Opinion issued June 30, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00368-CV

KIPP TEXAS, INC. D/B/A KIPP TEXAS PUBLIC SCHOOLS, Appellant

V.

JOHN & JANE DOE #1 (A/N/F J.P.), JANE DOE #2 (A/N/F A.N.), JOHN & JANE DOE #3 (A/N/F A.G.C.), AND JANE DOE #4 (A/N/F E.S.), Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2019-75560

O P I N I O N

KIPP Texas, Inc., doing business as KIPP Texas Public Schools, filed a plea to the jurisdiction, which the trial court denied. KIPP appeals. We reverse the trial court's denial of KIPP's jurisdictional plea and dismiss the appellees' lawsuit.

BACKGROUND

The appellees are the parents of several young girls who were sexually abused by a school counselor who has since pleaded guilty to sex crimes. In the suit before us, the parents sued the counselor's employer, KIPP, which runs the open-enrollment charter school at which the counselor worked. The parents allege claims for assault and negligence, asserting that KIPP enabled and turned a blind eye to the abuse.

In its answer to the suit, KIPP asserted immunity from suit and liability. In an affidavit accompanying its answer, KIPP's Deputy Chief of Human Resources represented that KIPP is a nonprofit company authorized by the Texas Education Agency to operate an open-enrollment charter school. Then, in its plea to the jurisdiction, KIPP argued that open-enrollment charter schools have governmental immunity to the same extent as public schools, which would be immune from the appellees' claims. On this basis, KIPP requested dismissal of the appellees' suit.

The appellees opposed dismissal on three grounds. First, they argued that the governmental immunity enjoyed by open-enrollment charter schools is limited to situations involving commercial contracts, not instances of sexual abuse. Second, they argued that to the extent governmental immunity extends to sexual abuse, the open-courts provision of the Texas Constitution bars the application of immunity. Third, they argued KIPP had not shown it is an open-enrollment charter school.

The trial court denied KIPP's plea to the jurisdiction without stating a rationale for the denial. KIPP now appeals from the denial of its jurisdictional plea.

GOVERNMENTAL IMMUNITY

Standard of Review

When, as here, the facts material to a jurisdictional inquiry are settled, we review the trial court's ruling on a plea to the jurisdiction de novo. *Kubosh v. Harris Cty.*, 416 S.W.3d 483, 486 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

Applicable Law

Sovereign immunity is a common-law doctrine that bars litigation against the state unless the state consents and waives its immunity. *Democratic Sch. Research v. Rock*, 608 S.W.3d 290, 306 (Tex. App.—Houston [1st Dist.] 2020, no pet.). Absent waiver, the state's political subdivisions, like public school districts, are also immune from litigation, though the immunity of these subdivisions is referred to as governmental immunity. *Id.* Governmental immunity has two components: immunity from suit and immunity from liability. *Id.* The former defeats a trial court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction, while the latter insulates political subdivisions of the state from money judgments even if immunity from suit has been waived. *Id.* Those who sue a political subdivision of the state must establish that the state consented to suit. *Id.* Otherwise, governmental immunity from suit deprives the trial court of subject-matter jurisdiction. *Id.*

Analysis

Sovereign and governmental immunity are doctrines unique to governmental authority. *Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 404 (Tex. 2020). As the names of these interrelated doctrines indicate, sovereign immunity is an attribute of a sovereign, like Texas, and governmental immunity is an attribute of the sovereign's political subdivisions, like public school districts. *Redus*, 602 S.W.3d at 404–05; *Rosenberg Dev. Corp. v. Imperial Performing Arts*, 571 S.W.3d 738, 746 (Tex. 2019). Private institutions are not commonly understood to be part of the government. *Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 907 (Tex. 2017). So, we must be careful not to extend immunity to every institution that at first blush exhibits the characteristics of government. *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 85 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The justifications for sovereign and governmental immunity are preservation of the state's limited resources to ensure it can carry out its essential functions and prevention of judicial interference with the legislature's prerogative to allocate tax dollars. *Redus*, 602 S.W.3d at 404. These justifications are inapt with respect to private institutions. *See id.* at 409–11. Moreover, unfairness is part and parcel of sovereign and governmental immunity, in that the application of these doctrines often precludes the redress of undeniable wrongs. *Id.* at 410–11; *Hall v. McRaven*, 508 S.W.3d 232, 245 (Tex. 2017) (Willett, J., concurring). Thus, we apply these doctrines solely when their

application is necessary to vindicate their justifications, which relate exclusively to the exercise of governmental authority. *See Hughes v. Tom Green Cty.*, 573 S.W.3d 212, 218 (Tex. 2019) (describing sovereign immunity as "a rule of necessity").

However, our Supreme Court has held that open-enrollment charter schools are entitled to governmental immunity. *El Paso Educ. Initiative v. Amex Props.*, 602 S.W.3d 521, 530 (Tex. 2020). And we must apply the Court's decisions faithfully. *See Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002) (Court of Appeals cannot abrogate or modify Supreme Court's decisions).

El Paso involved a dispute between an open-enrollment charter school and a landlord with whom the school negotiated a lease. 602 S.W.3d at 524–26. When the school repudiated the lease, the landlord brought suit for anticipatory breach of the lease. *Id.* at 525–26. The school, in turn, filed a plea to the jurisdiction, contending it had governmental immunity to the same extent as public school districts. *Id.* at 526. The trial court denied the school's jurisdictional plea, and the school appealed. *Id.* When the issue eventually reached our Supreme Court, it agreed with the school, holding "that open-enrollment charter schools and charter-holders are entitled to governmental immunity" to the same extent as public school districts. *Id.* at 530.

In holding that open-enrollment charter schools have governmental immunity to the same extent as public school districts, the Court noted that the legislature has chosen to make them part of the public education system, which the state is

constitutionally required to provide. *Id.* at 528 (citing TEX. CONST. art. VII, § 1 and TEX. EDUC. CODE § 12.105). These schools are generally open to the public and tuition-free. *Id.* at 528. Though open-enrollment charter schools are typically operated by private, nonprofit organizations, they are regulated by the state and largely publicly funded. *Id.* at 528–29 (citing EDUC. § 12.106). For these reasons, the legislature has statutorily provided that open-enrollment charter schools are immune from suit and liability to the same extent as public schools. *Id.* at 529 (citing EDUC. § 12.1056(a)). And the Court, which is the ultimate arbiter as to when sovereign and governmental immunity apply, agreed that open-enrollment charter schools act as an arm of the government and are entitled to governmental immunity to the same extent that public school districts enjoy the benefit of that doctrine. *Id.* at 527, 529–30; *see also Nettles v. GTECH Corp.*, 606 S.W.3d 726, 731 (Tex. 2020) (stating that judiciary decides when state and its political subdivisions have immunity and legislature decides when and to what extent to waive immunity).

The Court recognized that "[p]ublic school districts are generally entitled to governmental immunity from liability and suit." *El Paso*, 602 S.W.3d at 526; *see also* TEX. CIV. PRAC. & REM. CODE § 101.001(3)(B) (including school districts in definition of "governmental unit" in Texas Tort Claims Act, which is where legislature generally sets forth waivers of governmental immunity). With respect to tort claims, the legislature has waived the immunity of public school districts solely

in cases in which a plaintiff's injuries arise from the operation or use of a motor-driven vehicle. CIV. PRAC. & REM. §§ 101.021, 101.025, 101.051; *City of Galveston v. State*, 217 S.W.3d 466, 470 n.22 (Tex. 2007). Furthermore, the legislature has not waived governmental immunity with respect to any claim arising out of an intentional tort, like assault or battery. CIV. PRAC. & REM. § 101.057(2).

In this suit, the appellees allege claims for assault and negligence based on the sexual abuse of their children by a school counselor employed by KIPP at an open-enrollment charter school. A public school district would be immune from these claims. *See, e.g.*, *Brown v. Houston Indep. Sch. Dist.*, 123 S.W.3d 618, 619–23 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (affirming summary judgment for school district based on governmental immunity in suit alleging district was liable for sexual assault committed by district employee); *see also Houston Indep. Sch. Dist. v. PERX*, No. 14-13-01115-CV, 2014 WL 4262198, at *2–3 (Tex. App.—Houston [14th Dist.] Aug. 28, 2014, no pet.) (mem. op.) (reversing trial court's denial of jurisdictional plea because school district had governmental immunity from suit claiming it should have prevented sexual assault on bus); *Locke v. Santa Fe Indep. Sch. Dist.*, No. 14-98-00880-CV, 2000 WL 328351, at *1 (Tex. App.—Houston [14th Dist.] Mar. 23, 2000, no pet.) (per curiam) (not designated for publication) (opining that it is well-established that school districts are immune from tort claims like one at issue, which was based on school district's failure to report

and stop sexual abuse of pupil by one of his teachers, and affirming summary judgment based on district's defense of governmental immunity). Hence, KIPP likewise is immune from the appellees' claims. *El Paso*, 602 S.W.3d at 530.

The appellees try to avoid this outcome on three grounds. First, they argue that *El Paso* concerned a contract dispute and does not apply to claims of sexual abuse. Second, they argue that the open-courts provision of our Constitution bars the application of governmental immunity to their claims. Third, they argue that whatever the law may be, KIPP failed to submit evidence that it is an open-enrollment charter school. We consider and reject each of these arguments in turn.

Scope of El Paso's Holding

While *El Paso* arose in the context of a contract dispute, its holding is broader. At the outset of its decision, the Court stated it had to decide two issues: "In this case, we decide two issues. First, whether open-enrollment charter schools have governmental immunity. Second, whether that immunity is waived for a landlord's claim against one such school for anticipatory breach of a lease." 602 S.W.3d at 524. With regard to the first issue, the Court held "that open-enrollment charter schools and their charter-holders have governmental immunity from suit and liability to the same extent as public schools." *Id.* Thus, in any lawsuit in which an open-enrollment charter school asserts governmental immunity, the pertinent inquiry is whether a public school district would be immune under the same circumstances. If so, then

the trial court lacks subject-matter jurisdiction and must dismiss the lawsuit. *See id.* at 534–35 (reversing and dismissing suit for lack of jurisdiction based on open-enrollment charter school's governmental immunity, which had not been waived).

Open-Courts Provision

Article 1, Section 13 of the Texas Constitution contains what is commonly known as the open-courts provision: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." This provision prohibits the legislature from unreasonably abrogating well-established common-law claims. *Franka v. Velasquez*, 332 S.W.3d 367, 385 (Tex. 2011). But the open-courts provision does not pose an obstacle to the application of governmental immunity in this instance for two separate reasons.

First, the open-courts provision's guarantee against the unreasonable abrogation of well-established common-law claims restrains the legislature. *See id.* Thus, this aspect of the open-courts provision applies solely to statutory restrictions of common-law claims. *Fed. Sign. v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997); *LTTS Charter Sch. v. C2 Constr.*, 358 S.W.3d 725, 744 (Tex. App.—Dallas 2011, pet. denied). The legislature did enact a statute granting governmental immunity to open-enrollment charter schools. EDUC. § 12.1056(a). But the Supreme Court did not defer to this legislative enactment in *El Paso*. As the Court explained, sovereign and governmental immunity are common-law doctrines, and it is the

judiciary's responsibility to define their boundaries. *See* 602 S.W.3d at 527. So, while the Court took into account the statute enacted by the legislature, the Court's holding that open-enrollment charter schools have governmental immunity was based on its own independent evaluation. *Id.* at 527–30. Two justices concurred, opining that they would have deferred to the statute. *Id.* at 535–36 (Blacklock, J., concurring). The Court as a whole, however, did not embrace the concurrence's position. Thus, under *El Paso*, open-enrollment charter schools enjoy governmental immunity to the same extent as public school districts because the Court said so, as a matter of common-law interpretation, rather than because the legislature said so in the statute it enacted. Because the Court, rather than the legislature, abrogated the appellees' common-law claims, the open-courts provision is inapplicable.

Second, even if the open-courts provision applied to the Court's common-law extension of governmental immunity in *El Paso*, to establish a violation of the open-courts provision the appellees would have to show that the resulting restriction of their common-law claims is unreasonable or arbitrary when balanced against the restriction's purpose. *CenterPoint Energy Res. Corp. v. Ramirez*, 640 S.W.3d 205, 220 (Tex. 2022). While the Court did not address the open-courts provision in *El Paso*, it implicitly held that extending governmental immunity to open-enrollment charter schools is not unreasonable or arbitrary because doing so "satisfies governmental immunity's purposes." 602 S.W.3d at 530. The Court explained:

> Diverting charter school funds to defend lawsuits and pay judgments affects the State's provision of public education and reallocates taxpayer dollars from the legislature's designated purpose. Conferring immunity respects the legislature's decision to fulfill its constitutional obligation to provide a free, public education through charter schools, its allocation of tax dollars to meet that objective, and its directive that charter schools and charter-holders have immunity from suit and liability to the same extent as public schools.

Id. In other words, the Court decided that conferring governmental immunity on open-enrollment charter schools vindicated the justifications for the doctrine. That decision precludes a determination that doing so is unreasonable or arbitrary.

Evidence of KIPP's Status

The appellees additionally suggest in passing that whatever the law may be, KIPP failed to introduce any evidence that it is in fact an open-enrollment charter school. But in their operative pleading, the appellees allege that KIPP is a charter school, and they seek a declaration that the legislature's purported grant of governmental immunity to a private party, like KIPP, in Section 12.1056 of the Texas Education Code violates the open-courts provision of the Texas Constitution. As Section 12.1056 solely applies to open-enrollment charter schools, the appellees' own pleading is tantamount to a judicial admission that KIPP has this status. *See Lake Jackson Med. Spa v. Gaytan*, 640 S.W.3d 830, 839 (Tex. 2022) (clear, deliberate, unequivocal factual allegation made in live pleading and not pleaded in alternative constitutes judicial admission and bars pleader from disputing fact).

At any rate, the appellees raised this ostensible evidentiary deficiency during the trial court's hearing on KIPP's jurisdictional plea. KIPP noted on the record that it had submitted the aforementioned affidavit about its status as an open-enrollment charter school. The appellees did not object to the affidavit. Nor did the appellees file any evidence controverting the affidavit's representations about KIPP's status as an open-enrollment charter school, notwithstanding the trial court's invitation to file anything in the clerk's record while the court considered the jurisdictional plea. On this record, there is not a genuine issue as to any material fact about KIPP's status as an open-enrollment charter school, as the sole evidence on this subject favors KIPP. We must accept KIPP's uncontroverted affidavit as being true under these circumstances. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 270 (Tex. 1992).

CONCLUSION

We reverse the trial court's order denying KIPP Texas, Inc.'s plea to the jurisdiction. Because KIPP has governmental immunity, we dismiss this suit.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.