

No. 05-15-01559-CV

In the Fifth Court of Appeals
Dallas, Texas

DAWN NETTLES,
Appellant,

v.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION,
Appellees.

On Appeal from the 160th District Court
Dallas County, Texas
Trial Court Cause No. DC-14-14838

APPELLANT'S POST-SUBMISSION BRIEF

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TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellant Dawn Nettles, files this post-submission brief to briefly address matters raised during oral argument.

I. Extending governmental immunity to private contractors such as GTECH contravenes the public policy of the State of Texas.

At oral argument, GTECH emphasized that the Texas Legislature has enacted a “comprehensive” statutory scheme governing the Texas Lottery Commission and its private contractors. The Legislature can modify sovereign immunity by limiting it, as it has by the Texas Tort Claims act, or extending it, for instance by granting some immunity to private entities that contract with the government. The Legislature has done the latter for two different classes of private contractors. That The Legislature’s comprehensive statutory scheme does not extend immunity to GTECH (or any other private entity with whom the Texas Lottery Commission might contract) is dispositive here.

A. The Legislature has extended governmental or sovereign immunity to private companies that contract with government entities in only two limited instances.

Research has revealed two instances in which the Texas Legislature has expanded governmental or sovereign immunity to include private contractors. Curiously, both of those instances involve private contractors engaged in transportation projects.

In the Texas Transportation Code, a limited governmental immunity is extended to private corporations engaged by public transportation authorities. *See* TEX. TRANSP. CODE §§ 452.056, 452.0561. The Legislature also extended limited sovereign immunity to private corporations constructing or repairing roads on behalf of the Texas Department of Transportation. *See* TEX. CIV. PRAC & REM CODE § 97.002.

The Legislature could have enacted a similar provision to extend immunity to contractors of the Texas Lottery Commission, but has not elected to do so.

B. The Legislature’s expansion of immunity in those two instances demonstrates that governmental or sovereign immunity does not extend to private contractors as a matter of course.

Immunity for private corporations that contract with the government is not a feature of the Texas legal landscape. *See, e.g., Strakos v. Gehring*, 360, S.W.2d 787 (1962) (injured motorist sued general contractor of an Harris County highway construction project; nary a mention of sovereign or governmental immunity). Were private contractors in the employ of governmental units already immune from liability, there would have been no need for the Legislature to extend immunity to certain classes of them. Those statutes would be “useless acts.”

“[T]he legislature is never presumed to do a useless act.” *Hunter v. Fort Worth Cap. Corp.*, 620 S.W.2d 547, 551 (Tex. 1981); *see also Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 569 n.17 (Tex. 2014) (court “cannot ‘lightly presume that the

Legislature may have done [such] a useless act”’) (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998)). A statute is presumed to have been enacted by the Legislature with complete knowledge of the existing law and with reference to it. *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139 (Tex. 2013). Thus, the Court here must presume that the Legislature here has complete knowledge of the common-law doctrine of sovereign immunity, including its outer limits. This Court further presumes that when the Legislature acts, it acts intentionally, and that the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); see *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985).

GTECH asks this Court to declare CPRC § 97.002 and Transportation Code §§ 452.056 and 452.0561 to be “useless acts.” This Court should not abandon the Texas judiciary’s long-held deference to the legislative function to fabricate a new rule absolving the government’s private contractors of liability for their torts.

C. The Legislature’s silence with respect to GTECH or other of the Texas Lottery Commission’s private contractors demonstrates that the Legislature did not intend to extend immunity to them.

When the Legislature expresses its intent regarding a subject in one setting, but, as here, remains silent on that subject in another, a court abides by the rule that

such silence is intentional.¹ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497, 497 n.4 (Tex. 2013) (citing *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 175 (Tex. 2013); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859 (Tex. 2002); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000)). Accordingly, this Court “must give effect to the statute’s silence on this issue and the Legislature’s decision not to confer” immunity to contractors such as GTECH. See *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139 (Tex. 2013); *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) (“While this court may properly write in areas traditionally reserved to the judicial branch of government, it would be a usurpation of our powers to add language to a law where the [L]egislature has refrained.”); *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920) (“[Courts] are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law.”).

The Legislature saw fit to extend immunity to two limited classes of private contractors. The Legislature has apparently made the policy determination that extension of immunity to the Texas Lottery Commission’s private contractors does

¹In *Adcock*, the court says it will “generally” abide by the rule, but research has revealed no instance in which it has not done so.

not advance Texas public policy. The courts should not interfere with the legislative balancing of policy interests.

E. Public policy considerations do not support the extension of immunity to private contractors in the employ of the government.

The most common reason given to consider extending governmental immunity to private contractors is that such an act will improve the public fisc. GTECH can point to no study, quantification, or other determination of this supposed benefit. GTECH has nothing in the record to substantiate that point, and the most it can offer is conjecture.

In Texas, the extension of immunity proposed by GTECH may only come after careful legislative fact-finding and balancing of competing policy concerns. The record here is devoid of any information that would assist the Court in making such a determination on its own, so the wisest and safest, and least judicially active, course is to let the Legislature do what legislatures are supposed to do.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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This brief complies with the typeface requirements of TRAP 9 because:

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/s/ Peter M. Kelly

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A true and correct copy of this *Appellant's Post-Submission Brief* has been forwarded to all counsel of record on January 18, 2017, as follows:

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