In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00332-CV

ECKERD YOUTH ALTERNATIVES, INC. D/B/A ECKERD KIDS; AND ECKERD YOUTH ALTERNATIVES, INC. D/B/A ECKERD CONNECTS, Appellants

V.

KATRINA PYTEL AND JOSHUA PYTEL, Appellees

On Appeal from the 352nd District Court
Tarrant County, Texas
Trial Court No. 352-313343-19

Before Kerr, Birdwell, and Wallach, JJ.
Memorandum Opinion by Justice Kerr

MEMORANDUM OPINION

Eckerd Youth Alternatives, Inc. d/b/a Eckerd Kids and Eckerd Youth Alternatives, Inc. d/b/a Eckerd Connects (collectively, Eckerd) attempt to appeal from the trial court's interlocutory order denying their plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8). In a single issue, Eckerd argues that because it had contracted with the State of Texas to carry out a federally mandated state function on the State's behalf, sovereign immunity and derivative sovereign immunity bar Appellees Katrina and Joshua Pytel's claims against Eckerd for allegedly failing to perform tasks that are the State's contractual and statutory obligations. Eckerd thus contends that the trial court erred by denying its jurisdictional plea.

But we do not reach the immunity question because we lack jurisdiction over this appeal. Eckerd is not a "governmental unit," *see id.* § 101.001(3), and thus cannot appeal from the trial court's interlocutory order denying its plea to the jurisdiction, *see id.* § 51.014(a)(8). We will therefore dismiss the appeal for want of jurisdiction.

Background

Eckerd is a Florida-based nonprofit corporation that, according to Eckerd, is a child-placing agency licensed by the Texas Department of Family and Protective Services (the Department). *See* Tex. Hum. Res. Code Ann. § 42.002(12) ("'Child-placing agency' means a person, including an organization, other than the natural parents or guardian of a child who plans for the placement of or places a child in a child-care facility, agency foster home, or adoptive home."). In February 2016, while

the Department was then-two-year-old H.M.'s managing conservator, Eckerd facilitated H.M.'s foster placement with the Pytels. The Pytels adopted H.M. later that year.

After his adoption, H.M. displayed troubling behavior that necessitated a mental-health evaluation. During this evaluation, the Pytels discovered that Eckerd had withheld some of H.M.'s medical records from them. These records revealed that H.M. had serious mental-health issues and had been treated for those issues before he was placed with the Pytels.

Fearful for their second, younger child's well-being and unable to provide long-term care and treatment for H.M., the Pytels voluntarily terminated their parental rights to him. The Pytels then sued Eckerd for negligence, gross negligence, fraud, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act, alleging that had Eckerd fully disclosed H.M.'s medical history and records to them, they would not have adopted H.M.

Almost two years after the Pytels sued, Eckerd filed a plea to the jurisdiction challenging the existence of jurisdictional facts. Eckerd claimed that it had entered into a contract with the Department under which Eckerd would place and monitor children who were in the Department's care into foster and adoptive homes and would facilitate the adoptions of those children. Eckerd asserted that by virtue of its contractual relationship with the Department—which required Eckerd to carry out state and federally mandated functions for the Department, specifically providing

documentation to prospective adoptive parents—Eckerd was acting on the Department's behalf during the placement and adoption process with the Pytels.[1] Based on this contractual relationship, Eckerd argued that derivative sovereign immunity and, alternatively, sovereign immunity barred the Pytels' claims, and it asked the trial court to dismiss the case for lack of subject-matter jurisdiction.

The trial court denied Eckerd's plea, and Eckerd filed this interlocutory appeal.

Appellate Jurisdiction

The Pytels challenge our jurisdiction over this interlocutory appeal. But even without that, we would be obligated to review sua sponte issues affecting our jurisdiction. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004). Whether we have jurisdiction over an appeal is a legal question, which we review de novo. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). If the record does not affirmatively reflect our appellate jurisdiction, we must dismiss the appeal.[2] *See IFS Sec. Grp., Inc. v. Am. Equity Ins. Co.*, 175 S.W.3d 560, 562 (Tex. App.—Dallas 2005, no pet.).

---

[1]We note that the contract between the Department and Eckerd that Eckerd attached to its plea was effective on March 1, 2018, which was more than two years after H.M.'s adoption.

[2]Between them, Eckerd and the Pytels have included hundreds of pages of evidentiary material in the appendices to their briefs. But because none of these materials are included in the appellate record, we cannot consider them. *See Ahmed v. Sosa*, 514 S.W.3d 894, 896 (Tex. App.—Fort Worth 2017, no pet.); *see also* Tex. R. App. P. 34.1 (providing that the appellate record consists of the clerk's record and, when necessary, the reporter's record).

Our appellate jurisdiction is generally limited to appeals from final judgments. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (stating that "the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment"). "The legislature, however, has specified circumstances in which a litigant may appeal immediately from an otherwise unappealable order because a final judgment has not been rendered." *Rosenberg Dev. Corp. v. Imperial Performing Arts, Inc.*, 526 S.W.3d 693, 698 (Tex. App.—Houston [14th Dist.] 2017) (citing Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)), *aff'd*, 571 S.W.3d 738 (Tex. 2019). Here, Eckerd relies on Texas Civil Practice and Remedies Code Section 51.014(a)(8), which allows a person to appeal from a trial court's interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in [Texas Civil Practice and Remedies Code] Section 101.001."[3] Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8). We thus have jurisdiction over this appeal only if Eckerd is a "governmental unit." *See id.*; *see also id.* § 101.001(3) (defining "governmental unit").

The Texas Civil Practice and Remedies Code defines "governmental unit" to mean

[3]In addition to Subsection (a)(8), Eckerd's notice of appeal cites Subsections (a)(4) and (a)(12) as additional bases for our jurisdiction. Neither of these subsections confers jurisdiction over an appeal from an order denying a jurisdictional plea. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(4) (providing for appeal from an interlocutory order granting or refusing a temporary injunction or granting or overruling "a motion to dissolve a temporary injunction as provided by Chapter 65"), (a)(12) (providing for appeal from an interlocutory order denying a dismissal motion filed under the Texas Citizens Participation Act).

> (A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;
>
> (B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;
>
> (C) an emergency service organization; and
>
> (D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

See id. § 101.001(3). The first three subsections are inapplicable. Eckerd neither is nor claims to be a state agency,[4] a political subdivision of the state, or an emergency-service organization. The issue is thus whether Eckerd qualifies as a "governmental unit" under Subsection (D).

To so qualify, an entity must (1) be an "institution, agency, or organ of government" and (2) derive its "status and authority" as such from the Texas Constitution or from "laws passed by the legislature." *Id.*; *see Univ. of the Incarnate Word v. Redus*, 518 S.W.3d 905, 909 (Tex. 2017); *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*,

[4]Although Eckerd quotes Subsection (A) in its reply brief, it substantively argues that it is a governmental unit under Subsection (D), not Subsection (A).

342 S.W.3d 73, 75–76 (Tex. 2011). Under the first prong, the phrase "institution, agency, or organ of government" has a broad meaning, with the phrase "organ of government" encompassing "an entity that operates as a part of a larger governmental system." *Univ. of the Incarnate Word*, 518 S.W.3d at 910. To satisfy the second prong, "the entity asserting immunity from suit must have a legislative or constitutional source from which it derived its status and authority." *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 77 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (op. on reh'g) (citing *LTTS Charter Sch.*, 342 S.W.3d at 76, 81).

Here, Eckerd relies on two Texas Supreme Court cases to assert its status as a "governmental unit." In the first—*LTTS Charter School, Inc. v. C2 Construction, Inc.*—the supreme court concluded that Universal Academy, an open-enrollment charter school run by a nonprofit corporation, was a "governmental unit" under Subsection (D) for purposes of bringing an interlocutory appeal. 342 S.W.3d at 76, 79, 82. In so concluding, the court pointed out that open-enrollment charter schools have the same statutory entitlements to state funding and services as public school districts. *Id.* at 77–78 (citing Tex. Educ. Code Ann. §§ 12.106(a), .104(c)). The court went on to explain that an open-enrollment charter school's governmental status and authority arise from the Texas Education Code, which states that open-enrollment charter schools are "part of the public school system of this state"; were "created in accordance with the laws of this state"; are subject to "state laws and rules governing public schools"; and, together with public schools, "have the primary responsibility for implementing the

state's system of public education." *Id.* at 77–78, 82 (quoting Tex. Educ. Code Ann. §§ 11.002, 12.103(a), 12.105). The court additionally noted that the legislature considers open-enrollment charter schools to be governmental entities under a "host" of other laws outside the Education Code. *Id.* at 78, 82 (citing Tex. Educ. Code Ann. §§ 12.1051–.1053). The court further noted that an open-enrollment charter school may be audited and have its charter revoked by the Commissioner of Education. *Id.* at 80 (citing Tex. Educ. Code Ann. §§ 12.1163(a)(1), .115)

Given open-enrollment charter schools' statutory status as part of the public-school system, "their authority to wield" the powers given to public schools, and their right to "receive and spend state tax dollars (and in many ways to function as a governmental entity)," the supreme court was "confident that the [l]egislature considers" open-enrollment charter schools to be institutions, agencies, or organs of government under Subsection (D). *Id.* at 78 (citing Tex. Educ. Code Ann. §§ 12.104(a), .105–.107, .1053).

In response to the dissent—which argued that charter schools should not be considered governmental units because they receive their charters from the State Board of Education (SBOE) rather than the legislature and thus do not derive their status and authority from laws passed by the legislature[5]—the majority pointed out

[5]*LTTS Charter Sch.*, 342 S.W.3d at 84 (Guzman, J., dissenting).

that "[t]he dispositive issue is not who grants a charter but who grants a charter *meaning*." *Id.* at 81. The court opined,

> Who bestows the status and authority that a charter brings; what does having a charter mean, and who says so? The wellspring of open-enrollment charter schools' existence and legitimacy is the Education Code and its multiplicity of provisions that both detail and delimit what these public schools can and cannot do. The SBOE can issue no charters absent the Education Code, which dictates the requirements for charter eligibility and details with precision what powers are conferred. The "powers" of an open-enrollment charter school derive from statute; likewise its "authority to operate under the charter" (along with limitations upon that authority); same for its "[s]tatus." All emanate from legislative command. The [l]egislature has tasked the SBOE and the Texas Education Agency with certain day-to-day duties, but the fact that non-legislators have been delegated such tasks does not obscure the all-encompassing legislative regime that called charter schools into existence and that defines their role in our public-education system. The [l]egislature's own pronouncements declare the status and authority of open-enrollment charter schools. Other state entities and officials may exercise a measure of oversight pursuant to those statutory commands, but the commands themselves, and that they are legislative, are what matter most.

Id. at 81–82 (footnotes omitted).

Eckerd's second case is *University of the Incarnate Word v. Redus*. There, the supreme court held that a private university's police department was a "governmental unit" for purposes of law enforcement and could thus bring an interlocutory appeal. *Univ. of the Incarnate Word*, 518 S.W.3d at 911. It was clear to the court that University of the Incarnate Word (UIW) derived its status and authority to commission and employ peace officers and to operate a police department from laws passed by the legislature. *Id.* at 909 (citing Tex. Educ. Code Ann. § 51.212 (authorizing private

universities to operate police departments)). The question, however, was whether UIW was an "institution, agency, or organ of government." *Id.*

In determining whether UIW was an "organ of government," which the court defined as "an entity that operates as part of a larger governmental system," *id.* at 910, the court looked at statutory "indicators of governmental-unit status," such as the Education Code provision that gave UIW "the power to operate a police department like that of any city," *id.* (citing Tex. Educ. Code Ann. § 51.212(b)). The court noted that UIW had to "follow the same state-promulgated rules that its public counterparts follow," such as applying for state approval to create a police department, employing only state-licensed peace officers, and submitting to the same audits as other police departments. *Id.* (citing Tex. Occ. Code Ann. § 1701.301; 37 Tex. Admin. Code §§ 211.16, 211.26, 223.2(c)). Moreover, the court explained, "like state and local law-enforcement agencies, UIW must make certain records available for public review because the UIW police department is a governmental entity under the Public Information Act." *Id.* (citing Tex. Educ. Code Ann. § 51.212(f)). And although the legislature "has not granted private universities immunity from liability generally, as they did charter schools, the [l]egislature has granted limited immunity to private universities when their officers act pursuant to mutual assistance agreements with local police departments." *Id.* (citing Tex. Educ. Code Ann. §§ 51.212(b)(2), .2125).

The court went on to recognize that the governmental-unit-status indicators did not match those present in *LTTS Charter School*:

> Unlike the charter school, UIW lacks public funding, and the [l]egislature does not consider UIW a governmental entity under the Government Code and Local Government Code provisions relating to property held in trust and competitive bidding. Moreover, the [l]egislature's intended role for private universities in public law enforcement is less clear than its express inclusion of open-enrollment charter schools in the public-school system.

Id. (citations omitted).

But even without those governmental-unit-status indicators, the court concluded that UIW was a governmental unit for purposes of law enforcement:

> Nevertheless, the [l]egislature has authorized UIW to enforce state and local law using the same resource municipalities and the State use to enforce law: commissioned peace officers. UIW's officers have the same powers, privileges, and immunities as other peace officers. Because law enforcement is uniquely governmental, the function the [l]egislature has authorized UIW to perform and the way the [l]egislature has authorized UIW to perform it strongly indicate that UIW is a governmental unit as to that function. We accordingly conclude that UIW is a governmental unit for purposes of law enforcement and that UIW is therefore entitled to pursue an interlocutory appeal under section 51.014(a)(8) of the Civil Practice and Remedies Code.

Id. at 911 (citation omitted).

Here, Eckerd asserts that the act of providing child-welfare services is a traditionally governmental function. It argues that because it contracted with the Department to provide child-welfare services to children in the State's care, it is a "governmental unit" under the supreme court's reasoning in *LTTS Charter School* and *University of the Incarnate Word*. We disagree.

Although child-placing agencies like Eckerd cannot operate unless licensed by the Department,[6] are highly regulated and closely monitored by the State,[7] and may receive State funding, Eckerd lacks the governmental-unit-status indicators present in *LTTS Charter School* and *University of the Incarnate Word*. The record shows that Eckerd is a private company that the Department hired as an independent contractor.[8] Eckerd's status and authority to operate on the Department's behalf arise from its contract with the Department, not from the constitution or laws passed by the legislature.[9] Although Eckerd assists the Department in providing child-welfare services to children in the State's care,[10] child-placing agencies are not statutorily classified as part of the State's child-welfare system, and nothing indicates that the

---

[6] *See generally* Tex. Hum. Res. Code Ann. §§ 40.001(3), 42.041(a).

[7] *See generally id.* §§ 42.041–.068; 26 Tex. Admin. Code ch. 745 (Tex. Health & Hum. Servs. Comm'n, Licensing); 26 Tex. Admin. Code ch. 749 (Tex. Health & Hum. Servs. Comm'n, Minimum Standards for Child-Placing Agencies).

[8] The contract Eckerd attached to its plea to the jurisdiction states that the contract was effective on March 2, 2018, and ended on August 31, 2021, but could be renewed, extended, or terminated as the contract provided. We assume without deciding for purposes of this opinion only that the contract is currently still in effect.

[9] The legislature has authorized the Department to "enter into contracts or agreements with any person, including a federal, state, or other public or private agency, as necessary to perform any of the department's powers or duties." Tex. Hum. Res. Code Ann. § 40.058(a).

[10] The contract's stated purpose is for Eckerd to "provide quality care with the focus on safety, permanency, and well-being for children and youth in [the Department's] conservatorship so that they can move into a least restrictive and more permanent, family-like setting."

legislature considers child-placing agencies to be governmental entities or has granted them immunity. Eckerd is a government contractor, not an "institution, agency, or organ of government the status and authority of which are derived from" the Texas Constitution or laws passed by the legislature. Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(D); *see, e.g.*, *City of New Braunfels v. Carowest Land, Ltd.*, 578 S.W.3d 668, 676 (Tex. App.—Austin 2019, no pet.) ("Nor are we persuaded that the existence of statutes authorizing the City to enter into contracts with private entities satisfies section 101.001's requirement that an entity's status and authority be 'derived from the Constitution of Texas or from laws passed by the legislature under the constitution.'"); *Orion Real Est. v. Sarro*, 559 S.W.3d 599, 603 (Tex. App.—San Antonio 2018, no pet.) (holding that private company hired as an independent contractor to manage apartments developed by housing authority was not a governmental unit). Eckerd is thus not a governmental unit entitled to bring an interlocutory appeal under Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(a)(8), 101.001(3).[11]

Conclusion

Because Eckerd is not a governmental unit, *see id.* § 101.001(3), the trial court's order denying Eckerd's plea to the jurisdiction is not an appealable interlocutory

[11]Our decision here is limited to our jurisdiction over this interlocutory appeal; we leave undecided the issue of whether Eckerd is immune from suit. *See Univ. of the Incarnate Word*, 518 S.W.3d at 911; *LTTS Charter Sch.*, 342 S.W.3d at 78 n.44, 82.

order, *see id.* § 51.014(a)(8). We thus lack jurisdiction over this appeal, and we dismiss it for want of jurisdiction. *See* Tex. R. App. P. 42.3(a), 43.2(f).

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: June 16, 2022