As discussed in that case the court simply concluded that in order to implement the wide spread relief that was requested in that case involving a mental health facility in Ohio, that it would not be possible to do that with the county officials that were in that lawsuit. In Pennhurst in footnote 34, the SC specifically upheld the case which is cited in our brief, which is now Mount Healthy City Board of Education v. Doyle. And in Doyle the SC specifically held that the 11th amendment prohibition did not apply to a school district. And did not insulate a school district from liability. And therefore based upon the Mount Healthy case which is still good law and based upon the court's statement even in Pennhurst in the footnote, it is my belief that the federal court can certainly have entertained jurisdiction particularly when the court considers that in 1990 as of December 1 of that year, the congress passed the supplemental jurisdiction statute which is not in my brief but which I would like to bring to the attention of the court. That's at 28 USC 1367. The supplemental jurisdiction statute was passed by the congress in view of a case that the US SC decided in 1988, which held that pendent jurisdiction should not be exercised but on very rare occasions. The supplemental jurisdiction statute changed that substantially.

HECHT: You characterized this in your state court jurisdiction argument as an administrative appeal, something that is in the nature of an appeal from the commissioner's decision do you not?

HEIDELBERG: I argued in my other point of error that that's what it should have been, but it was not brought that way.

HECHT: If it should have been that it would be sort of unlikely that the US district court would take jurisdiction to something like that.

HEIDELBERG: Your honor if that lawsuit would have been filed in federal court in Travis county under the old administrative procedures act, which is required, and which was required at that time, I would agree with the court that Judge Nowlen or whomever would probably defer jurisdiction in that case and remand it back to the state court. My point in that regard is that if in fact this is going to be an appeal of an administrative order it had to be done in accordance with the administrative procedures act, and that is to file the lawsuit in Travis county district court within 30 days after the finality of the commissioner's decision. That was not done. And therefore my characterization of the cause of action of the plaintiff at the trial court below was that it was a breach of contract cause of action. The contract that Mr. McKinney had incorporates the laws in the State of Texas. And therefore the education code by definition is included within those laws. And so his action really was an action for a breach of contract. That's the only kind of action he could have brought in Bexar county. That's my belief.

The supplemental jurisdiction statute is important. It is my belief that it would have allowed Judge Prado to entertain those claims. Counsel for Mr. McKinney certainly thought those claims could be entertained because of the representations that were made by him and that are contained in this record. The issue as to whether or not the school district is susceptible to suit in federal court in the face of the 11th amendment I believe was resolved not only by Mount Healthy and also Pennhurst, but also by a case cited out of the 5th circuit Farias v. Bexar County Board of Trustees for MHMR in which local officials were not allowed the luxury of asserting the 11th amendment as a bar to their lawsuit.

We relied at the TC on Lopez v. The Houston ISD. There the court held that the school district was not an 11th amendment state entity. The 4th court did not agree. However we still rely upon Lopez and still believe it is good law.

Judge Nowell recently decided a case called Smith v. Travis County Education District which involved an entity similar to school districts. So it is my belief that with respect to the 11th amendment argument that it is clear that there is an entitlement on behalf of this plaintiff at the TC below to maintain that suit. It happens everyday that when you have a lawsuit in federal court that they are joined with those causes of action, causes for breach of contract. It happens everyday. That is one of the concerns that I had with this decision.

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RESPONDENT

DEAN: My it please the court. My name is Truman Dean. I am from the Texas State Teachers Association staff counsel representing respondent. There are a couple of points I want to quickly make. We filed a lawsuit in San Antonio, Bexar County, to enforce the commissioner's decision. It was an enforcement action as well as breach of contract because the school district refused to reinstate him.

BAKER: Was this statement correct that there was an agreement between counsel to forego any additional school board hearings until the litigation was over?

DEAN: That's partially correct. There was an agreement...we wanted him immediately reinstated as the commissioner ordered. They refused. We filed the lawsuit. They said we are putting you to a school board hearing and we agreed to postpone a second school board hearing until the state court and federal court case was over with. But we filed the state court lawsuit to enforce the commissioner's decision to reinstate Charles McKinney. We also filed a breach of contract action in Bexar county for damages. But the reason we filed the lawsuit is they refused and failed to reinstate him, which they were ordered to do by the commissioner. And that's what this state court case is about.

Now we don't disagree with the CA's decision, but we do not believe it is necessary for this court to go as far as the CA. The issue in this case is very narrow and very small. You didn't grant writ on point of error 1, which was over jurisdiction and venue in Bexar County. You only granted writ on the 11th amendment immunity question.

What I am asking for is a very narrow small insignificant extension of Pennhurst, which is when a state administrative agency issues an order, that order is to be enforced in state court not federal court because of the 11th amendment implications. In other words let me give you an example outside of McKinney. I had a case against a school district a long time ago for a black female which also involved whistleblowing, and she was terminated. We brought a suit in federal court alleging race and sex, and we also alleged the Texas Whistleblower Act in federal court. We're not arguing with that. That's permissible, that's a pendent state claim. But let's say we have handled it differently. Let's say we have taken the Texas whistleblower case and had gone through the TEA procedure and gone to the commissioner and gotten an order from the commissioner: Yes, the Texas Whistleblower Act was violated, and I order you to reinstate her. At that point what we are saying is you cannot take that state agency order and take it into federal court and get it enforced, because of the 11th amendment.

CORNYN: You think you could file the breach of contract action?

DEAN: In this case like the CA's ruled in this case they are so intertwined they are exactly on the same issues that it wouldn't have made sense. But, yes, you can normally file a breach of contract case in federal court. But the argument we made and which the CA accepted is that McKinney's lawsuit to enforce the commissioner's decision and his breach of contract were so intertwined they should be brought in the same place.

HECHT: But do you think that once the DC concluded there was no violation of federal law, that it would have retained jurisdiction under pendent jurisdiction of the breach of contract claim that that's how it viewed the claim?

DEAN: Well as the CA's points out in its decision, the federal court never reached the state court issue. He never ruled specifically on the commissioner's decision. The lawyers who took over McKinney's case in federal court just argued: The commissioner's decision is evidence of race discrimination.

HECHT: But as you know the question for res judicata is whether you could have brought it there.

DEAN: Right. And our position is: No, that you could not.

HECHT: Even as a breach of contract?

DEAN: No. But not because of the unique circumstances of this case as the CA's ruled that they were totally intertwined.

HECHT: But if had only been a breach of contract claim you could have?

DEAN: Yes. But in this case with the statutory claim being the breach of contract, then they were hopelessly intertwined and they would have to be brought in state court together.

CORNYN: So they were indistinct? I mean is that what you are arguing?

DEAN: Yes.

CORNYN: So why couldn't you have brought those in federal court if there was no real distinction between the two claims?

DEAN: Because our position is today, and it's been our position all along that a state administrative agency order cannot be enforced by a federal court against a school district of the State of Texas. And I wanted to quote part of Pennhurst just for one second. It says: It is difficult...

CORNYN: That's because the 11th amendment its effect on a state school, not because the federal court could not have addressed the breach of contract and the suit enforced the commissioner's decision in federal court?

DEAN: I think if he had simply brought a simple breach of contract case, yes he could have brought it in federal court. The enforcement of the commissioner's order in our opinion could not be brought in federal court because of the 11th amendment. And as the CA stated it was proper to bring that in state court because they are totally intertwined. I mean our breach of contract is based on the same statute which was 13.114. I mean we said you breached this contract by violating 13.114. That's our breach of contract action. Based on the statutory violation. In Pennhurst the court said: It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with principles of federalism that underline the 11th amendment.

Now the petitioner has not cited you one case in his brief either to the CA or to you where a federal court has enforced a state administrative agency order based on state law. And Judge

Nowlins' decision that was cited by petitioners Smith v. Travis County Educational District writes a full page on page 1184 about: Well since this is a federal due process claim and not based on a Texas state constitutional claim or a Texas state statute claim I will hear it since it's brought under the 14th amendment to the US constitution. And it was very clear from reading that part of his decision that if it had been based on a state court claim or a state law claim or a state constitutional claim that he would not have heard it because of the 11th amendment. But he wrote a full page on the fact that this is a federal due process claim brought under the 14th amendment to the US constitution. It's a federal case and I will hear it. In §5 of the 14th amendment Enforcement Provisions make it clear that in civil rights cases which is what Lopez was, which is cited by petitioners, that §5 of the 14th amendment to the US constitution limits the 11th amendment. That's why Lopez and cases in _____ and cases like that can be brought in federal court and have state pendent claims because of the 14th amendment limitation on the 11th amendment. But as the CA correctly pointed out in their decision I don't have a civil rights case in my state court case. I am not claiming race discrimination. I am not claiming first amendment. I am not claiming 14th amendment due process. I don't have any state constitutional claims. All I am trying to do is enforce the commissioner's order to reinstate the respondent. I want a remand to the district court where the district court will order the San Antonio ISD to follow the commissioner's order and reinstate the respondent unless and until they lawfully terminate him, which they have failed and refused to do all these years. That's why we filed the lawsuit to enforce the commissioner's decision. We also filed a breach of contract. And he raises in his point of error 1 before this court, which you opted not to grant writ on, that my jurisdiction and venue was proper in Bexar County, and I did have a right to file an enforcement action in Bexar County.

ENOCH: Anywhere in this process have you argued that if the 11th amendment did not prohibit this claim from being brought in federal court, that res judicata still would not apply?

DEAN: I have not made that argument.

ENOCH: The issues that have been presented by the parties here are strictly whether or not the 11th amendment applies or doesn't apply one wins or loses depending on we rule on that issue?

DEAN: Yes, your honor. In our opinion, and this is a very narrow small extension of Pennhurst, very small extension, very narrow extension which is when any state administrative agency enters an order against a party, that order is to be enforced in state court and does not belong in federal court. In that language I read you from Pennhurst a moment ago supports that proposition and the CA supported my proposition.

Now petitioner has cited the language of a lawyer who represented Mr. McKinney in federal court that he was going to amend to add the commissioner's decision to the federal court litigation. Attached to my brief to the CA is Petitioner's Reply to McKinney's Federal Reply to Their Motion for Summary Judgment. And the heading on this is Plaintiff's Reliance Upon the Determination of the Commissioner of Education Regarding the Procedures of _____ to the Termination of Plaintiff McKinney Bears No Relevance to Plaintiff's Claims of Racial Discrimination. And Petitioner argued in federal court: Don't look at the commissioner's decision. It's irrelevant. It has nothing to do with race discrimination. You shouldn't consider it. It's not evidence of race discrimination. It's not before you. And now they are arguing that res judicata after they argued before the federal court: Don't consider it; don't consider it. And the federal court lawsuit was never amended to add the enforcement of the commissioner's decision.

McKinney's lawyers simply cited the commissioner's decision as evidence of racial discrimination. They did not attempt to enforce the action in federal court. Nor do I think they could have. I guess the question is could they have? And my answer is no.

CORNYN: Because it would not have had pendent jurisdiction?

DEAN: No, because a state administrative agency order based on state law should only be enforced by state courts, not by federal courts.

CORNYN: Not so under principles of pendent jurisdiction. You are not arguing that you could not have physically brought it, you are just saying because the 11th amendment you could not have brought it?

DEAN: Right. Because under the 11th amendment I could not bring an action to enforce the commissioner's decision in federal court. And I would have been precluded from doing so.

ENOCH: Let's focus on the 11th amendment. What test or what analysis or what rules should we be governed by in determining whether or not the 11th amendment is applicable in this case to school districts?

DEAN: Like I said before you do not have to go as far as the CA did to rule in my favor. I think what you should start with is Pennhurst.

ENOCH: How far did the CA go?

DEAN: Well what I am saying for you to affirm the CA I don't think you have to accept all their analysis or go as far as they did with Pennhurst. What I am arguing is you start with Pennhurst and then give me a narrow small extension of Pennhurst. But the first case I would refer you to is Pennhurst, which is what the CA relied on.

ENOCH: If an agency receives funding from the state is that sufficient to implicate the 11th amendment?

DEAN: I guess it would depend on how much funding and how much independence the agency has.

ENOCH: Would that mean a school district like Highland Park in Dallas that gets no state funds is not an arm of the state, but this school district that gets 70% of its funds from the state is a part of the state arm?

DEAN: Well I am not sure that Highland Park doesn't receive state funds. I'm not sure your honor.

ENOCH: Assume for the purposes of a hypothetical that some school districts as we have held in Edgewood get no funding from the state and other school districts get 100% of their funding. Should that make a distinction as to how we treat those school districts with respect to the 11th amendment?

DEAN: I guess you could make that argument, but my argument is a little bit different than that. My argument is, the argument that I am putting forth today is that simply that a state administrative agency order cannot and should not be enforced in federal court when it's based on state law. It should be only enforced in state courts. It is true that 70% of San Antonio ISD funds during the relevant year came from the State of Texas. That is true. And that was commented on by the CA. And that's exactly what I am talking about that for me to win, for respondent to win you don't have to go that far in the analysis. You simply have to make a narrow extension of Pennhurst that a state administrative agency

order should not be enforced in federal court because of the 11th amendment. That's my argument.

SPECTOR: What is the posture of this case? It's been remanded to...

DEAN: Well I lost at the district court level based on the 11th amendment. He said it was res judicata.

SPECTOR: No. If this court affirms the CA, and the case goes back to the TC, but you've stipulated that there will be no reinstatement or no hearing until the litigation is complete.

DEAN: I am glad you brought that up. I did not stipulate there would be no reinstatment. I sued to get reinstatement. That's what I am trying to do is to get the DC...now if you affirm and I win, I will go back to the DC. I will file a partial motion for summary judgment to enforce the commissioner's decision to get the DC to compel them, to let him come back to work next year. Not now, but next year at the beginning of the school year at the San Antonio ISD.

GONZALEZ: As a band director?

DEAN: Yes, as a band director.

GONZALEZ: The same school that he was in?

DEAN: I am not sure we would fight over the same school. I don't know how important that is to my client. But we want him back as a band director at the school district.

GONZALEZ: An assistant band director somewhere?

DEAN: We want him back as a band director.

GONZALEZ: We've had this problem about coaches, whether he would be head coach or reassigned to some other...

DEAN: We had the same problem with band directors. But the point is the commissioner ruled that my client was illegally terminated and they were ordered to reinstate him and they've refused.

SPECTOR: Then my next question is assuming that happens and he is reinstated is the board then free to have another hearing to decide whether or not he should be terminated?

DEAN: Yes I think they are. I would go forward with my DC case to get my contract damages for the year he was terminated. Plus he is working at the Dallas ISD, but each year he's making less than he would be making at the San Antonio school district.

GONZALEZ: One of the possible outcomes if we were to affirm the CA is that the San Antonio ISD can have another hearing, and if they get the requisite number of votes to terminate his contract all...

DEAN: Or I could win. I mean they might terminate him or I might win the school board hearing and he may not be terminated the second time. I mean it was a close vote: 3-2. And I think it would be a close vote again. I may end up with the votes.

GONZALEZ: Assuming they terminate him in the second hearing, you would still be fighting for of course the lost wages he's had?

DEAN: Yes, sir. Up to that point, and then what we do after the second termination we would have to make a second separate decision about how to proceed after that.

GONZALEZ: File another lawsuit and fight it _____.

DEAN: Well that would be up to the client if he wanted to continue fighting or if he wanted to stay at DISD, I guess. What I am simply proposing today is a small extension of Pennhurst...

GONZALEZ: You keep talking about extension. Is that an application of favor and not an extension?

DEAN: Yes. And I am saying application. Application or extension of a very narrow range of issues in that when you have a state administrative agency order based on state law it should be enforced in state court, not in federal court. It's none of the federal court's business.

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REBUTTAL

HEIDELBERG: I, too, urge the implications of Pennhurst, but certainly disagree with those implications. As I indicated Pennhurst I believe is clear that the county officials that were involved as defendants in that lawsuit were not subject to the prohibitions or protections of the 11th amendment. I think the opinion is clear on that.

In Pennhurst it is interesting that some of the issues that were raised by the plaintiffs below involved applications of a state statute. It wasn't strictly a 14th amendment claim of denial of due process because of the conditions of the facility in which these people were institutionalized. But rather it was also an application of the state law of Pennsylvania in that particular case.

Reliance has also been made on the Kitchens case clearly involving the State Department of Health in the State of Texas, a 5th circuit case. That was relied upon I believe by the court below. That case once again applies strictly to state actors. It does not apply to actors such as the school district, or the trustees. In the case that I mentioned before, the Doyle case in part the supreme court states: "Petitioner is but one of many local school boards within the State of Ohio. It is subject to some guidance from the State Board of Education, and receives a significant amount of money from the state. But local school boards have extensive powers to issue bonds, and to levy taxes within certain restrictions of state law." As the court is very well aware so does the State of Texas, and some of those school boards in Texas. I was reminded when I came up here this morning that they are called Independent School Districts. Meaning they do have certain independent rights. And certainly the school districts in the State of Texas had the authority to set the tax rates and do many things that this court is well aware of by virtue of the Edgewood litigation. The court continues: "On balance, the record before us indicates that a local school board such as petitioner is more like a county or city than it is like an arm of the state. We therefore hold that it's not entitled to assert any 11th amendment immunity from suit in the federal courts."

That you honors I believe is the law with respect to the application of the 11th amendment to the school districts in this State. And because of that I believe that the court should reverse the decision of the CA and hold that the 11th amendment does not shield school districts from actions regardless of the characterization; and therefore that as conceded by counsel the Doctrine of Res Judicata applies, and this case should be reversed and rendered.