
NO. 05-15-01559-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

DAWN NETTLES,

Appellant,

v.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION,

Appellees.

GTECH'S RESPONSE TO
APPELLANT'S POST-SUBMISSION BRIEF

HAYNES AND BOONE, LLP

Nina Cortell
State Bar No. 04844500
2323 Victory Avenue
Suite 700
Dallas, Texas 75219
Telephone: (214) 651-5000
Facsimile: (214) 651-5940
nina.cortell@haynesboone.com

HAYNES AND BOONE, LLP

Kent Rutter
State Bar No. 00797364
1221 McKinney Street
Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600
kent.rutter@haynesboone.com

REED SMITH LLP

Kenneth E. Broughton
State Bar No. 03087250
Michael H. Bernick
State Bar No. 24078227
Arturo Munoz
State Bar No. 24088103
811 Main Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 469-3800
Facsimile: (713) 469-3899
kbroughton@reedsmith.com
mbernick@reedsmith.com
amunoz@reedsmith.com

ARGUMENT

I. The Texas Supreme Court considered and rejected Nettles's statutory immunity argument in *Brown & Gay*.

Nettles argues in her post-submission brief that the Legislature has extended *statutory* immunity to certain transportation entities, but not contractors like GTECH. From there, Nettles leaps to the incorrect conclusion that GTECH does not have *common-law* immunity.

Precisely that same argument was made—essentially verbatim—in a post-submission brief that the plaintiffs filed with the Texas Supreme Court in *Brown & Gay*.¹ The Court rejected it out of hand:

[The plaintiffs] contend that affirmative statutory extensions of immunity to private contractors in some instances demonstrate legislative intent to foreclose such immunity absent a specific legislative grant. For example, the Transportation Code provides that an independent contractor of a regional transportation authority that “performs a function of the authority or [certain other specified entities] is liable for damages only to the extent that the authority or entity would be liable” for performing the function itself. TEX. TRANSP. CODE § 452.056; *see also id.* § 452.0561 (extending the same immunity to independent contractors of certain statutory transportation entities). The [plaintiffs] argue that the absence of similar legislation applicable to

¹ Respondent's Post-Submission Brief, filed Oct. 20, 2014 in *Brown & Gay Engineering, Inc. v. Olivares*, No. 13-0605 (Tex.) (available at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=52b4d3d6-6b2f-46cc-85b1-12a1baaedaa7&coa=cossup&DT=OTHER&MediaID=5a4b5267-9d6e-4ce5-b251-2c5d9aa4a811>).

contractors of local government corporations like the Authority evinces legislative intent to deprive such contractors of immunity. That may be the case, but it does not answer the question before us.

Sovereign immunity is a common-law creation, and “it remains the judiciary’s responsibility to define the boundaries of the . . . doctrine and to determine under what circumstances sovereign immunity exists in the first instance.” *Reata Constr. Corp. [v. City of Dallas]*, 197 S.W.3d [371,] 375 [(Tex. 2006)]. By contrast, as noted above, the Legislature determines when and to what extent to waive that immunity. *Id.* Accordingly, ***the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising their independent discretion in performing government functions.***

Brown & Gay Eng’g, Inc. v. Olivares, 461 S.W.3d 117, 122-23 (Tex. 2015) (emphasis added). Although GTECH quoted from this portion of the *Brown & Gay* opinion in its principal brief (*see* Appellee’s Br. at 24-25), Nettles has continuously ignored it and now advances an argument that is decisively rejected by it.

To answer ***the separate question*** of whether a contractor has ***common-law*** immunity, a court must determine whether the contractor’s actions “were actions of the . . . government” and it “exercised no discretion in its activities.” *Id.* at 124-25 (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994) (internal alterations omitted)). The statutory scheme at issue here supplies the answer. The Texas Government Code mandates that the TLC shall “exercise strict control” over the Texas Lottery and “prescribe the form of tickets.” (*See* Appellee’s Br. at 1-2

(quoting TEX. GOV'T CODE §§ 466.014(a), 466.251(a), 467.101(a).) These statutes dispel the notion that GTECH had control over the form of the “Fun 5’s” tickets or exercised its own discretion. Further, as discussed at oral argument and in the briefing, the record confirms that that is what happened here. Accordingly, the two-part test from *Brown & Gay* is fully met.

II. Public policy supports immunity.

The relevant statutory scheme is also directly tied to the public fisc. As noted at argument, the Texas Government Code requires the Texas Lottery Commission to deposit its revenues into the State treasury and those revenues are to be used primarily to fund education. TEX. GOV'T CODE §§ 466.351, 466.355.² *See* Appellee’s Br. at 18-21. This statutory scheme has been very successful, providing billions of dollars to educating Texas school children.

Without doubt, permitting fraud challenges to the State’s sale of lottery tickets will have a devastating impact on this successful funding mechanism. The Texas Lottery’s “success depends on maintaining the public trust.” (CR152.) Fraud claims, if allowed, will necessarily erode the public trust, depressing ticket

² “The Legislature determines public policy through the statutes it passes.” *Fairfield Ins. Co. v. Stephens Martin Paving*, 246 S.W.3d 653, 665 (Tex. 2008); *see also id.* at 655 (“the State’s public policy is reflected in its statutes”).

sales and the revenue stream they produce. One need not quantify the precise dollar effect to conclude that derivative immunity protects the public fisc.

Further, as noted at argument and in the briefing, there is the threshold question of what role, if any, is played here by the public fisc discussion in *Brown & Gay*. See, e.g., Appellee’s Br. 18-21 (“Consistent with [a] non-fiscal rationale for immunity, the *Brown & Gay* court was clear that it was *not* eliminating immunity for contractors whose actions were ‘actions of the . . . government’ and that ‘exercised no discretion.’”). The present case is also distinguishable in important ways. First, as discussed above, the statutory context is different. Second, the broad issue presented in *Brown & Gay* (whether anyone with a government contract is entitled to derivative immunity) is very different from the narrow proposition here (whether a contractor acting “as the government” is entitled to derivative immunity)—bringing into question whether a public fisc limiting principle applies. Third, there is no ability to use insurance to manage risk posed by fraud claims, as insurance will not cover intentional torts. And, finally, while *Brown & Gay* expressed a policy concern that immunity “places the burden . . . on injured individuals,” here there is no public policy that favors providing litigation remedies to dissatisfied purchasers of Texas Lottery tickets. (See Appellee’s Br. at 23-24.) In fact, just the opposite is true. (See *id.*)

For all of these reasons, there is no public policy impediment to immunity.

Nettles concludes her filing with a request that this Court defer to the Legislature for “fact-finding and balancing of competing policy concerns.” But the Legislature has provided all the guidance that is needed. The Texas Lottery Commission is to “exercise strict control” over the Texas Lottery and “prescribe the form of tickets.” When, as here, the contractor merely implements the government’s ticket instructions, derivative immunity exists under *Brown & Gay*.

Respectfully submitted,

HAYNES AND BOONE, LLP

/s/ Nina Cortell

Nina Cortell
State Bar No.04844500
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Telephone: (214) 651-5000
Facsimile: (214) 651-5940
nina.cortell@haynesboone.com

Kent Rutter
State Bar No. 00797364
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600
kent.rutter@haynesboone.com

Kenneth E. Broughton
State Bar No. 03087250
Michael H. Bernick
State Bar No. 24078227
Arturo Munoz
State Bar No. 24088103
REED SMITH LLC
811 Main Street, Suite 1700
Houston, Texas 77002
Telephone: (713) 469-3800
Facsimile: (713) 469-3899
kbroughton@reedsmith.com
mbernick@reedsmith.com
amunoz@reedsmith.com

**ATTORNEYS FOR APPELLEE,
GTECH CORPORATION**

CERTIFICATE OF COMPLIANCE
TEX. R. APP. P. 9.4(i)(3)

I hereby certify that this Brief of Appellee contains a total of 1,030 words, excluding the parts of the brief exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2010. This Brief of Appellee is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Dated: January 25, 2017.

/s/ Kent Rutter

Kent Rutter

*Counsel for Appellee,
GTECH Corporation*

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this *Brief of Appellee* was served on the following counsel of record via e-service on this 25th day of January, 2017:

Counsel for Appellants:

Peter M. Kelly
KELLY, DURHAM & PITTARD, L.L.P.
1005 Heights Boulevard
Houston, Texas 77008
pkelly@texasappeals.com

Richard L. LaGarde
Mary Ellis LaGarde
LAGARDE LAW FIRM, P.C.
3000 Wesleyan, Suite 380
Houston, Texas 77027
richard@lagardelaw.com
mary@lagardelaw.com

Manfred Sternberg
MANFRED STERNBERG & ASSOCIATES
4550 Post Oak Place Dr., Suite 119
Houston, Texas 77027
manfred@msternberg.com

Counsel for Appellee Texas Lottery Commission:

Ryan S. Mindell
Assistant Attorney General
Financial Litigation and Charitable Trusts Division
P.O. Box 12548
Austin, Texas 78711-2548
ryan.mindell@texasattorneygeneral.gov

/s/ Kent Rutter

Kent Rutter

16116312