NO. 03-16-00172-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AT AUSTIN

GTECH CORPORATION,

Appellant,

v.

JAMES STEELE, et al.,

Appellees.

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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See Appendix Tab A.

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See Appendix Tab A.

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STATEMENT OF THE CASE

Nature of the Case:	More than 1,200 Plaintiffs and Intervenors sued GTECH, a contractor for the Texas Lottery Commission, complaining that their $5 Texas Lottery scratch-off tickets were misleading and seeking more than $500 million in damages. (CR3-20, 25-60, 72-120, 136-230, 696-704.)
Trial Court:	Judge Amy Clark Meachum, 201st Judicial District Court, Travis County.
Course of Proceedings:	GTECH filed a plea to the jurisdiction asserting the doctrine of derivative immunity, which shields government contractors from suits arising from actions directed by a governmental entity. (CR231-374, 709-855.)
Trial Court Disposition:	The trial court denied GTECH's plea to the jurisdiction, but acknowledged that "there is a substantial ground for difference of opinion" and granted permission to appeal. (Supp. CR3-5; Tab C.) On April 15, 2016, this Court agreed that there is a substantial ground for difference of opinion and accepted the appeal. (Tab D.)

STATEMENT REGARDING ORAL ARGUMENT

GTECH respectfully requests oral argument. The outcome of this appeal is important not only to the parties, but also to provide clarity to all government contractors who may face tort claims for following the directions they receive from governmental entities. Two Texas trial courts have reached contrary conclusions on the issue of GTECH's immunity: the trial court in a Dallas case that is essentially identical to this one held that GTECH has immunity because its

challenged conduct was done at the direction of a governmental entity (the Texas Lottery Commission), but the court below reached the opposite conclusion.

In addition, a correction of the trial court's erroneous decision at this time will prevent a significant waste of judicial resources. This case is a "mass action" brought by 1,238 individuals who allegedly purchased scratch-off tickets from the Texas Lottery. At trial, each of them would individually need to prove all of the elements of fraud, unnecessarily tying up (for weeks or months) a busy trial court that lacks jurisdiction.

Because the outcome of this appeal will have significant consequences for the parties, the Texas Lottery Commission, Texas law, and the Texas judicial system, GTECH requests an opportunity to present oral argument.

ISSUE PRESENTED

Did the trial court err by denying GTECH's plea to the jurisdiction, which is based on its derivative governmental immunity?

STATEMENT OF FACTS

I. GTECH and the Commission.

This case concerns a Texas Lottery scratch-off ticket called "Fun 5's." The Texas Lottery is owned and operated by the Texas Lottery Commission, a state agency that has governmental immunity. (CR273.) By statute, the Commission and its executive director "have broad authority and shall exercise strict control and close supervision over all [Texas Lottery] games conducted in this state." TEX. GOV'T CODE § 466.014(a); *see also* TEX. GOV'T CODE § 467.101(a) (similar).

Pursuant to its statutory mandate, the Commission entered into services contracts with GTECH and two other contractors. (CR265, 275.) GTECH's contracts call for it to submit "draft working papers" to the Commission containing specifications for proposed scratch-off tickets, including the design, artwork, prize structures, and rules of the game. (CR275, 283.) GTECH's role in the process is limited to submitting ***proposed*** specifications; it has no authority to select the ***final*** specifications. GTECH's role is limited by its contracts with the Commission, which require GTECH to ensure that all scratch-off tickets "shall in all respects conform to, and function in accordance with, ***Texas Lottery-approved specifications and designs.***" (CR527 (emphasis added).) GTECH's role is further limited by the Government Code, which mandates that the executive director of the

Commission, rather than a contractor like GTECH, "shall prescribe the form of tickets." TEX. GOV'T CODE § 466.251(a).

The executive director is assisted by members of the Commission's staff, who have decades of combined experience in selecting and designing successful scratch-off tickets. (CR274.) When the Commission's staff members decide that a ticket concept is worth pursuing, they use the draft working papers as a starting point for their decisions about the specifications for the ticket. (CR275.)

During this process, the Commission's staff members manually mark up the draft working papers and send emails directing GTECH to make changes to the proposed ticket. (CR275.) GTECH revises the draft working papers as directed by the Commission and sends them back to the Commission for further review. (CR275.) Often, the Commission will make several rounds of revisions before it settles on the final specifications for a ticket. (CR275.)

When the Commission has decided on the final specifications, it approves the final working papers. GTECH uses the final working papers to print the tickets, which the Commission sells through its retail ticket outlets. (CR277.) GTECH's name does not appear on Texas Lottery tickets. (CR274.) GTECH does not sell the tickets or communicate with prospective purchasers of the tickets. (CR274, 529-31.)

When a ticket buyer seeks to redeem a winning ticket, the ticket buyer presents the ticket to a retail outlet employee or the outlet's self-validating machines. The employee or machine accesses a computer network that validates the ticket as a winner, provided that the ticket is a winning ticket under the rules of the game. (CR275.) GTECH programs the computer network in accordance with the final working papers approved by the Commission. (CR275, 276.)

II. The "Fun 5's" ticket.

On March 13, 2013, GTECH proposed to the Commission a prototype of what became the "Fun 5's" scratch-off ticket. (CR275.) Similar tickets had been sold by other state lotteries without consumer complaints, and GTECH's proposal was based on a "Fun 5's" scratch-off ticket that the Nebraska Lottery had sold. (CR275.) The Nebraska "Fun 5's" ticket had five different games on its face, one of which was a tic-tac-toe game:

(CR258.)

The Commission expressed interest in the "Fun 5's" concept and GTECH sent an initial set of draft working papers to the Commission. (CR275.) Like the Nebraska Lottery ticket, the proposed Texas Lottery ticket contained five games, including a tic-tac-toe game. The tic-tac-toe game contained a 3-by-3 grid of symbols, a "PRIZE" box, and a box labeled "5X BOX," which is known as a "multiplier." (CR275-76, 295-97.) If the player scratched off the grid and revealed "three Dollar Bill ' 

' symbols in any one row, column, or diagonal line," the player would win the prize revealed by scratching off the "PRIZE" box. (CR275,

295-97.) And if the player scratched off the multiplier "5X BOX" and revealed a "5" symbol, the player would win five times that prize. (CR275-76, 295-97.)

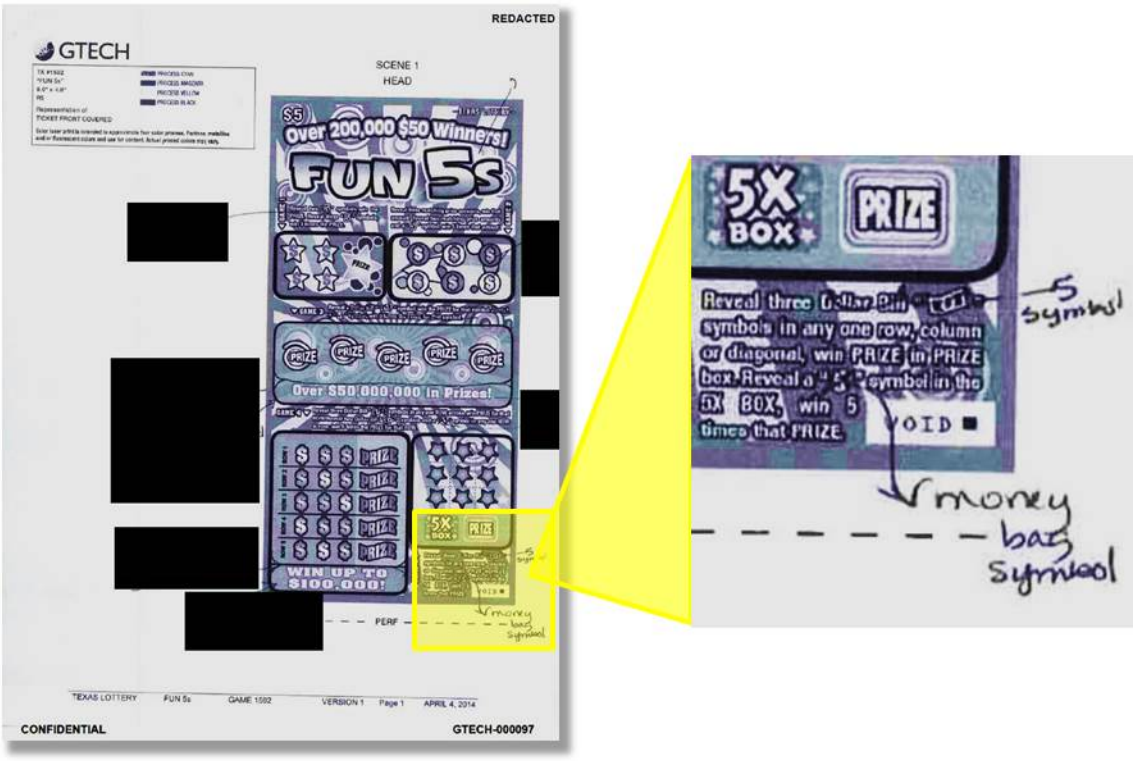
As initially proposed by GTECH to the Commission, the "Fun 5's" ticket looked like this:

(CR296.)

Of particular significance here, the draft working papers initially proposed by GTECH specified that "[t]he '5' Play Symbol will only appear in the [multiplier "5X BOX"] when the player has won by getting three (3) "BILL" Play Symbols in

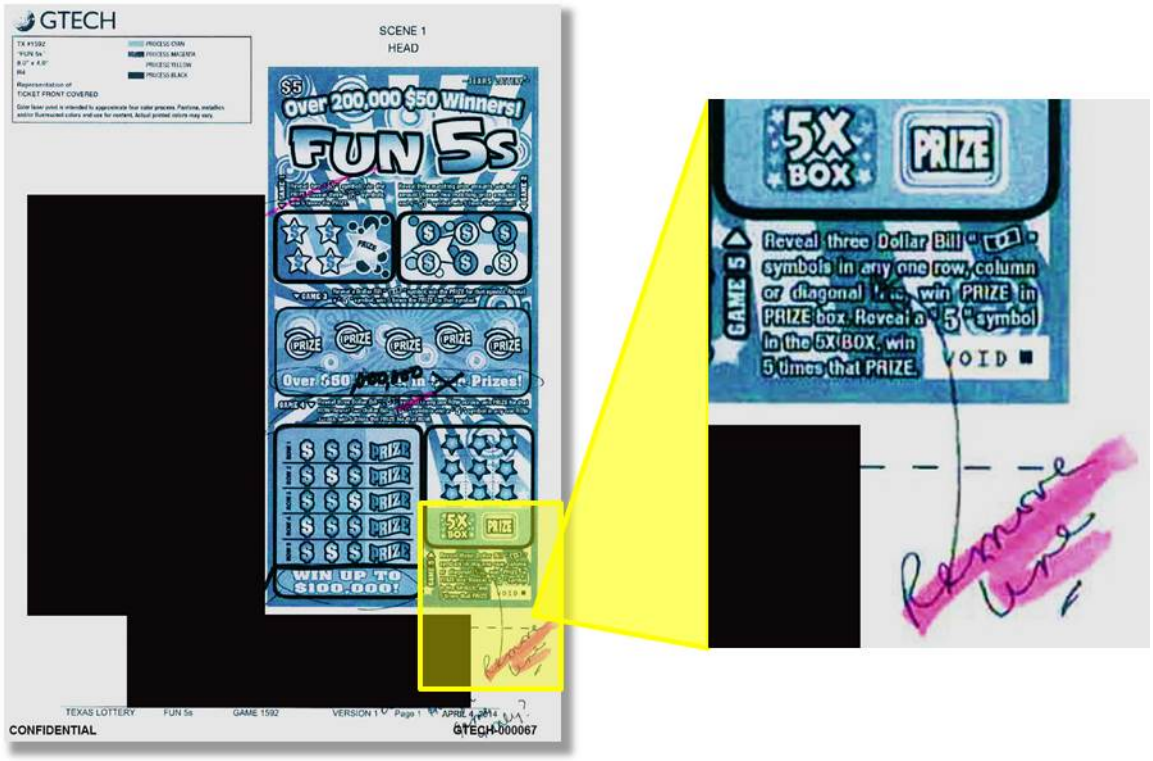
a single row, column, or diagonal." (CR276, 310.) In other words, ***some*** of the tickets in which players ***won*** the tic-tac-toe game would contain a symbol in the multiplier "5X Box," while ***none*** of the tickets in which players ***did not win*** the tic-tac-toe game would contain a symbol in the multiplier "5X Box." (CR265, 310.)

The Commission decided to include a tic-tac-toe game on its "Fun 5's" tickets, but decided that the game would differ from GTECH's proposal and the Nebraska Lottery ticket in several ways. (CR276, 315-34.) First, the Commission directed GTECH to change the "5" symbol to a "money bag" symbol and change the "dollar bill" symbol to a "5" symbol:



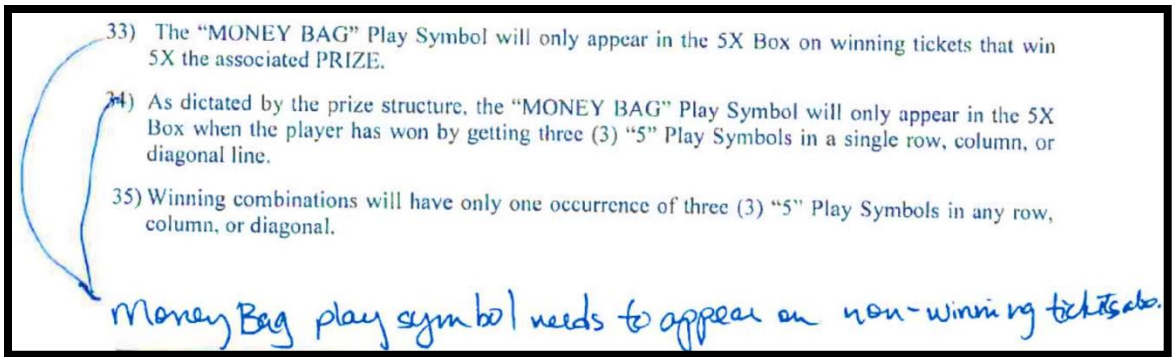
(CR276, 325 (handwritten notations made by the Commission).)

The Commission also revised the rules of the tic-tac-toe game:



(CR316 (handwritten notations made by the Commission).)

Critically, the Commission further modified GTECH's proposal by directing GTECH to include a "money bag" symbol in the multiplier "5X BOX" on tickets in which players did ***not*** win the tic-tac-toe game, as well as tickets in which they did. (CR276, 334.) The Commission instructed GTECH that the "Money Bag play symbol needs to appear on non-winning tickets also":


33) The "MONEY BAG" Play Symbol will only appear in the 5X Box on winning tickets that win 5X the associated PRIZE.

34) As dictated by the prize structure, the "MONEY BAG" Play Symbol will only appear in the 5X Box when the player has won by getting three (3) "5" Play Symbols in a single row, column, or diagonal line.

35) Winning combinations will have only one occurrence of three (3) "5" Play Symbols in any row, column, or diagonal.

Money Bag play symbol needs to appear on non-winning tickets also.

(CR276, 334 (handwritten notations made by the Commission).)

The Commission directed this change as a security measure to prevent "microscratching," which occurs when an individual (often an employee of a retail ticket outlet) uses a pin to reveal a microscopic portion of the play area of a scratch-off ticket. (CR242, 276.) This technique reveals whether the ticket is a winner before it is sold. (CR242, 276.) The Commission explained to GTECH that if the "money bag" symbol appeared only on tickets in which players won the tic-tac-toe game, that might make the game an easy target for microscratching, as only the multiplier "5X BOX" would need to be microscratched to determine whether the ticket was a winning ticket:

From: Burrola, Jessica [mailto:Jessica.Burrola@lottery.state.tx.us]
Sent: Monday, May 12, 2014 12:14 PM
To: Thurston, Laura M
Subject: ADDL COMMENTS 2; GAME # 1592 Fun 5's
Importance: High

Please see below and attached, for a few more comments

3) Game #5: Game parameters #33 and #34 (see below) mention the money bag symbol as only appearing on winning tickets. This would make it an easy target for micro-scratching since only the rest of game 5 would not have to be micro-scratched to know that it is a winner. We would prefer to have the money bag symbol appear on non-winning tickets, too.

Jessica Burrola | Instant Product Specialist| Texas Lottery Commission
P.O. Box 16630 | Austin, TX 78761-6630 | 512-344-5125
jessica.burrola@lottery.state.tx.us

(CR242, 276.) Two days later, the Commission followed up and directed GTECH to print a "money bag" symbol on approximately 25% of the non-winning tickets:

From: Bowersock, Dale <Dale.Bowersock@lottery.state.tx.us>
Sent: Wednesday, May 14, 2014 12:04 PM
To: Thurston, Laura M; Burrola, Jessica
Cc: Whyte, Penelope; Gaddy, Walter; Calderon, Sylvia; Edwards, Fran
Subject: RE: ADDL COMMENTS 2; GAME # 1592 Fun 5's

What we are looking for is a parameter which is very clearly defined, such as:

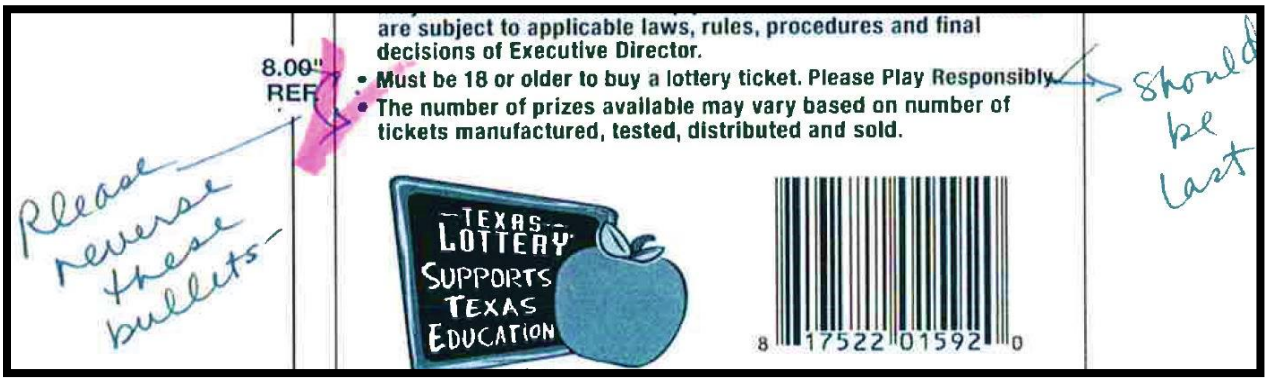
"The "MONEY BAG" Play Symbol will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in GAME 5."

Dale Bowersock
Instant Product Coordinator
Texas Lottery Commission
(512) 344-5166

(CR260-63, 271, 276.)

The Commission changed other aspects of GTECH's proposal as well. For example, the Commission directed GTECH to change the phrase "Over $50 Million in Cash Prizes!" to "Over $50,000,000 in Prizes!":

(CR316 (handwritten notations made by the Commission).) The Commission also directed GTECH to change the order of the rules on the back of the ticket:



(CR321 (handwritten notations made by the Commission).)

GTECH followed the Commission's directions to the letter and prepared a set of final working papers for the Commission's approval. As illustrated in the final working papers, the "Fun 5's" ticket and tic-tac-toe game looked like this:

(CR340.) In accordance with the changes made by the Commission, a "money bag" symbol appeared on approximately 25% of the non-winning tickets, and the rules of the tic-tac-toe game read: "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." (CR340.) On May 15, 2014, the Commission approved the final working papers for the "Fun 5's" ticket. (CR336.)

On June 20, 2014, the Commission prepared the official rules and specifications for the "Fun 5's" ticket and published them in the Texas Register.

See Texas Lottery Comm'n, Instant Game Number 1592 "Fun 5's," 39 TEX. REG. 4799 (2014). The Commission did not send the official rules and specifications to GTECH for its review before it published them in the Texas Register. (CR274.)

III. The litigation.

On September 2, 2014, the Commission, through its retailers, began selling "Fun 5's" tickets to the public. (CR274.) Approximately two weeks later, the news media began reporting that Plaintiff Geraldine Steele was claiming to be confused by the tic-tac-toe game and that buyers of "Fun 5's" tickets might be able to sue.[1] Subsequently, many other individuals bought "Fun 5's" tickets, complained that the tickets were misleading, and sued.

A lawsuit was filed in Dallas,[2] and an essentially identical lawsuit—this case—was filed in Austin. In both cases, the crux of the complaint is that ticket purchasers were misled to believe that the presence of a "money bag" symbol in the multiplier "5X Box" meant that purchasers were entitled to five times the amount of money in the "PRIZE" box, ***even though the purchasers did not have***

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[1] *See, e.g.*, Brittney Martin, "A half-million win? Scratch that, lottery tells disappointed ticket buyers," Dallas Morning News (Sept. 16, 2014), available at http://www.dallasnews.com/news/state/headlines/20140916-a-half-million-win-scratch-that-lottery-tells-disappointed-ticket-buyers.ece (last visited July 6, 2016).

[2] *Dawn Nettles v. GTECH Corp.*, No. DC-14-14838 (160th Judicial District Court, Dallas County, Tex.).

three play symbols in any one row, column, or diagonal in the tic-tac-toe game.

Plaintiffs focused on three points:

1. a "money bag" symbol appeared in the multiplier "5X BOX" on tickets that did not have three symbols in any one row, column, or diagonal;

2. the computer system did not validate their tickets as winners because they did not have three symbols in any one row, column, or diagonal; and

3. the rules of the tic-tac-toe game misled them into believing they had won.

(CR3-20, 25-60, 72-120, 136-230, 696-704.)

The Plaintiffs and Intervenors in this case (the "Plaintiffs") are 1,238 individuals who claim they each purchased one or more "Fun 5's" tickets for $5 each. They chose not to sue the Commission, an entity with governmental immunity. Instead, they sued only GTECH. Under a "benefit of the bargain" theory, Plaintiffs seek compensatory damages in excess of $500 million, plus exemplary damages. (CR195.)

As the litigation progressed, Plaintiffs amended their pleadings several times in a series of attempts to state a claim against GTECH. In their original and first amended petitions, Plaintiffs accused GTECH of failing to "use ordinary care to ensure that its computer validation program would validate" their "Fun 5's" tickets as winners. (CR15, 33.) They sued GTECH for negligence, tortious interference, and breach of fiduciary duty. (CR3-20, 25-60.) GTECH responded that it

programmed the computer system precisely as the Commission directed, and that the Commission has exclusive authority to determine which tickets are winning tickets—meaning that GTECH has immunity. (CR61-71.)

Confronted with this clear, legal impediment to their suit, Plaintiffs filed a second amended petition. Instead of focusing on their complaint that the computer system did not validate their tickets as winners, Plaintiffs blamed GTECH and the Commission for "jointly" deciding to print the "money bag" symbol on non-winning tickets and for "jointly" deciding on the rules of the tic-tac-toe game. (CR81.) Plaintiffs dropped their claims of negligence and breach of fiduciary duty and asserted new claims of fraud, fraud by non-disclosure, and "aiding and abetting fraud." (CR81-86.)

Meanwhile, in the Dallas case, GTECH filed a plea to the jurisdiction asserting that it had immunity because the case arose from actions directed by the Commission. The Dallas court agreed, granting GTECH's plea and dismissing the case. (CR694.)

This prompted Plaintiffs to file yet another amended complaint—their third amended petition in this case. (CR169-230, 696-704.) Plaintiffs abandoned their allegation that GTECH and the Commission "jointly" decided to print "money bag" symbols on non-winning tickets, instead conceding that the decision to print "money bag" symbols on non-winning tickets was ***"requested by the***

[*Commission*]" *alone.* (CR179-80). In a failed attempt to mitigate that concession, Plaintiffs disingenuously declared that they were no longer complaining about the appearance of "money bag" symbols on their tickets. (CR180.)

Plaintiffs also abandoned their allegation that GTECH and the Commission "jointly" decided on the rules of the tic-tac-toe game. But instead of recognizing that the Commission alone decided the rules, Plaintiffs alleged for the first time that "GTECH chose the wording" on its own and did so "in its exercise of independent discretion." (CR180, 190; *see also* CR192-93.)

The trial court concluded that Plaintiffs had finally phrased their claims in a way that defeated GTECH's immunity. It denied GTECH's plea to the jurisdiction but granted permission to appeal, finding that "there is a substantial ground for difference of opinion" regarding GTECH's immunity.[3] (CR695, Tab B; Supp. CR3-5, Tab C.) On April 15, 2016, this Court agreed that the requirements for a permissive appeal were satisfied, including the requirement that there be a substantial ground for difference of opinion regarding the trial court's decision. (Tab D.)

[3] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168.

SUMMARY OF THE ARGUMENT

Under Texas law, when a government contractor is sued for complying with directions it received from an entity with governmental immunity, the contractor is likewise entitled to immunity.

That is the case here. Under both the Government Code and its contracts with GTECH, the Commission alone has authority over all aspects of Texas Lottery games. The Commission determined the final specifications for its "Fun 5's" tickets, and GTECH followed the Commission's directions to the letter. Accordingly, GTECH has immunity from Plaintiffs' claims.

In the Dallas case, the trial court recognized GTECH's immunity and granted its plea to the jurisdiction. In this case, however, the trial court erroneously denied GTECH's plea to the jurisdiction. This Court should reverse and render judgment dismissing the case.

ARGUMENT

I. Based on the undisputed evidence, the trial court erred by denying GTECH's plea to the jurisdiction.

"Whether a court has subject matter jurisdiction is a question of law." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*." *Id.* at 228. An appellate court should

reverse and render judgment dismissing the case "if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue." *Id.*

Here, the relevant evidence is undisputed. The relationship between the Commission and GTECH is defined by the Government Code and the contracts contained in the record, and all relevant communications between the Commission and GTECH are documented in emails and working papers that are likewise contained in the record. As set forth below, the undisputed evidence establishes as a matter of law that GTECH has immunity.

II. GTECH has immunity because the Commission determined the specifications for the "Fun 5's" tickets.

This case turns on a fundamental principle of law: when a government contractor is sued for complying with directions it received from an entity with governmental immunity, the contractor is likewise entitled to immunity. *See Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015). (Tab E.)

In *Brown & Gay*, the Texas Supreme Court examined several cases in which Texas and federal courts extended immunity to contractors that followed the directions they received from governmental entities. For example, in an "instructive" earlier case from the Texas Supreme Court, a government contractor was held to have immunity because "its actions were actions of" the governmental entity and were "executed subject to the control of" the governmental entity. *Id.* at 124 (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994)). In a federal case

examined in *Brown & Gay*, a government contractor was held to have immunity because it "was following [governmental] orders." *Id.* at 125 (quoting *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000)). And in several other cases examined in *Brown & Gay*, government contractors were held to have immunity where they executed projects in accordance with the directions of a governmental entity. *Id.* at 125-26 (citing *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940); *Ackerson v. Bean Dredging LLC*, 589 F.3d 195 (5th Cir. 2009); and *Glade v. Dietert*, 295 S.W.2d 642 (Tex. 1956)).

"In each of these cases," the court summarized in *Brown & Gay*, "the complained-of conduct for which the contractor was immune was effectively attributed to the government." *Id.* at 125. "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.* (emphasis in original). Accordingly, the *Brown & Gay* court held that a private entity contracting with the government has immunity if "its actions were actions of the . . . government" and "it exercised no discretion in its activities." *Id.* at 124-25 (quoting *K.D.F.*, 878 S.W.2d at 597) (internal alterations omitted). Here, because the Commission determined the specifications of the "Fun 5's" ticket and GTECH exercised no independent discretion in that regard, GTECH is entitled to immunity.

This conclusion is not altered by an argument advanced by the plaintiff in the Dallas case. The plaintiff in that case argues that, under *Brown & Gay*, "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." But neither the Dallas plaintiff nor the Plaintiffs in this case asserted that argument in the trial courts, and they may not assert it for the first time on appeal. *See* TEX. R. APP. P. 33.1(a)(1). Moreover, Plaintiffs' omission of this argument below makes perfect sense because it is contrary to three later decisions—all of which interpret *Brown & Gay* as turning on whether the party seeking immunity acted at the direction of the government.[4] Because GTECH acted at the direction of the Commission, it has immunity.

III. GTECH has immunity because it followed the Commission's directions to the letter.

Plaintiffs' claim—that they were misled to believe they would win five times the indicated prize—centers on three points:

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[4] *See Lenoir v. U.T. Physicians*, ___ S.W.3d ___, ___, No. 01-14-00767-CV, 2016 WL 1237771, at *10 (Tex. App.—Houston [1st Dist.] Mar. 29, 2016, no pet. h.); *Freeman v. Am. K-9 Detection Servs., L.L.C.*, ___ S.W.3d___, ___, No. 13-14-00726-CV, 2015 WL 6652372, at *7 (Tex. App.—Corpus Christi Oct. 29, 2015, pet. filed); *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs., Inc.*, No. Civ. A. H-15-0754, 2016 WL 1259518, at *10 (S.D. Tex. Mar. 31, 2016). Further, Plaintiffs cannot claim the absence of unforeseen losses to the Commission and the State. In the unlikely event Plaintiffs' claims are upheld, the resulting loss of future lost ticket sales would cause an unforeseen detriment to the Commission and the State, which directs approximately 99% of its revenue from Texas Lottery ticket sales to a fund that is exclusively for education.

1. a "money bag" symbol appeared in the multiplier "5X BOX" on tickets that did not have three symbols in any one row, column, or diagonal;

2. the computer system did not validate their tickets as winners because they did not have three symbols in any one row, column, or diagonal; and

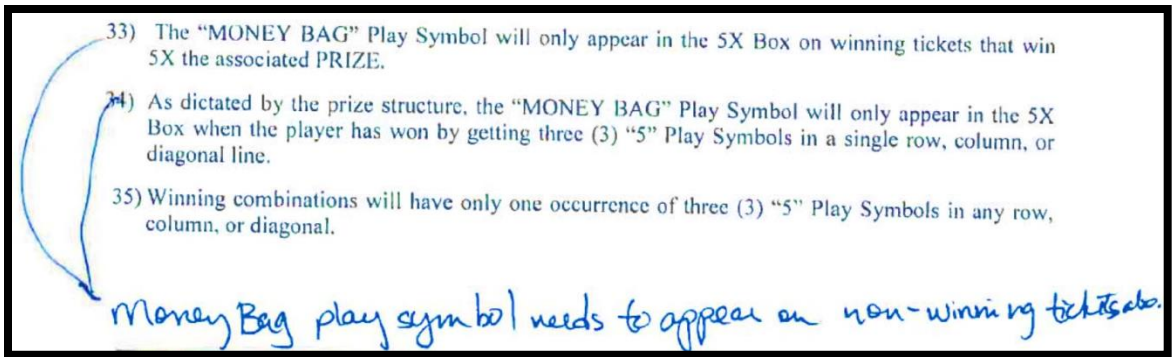
3. the rules of the tic-tac-toe game misled them into believing they had won.

(CR3-20, 25-60, 72-120, 136-230, 696-704.)

Plaintiffs judicially admit that the first two components of their claim arise from decisions made by the Commission. (CR177, 179-80.) That alone dictates a finding of immunity, because Plaintiffs' claim relies on all three components. Moreover, the undisputed evidence establishes that the final component of Plaintiffs' claim—the rules stated on the ticket—was likewise determined by the Commission, further establishing GTECH's entitlement to immunity.

A. The "money bag" symbol.

Regarding the first component of Plaintiffs' complaint, the Commission, not GTECH, decided that the "Money Bag play symbol needs to appear on non-winning tickets":


33) The "MONEY BAG" Play Symbol will only appear in the 5X Box on winning tickets that win 5X the associated PRIZE.

34) As dictated by the prize structure, the "MONEY BAG" Play Symbol will only appear in the 5X Box when the player has won by getting three (3) "5" Play Symbols in a single row, column, or diagonal line.

35) Winning combinations will have only one occurrence of three (3) "5" Play Symbols in any row, column, or diagonal.

Money Bag play symbol needs to appear on non-winning tickets also.

(CR276, 334 (handwritten notations made by the Commission).) In light of this evidence, Plaintiffs have judicially admitted that the appearance of the "money bag" symbol on non-winning tickets was "requested by the [Commission]" alone. (CR179-80.)

Plaintiffs cannot neutralize their admission simply by declaring that their claims, as stated in their third amended petition, "do not challenge the [Commission's] request for GTECH to print Money Bag symbols on both winning and non-winning tickets. . . . Rather, Plaintiffs complain of the misleading and deceptive wording [of the rules of the tic-tac-toe game]." (CR382; *see* CR180.) To the contrary, Plaintiffs' withdrawal of their complaint about the use of the "money bag" symbol leaves them unable to articulate a coherent complaint about the rules of the tic-tac-toe game. After all, it is only because the "money bag" symbol appeared on non-winning tickets that the rules—which allegedly implied that all tickets with "money bag" symbols were winners—were purportedly misleading.

Plaintiffs themselves confirm and concede this point in their third amended petition: "***Because the Money Bag '***  ***' symbol would be appearing on both***

winning and non-winning tickets, it was incumbent upon [GTECH] to change the wording of the instructions . . . .” (CR177 (emphasis added).) Over and over again, Plaintiffs’ third amended petition demonstrates that it is impossible to describe their claims without complaining that the “money bag” symbol appeared on non-winning tickets:

- “Plaintiffs purchased Fun 5’s tickets that revealed a ***Money Bag ‘***  ***’ symbol*** in Game 5. Plaintiffs reasonably relied upon the representation GTECH printed on the Fun 5’s tickets that Plaintiffs would receive five times the amount printed in the PRIZE box on their tickets if their tickets revealed a ***Money Bag ‘***  ***’ symbol.***”

- “[Plaintiffs] contend that they were misled by GTECH into believing that if their tickets revealed a ***Money Bag ‘***  ***’ symbol*** in Game 5, they would win five times the amount in the PRIZE box.”

- “In fact, a significant percentage of tickets with a ***Money Bag ‘***  ***’ symbol*** were not ‘winning’ tickets.”

- “GTECH programmed its computers to leave off from the list of ‘winning’ tickets a significant percentage of tickets that revealed a ***Money Bag ‘***  ***’ symbol.***”

- “GTECH knew that if it left off from the list of ‘winning’ tickets a significant percentage of tickets that revealed a ***Money Bag ‘***  ***’ symbol,*** those tickets would not be eligible for prize payouts.”

- “GTECH had a duty to disclose to Plaintiffs that a significant percentage of the tickets with a ***Money Bag ‘***  ***’ symbol*** would not be on the list of ‘winning’ tickets.”

- "GTECH assisted the [Commission] [in allegedly committing fraud] by . . . continuing to operate the computer system which validated Plaintiffs' tickets as "nonwinners" even though the instructions represented that the players would 'win' if they revealed a ***Money Bag '***  ***' symbol.***"

- "GTECH validated the tickets as non-winning tickets even though some of Plaintiffs' tickets contained a ***Money Bag '***  ***' symbol*** . . . ."

- "Plaintiffs should have received a prize payout of five times the amount appearing in the Prize Box on each of their Fun 5's tickets that revealed a ***Money Bag '***  ***' symbol.***"

(CR190-92, 194, 196 (emphasis added).)

It is the true nature of this case—not Plaintiffs' artful denial that they are complaining about the use of the "money bag" symbol—that determines whether GTECH has immunity. *See Clint Indep. Sch. Dist. v. Marquez,* ___S.W.3d ___, ___, No. 14-0903, 2016 WL 1268000, at *15 (Tex. Apr. 1, 2016) (dismissing the case and noting that "[e]ven if the [plaintiffs] amended their petition to delete all references to the Education Code, the true nature of their complaint would not change"); *City of Austin v. Silverman*, No. 03-06-00676-CV, 2009 WL 1423956, at *3 (Tex. App.—Austin May 21, 2009, pet. denied) (mem. op.).

In *Silverman*, the plaintiff alleged that he tripped on a sidewalk in downtown Austin. He asserted a premises-defect claim, emphasizing that the Texas Tort Claims Act waives the City of Austin's immunity from premises-defect claims. *Id.*

at *1. The City responded that the plaintiff "was not truly asserting a premises-defect claim but instead was complaining of the sidewalk's design, which meant the City retained its immunity from suit." *Id.* This Court, after examining the evidence, agreed with the City. The plaintiff's complaint, this Court observed, was that "he stepped down, expecting to find a step, and instead fell because '[t]here was no stair in the area that I stepped on.'" *Id.* at *2. Notwithstanding the plaintiffs' characterization of his claim, the reality was that the dispute arose from the design of the sidewalk, not a defect in the sidewalk. This Court therefore reversed the order denying the City's plea to the jurisdiction, explaining that plaintiffs "cannot rely on artful pleading to establish a waiver of immunity where the law provides none." *Id.* at *3.

The same principle applies here. Despite Plaintiffs' artful pleading, the truth is that they would have no complaint if the "money bag" symbol had not appeared on non-winning tickets. Because the appearance of the "money bag" symbol is a necessary component of Plaintiffs' claims, and because Plaintiffs have judicially admitted that this change was directed by the Commission, GTECH has immunity. *See Brown & Gay*, 461 S.W.3d at 125.

B. The computer validation program.

The Commission, not GTECH, also decided that the computer system would not validate a ticket as a winner of the tic-tac-toe game unless it contained three

play symbols in any one row, column, or diagonal. Plaintiffs have abandoned their earlier allegation that GTECH failed to "use ordinary care to ensure that its computer validation program would validate" their tickets as winners. (CR15, 33.) Again switching gears, Plaintiffs now judicially admit that GTECH programmed the computer system "[a]t the request of the [Commission]." (CR177.)

That concession is fatal, because the programming of the computer system remains an essential component of Plaintiffs' claims. After all, if the computer system had validated Plaintiffs' tickets as winners, their claims would not exist.

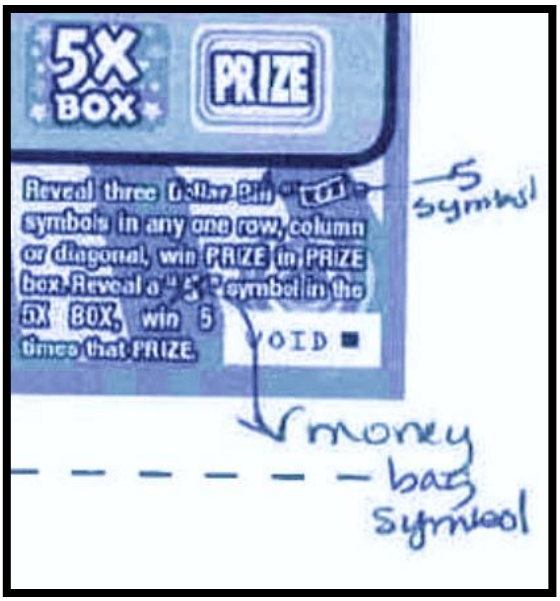
This is illustrated by Plaintiffs' third amended petition, in which Plaintiffs continue to sue GTECH for "aiding and abetting fraud" based on the allegation that GTECH continued "to operate the computer system which validated Plaintiffs' tickets as 'non-winners' even though the instructions represented that the players would 'win' if they revealed a Money Bag '  ' symbol." (CR194.) Plaintiffs similarly claim that GTECH tortiously interfered with an alleged contract between Plaintiffs and the Commission "by using and continuing to use a non-conforming computer program that left the serial number of Plaintiffs' tickets off from the list of 'Winning Tickets.'" (CR195.) Finally, Plaintiffs claim conspiracy based on the allegation that GTECH "use[d] GTECH's computer system to validate tickets as nonwinners." (CR195.) In each instance, the cause of Plaintiffs' alleged injury is not the independent actions of GTECH, but rather the actions of the Commission

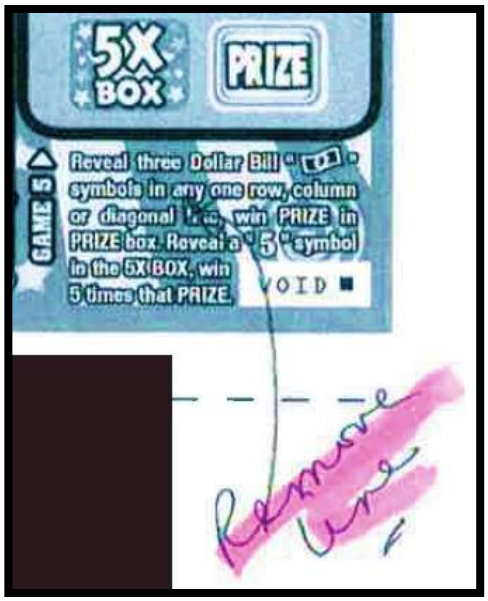
through GTECH, meaning GTECH has derivative immunity from Plaintiffs' claims. *See Brown & Gay*, 461 S.W.3d at 125.

C. The rules of the tic-tac-toe game.

Plaintiffs' final complaint is directed at the stated rules of the tic-tac-toe game. Because those rules were also determined by the Commission, GTECH is entitled to immunity on this additional ground.

It is not true, as Plaintiffs allege in their third amended petition, that "GTECH chose the wording" of the rules "in its exercise of independent discretion." (CR180, 190; *see also* CR192-93.) Although GTECH initially drafted proposed language for the rules, the Commission alone decided the final language printed on the "Fun 5's" tickets. The uncontroverted evidence establishes that after the Commission received the initial draft working papers for the "Fun 5's" game from GTECH, it decided to change the rules of the tic-tac-toe game in two respects, while retaining the rules in other respects:





(CR276, 316, 325 (handwritten notations made by the Commission).) Thus, the Commission alone decided which elements of the proposed rules to change and which ones to retain, and the Commission alone controlled the wording that appeared on the "Fun 5's" tickets. *See* TEX. GOV'T CODE § 466.251.

Plaintiffs cannot avoid this conclusion by artfully rephrasing their complaint about the rules. In addition to complaining that GTECH "***chose*** the wording" of the rules, Plaintiffs rephrase their complaint as an allegation that GTECH "***refrain[ed] from changing***" the wording. (CR179-80 (emphasis added).) Similarly, Plaintiffs allege that GTECH should have ***objected*** to the wording because it purportedly owed a duty of "reasonable care" which required it to "notif[y] the [Commission] if a requested change in the parameters of the game would cause problems with the [rules of the] game." (CR391.)

For several reasons, these artful variations of Plaintiffs' complaint cannot defeat GTECH's immunity. First, when Plaintiffs complain that GTECH ***did not depart from or second-guess*** the Commission's directions, that is just another way of complaining that GTECH ***followed*** the Commission's directions to the letter—which is precisely the circumstance that gives rise to GTECH's immunity under *Brown & Gay*. *See* 461 S.W.3d at 124-25. If Plaintiffs were allowed to circumvent *Brown & Gay* and defeat GTECH's immunity so easily, then the plaintiffs in any other case could follow suit, effectively bringing contractor immunity in Texas to an end.

Second, Plaintiffs' insistence that GTECH owed a duty of "reasonable care" is at odds with their decision to abandon their negligence claims and replace them with claims of fraud. (CR3-20, 25-60, 81-86, 190-97.) Under *Brown & Gay* and other cases, a contractor's immunity depends on whether the plaintiff has asserted claims "arising from" a contractor's discretionary acts. *See Brown & Gay*, 461 S.W.3d at 125 (discussing *Yearsley*, 309 U.S. at 20); *Lenoir*, ___ S.W.3d at ___ n.9, 2016 WL 1237771, at *11 n.9 (discussing *Rodriguez v. New Jersey Sports & Exposition Auth.*, 472 A.2d 146, 149 (N.J. Super. 1983)). Here, it can hardly be said that the claims in Plaintiffs' third amended petition "arise from" a purported failure to exercise "ordinary care," because Plaintiffs are not suing GTECH for ***negligence***—they are suing GTECH for ***fraud*** and other torts. (CR190-97.)

Third, Plaintiffs' argument has been rejected by the U.S. Supreme Court and should therefore be rejected in Texas as well, considering that the Texas Supreme Court relied heavily on federal case law in *Brown & Gay*. 461 S.W.3d at 125-26. Just as Plaintiffs argue that GTECH, having participated in the design process, was required to identify any potential problems, the plaintiff in *Boyle v. United Technologies Corporation* urged the U.S. Supreme Court to uphold the contractor's immunity "only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; ***or*** (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it." 487 U.S. 500, 513 (1988) (emphasis in original). The Court in *Boyle* rejected that proposed test, explaining that "it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." *Id.*

As other courts have recognized, *Boyle* further establishes that a contractor does not need to show that the government "exercise[d] discretion with regard to the ***specific*** feature alleged to be defective." *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 718-19 (D. Md. 1997) (emphasis in original). Instead, "a contractor need only show government approval of the ***overall*** design." *Id.* at 719 (emphasis in original). Even where the specification at issue ***originated with*** the contractor,

the contractor has immunity so long as the specification was ***reviewed by*** the government and included in the final specifications ***approved by*** the government. *Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986). Where the government has approved the final specifications, "[i]t is not necessary that there be 'continuous back and forth discussions regarding the inclusion or exclusion of the specific design deficiency alleged in the case.'" *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821, 824 (D.N.J. 1989) (quoting *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987) (internal alterations omitted), *aff'd*, 912 F.2d 67 (3d Cir. 1990)). Here, the undisputed evidence shows that the Commission considered the rules proposed by GTECH, modified those rules in some respects, and approved the modified rules as part of the final working papers. (CR336.)

Finally, Plaintiffs' argument misapprehends the contractual relationship between GTECH and the Commission. Under the contracts between GTECH and the Commission, it is the ***Commission's*** role to approve or disapprove ***GTECH's*** work and direct changes in the specifications for Texas Lottery tickets—not the other way around. One of GTECH's contracts with the Commission provides that "GTECH warrants and agrees that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, ***Texas Lottery-approved specifications and designs.***" (CR527 (emphasis added).) Another contract provides that the Commission will review the draft working papers and send its changes to

GTECH, which must implement those changes within two business days. (CR283.) There is no corresponding provision allowing GTECH to review or change the directions it receives from the Commission. As to the final working papers, the contract provides: "Any changes to the final executed working papers must be in writing and approved by the Executive Director" of the Commission or his designee. (CR283.) Again, there is no corresponding provision allowing GTECH to make changes to the final working papers.

Because the duties owed by GTECH are set forth in the contract, GTECH did not owe the Commission a general duty of "reasonable care" as a matter of Texas law. *See LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014). It makes no difference that some employees of the Commission were persuaded to agree with Plaintiffs' counsel that they expect GTECH to use "reasonable care" when proposing scratch-off concepts. (CR388-89, 457, 481-82.) The existence of a duty is a question of law, and "testimony is insufficient to create a duty where none exists at law." *Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224, 228 n.3 (Tex. App.—Dallas 2008, no pet.).

Because the Commission decided on the rules of the tic-tac-toe game and GTECH owed no extra-contractual duties, GTECH has immunity.

* * * * *

In summary, Plaintiffs judicially admit that two essential components of their claim relate to decisions of the Commission, which alone establishes GTECH's immunity. They admit that the Commission directed GTECH to include the "money bag" symbol on non-winning tickets, and that GTECH programmed the computer system as the Commission directed. These admissions are dispositive because they are central to Plaintiffs' claims that they were misled. Immunity is also established because the uncontroverted evidence establishes that the Commission determined the wording of the rules of the tic-tac-toe game. Accordingly, this Court should reverse the order denying GTECH's plea to the jurisdiction and render judgment dismissing the case. *See Marquez*, ___ S.W.3d at ___, 2016 WL 1268000, at *14; *Miranda*, 133 S.W.3d 226-31.

CONCLUSION AND PRAYER

GTECH respectfully requests that this Court reverse the order of the trial court and render judgment dismissing the case. GTECH also requests all further relief to which it is entitled.

Respectfully submitted,

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

I hereby certify that this Brief of Appellant contains a total of **5,821** 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 Appellant is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Dated: July 6, 2016.

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this *Brief of Appellant* was served on the counsel of record as listed in Appendix Tab A via e-service on this 6th day of July, 2016.

/s/ Kent Rutter
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APPENDIX

Tab A — List of Parties and Counsel for Appellees

Tab B — Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction (CR695)

Tab C — Amended Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction (Supp. CR3-5)

Tab D — Court of Appeals Order dated April 15, 2015

Tab E — *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)

TAB A

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TAB B

Order Overruling Defendant GTECH Corporation's
First Amended Plea to the Jurisdiction (CR695)

CAUSE NO. D-1-GN-14-005114

JAMES STEELE, et al.,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
	§	
vs.	§	**TRAVIS COUNTY, TEXAS**
	§	
GTECH CORPORATION,	§	
Defendant.	§	**201st JUDICIAL DISTRICT**
	§	

ORDER OVERRULING DEFENDANT GTECH CORPORATION'S
FIRST AMENDED PLEA TO THE JURISDICTION

After considering Defendant GTECH Corporation's First Amended Plea to the Jurisdiction, Plaintiffs' response thereto and other evidence on file, the Court OVERRULES Defendant GTECH Corporation's First Amended Plea to the Jurisdiction.

IT IS HEREBY ORDERED that Defendant GTECH Corporation's First Amended Plea to the Jurisdiction is overruled.

SIGNED on this 25th day of February, 2016.

PRESIDING JUDGE

004454581

ENTERED BA

TAB C

Amended Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction (Supp. CR3-5)

CAUSE N°. D-1-GN-14-005114

JAMES STEELE, et al. *Plaintiffs,*	§	IN THE DISTRICT COURT OF
VS.	§	TRAVIS COUNTY, TEXAS
GTECH CORPORATION, *Defendant.*	§	201ST JUDICIAL DISTRICT

AMENDED ORDER OVERRULING DEFENDANT GTECH CORPORATION'S FIRST AMENDED PLEA TO THE JURISDICTION

After considering Defendant GTECH Corporation's First Amended Plea to the Jurisdiction, Plaintiffs' response thereto and other evidence on file, the Court OVERRULES Defendant GTECH Corporation's First Amended Plea to the Jurisdiction.

Pursuant to Tex. Civ. Prac. & Rem. Code § 51.014(d) and Tex. R. Civ. P. 168, the Court hereby GRANTS permission to appeal this Amended Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction ("Amended Order").

The Court finds that GTECH Corporation's entitlement to derivative governmental immunity is a controlling question of law as to which there is a substantial ground for difference of opinion and finds that an immediate appeal from this Amended Order may materially advance the ultimate termination of the litigation. More specifically, GTECH Corporation's entitlement to derivative governmental immunity is a threshold question of law upon which all of Plaintiffs' claims depend. Its resolution would thus deeply affect and could significantly shorten the time, effort, and expense of litigating this case.

IT IS HEREBY ORDERED that Defendant GTECH Corporation's First Amended Plea to the Jurisdiction is OVERRULED and that GTECH Corporation's Petition for Permission to Appeal this Amended Order is GRANTED.

SIGNED on this 28th day of March, 2016

Presiding Judge

AGREED:

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TAB D

Court of Appeals Order dated April 15, 2015

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00172-CV

GTECH Corporation, Appellant

v.

James Steele, et al., Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT
NO. D-1-GN-14-005114, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

O R D E R

PER CURIAM

In this cause, GTECH Corporation has sought to invoke our jurisdiction to review an interlocutory order through both a notice of appeal filed under color of Texas Civil Practice and Remedies Code Section 51.014, Subsection (a)(8),[1] and a petition for permissive appeal under Subsection (f) of Section 51.014.[2] The petition is unopposed; consequently, we will suspend

[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8) ("A person may appeal from an interlocutory order of a district court . . . that . . . grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001").

[2] *See id*. § 51.014(f) ("An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d)."); *see also id*. § 51.014(d) ("a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if: (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation"); Tex. R. App. P. 28.3 (implementing rule). Accompanying GTECH's petition is an order from the district court that satisfies Subsection (d).

the ten-day response period and proceed to rule.[3] We agree with GTECH that the appeal is warranted and we accept it.[4] This appeal will proceed under the rules governing accelerated appeals, and for those purposes the date of this order is deemed the date the notice of appeal was filed.[5]

Furthermore, out of concern that it may otherwise be required to file duplicative briefing in both this permissive appeal and a parallel appeal it has perfected under Subsection (a)(8), GTECH has filed an unopposed motion to file a single brief in this cause and to extend its deadline until June 6, 2016. We grant this relief as well.

It is ordered on April 15, 2016.

Before Chief Justice Rose, Justices Pemberton and Bourland

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[3] *See* Tex. R. App. P. 10.3(a)(2), 28.3(j).

[4] *See* Tex. Civ. Prac. & Rem. Code § 51.014(f).

[5] *See id.*; Tex. R. App. P. 28.3(k).

TAB E

Brown & Gay Eng'g, Inc. v. Olivares,
461 S.W.3d 117 (Tex. 2015)

461 S.W.3d 117
Supreme Court of Texas.

Brown & Gay Engineering, Inc., Petitioner,
v.
Zuleima Olivares, Individually and as the Representative of the Estate of Pedro Olivares, Jr., & Pedro Olivares, Respondents

No. 13–0605
|
Argued October 15, 2014
|
Opinion Delivered: April 24, 2015

Synopsis

Background: Representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on a tollway brought an action against various entities, including private engineering firm that was contracted by county toll road authority to design the tollway. The 334th District Court, Harris County, Kenneth Price Wise, J., granted firm's plea to the jurisdiction based on governmental immunity under the Texas Tort Claims Act. Representative appealed. The Houston Court of Appeals, Fourteenth District, 401 S.W.3d 363, reversed and remanded. Firm petitioned for review.

Holdings: As matters of apparent first impression, the Supreme Court, Lehrmann, J., held that:

[1] extension of sovereign immunity to firm would not further the doctrine's rationale, and

[2] firm was not entitled to share in authority's sovereign immunity on the ground that authority was statutorily authorized to engage firm's services and would have been immune had it performed those services itself.

Affirmed.

Hecht, C.J., concurred in judgment and filed opinion in which Willett and Guzman, JJ., joined.

See also 316 S.W.3d 114.

West Headnotes (13)

[1] **States**Conditions and restrictions
StatesNecessity of Consent

"Sovereign immunity" is the doctrine that no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.

Cases that cite this headnote

[2] **Municipal Corporations**Capacity to sue or be sued in general

Referred to as "governmental immunity" when applied to the state's political subdivisions, sovereign immunity encompasses both immunity from suit and immunity from liability.

2 Cases that cite this headnote

[3] **Municipal Corporations** Capacity to sue or be sued in general

"Immunity from liability" is an affirmative defense that bars enforcement of a judgment against a governmental entity, while "immunity from suit" bars suit against the entity altogether and may be raised in a plea to the jurisdiction.

2 Cases that cite this headnote

[4] **Municipal Corporations** Capacity to sue or be sued in general
States Liability and Consent of State to Be Sued in General

Doctrine of sovereign immunity protects the state and its political subdivisions from lawsuits for monetary damages and other forms of relief and leaves to the legislature the determination of when to allow tax resources to be shifted away from their intended purposes toward defending lawsuits and paying judgments.

2 Cases that cite this headnote

[5] **States** Power to Waive Immunity or Consent to Suit

While inherently connected to the protection of the public fisc, sovereign immunity preserves separation-of-powers principles by preventing the judiciary from interfering with the legislature's prerogative to allocate tax dollars.

Cases that cite this headnote

[6] **States** Independent contractors

That a statute recognizes that private contractors are not entitled to sovereign immunity under certain circumstances, such as when a private party contracts with the government to finance, construct, operate, maintain, or manage correctional facilities, does not imply that such entities are entitled to immunity in all other situations. Tex. Gov't Code Ann. §§ 495.001, 495.005.

1 Cases that cite this headnote

[7] **States** Liability and Consent of State to Be Sued in General
States Necessity of constitutional or statutory consent

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; by contrast, the legislature determines when and to what extent to waive that immunity.

1 Cases that cite this headnote

[8] **States** Independent contractors

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.

6 Cases that cite this headnote

[9] **Automobiles**Liabilities of contractors, public utilities, and others

Extension of sovereign immunity to private engineering firm that was contracted by county toll road authority to design a tollway would not further the doctrine's rationale, in a case in which firm was sued by representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on the tollway; sovereign immunity was 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, and immunizing firm would in no way further that rationale.

2 Cases that cite this headnote

[10] **Automobiles**Liabilities of contractors, public utilities, and others

Private engineering firm that was contracted by county toll road authority to design a tollway was not entitled to share in authority's sovereign immunity on the ground that authority was statutorily authorized to engage firm's services and would have been immune had it performed those services itself, in a case which firm was sued by representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on the tollway; the lawsuit did not threaten allocated government funds and did not seek to hold firm responsible merely for following authority's directions, and firm was responsible for its own alleged negligence as a cost of doing business and could insure against that risk.

1 Cases that cite this headnote

[11] **Public Employment**Qualified immunity

Unlike sovereign immunity," qualified immunity" does not protect the government's tax-funded coffers from lawsuits and monetary judgments; rather, it protects government officials' personal coffers by shielding officials from harassment, distraction, and liability when they perform their duties reasonably.

Cases that cite this headnote

[12] **Public Employment**Qualified immunity

Qualified immunity is a uniquely federal doctrine.

2 Cases that cite this headnote

[13] **Public Employment**Privilege or immunity in general

Unlike sovereign immunity from suit, which may be raised in a plea to the jurisdiction, "official immunity" is an affirmative defense that must be pled and proved by the party asserting it.

5 Cases that cite this headnote

***119** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

Justice Lehrmann delivered the opinion of the Court, in which Justice Green, Justice Johnson, Justice Boyd, and Justice Devine joined.

The doctrine of sovereign immunity bars suit against the government absent legislative consent. In this case, a private engineering firm lawfully contracted with a governmental unit to design and construct a roadway, and a third party sued the firm for negligence in carrying out its responsibilities. The firm filed a plea to the jurisdiction seeking the same sovereign-immunity protection that the governmental unit would enjoy had it performed the work itself. The trial court granted the plea, but the court of appeals reversed, holding that the firm was not immune from suit. We hold that extending sovereign immunity to the engineering firm does not serve the purposes underlying the doctrine, and we therefore decline to do so. Accordingly, we affirm the court of appeals' judgment.

I. Background

During the early hours of January 1, 2007, an intoxicated driver entered an exit ramp of the Westpark Tollway in Fort Bend County. He proceeded east in the westbound lanes for approximately eight miles before colliding with a car driven by Pedro Olivares, Jr. Both drivers were killed.

The Fort Bend County portion of the Tollway fell under the purview of the Fort Bend County Toll Road Authority, a local government corporation created to design, build, and operate the Tollway. Rather than utilize government employees to carry out its responsibilities, the Authority entered into an Engineering Services Agreement with Brown & Gay Engineering, Inc. pursuant to Texas Transportation Code section 431.066(b), which authorizes local government corporations to retain "engineering services required to develop a transportation facility or system." Under that agreement, the Authority delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority's Board of Directors.[1] Brown & Gay was contractually responsible for furnishing the necessary equipment and personnel to perform its duties and was required to ***120** maintain insurance for the project, including workers' compensation, commercial general liability, business automobile liability, umbrella excess liability, and professional liability.

[1] The Authority maintained no full-time employees.

Olivares's mother, individually and as representative of his estate, and his father sued the Authority and Brown & Gay, among others,[2] alleging that the failure to design and install proper signs, warning flashers, and other traffic-control devices around the exit ramp where the intoxicated driver entered the Tollway proximately caused Olivares's death. The Authority filed a plea to the jurisdiction on governmental-immunity grounds. The trial court denied the plea, but on interlocutory appeal the court of appeals reversed, holding that the Authority was immune from claims based on its discretionary acts related to the placement and sufficiency of signs and other traffic-control and traffic-safety devices. *Fort Bend Cnty. Toll Road Auth. v. Olivares*, 316 S.W.3d 114, 121–26 (Tex.App.–Houston [14th Dist.] 2010, no pet.). The court of appeals remanded the case to the trial court to give the Olivareses an opportunity to amend their pleadings. *Id.* at 129. On remand, the Olivareses nonsuited the Authority, whose immunity is no longer at issue in this proceeding.

[2] The Olivareses initially sued the Authority, Harris County, Fort Bend County, the Texas Department of Transportation, and the Harris County Toll Road Authority. They amended their petition to add Brown & Gay and Michael Stone Enterprises, Inc. as defendants. Harris County, Fort Bend County, TxDOT, and the Harris County Toll Road Authority have all been nonsuited. Stone Enterprises is not a party to the petition for review filed in this Court.

Brown & Gay then filed its own plea to the jurisdiction, arguing that it was an employee of the Authority being sued in its official capacity and was therefore entitled to governmental immunity. *See 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" (internal quotation marks and citation omitted)). The trial court granted the plea, but the court of appeals reversed, holding that Brown & Gay was not entitled to

governmental immunity because it was an independent contractor, not an "employee" of the Authority as that term is defined in the Texas Tort Claims Act.[3] 401 S.W.3d 363, 378–79 (Tex.App.–Houston [14th Dist.] 2013).

3 The Tort Claims Act defines "employee" as "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." TEX. CIV. PRAC. & REM. CODE § 101.001(2).

In this Court, Brown & Gay argues that its status as an independent contractor rather than a government employee does not foreclose its entitlement to the same immunity afforded to the Authority. It argues that the court of appeals' reliance on the Tort Claims Act was misplaced because the Act "uses 'employee' to delineate the circumstances where the government will be liable under a waiver of immunity," not "to limit the scope of ... unwaived governmental immunity." Brown & Gay further argues that the purposes of sovereign immunity are served by extending it to private entities performing authorized governmental functions for which the government itself would be immune.

*121 II. Analysis

A. Origin and Purpose of Sovereign Immunity

[1] [2] [3]Once again we are presented with questions about the parameters of sovereign immunity, the well-established doctrine "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) (quoting *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). While sovereign immunity developed as a common-law doctrine, we "have consistently deferred to the Legislature to waive such immunity." *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 375 (Tex.2006) (emphasis omitted). Referred to as governmental immunity when applied to the state's political subdivisions,[4] *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57–58 (Tex.2011), sovereign immunity encompasses both immunity from suit and immunity from liability, *Reata Constr. Corp.*, 197 S.W.3d at 374. Immunity from liability is an affirmative defense that bars enforcement of a judgment against a governmental entity, while immunity from suit bars suit against the entity altogether and may be raised in a plea to the jurisdiction. *State v. Lueck*, 290 S.W.3d 876, 880 (Tex.2009); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex.2003).

4 We will use the term sovereign immunity throughout the remainder of the opinion to refer to both doctrines.

[4] [5]Although the doctrine's origins lie in the antiquated "feudal fiction that 'the King can do no wrong,' " modern-day justifications revolve around protecting the public treasury. *Taylor*, 106 S.W.3d at 695. At its core, the doctrine "protects the State [and its political subdivisions] from lawsuits for money damages" and other forms of relief, and leaves to the Legislature the determination of when to allow tax resources to be shifted "away from their intended purposes toward defending lawsuits and paying judgments." *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 853–54 (Tex.2002) (plurality op.); *see also Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex.2011) (per curiam) (noting that sovereign immunity "shield[s] the state from lawsuits seeking other forms of relief," not just suits seeking money judgments). And while inherently connected to the protection of the public fisc, sovereign immunity preserves separation-of-powers principles by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 97 (Tex.2012) (noting that immunity respects "the relationship between the legislative and judicial branches of government"); *see also Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 414 (Tex.1997) (Hecht, J., concurring) (outlining modern political and financial justifications for sovereign immunity).

Sovereign immunity thus protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation. It also recognizes that the Legislature has the responsibility to determine how these public funds will be spent. But with this benefit comes a significant cost: in "shield[ing] the public from the costs and consequences of improvident actions of their governments," *Tooke*, 197 S.W.3d at 332, sovereign immunity places the burden of shouldering those "costs and consequences" on injured individuals. *See* ***122** *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 172 (Tex.App.–Austin 2013, no pet.) (noting that "sovereign immunity generally shields our state government's improvident acts—however improvident, harsh, unjust, or infuriatingly boneheaded these acts may seem" (internal quotation marks and citation omitted)). And it does so by foreclosing—absent a

legislative waiver—the litigation and judicial remedies that would be available to the injured person had the complained-of acts been committed by private persons. *Id.*

In this case, we do not consider whether a governmental unit is immune from suit or whether the government's immunity has been waived. Instead, a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit seeks to invoke the same immunity that the government itself enjoys. With the considerations outlined above in mind, we examine the parties' arguments.

B. Effect of Statutes Extending or Limiting Immunity

[6]Notwithstanding the doctrine's judicial origins, both parties argue in part that the Legislature has resolved whether to extend sovereign immunity to a private contractor like Brown & Gay. Brown & Gay cites a statute that explicitly prohibits private parties that contract with the government to finance, construct, operate, maintain, or manage correctional facilities from claiming sovereign immunity in a suit arising from services under the contract. TEX. GOV'T CODE §§ 495.001, .005.[5] Brown & Gay infers from this provision that sovereign immunity extends to private entities contracting to perform government functions, unless otherwise provided by statute. We disagree. The fact that a statute recognizes that private contractors are not entitled to sovereign immunity under certain circumstances does not imply that such entities are entitled to immunity in all other situations.

5 "A private vendor operating under a contract authorized by this subchapter may not claim sovereign immunity in a suit arising from the services performed under the contract by the private vendor or county." TEX. GOV'T CODE § 495.005.

On the other hand, the Olivareses 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 Olivareses argue that the absence of similar legislation applicable to 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.

[7] [8]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.*, 197 S.W.3d at 375. 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 ***123** encompass private government contractors exercising their independent discretion in performing government functions.[6] For the reasons discussed below, we hold that they do not.

6 To that end, Brown & Gay is correct that the Tort Claims Act does not create sovereign immunity; it "provides a limited waiver" of that immunity. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex.2004).

C. Sovereign Immunity and Private Contractors

1. Extending Sovereign Immunity to Brown & Gay Does Not Further the Doctrine's Rationale and Purpose

[9]Guiding our analysis of whether to extend sovereign immunity to private contractors like Brown & Gay is whether doing so comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine. Brown & Gay contends that extending immunity serves these purposes. We disagree.

Seizing on the general purpose of protecting the public fisc, Brown & Gay argues that immunity for government contractors will save the government money in the long term. More specifically, while Brown & Gay recognizes that its exposure to defense costs and a money judgment will not affect the Tollway project's cost to the government, Brown & Gay asserts that the increased costs generally associated with contractors' litigation exposure will be passed on to the government, resulting in higher contract prices and government expense. Citing the same rationale, an amicus brief urges us to adopt a framework that

would extend sovereign immunity to a private entity performing discretionary government work, so long as the contractor is authorized to do so and the government would be immune had it performed the work itself. In proposing this test, the amicus contends that, just as sovereign immunity has been extended to political subdivisions performing governmental functions, it should be extended to private entities authorized to perform those functions.

As an initial matter, we note that Brown & Gay cites no evidence to support its proposed justification and ignores the many factors at play within the highly competitive world of government-contract bidding. It also disregards the fact that private companies can and do manage their risk exposure by obtaining insurance, as Brown & Gay did in this case. But even assuming that holding private entities liable for their own negligence in fact makes contracting with those entities more expensive for the government, this argument supports extending sovereign immunity to these contractors only if the doctrine is strictly a cost-saving measure. It is not.

Sovereign immunity has never been defended as a mechanism to avoid any and all increases in public expenditures. Rather, it was 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. *Sefzik,* 355 S.W.3d at 621; *IT–Davy,* 74 S.W.3d at 853. Immunizing a private contractor in no way furthers this rationale. Even 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.

***124** By contrast, immunizing the government—both the State and its political subdivisions—from suit directly serves the doctrine's purposes because the costs associated with a potential lawsuit cannot be anticipated at the project's outset. Litigation against the government therefore disrupts the government's allocation of funds on the back end, when the only option may be to divert money previously earmarked for another purpose.[7] It is this diversion—and the associated risk of disrupting government services—that sovereign immunity addresses. Accordingly, the rationale underlying the doctrine of sovereign immunity does not support extending that immunity to Brown & Gay.

[7] As noted above, private parties like Brown & Gay have an established means of protecting themselves from the specter of costly litigation—insurance. Indeed, as noted above Brown & Gay was contractually required to, and did, purchase several categories of insurance coverage on the Tollway project. The premiums for this coverage were undoubtedly taken into account during the bidding process.

2. Sovereign Immunity Does Not Extend to Private Companies Exercising Independent Discretion

[10]We have never directly addressed the extension of immunity to private government contractors, but our analysis in *K.D.F. v. Rex,* 878 S.W.2d 589 (Tex.1994), is instructive. In that case, we examined whether a private company that contracted with the Kansas Public Employees' Retirement System, a Kansas governmental entity created to manage and invest Kansas state employees' retirement savings, could benefit from the system's sovereign immunity and take advantage of a Kansas statute that required all "actions 'directly or indirectly' against the system" to be brought in a particular county in Kansas. *Id.* at 592. *K.D.F.* required us to interpret statutory language that is not at issue here; however, in rejecting the private company's assertion that any lawsuit against it was "indirectly" a lawsuit against the system, we tellingly noted:

> While sovereign immunity protects the activities of government entities, no sovereign is entitled to extend that protection *ad infinitum* through nothing more than private contracts. [The private entity] is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the Kansas government, executed subject to the control of [the system].

Id. at 597. In turn, we held that another private company that "operate [d] solely upon the direction of [the system]" and "exercise[d] no discretion in its activities" was indistinguishable from the system, such that "a lawsuit against one [wa]s a lawsuit against the other." *Id.* This reasoning implies that private parties exercising independent discretion are not entitled to sovereign immunity.

The control requirement discussed in *K.D.F.* is consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances. For example, in *Butters v. Vance International, Inc.,*

a female employee of a private security firm hired to supplement security at the California residence of Saudi Arabian royals sued the firm for gender discrimination after being declined a favorable assignment. 225 F.3d 462, 464 (4th Cir.2000). Although the firm had recommended the employee for the assignment, Saudi military supervisors rejected the recommendation on the grounds that the assignment would offend Islamic law and Saudi cultural norms. *Id.* Concluding that the Saudi government would be immune from suit under the Foreign Sovereign Immunities Act, the Fourth Circuit then considered ***125** whether that immunity attached to the security firm. *Id.* at 465. Holding that it did, the court relied on the fact that the firm "was following Saudi Arabia's orders not to promote [the employee]," expressly noting that the firm "would not [have been] entitled to derivative immunity" had the firm rather than the sovereign made the decision to decline the promotion. *Id.* at 466.

This limitation on the extension of immunity to government contractors is echoed in other cases. For example, in *Ackerson v. Bean Dredging LLC,* federal contractors were sued for damages allegedly caused by dredging in conjunction with the Mississippi River Gulf Outlet project. 589 F.3d 196 (5th Cir.2009). Relying on *Yearsley v. W.A. Ross Construction Co.,* 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940), the Fifth Circuit held that the contractors were entitled to immunity for their actions taken within the scope of their authority for the purpose of furthering the project. 589 F.3d at 206–07, 210.[8] Notably, however, the court found significant that the plaintiffs' allegations "attack[ed] Congress's policy of creating and maintaining the [project], *not any separate act of negligence by the Contractor Defendants.*" *Id.* at 207 (emphasis added); *see also Yearsley,* 309 U.S. at 20, 60 S.Ct. 413 (holding that a contractor directed by the federal government to construct several dikes was immune from claims arising from the resulting erosion and loss of property when the damage was allegedly caused by the dikes' existence, not the manner of their construction).

[8] The Fifth Circuit noted that the contractors' entitlement to dismissal was not jurisdictional. 589 F.3d at 207.

We cited *Yearsley* in a case involving a city contractor hired to build sewer lines along a city-owned easement in accordance with the city's plans and specifications. *Glade v. Dietert,* 156 Tex. 382, 295 S.W.2d 642, 643 (1956). The city had inadvertently failed to acquire the entire easement as reflected in the plans, and the contractor was sued for trespass after bulldozing a portion of a landowner's property. *Id.* While immunity was not at issue in *Glade* because the city owed the landowner compensation for a taking, we cited *Yearsley* and other case law for the proposition that a public-works contractor "is liable to third parties only for negligence in the performance of the work and not for the result of the work performed according to the contract." *Id.* at 644.

In each of these cases, 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.[9] In ***126** this case, the Olivareses do not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders. Under the contract at issue, Brown & Gay was responsible for preparing "drawings, specifications and details for all signs." Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown & Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay's decisions in designing the Tollway's safeguards are its own.[10]

[9] One federal district court aptly summarized the framework governing the extension of derivative immunity to federal contractors as follows:

> The rationale underlying the government contractor defense is easy to understand. Where the government hires a contractor to perform a given task, and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications, the contractor is entitled to the same immunity the government would enjoy, because the contractor is, under those circumstances, effectively acting as an organ of government, without independent discretion. Where, however, the contractor is hired to perform the same task, but is allowed to exercise discretion in determining how the task should be accomplished, if the manner of performing the task ultimately causes actionable harm to a third party the contractor is not entitled to derivative sovereign immunity, because the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner. Similarly, where the contractor is hired to perform the task according to precise specifications but fails to comply with those specifications, and the contractor's deviation from the government specifications actionably harms a third party, the contractor is not entitled to immunity because, again, the harm was not caused by the government's insistence on a specified manner of performance but rather by the contractor's failure to act in

> accordance with the government's directives.
> *Bixby v. KBR, Inc.*, 748 F.Supp.2d 1224, 1242 (D.Or.2010).

[10] At oral argument, Brown & Gay's counsel recognized that the details of the Tollway project, or the "discretionary functions" as put by counsel, were delegated to Brown & Gay.

Similar principles have been echoed in Texas appellate court decisions, cited by Brown & Gay, addressing the extension of immunity to private agents of the government. Two of these cases extended immunity to private law firms hired to assist the government with collecting unpaid taxes. *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736 (Tex.App.–Houston [1st Dist.] 2010, no pet.); *City of Hous. v. First City*, 827 S.W.2d 462 (Tex.App.–Houston [1st Dist.] 1992, writ denied). In *City of Houston*, the court of appeals engaged in a traditional principal–agency analysis to hold that the law firm was not liable as the city's agent on the plaintiff's claim that the city breached an "accord and satisfaction." 827 S.W.2d at 479–80. In contrast, the Olivareses do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions.

In *Ross*, the court of appeals held that the law firm was the "equivalent of a state official or employee" being sued in its official capacity. 333 S.W.3d at 742–43. But Brown & Gay has notably abandoned the very argument that the case would seem to support: that the Olivareses sued Brown & Gay as a government employee in its official capacity and therefore effectively sued the government. Moreover, in determining whether the law firm was the equivalent of a state official in *Ross*, the court of appeals examined the pleadings to conclude that the plaintiff had sued the law firm as an agent of the taxing entity and had "asserted no facts indicating that the taxing entities did not have the legal right to control the details of the tax-collecting task delegated to [the firm]." *Id.*

Regardless of whether these cases were correctly decided, the government's right to control that led these courts to extend immunity to a private government contractor is utterly absent here. The evidence shows that Brown & Gay was an independent contractor with discretion to design the Tollway's signage and road layouts. We need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative.[11]

[11] The amicus asserts that "no policy reason" supports employing a control-oriented analysis. In doing so, the amicus implicitly recognizes that policy concerns are central to deciding whether immunity should be extended. As discussed at length above, the policy behind immunity does not support its extension here regardless of whether a control-oriented analysis applies.

***127** Finally, Brown & Gay cites *Foster v. Teacher Retirement System*, 273 S.W.3d 883 (Tex.App.–Austin 2008, no pet.), to support the extension of immunity in this case. In that case, a retired teacher sued the Teacher Retirement System of Texas (a state agency) as well as Aetna, the private company hired to administer the agency's insurance plan. *Id.* at 885. The suit arose from Aetna's denial of health coverage on a claim after concluding that the provider was not in-network and the treatment was not medically necessary. *Id.* The court of appeals held that both the agency and Aetna were immune from suit for claims arising out of the coverage denial. *Id.* at 890. However, the terms of the contract, the relationship between the state agency and the contractor, and the direct implication of state funds in that case distinguish it from the case at hand.

In *Foster*, the court of appeals recognized that Aetna had discretion to interpret the insurance plan, but explained that, under the contract with the agency, "Aetna simply provide[d] administrative services to facilitate the provision of health care to [covered] retirees." *Id.* Further, the insurance plan was fully funded by the state such that Aetna had no stake in a claim's approval or denial, the agency set the terms of the plan, Aetna acted as an agent of and in a fiduciary capacity for the agency, and the agency agreed to indemnify Aetna for any obligations arising out of its good-faith performance. *Id.* at 889–90. The court compared Aetna to the "fiduciary intermediaries" discussed in federal case law holding that "a private company is protected by Eleventh Amendment immunity if the suit amounts to one seeking to recover money from the state." *Id.* at 889 (citing cases). In this case, no fiduciary relationship exists between Brown & Gay and the Authority. Further, in suing Brown & Gay the Olivareses do not effectively seek to recover money from the government. Unlike the coverage claims in *Foster*, which implicated both the state-funded insurance plan and the agency's duty to indemnify Aetna, the underlying suit threatens only Brown & Gay's pockets.

In sum, we cannot adopt 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. That is, we decline to extend to private entities the same immunity the government enjoys for reasons unrelated to the rationale that justifies such immunity in the first place. The Olivareses' suit does not threaten allocated government funds and does not seek to hold Brown & Gay liable merely for following the government's directions. Brown & Gay is responsible for its own negligence as a cost of doing business and may (and did) insure against that risk, just as it would had it contracted with a private owner.

D. Justifications for Qualified and Official Immunity Do Not Support the Extension of Sovereign Immunity to Private Parties

In addition to the cost-saving rationale discussed above, Brown & Gay cites the U.S. Supreme Court's opinion in *Filarsky v. Delia* to argue that extending sovereign immunity to government contractors advances the government interest in avoiding "unwarranted timidity" on the part of those performing public duties. ***128** —— U.S. ——, 132 S.Ct. 1657, 1665, 182 L.Ed.2d 662 (2012). The issue in *Filarsky* was whether individuals hired to do government work "on something other than a permanent or full-time basis" enjoyed the same qualified immunity as traditional government employees from claims brought against them under 42 U.S.C. § 1983. *Id.* at 1660. The Supreme Court held that a private attorney engaged by a city to investigate a personnel matter could assert qualified immunity in a suit alleging constitutional violations committed during the course of the investigation. *Id.* at 1661, 1667–68. The Court saw no basis to distinguish between a full-time government employee, who would be entitled to assert such immunity, and an individual hired to do government work on some other basis. *Id.*

[11]Brown & Gay's reliance on *Filarsky* 's qualified-immunity analysis is misplaced. The federal doctrine of qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Unlike sovereign immunity, qualified immunity does not protect the government's tax-funded coffers from lawsuits and money judgments. Rather, it protects government officials' personal coffers by "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

[12] [13]Qualified immunity is a uniquely federal doctrine, calling into further doubt *Filarsky* 's relevance to the issue in this case. At best, the doctrine bears some resemblance to the Texas common-law defense of official immunity, which protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority.[12] *Kassen v. Hatley,* 887 S.W.2d 4, 8 (Tex.1994); see also *Ballantyne v. Champion Builders, Inc.,* 144 S.W.3d 417, 424 (Tex.2004) ("Common law official immunity is based on the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation."). In *Kassen,* we noted the well-established distinction between "official immunity, which protects individual officials from liability, [and] sovereign immunity, which protects governmental entities from liability." 887 S.W.2d at 8. We also recognized that a government employee's right to official immunity is unrelated to a plaintiff's right to pursue the government under a legislative waiver of sovereign immunity. *Id.* Further, unlike sovereign immunity from suit, which as noted above may be raised in a plea to the jurisdiction, official immunity is an affirmative defense that must be pled and proved by the party asserting it. *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex.1994).

12 In *City of Lancaster v. Chambers,* we noted that federal law on qualified immunity was instructive in evaluating whether a police officer was entitled to official immunity for his actions in conducting a high-speed chase. 883 S.W.2d 650, 654 (Tex.1994).

In this case, Brown & Gay has never argued that the official-immunity defense may be asserted by a person performing government work "on something other than a permanent or full-time basis." *Filarsky,* 132 S.Ct. at 1660. Nor has it ever pled or argued that the elements of the defense are satisfied here. Instead, Brown & Gay argues that it is entitled to the same immunity that the government ***129** itself enjoys. But the policies underlying official and qualified immunity are simply irrelevant to that contention.

Brown & Gay also argues that declining to extend sovereign immunity to contractors like Brown & Gay will make it difficult for the government to engage talented private parties fearful of personal liability. As noted above, such speculation fails to

take into account a private party's ability to manage that liability exposure through insurance. It also ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay.

Moreover, a long line of Texas case law recognizes government contractors' liability for their negligence in road and highway construction. *See, e.g.*, *Bay, Inc. v. Ramos*, 139 S.W.3d 322, 328 (Tex.App.–San Antonio 2004, pet. denied) (holding that a government contractor hired for highway construction work was not entitled to share in the state's sovereign immunity when the contractor exercised considerable discretion in maintaining the construction site where the plaintiff's injury occurred); *Overstreet v. McClelland*, 13 S.W.2d 990, 992 (Tex.Civ.App.–Amarillo 1928, writ dism'd w.o.j.) (holding that a government contractor hired for highway construction work had a duty to exercise ordinary care to protect travelers using the highway despite the fact that the government itself could not be held liable for the negligence of its officers or agents); *cf. Strakos v. Gehring*, 360 S.W.2d 787, 790, 793–94 (Tex.1962) (holding, in the context of rejecting the "accepted work" doctrine, that a county contractor hired to relocate fencing alongside widened roads was not insulated from tort liability for injuries that occurred after the county accepted the work but were caused by the condition in which the contractor left the premises). Brown & Gay cites no evidence supporting a shortage of willing contractors notwithstanding this line of cases.

III. Conclusion

We decline to extend sovereign immunity to private contractors based solely on the nature of the contractors' work when the very rationale for the doctrine provides no support for doing so. We hold that the trial court erred in granting Brown & Gay's plea to the jurisdiction and that the court of appeals properly reversed that order. Accordingly, we affirm the court of appeals' judgment.

Chief Justice Hecht filed an opinion concurring in the judgment, in which Justice Willett and Justice Guzman joined.

Justice Brown did not participate in the decision.

Chief Justice Hecht, joined by Justice Willett and Justice Guzman, concurring in the judgment.
Immunity protects the government. An independent contractor is not the government. Therefore, immunity does not protect an independent contractor. That simple syllogism seems to me to resolve this case.

An independent contractor may act *as* the government, in effect becoming the government for limited purposes, and when it does, it should be entitled to the government's immunity. A statutory example is Section 452.0561 of the Transportation Code, which provides that "[a]n independent contractor ... performing a function of [certain public transportation entities] is liable for damages only to the extent that the entity ... would be liable if the entity ... itself were performing the ***130** function."[1] The Court cites several cases providing other examples. But an independent contractor acting only in the service of the government is not a government actor. A statutory example of this is Section 495.005 of the Government Code, which provides that "[a] private vendor operating under a contract [for correctional facilities and services] may not claim sovereign immunity in a suit arising from the services performed".[2]

[1] TEX. TRANSP. CODE § 452.0561; *see also id.* § 452.056(d) ("[A]n independent contractor ... that ... performs a function of [a regional transportation authority or certain other public transportation entities] is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function...."); *id.* § 454.002(b) ("An independent contractor that on behalf of a municipality provides mass transportation service that is an essential governmental function ... is liable for damages only to the extent that the municipality would be liable if the municipality were performing the function."); *id.* § 460.105(c) ("[A]n independent contractor of [a coordinated county transportation authority] that performs a function of the authority is liable for damages only to the extent that the authority would be liable if the [authority] itself were performing the function.").

[2] *Id.* § 495.005.

In determining whether an independent contractor is acting *as* or only *for* the government, the extent of the government's control over the independent contractor's actions is relevant but not conclusive. For example, the government's control over

its lawyer is necessarily limited by the lawyer's duty under the rules of professional conduct to "exercise independent professional judgment" in representing a client.[3] That limited control notwithstanding, a lawyer has been said to be immune from suit for his conduct in representing a governmental entity.[4] Courts have concluded that a construction contractor's immunity from suit may depend, not on a governmental entity's control over the contractor's work, but rather over whether the suit complains of the very existence of a project, a governmental decision, as opposed to the contractor's performance.[5] A contractor may act for itself in the sense that it is liable for negligent performance of its work, but insofar as it is simply implementing the government's decisions it is entitled to the government's immunity.[6] An independent contractor's authority or even agency to serve the government are also relevant, but the ultimate issue is whether the independent contractor is actually authorized by the government to act in its place.

[3] TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01.

[4] *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736, 742, 745–747 (Tex.App.–Houston [1st Dist.] 2010, no pet.).

[5] *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20–21, 60 S.Ct. 413, 84 L.Ed. 554 (1940) (federal contractor immune from liability where the lawsuit attacked dikes' existence rather than the method of construction); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196 (5th Cir.2009) (concluding that federal contractors were entitled to *Yearsley* 's "government-contractor immunity" from liability where the lawsuit attacked Congress's project rather than contractors' own acts).

[6] We recognized in *Allen Keller Co. v. Foreman*, 343 S.W.3d 420, 425–426 (Tex.2011), that a government contractor owes no duty of care to design a highway project safely where the contractor acts in strict compliance with the governmental entity's specifications. We distinguished between "the duties that may be imposed upon a contractor that has some discretion in performing the contract and a contractor that is left none". *Id.* at 425 (citing *Strakos v. Gehring*, 360 S.W.2d 787, 803 (Tex.1962) (op. on rehearing)). That such a contractor acts as the government and may therefore be entitled to its immunity follows from the same principle.

The Fort Bend County Toll Road Authority tasked Brown & Gay with selecting ***131** 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.[7] I therefore concur in the Court's judgment.

[7] The Legislature has also recognized that compliance with governmental direction may be a prerequisite for limits on liability. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 97.002 ("A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.").

But I cannot join its opinion. In my view, it is unnecessary, and also incorrect, to argue, as the Court does, that affording a highway contractor immunity does not serve immunity's purpose in shielding the government from financial liability. Brown & Gay argues that contractor liability, or the cost of insurance to cover it, increases construction costs, and consequently contract costs to the government, long-term. The Court's response is that the purpose of immunity is only to protect the government from *unforeseen* expenditures, not merely to save costs. The Court's position is contradicted by the very authority on which it relies: "While the doctrine of sovereign immunity originated to protect the public fisc from unforeseen expenditures that could hamper governmental functions, *it has been used to shield the state from lawsuits seeking other forms of relief*".[8] The Court's restricted view of the purpose of immunity is not supported by authority.

[8] *Tex. Dept. of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex.2011) (per curiam) (emphasis added) (citations omitted).

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