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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 BRIEF

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TABLE OF CONTENTS

Identity of Parties and Counsel. ii

Table of Contents. v

Index of Authorities.. vii

Statement of the Case. ix

Statement Regarding Oral Argument. x

Issues Presented.. xi

Statement of Facts. 1

Summary of Argument. 9

Argument and Authority. 10

I. Standard and scope of review--*de novo*.. 10

II. The doctrine of sovereign immunity should not be extended to protect GTECH, an arm's length independent contractor.. 13

A. Extending sovereign immunity to GTECH does not further the doctrine's rationale and purpose of protecting the public fisc. (Issue No. 1(a)). 16

1. GTECH's agreement to hold the TLC harmless from liability for GTECH's negligence insulates the public fisc from any unforeseen expenditures.. 17

2. The Contract for Instant Ticket Manufacturing and Services also obligates GTECH to defend the TLC and to assume the

TLC's liability for claims of the type raised in this lawsuit... 19

3. Nettles's claims are covered by the hold harmless agreements.. 20

B. GTECH is an independent contractor of TLC, and is contractually charged with exercising its independent discretion (Issue No. 1(b)). 21

1. GTECH specifically and expressly agreed that it is an independent contractor of TLC.. 21

2. Because GTECH exercised "independent discretion," it is not entitled to derivative sovereign immunity... 22

3. That GTECH's working papers were subject to approval by the TLC does not give GTECH immunity from suit.. 23

Conclusion and Prayer.. 24

Certificate of Compliance. 27

Certificate of Service. 28

Appendix
Order granting GTECH's plea to the jurisdiction, CR490. . . . . Tab 1

INDEX OF AUTHORITIES

Cases **Page**

Bland Indep. Sch. Dist. v. Blue,
34 S.W.3d 547 (Tex. 2000). 10

Brown & Gay Eng'g, Inc. v. Olivares,
461 S.W.3d 117 (Tex. 2015). . . . . x, 9-10, 13-16, 21-23

Butters v. Vance Int'l, Inc.,
225 F.3d 462 (4th Cir. 2000). 13

City of Keller v. Wilson,
168 S.W.3d 802 (Tex. 2005). 12

City of Waco v. Kirwan,
298 S.W.3d 618 (Tex. 2009). 11

Dresser Indus. v. Page Petroleum,
853 S.W.2d 505 (Tex. 1993). 17

Hosner v. DeYoung,
1 Tex. 764 (1847). 13

K.D.F. v. Rex,
878 S.W.2d 589 (Tex. 1994). 14

Reata Constr. Corp. v. City of Dallas,
197 S.W.3d 371 (Tex. 2006). 13

Tex. Adjutant General's Office v. Ngakoue,
408 S.W.3d 350 (Tex. 2013). 14

Tex. Ass'n of Bus. v. Tex. Air Control Bd.,
852 S.W.2d 440 (Tex. 1993). 11

Tex. Dep't of Parks & Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004). 11-12

Tex. Dep't of Transp. v. Jones,
8 S.W.3d 636 (Tex. 1999). 10

Tex. Natural Res. Conservation Comm'n v. IT–Davy,
74 S.W.3d 849 (Tex. 2002). 11

Tooke v. City of Mexia,
197 S.W.3d 325 (Tex. 2006). 13

Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.,
819 S.W.2d 801 (Tex. 1991). 12

Univ. of N. Tex. v. Harvey,
124 S.W.3d 216 (Tex. App.--Fort Worth 2003, pet. denied). 11

Yearsley v. W. A. Ross Constr. Co.,
309 U.S. 18, 60 S. Ct. 413, 84 L. Ed. 554 (1940). 13

STATEMENT OF THE CASE

Nature of the Case:	This is an action for fraud against the private contractor operator of the Texas lottery, brought by a purchaser of a winning ticket that was subsequently ruled invalid. CR 416-45 (petition).
Trial Court:	The Honorable Jim Jordan, presiding in the 160th Judicial District Court, Dallas County, Texas.
Course of Proceedings:	Defendant GTECH filed an amended plea to the jurisdiction, asserting derivative sovereign immunity, on October 16, 2015. CR 107-11.
Trial Court Disposition:	The trial court granted Defendant GTECH's plea to the jurisdiction on December 4, 2015. App. Tab 1, CR 490. The plea to the jurisdiction made by the other defendant, the Texas Lottery Commission, had been granted on November 17, 2015. CR 317.
Parties in this Appeal:	Appellant underlying plaintiff Dawn Nettles. Appellee is underlying defendant GTECH Corporation.

Statement Regarding Oral Argument

Oral argument will assist the court in applying the precedent established by the recent Texas Supreme Case *of Brown & Gay Engineering v. Olivares*, 461 S.W.3d 117 (Tex. 2015) to the particular facts of this case.

ISSUES PRESENTED

Issue No. 1:

The trial court erred by granting GTECH's plea to the jurisdiction.

Issue No. 1(a):

According to the Texas Supreme Court, the protections of sovereign immunity should only be extended to private entities that contract with the government if a finding of liability would expose the government to unforeseen expenditures. In the absence of even the possibility of unforeseen expenditures in this case, sovereign immunity should not be extended to GTECH.

Issue No. 1(b):

According to the Texas Supreme Court, the protections of sovereign immunity should only be extended to private entities that contract with the government in instances where the private party has not exercised its independent discretion. Here, GTECH was specifically required to exercise its independent discretion with respect to the design of the games, so it is not entitled to sovereign immunity.

STATEMENT OF FACTS

GTECH, which is also known by its assumed trade name of "IGT," is the U.S. subsidiary of an Italian gaming company that operates lotteries, sports betting, and commercial bookmaking throughout the world. GTECH has the exclusive contract to operate the Texas state lottery through the year 2020. CR 418.

GTECH's fee is 2.21 % of sales. The Texas Lottery generates sales in excess of $4.3 billion annually. GTECH receives approximately $100 million per year from the TLC under its contract. *Id.*

TLC contracts with GTECH to design and implement certain lottery games.

On December 10, 2014, GTECH and the TLC renewed their longstanding contractual arrangement by executing a "Contract for Lottery Operations and Services" ("Operations Contract"). CR 119. The Operations Contract gives GTECH the exclusive right to operate the Texas Lottery through the year 2020. The Operations Contract is a matter of public record and can be accessed on the TLC's website.

Paragraph 3.8 of GTECH's Operations Contract describes the arm's length relationship of the parties as follows:

> GTECH and the Texas Lottery agree and understand that GTECH shall render the goods, services and requirements under this Contract as an independent contractor, and nothing contained in the Contract will be construed to create or imply a joint venture, partnership,

> employer/employee relationship, principal-agent relationship or any other relationship between the parties.

CR 124.

GTECH develops and offers to TLC the "Fun 5s" game.

In March of 2013, GTECH made a presentation to the TLC and provided examples of GTECH scratch-off games available for sale to the TLC. CR 425. One of those games was known as the "Fun 5s" game. GTECH had previously operated the Fun 5s game in Nebraska, Indiana, Kansas, and Western Australia with much financial success. CR 425, 362-63.

The TLC selected GTECH's Fun 5s game as one of the scratch-off games it intended to purchase from GTECH for use during fiscal year 2014. CR 425. It was GTECH's responsibility to prepare the first draft of the working papers for the Fun 5s game. CR 425-26, 360. GTECH's customer service representative, Penny Whyte, prepared the initial draft of the working papers for the Fun 5s game. CR 425-26, 366-67. The TLC had no involvement in putting together the initial draft working papers. CR 425-26, 386. The initial draft working papers were sent to the TLC only after GTECH had done an internal review of the artwork, instructions, and parameters for the game. CR 425-26, 376-77.

On April 16, 2014, GTECH sent the draft "working papers" for approval by the TLC. CR 425-26. The draft working papers closely mirrored the game parameters,

artwork, and instructions used by GTECH for its Fun 5s game in Nebraska. CR 425-26, 364. The game instructions found in GTECH's initial draft working papers were identical to those chosen by GTECH when it first submitted the artwork for the Fun 5s game to the TLC except GTECH changed the word "get" to "reveal." CR 425-26, 387-89.

GTECH's draft working papers proposed a Fun 5s game ticket consisting of five games. For Game 5, GTECH proposed a tic-tac-toe style of game with the following printed instructions:

CR 425-26, 364.

According to the testimony of Gary Grief, Executive Director of the TLC, the TLC relies on GTECH for the language that goes on the tickets because GTECH has

the experience in the industry and GTECH runs games in states other than Texas. CR 427, 397. Grief expected GTECH to exercise reasonable care to propose language for the Fun 5s tickets that was not misleading. CR 427, 398.

On April 30, 2014, the TLC requested that GTECH change the "Dollar Bill" symbol to a "5" symbol and change the "5" symbol to a Money Bag symbol. CR 428, 365. On May 12, the TLC requested that GTECH change the parameters of Game 5 to provide that the winning Money Bag symbol in the 5X Box would be printed on both winning tickets and non-winning tickets. The stated reason for the requested change was a fear that the 5X Box would be an easy target for "micro-scratching" since only the 5X box would need to be scratched to tell if a ticket was a "winning" ticket. CR 428, 366-67.

GTECH changed the game's parameters and programmed its computers so that a significant percentage of the tickets that had not won the tic-tac-toe game would nonetheless reveal a Money Bag symbol in the 5X Box. CR 429, 368. It is not unusual for the TLC to ask GTECH to make a change in a game's parameters. However, if a change in the parameters is requested, it is GTECH's duty to review the instructions to ensure there is no need for a change in the instructions to make them clear and unambiguous. CR 430, 381-82.

According to the testimony of GTECH's client services representative, Penny Whyte, if the TLC requests that a change be made to the working papers, GTECH's

client service representative will look at the requested change and will decide from there whether to make the requested change. It was the responsibility of employees of GTECH's printing division to check the parameters of the game in the working papers, to compare the language on the tickets to make sure it was not misleading or deceptive, and to make sure the final executed working papers were free of errors. CR 427, 370-71. It is GTECH's expectation that when it sends proposed working papers to the lottery, the instructions for the game will be clear and not misleading. CR 427, 402.

It was the responsibility of GTECH's client services representative and its software department to conduct a comprehensive review of the game's instructions to make sure that the change in parameters requested by the TLC did not require a change in the language of the game's instructions. CR 429-30, 403. GTECH's customer service representative and its software department had the knowledge and expertise necessary to ensure that the language was clear, unambiguous, and not misleading. CR 427, 402.

According to the testimony of the TLC's Products and Drawings Manager, Robert Tirloni, it should be the goal of the personnel at GTECH to review the working papers and to make sure the instructions are clear. CR 427, 415.

The TLC's Instant Product Coordinator, Dale Bowersock, testified that it is important for instructions on scratch-off games to be clear and not misleading. CR

427-28, 391. **It is part of GTECH's job to point out concerns about the game to the TLC.** CR 427-28, 391. The TLC expects GTECH to have the responsibility to make sure the instructions in their games are not misleading. The TLC expects GTECH to propose wording that is clear and does not misrepresent the chances to win a game. CR 427-28, 390. The TLC expected GTECH to exercise reasonable care to make sure that the instructions on the Fun 5s game were clear and unambiguous. CR 429, 412-13. The TLC does not expect GTECH to deliver games that are misleading. CR 429, 413-14.

In the Texas game, the Money Bag symbol would thereafter appear on both winning and non-winning tickets, rather than just the winning tickets as originally designed. It was therefore incumbent upon GTECH's client service representative and its software department to change the wording of the instructions to make it clear to consumers that they would win 5 times the amount in the PRIZE Box only if the ticket revealed both a Money Bag symbol in the 5X Box and also revealed three five symbols in any one row, column, or diagonal in the tic-tac-toe game. CR 429, 408-09.

GTECH's client service representatives, Laura Thurston and Penelope Whyte, both reviewed the language of the instructions after the change in parameters was requested by the TLC. CR 430, 378-80, 404-05. Both of the GTECH employees made the decision that GTECH would not change the wording of the instructions to

make them less misleading or deceptive. *Id.* Although the TLC was required to sign off on the final working papers, the TLC was relying on GTECH and its unparalleled industry expertise; GTECH had designed and operated scratch-off games for many years. CR 430, 381-82. Further, Thurston admits that it would have been reasonable for the TLC to have relied upon GTECH to notify the TLC if a change in the instructions was needed. CR 430, 383.

GTECH had a contractual duty to ensure that the final executed working papers it submitted to the TLC were complete and free of any errors. CR 430, 369. In the final executed working papers GTECH presented to the TLC, GTECH decided to use substantially the same language it had proposed in the original draft working papers. CR 430-31. The wording GTECH proposed for the final executed working papers stated as follows:

> Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag symbol in the 5X BOX, win 5 times that PRIZE.

Id.

The Fun 5s game becomes fun no longer.

Dawn Nettles is one of approximately 1,000 Texas consumers who have filed suit against GTECH, the private operator of the Texas lottery. The dispute surrounds the language developed by GTECH and printed by GTECH on 16.5 million tickets

it sold to the Texas Lottery. Specifically, GTECH developed and printed the following language on the Fun 5s scratch-off tickets:

> Reveal three "5" symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag symbol in the 5X BOX, win 5 times that PRIZE.

GTECH programmed its computers to validate the Fun 5's tickets as winners of five times the PRIZE in the PRIZE box only if the tickets revealed both a Money Bag symbol and also three "5" symbols in any one row, column, or diagonal. These instructions clearly indicate that a player can win the 5X prize by uncovering *only* the Money Bag symbol. The instructions should have indicated that the 5X prize is won only if the Money Bag symbol appears *in addition to* the three "5" symbols in any one row, column, or diagonal.

Sales of the Fun 5s tickets began on September 2, 2014. On that same day the TLC began to get calls on its consumer hotline from players who believed they had automatically won because their tickets revealed a Money Bag symbol. On September 3rd, 83 players called the TLC to complain that the wording was "misleading." Hundreds more called in the following days.

Legal proceedings ensue.

Nettles filed suit against GTECH and the TLC on December 23, 2014. Each of the defendants filed a plea to the jurisdiction, and the trial court granted them both by separate orders. CR 317 (TLC), 490 (GTECH). Nettles has appealed the dismissal

of the suit, but will file an unopposed motion dismissing the TLC from the appeal and thus the entire case.

Separately, hundreds of individuals have filed a mass action against GTECH in Travis County. *See* Cause No. D-1-GN-14-005114, in the 201st District Court of Travis County. In that case, the district court *denied* GTECH's plea to the jurisdiction. GTECH has sought review of that decision by a permissive appeal. *See GTECH Corp. v. Steele, et al.*, Cause No. 03-16-00172-CV, in the Third Court of Appeals, Austin, Texas.

SUMMARY OF ARGUMENT

GTECH, a private contractor, argued to the court below that it is immune from suit under the doctrine of "derivative sovereign immunity," which Texas law does not recognize under these facts. In both its Lottery Operations Contract and its Instant Ticket Manufacturing Contract with the TLC, GTECH agreed that it would act as an "independent contractor" and not as an "employee" or "agent" of the TLC. The Texas Supreme Court has made it clear that "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015).

The Court's analysis in *Brown & Gay* starts with an examination of the record to determine if the independent contractor presented any evidence to justify an expansion of the doctrine of sovereign immunity to protect the contractor. Here, as

in *Brown & Gay*, the record does not support such an expansion--there is nothing to suggest that holding GTECH liable for its negligent or fraudulent acts[1] will pose any threat to the public fisc.

The *Brown & Gay* court went on to examine whether the independent contractor exercised sufficient independent discretion to be held independently liable for its own actions. Here, Nettles's allegations and the deposition testimony make clear that GTECH exercised independent discretion when it formulated the misleading and deceptive language used in the instructions for the Fun 5s scratch-off tickets. GTECH is thus not immune from suit under the doctrine of "derivative immunity."

ARGUMENT AND AUTHORITY

I. Standard and scope of review--*de novo*.

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id.*; *see Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter

[1] Nettles notes that the question before this court is not whether GTECH is liable, but whether Nettles will even have the opportunity to proceed with her case.

jurisdiction are questions of law that are reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)*; Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 220 (Tex. App.--Fort Worth 2003, pet. denied). The court construes the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Miranda*, 133 S.W.3d at 226, 228. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend its pleadings. *Id.* at 226–27.

Where the plea to the jurisdiction challenges the existence of jurisdictional facts, the reviewing court considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even when the evidence implicates the merits of the cause of action. *Id.* at 227; *Blue*, 34 S.W.3d at 555; *see City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). A review of a plea to the jurisdiction challenging the existence of jurisdictional facts mirrors that of a traditional motion for summary judgment. *Miranda*, 133 S.W.3d at 228. The defendant is required to meet the summary judgment standard of proof for its

assertion that the trial court lacks jurisdiction. *Id.* Once the defendant meets its burden, the plaintiff is then required to show that there is a disputed material fact regarding the jurisdictional issue. *Id.* If the evidence creates a fact question regarding jurisdiction, the trial court must deny the plea to the jurisdiction and leave its resolution to the fact finder. *Id.* at 227–28. But, if the evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. In considering this evidence, the reviewing court must "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.*

The reviewing court considers circumstantial evidence, but if the party's position is supported "only by meager circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists." *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005). The court applies the equal inference rule: "'[w]hen the circumstances are equally consistent with either of two facts, neither fact may be inferred.'" *Id.* (*quoting Tubelite, a Div. of Indal, Inc. v. Risica & Sons, Inc.*, 819 S.W.2d 801, 805 (Tex. 1991)).

II. The doctrine of sovereign immunity should not be extended to protect GTECH, an arm's length independent contractor.

The doctrine of sovereign immunity provides that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Tooke v. City of Mexia*, 197 S.W.3d 325, 331 (Tex. 2006) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). It is a common-law doctrine developed by the courts without any legislative or constitutional enactment. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). The judiciary bears the responsibility to defining the boundaries of the doctrine and to determine under what circumstances sovereign immunity exists or may be extended. *Brown & Gay*, 461 S.W.3d at 122-23. By contrast, the Legislature determines when and to what extent to waive sovereign immunity if the courts find that immunity exists. *Id.* at 122. Accordingly, the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, a particular entity is afforded the protections of sovereign immunity. *Id.*

Contractors and agents acting within the specific scope of their "employment" for the government generally have derivative sovereign immunity. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20-21, 60 S. Ct. 413, 84 L. Ed. 554 (1940) (noting that "there is no liability on the part of the contractor for executing [the] will [of Congress]").

However, the Texas Supreme Court has held that a government contractor "is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity]." *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994). Under Texas law, then, "private parties exercising independent discretion **are not entitled** to sovereign immunity." *Brown & Gay,* 461 S.W.3d at 124 (emphasis added) (*citing K.D.F.*, 878 S.W.2d at 597).

In *Brown & Gay*, the plaintiff claimed that a government contractor, negligently designed and constructed a roadway, thereby causing a fatal accident. *Id.* at 121. Brown & Gay argued that it was entitled to derivative immunity as an "employee" of the Fort Bend County Toll Road Authority, the governmental entity that issued the contract. *Id.* at 120 (citing *Tex. Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350, 356 (Tex. 2013) (explaining that a suit against a government official acting in an official capacity is "merely another way of pleading an action against the entity of which the official is an agent")). The trial court agreed with Brown & Gay and dismissed the case, but the Fourteenth Court of Appeals reversed, holding that Brown & Gay was not entitled to immunity because it was an independent contractor, rather than an employee, of the Authority. *Id.* The Texas Supreme Court affirmed the court of appeals' decision. *Id.*

In its opinion, the Supreme Court first reviewed federal case law establishing that derivate immunity is extended to private contractors "only in limited circumstances." The Court noted that in each of the cases examined, "the complained-of conduct for which the contractor was immune was effectively attributed to the government. That is, the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government through the contractor." *Id.* at 125. In *Brown & Gay*, on the other hand, the plaintiffs did not complain of harm caused by Brown & Gay's "implementing the Authority's specifications or following any specific government directions or orders," nor did they complain about the decision to build the roadway at issue or "the mere fact of its existence." *Id.* Instead, the plaintiffs argued that Brown & Gay was "independently negligent in designing the signs and traffic layouts" for the roadway. *Id.* Thus, the Texas Supreme Court rejected Brown & Gay's "contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself." *Id.* at 127.

A. Extending sovereign immunity to GTECH does not further the doctrine's rationale and purpose of protecting the public fisc. (Issue No. 1(a)).

The *Brown & Gay* court held that the policy rationales underlying the doctrine of sovereign immunity would not be advanced by affording immunity to private contractors. The Court explained that sovereign immunity is "designed to guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes," but "[i]mmunizing a private contractor in no way furthers this rationale." *Id*. at 123 (Tex. 2015). The Court explained:

> [e]ven if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price. This allows the government to plan spending on the project with reasonable accuracy.

Id.

Here, GTECH provided the trial court with no evidence at all tending to show how holding GTECH liable might deleteriously affect the public fisc--just like Brown & Gay failed to adduce such evidence when it had the chance. *See Brown & Gay*, 461 S.W.3d at 123 ("As an initial matter, we note that Brown & Gay cites no evidence to support its proposed justification . . . ."). Further, as discussed below, the contracts between the TLC and GTECH specifically insulate the TLC from any financial liability for GTECH's actions. The doctrine of sovereign immunity can be

extended to protect private contractors when there is a threat to the public fisc; in the absence of such a threat, there is no reason to extend it. The record here suggests no public policy reason to extend sovereign immunity to GTECH.

1. GTECH's agreement to hold the TLC harmless from liability for GTECH's negligence insulates the public fisc from any unforeseen expenditures.

The Supreme Court has defined a "hold harmless" agreement as "[a] contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility. . . . [An] agreement or contract in which one party agrees to hold the other without responsibility for damage or other liability arising out of the transaction involved." *Dresser Indus. v. Page Petroleum*, 853 S.W.2d 505, 507-508 (Tex. 1993).

The undisputed evidence shows that GTECH entered into two contracts with the TLC, both of which require GTECH to "indemnify, defend, and hold the Texas Lottery . . .harmless" from claims of the type alleged by Nettles. GTECH was aware, before it signed the contracts, that it was agreeing to assume the TLC's liability for any claims that might arise, in whole or in part, because of something GTECH did or failed to do. GTECH had two lawyers review the contracts before they were executed and GTECH's account development manager for Texas testified that GTECH stands by its contractual obligation.

The relationship between GTECH and the TLC is governed in part by the Operations Contract. Section 3.33 of the Operations Contract provides, in relevant part, as follows:

> 3.33.1 GTECH shall indemnify, defend and hold the Texas Lottery . . . harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works . . . which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of GTECH . . . whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not . . . .

CR 261.

The other contract that governed the relationship between the TLC and GTECH is the "Request for Proposals for Lottery Operations and Services" ("Request for Proposals") which was issued by the Texas Lottery Commission on January 4, 2010. The Request for Proposals was incorporated into and made a part of the Operations Contract as an exhibit to that agreement. At page VI of the Request for Proposals, the term "Works" was defined as follows:

> Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer . . . at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to . . . lottery games . . . ."

CR 266-67.

Read together (as the parties agreed to do), those documents provide that GTECH will hold the TLC harmless from any claim occasioned by GTECH's design of the Fun 5s game. GTECH has presented no evidence suggesting that the hold harmless clause will not actually hold the TLC harmless. The public fisc is thus insulated from harm by GTECH's express agreement.

2. The Contract for Instant Ticket Manufacturing and Services also obligates GTECH to defend the TLC and to assume the TLC's liability for claims of the type raised in this lawsuit.

In addition, GTECH is the successor in interest to the rights and obligations of GTECH Printing Corporation in the Instant Ticket Contract. That contract incorporates by reference the provisions of the "Request for Proposals for Instant Ticket Manufacturing and Services" ("Instant Ticket RFP") issued by the Texas Lottery Commission on November 7, 2011. The Instant Ticket RFP provides, in language similar to the Operations Contract, as follows:

> 3.32.1 The Successful Proposer shall indemnify, defend and hold the Texas Lottery . . . harmless from and against any and all claims, demands, causes of action, liabilities, lawsuits, losses, damages, costs, expenses or attorneys' fees (collectively, "Claim"), and including any liability of any nature or kind arising out of a Claim for or on account of the Works . . . which may be incurred, suffered, or required in whole or in part by an actual or alleged act or omission of the Successful Proposer . . . , whether the Claim is based on negligence, strict liability, intellectual property infringement or any other culpable conduct, whether frivolous or not.

CR 211.

The term “Works” is defined at Page V of the Instant Ticket RFP as follows:

> Any tangible or intangible items or things that have been or will be prepared, created, maintained, serviced or developed by a Successful Proposer . . . at any time following the effective date of the Contract, for or on behalf of TLC under the Contract, including but not limited to . . . lottery games, . . . game designs, . . . instructions . . . .

CR 209.

Thus the Instant Ticket Contract and the related RFP insulate the public fisc, too.

3. Nettles’s claims are covered by the hold harmless agreements.

Nettles’ Third Amended Petition (which was the live pleading at the time GTECH’s plea to the jurisdiction was submitted) clearly alleges that her damages were caused in whole or in part by an actual or alleged act or omission of GTECH. Her allegations clearly fall within the scope of the contractual language that triggers GTECH’s obligation to defend and hold harmless the TLC. By preparing an developing the parameters of the Fun 5s game, and then, most significantly failing to adjust the parameters to account for the anti-fraud measure requested by the TLC, GTECH performed “work” as defined by the contracts. That “work” is covered by the indemnity and hold-harmless clauses.

B. GTECH is an independent contractor of TLC, and is contractually charged with exercising its independent discretion. (Issue No. 1(b)).

Once the TLC requested a change in the game's parameters, it was the responsibility of GTECH's customer service representatives and its software department to examine the wording of the game's instructions to ensure that the requested change in parameters did not make the existing instructions misleading and deceptive. In the exercise of reasonable care, GTECH's personnel should have notified the TLC if a requested change in the parameters of the game would cause problems with the game. Both of GTECH's customer service representatives testified that they did examine the existing wording of the instructions and that it was they who decided to keep the old wording despite the change in the game's parameters.

The TLC relied upon GTECH to use its experience and expertise to choose wording that would not be misleading and deceptive. This faulty exercise of "independent discretion" on the part of GTECH is the reason misleading and deceptive language was printed on the Fun 5s tickets. Because GTECH exercised "independent discretion," it is not entitled to immunity.

1. GTECH specifically and expressly agreed that it is an independent contractor of TLC.

In *Brown & Gay*, the Court found that the private contractor was not entitled to "derivative immunity" because it was an independent contractor, not an employee or agent of the governmental entity. *Brown & Gay*, 461 S.W.3d at 123-26. Similarly,

in this case GTECH's contracts with the TLC expressly provide that GTECH is to act as an independent contractor and not as an employee or agent of the TLC.

As discussed above, the Operations Contract gives GTECH the exclusive right to operate the Texas Lottery through the year 2020. Paragraph 3.8 of GTECH's Operations Contract describes the relationship of the parties as follows:

> GTECH and the Texas Lottery agree and understand that GTECH shall render the goods, services and requirements under this Contract as an independent contractor, and nothing contained in the Contract will be construed to create or imply a joint venture, partnership, employer/employee relationship, principal-agent relationship or any other relationship between the parties.

CR 124.

GTECH is thus not an employee or agent of the TLC. It is an independent contractor. Therefore, it is not entitled to assert "derivative immunity" as an "employee" or "agent" of the TLC.

2. Because GTECH exercised "independent discretion," it is not entitled to derivative sovereign immunity.

The Supreme Court has made it clear that "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay*, 461 S.W.3d at 124. The allegations in Nettles' Third Amended Petition as well as the jurisdictional evidence make it clear that GTECH exercised "independent discretion" when it formulated the language printed on the Fun 5s tickets.

The Statement of Facts above sets out in detail GTECH's role in the development and modification of the Fun 5s game. Under the contractual language and according to the witnesses' testimony, GTECH bore the responsibility to conduct a comprehensive review of the game's instructions to make sure that the change in parameters requested by the TLC did not require a change in the language of the game's instructions. Because GTECH, and not TLC, had the knowledge and expertise necessary to ensure that the language was not defective or problematic, the precise phrasing was within GTECH's independent discretion.

3. That GTECH's working papers were subject to approval by the TLC does not give GTECH immunity from suit.

In *Brown & Gay*, the Fort Bend Toll Road Authority delegated the responsibility for designing road signs and traffic layouts to Brown & Gay, "subject to approval by the Authority's Board of Directors." *Brown & Gay*, 461 S.W.3d at 119. The Supreme Court made clear that even though the contractor's work was subject to approval by the governmental agency, the private contractor was not entitled to sovereign immunity. *Id.* at 129.

In the concurring opinion in *Brown & Gay*, Justice Hecht, joined by Justices Willett and Guzman, agreed that the private contractor was not entitled to sovereign immunity and noted as follows:

> The Fort Bend County Road Authority tasked Brown & Gay with selecting and designing road signs and supervised the firm's work. But

> the Authority did not tell Brown & Gay how to do the work. The discretion Brown & Gay retained separated it from the Authority and thus from the Authority's immunity.

Id. at 130-131.

Similarly, in this case, the TLC delegated the responsibility for preparing the working papers for the Fun 5s game to GTECH, subject to approval of the final executed working papers by the TLC. Nettles's allegations and the deposition testimony in this case make it clear that the TLC was relying upon GTECH to use its experience and its expertise to choose wording for the instructions that was clear and not misleading or deceptive. GTECH's two customer service representatives admitted that they exercised their discretion to review the wording after the TLC requested a change in the game's parameters. The two GTECH employees decided not to change the wording to make the instructions less confusing or misleading. This exercise of discretion separates GTECH from the TLC and from the TLC's sovereign immunity.

CONCLUSION AND PRAYER

GTECH was a private independent contractor and not an employee or agent of the TLC. By operation of the contracts between GTECH and TLC, a finding of liability on the part of GTECH would have no effect on the public fisc. GTECH exercised "independent discretion" in choosing language for the instructions it printed on the Fun 5s tickets. Although the TLC approved the final executed working papers,

the TLC was relying upon GTECH's experience and expertise to choose language that was not misleading or deceptive. Under the holdings of last year's *Brown & Gay* opinion, GTECH is not entitled to derivative sovereign immunity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

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APPENDIX
TAB 1

CAUSE NO. DC-14-14838

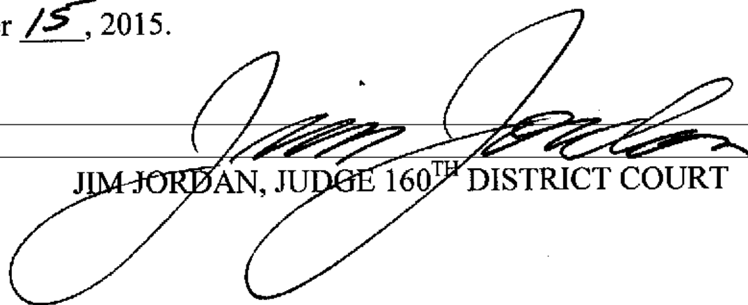
DAWN NETTLES, *Plaintiff*	§ §	IN THE DISTRICT COURT OF
VS.	§ § §	DALLAS COUNTY, TEXAS
GTECH CORPORATION, *Defendant*	§ §	160th JUDICIAL DISTRICT

ORDER

On December 4, 2015, 2015, the Court heard Defendant GTECH Corporation's First Amended Plea to the Jurisdiction (the "Motion"), in the above-numbered and styled cause. After considering the Motion, Plaintiff's Response, Defendant's Reply, the pleadings on file and the arguments of counsel, the Court grants the Motion.

IT IS THEREFORE ORDERED that Plaintiff causes of action brought against GTECH, as alleged in Plaintiffs Third Amended Original Petition, are hereby dismissed. The Court awards GTECH judgment for its taxable costs of court against Plaintiff Dawn Nettles.

Signed December 15, 2015.



JIM JORDAN, JUDGE 160TH DISTRICT COURT