NO. 05-15-01559-CV

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

DAWN NETTLES,

Appellant,

v.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION,

Appellees.

GTECH'S BRIEF OF APPELLEE

HAYNES AND BOONE, LLP

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

HAYNES AND BOONE, LLP

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

REED SMITH LLP

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

ORAL ARGUMENT CONDITIONALLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

I. Appellant:

Dawn Nettles

Counsel:

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

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

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

II. Appellee:

GTECH Corporation

Counsel:

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

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

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

III. Appellee:

Texas Lottery Commission

Counsel:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

STATEMENT OF THE CASE

Nature of the Case:	Plaintiff sued the Texas Lottery Commission and GTECH, a contractor for the Texas Lottery Commission, complaining that her $5 Texas Lottery scratch-off tickets were misleading and seeking more than $4,000,000 in damages. (CR6-21, 55-100, 416-45, 448-51.)
Trial Court:	Judge Jim Jordan, 160th Judicial District Court, Dallas County.
Course of Proceedings:	The Texas Lottery Commission and GTECH filed pleas to the jurisdiction. (CR101-11, 452-54.)
Trial Court Disposition:	The trial court granted the pleas to the jurisdiction and dismissed the case. (CR317, Tab A; CR490, Tab B.)
Court of Appeals Order:	On May 23, 2016, this Court granted Nettles's unopposed motion to dismiss her appeal as to the Texas Lottery Commission, ordering that the appeal "will proceed as to GTECH Corporation only." (Tab C.)

STATEMENT REGARDING ORAL ARGUMENT

In the event the Court hears oral argument, GTECH requests an opportunity to address the Court.

ISSUES PRESENTED

Issue 1: The trial court did not err by granting GTECH's plea to the jurisdiction, which is based on its derivative governmental immunity.

> ***Issue 1(a):*** Nettles did not preserve her argument that a contractor has immunity only when necessary to shield the government from unforeseen expenditures. In any event, that argument is incorrect.
>
> ***Issue 1(b):*** For purposes of derivative governmental immunity, it makes no difference whether GTECH is an independent contractor. GTECH has immunity because it did not exercise independent discretion, and because the TLC approved the final specifications for the "Fun 5's" tickets.

STATEMENT OF FACTS

I. GTECH and the TLC.

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 ("TLC"), a state agency that has governmental immunity. (CR132-33, 476.) By statute, the TLC 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 TLC entered into services contracts with GTECH and two other contractors. (CR475.) GTECH's contracts call for it to submit "draft working papers" to the TLC containing specifications for proposed scratch-off tickets, including the design, artwork, prize structures, and rules of the game. (CR475.) 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 TLC, 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.***" (CR130 (emphasis added).) GTECH's role is further limited by the Government Code, which

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

When the TLC decides that a ticket concept is worth pursuing, staff members at the TLC use the draft working papers proposed by GTECH as a mere starting point for their decisions about the specifications for the ticket. (CR475.) During this process, the TLC's staff members manually mark up the draft working papers and send emails directing GTECH to make changes to the proposed ticket. (CR475.) GTECH revises the draft working papers as directed by the TLC and sends them back to the TLC for further review. (CR475-76.) Often, the TLC will make several rounds of revisions before it settles on the final specifications for a ticket. (CR476.)

Once the TLC has decided on the final specifications and its changes are made, the TLC approves the final working papers. GTECH uses the final working papers to print the tickets, which the TLC sells through its retail ticket outlets. (CR449.) GTECH's name does not appear on Texas Lottery tickets. (CR134.) GTECH does not sell the tickets or communicate with prospective purchasers of the tickets. (CR134.)

When a ticket purchaser seeks to redeem a winning ticket, the purchaser 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. (CR310-11, 389, 438.) GTECH programs the computer network in accordance with the final working papers approved by the TLC. (CR310-11, 389, 438.)

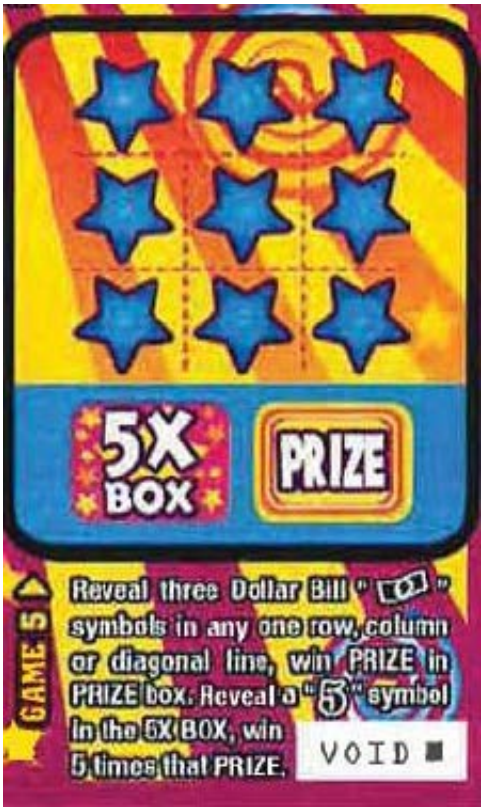
II. The "Fun 5's" ticket.

On March 13, 2013, GTECH proposed to the TLC a prototype of what became the "Fun 5's" scratch-off ticket. (CR475.) 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. (CR425-26, 475.) The Nebraska "Fun 5's" ticket had five different games on its face, one of which was a tic-tac-toe game.

The TLC expressed interest in the "Fun 5's" concept and GTECH proposed an initial set of draft working papers to the TLC. (CR425, 475.) 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." (CR426.) 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. (CR426.) And if the player scratched off the multiplier "5X BOX" and revealed a "5" symbol, the player would win five

times that "PRIZE." (CR426.) As initially proposed by GTECH to the TLC, the tic-tac-toe game looked like this:

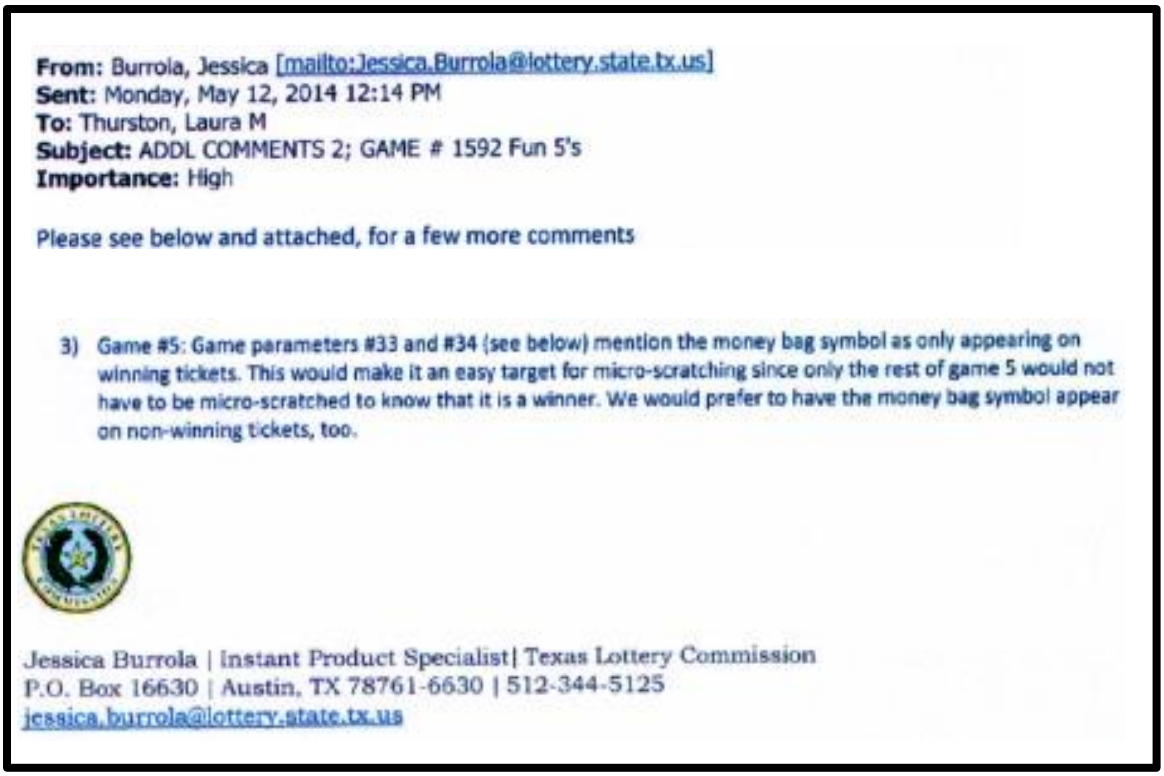


(CR426.)

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." (CR476.) 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." (CR476.)

The TLC 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. First, the TLC directed GTECH to change the "5" symbol to a "money bag" symbol on the draft working papers and change the "dollar bill" symbol to a "5" symbol. (CR428, 476.) The TLC also made a minor revision to the rules of the tic-tac-toe game. (CR426.)

Critically, the TLC 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. (CR428.) The TLC 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. (CR367, 428, 476.) This technique reveals whether the ticket is a winner before it is sold. (CR476.) The TLC 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

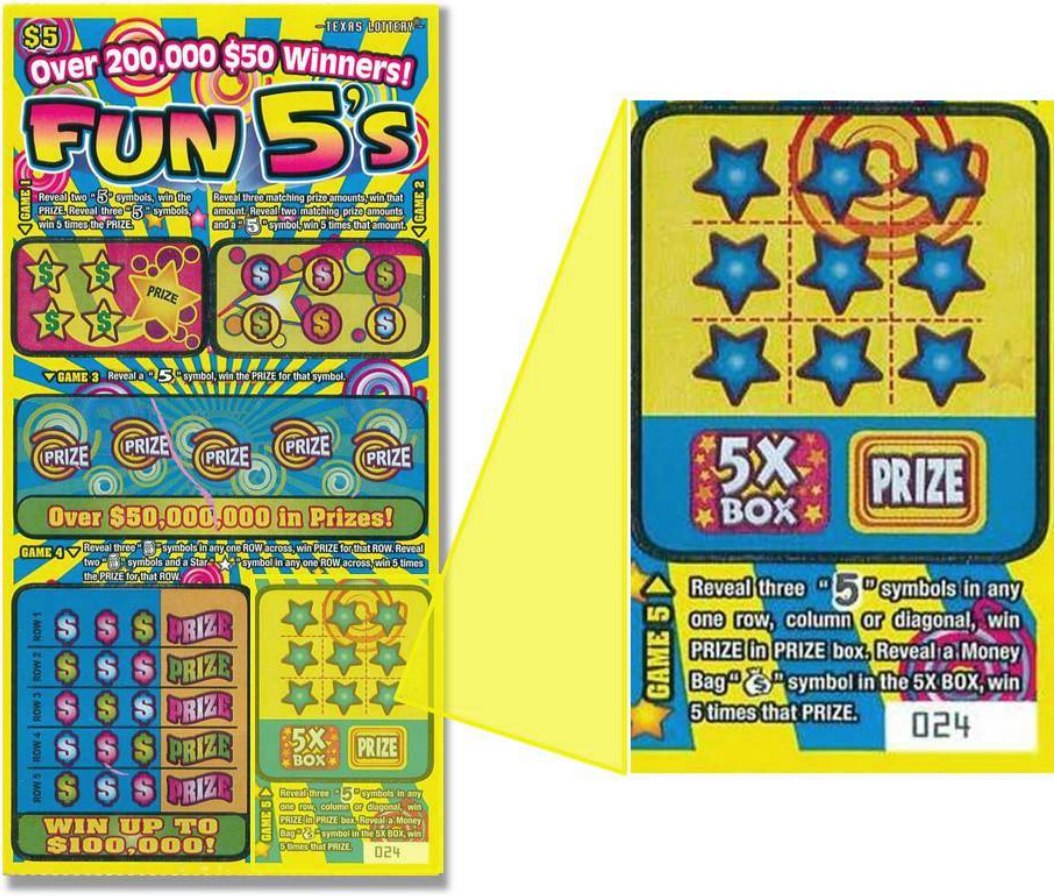
Please see below and attached, for a few more comments

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

(CR428, 466.) Two days later, the TLC followed up and directed GTECH to print a "money bag" symbol on approximately 25% of the non-winning tickets. (CR476.)

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



(CR432.) In accordance with the changes made by the TLC, 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." (CR432, 476.) On May 16, 2014, the TLC approved the final working papers for the "Fun 5's" ticket. (CR369, 405, 431.)

On June 20, 2014, the TLC, not GTECH, 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 TLC did not send the official rules and specifications to GTECH for review before publishing them in the Texas Register. (CR373.)

III. The litigation.

On September 2, 2014, the TLC, through its retailers, began selling "Fun 5's" tickets to the public. (CR295.) Approximately two weeks later, the news media began reporting that some purchasers of "Fun 5's" tickets, purporting to be confused by the tic-tac-toe game, had contacted Plaintiff Dawn Nettles, who operates a website devoted to critiquing the Texas Lottery.[1] The media reported that "a lawyer . . . thinks they have a good case."[2]

In December 2014, Nettles filed this lawsuit in Dallas, and more than 1,200 other ticket purchasers filed a separate "mass action" in Austin.[3] Nettles complains that the $5 "Fun 5's" tickets she purchased were misleading and seeks

---

[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 14, 2016).

[2] *Id.*

[3] In the Austin case, *James Steele, et al. v. GTECH Corp.*, No. D-1-GN-14-005114 (201st Judicial District Court, Travis County, Tex.), the plaintiffs and intervenors seek compensatory damages in excess of $500 million, plus exemplary damages. The trial court denied GTECH's plea to the jurisdiction but acknowledged that "there is a substantial ground for difference of opinion" regarding GTECH's immunity and granted permission to appeal. The Austin court of appeals agreed that a substantial ground for difference of opinion exists and accepted the appeal, which is styled *GTECH Corp. v. James Steele, et al.*, No. 03-16-00172-CV (Tex. App—Austin). GTECH filed its brief of appellant on July 6, 2016.

compensatory damages in excess of $4 million, plus exemplary damages. (CR6-21, 55-100, 416-45, 448-51.) The crux of her complaint is that she was misled to believe that the presence of a "money bag" symbol in the multiplier "5X Box" meant that she was entitled to five times the amount of money in the "PRIZE" box, ***even though she did not have three play symbols in any one row, column, or diagonal in the tic-tac-toe game.***

In her original petition, Nettles sued GTECH alone for negligence, tortious interference, and breach of fiduciary duty. (CR6-21.) After GTECH filed its original plea to the jurisdiction and motion to dismiss, Nettles filed an amended petition in which she abandoned her claims of negligence and breach of fiduciary duty and asserted new claims of fraud, fraud by non-disclosure, and "aiding and abetting fraud." (CR24-34, 55-73.) Her second and third amended petitions added the TLC as a defendant. (CR74-100, 416-45.)

The TLC filed a plea to the jurisdiction asserting its governmental immunity. (CR101-06.) GTECH filed a first amended plea to the jurisdiction asserting the doctrine of derivative governmental immunity, which shields government contractors from suits arising from actions directed by a governmental entity. (CR107-11.) The trial court granted both pleas to the jurisdiction and dismissed the case. (CR317, Tab A; CR490, Tab B.)

On May 23, 2016, this Court granted Nettles's motion to dismiss her appeal as to the Texas Lottery Commission, ordering that the appeal "will proceed as to GTECH Corporation only." (Tab C.)

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 TLC alone has authority over all aspects of Texas Lottery games. The TLC determined the final specifications for its "Fun 5's" tickets, and Nettles admits that all of her complaints about the "Fun 5's" tickets arise from decisions made by the TLC, not GTECH. Nettles further admits that GTECH followed the TLC's directions to the letter. Accordingly, GTECH has immunity.

Nettles cannot avoid that conclusion by arguing that GTECH could be held liable without causing the government to make unforeseen expenditures. That argument was not preserved for this Court's review, and it is based on a misreading of the authority she cites.

Nor can Nettles defeat GTECH's immunity by arguing that GTECH was required to exercise independent discretion because it owed a duty of "reasonable care" when deciding whether to implement or reject the TLC's changes to the

working papers. GTECH is contractually obligated to implement the TLC's decisions, and nothing in its contracts with the TLC requires—or even allows—GTECH to second-guess those decisions. Moreover, Nettles's insistence that GTECH owed a duty of "reasonable care" cannot be reconciled with her decision to abandon her claims of negligence and replace them with claims of fraud.

The trial court correctly granted GTECH's plea to the jurisdiction. This Court should affirm.

ARGUMENT

When "the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). Here, the relevant evidence is undisputed: Nettles concedes that the TLC made all of the decisions from which her claims arise, and further concedes that GTECH followed the Commission's directions to the letter. (CR484, 486; RR13.) The trial court examined this undisputed evidence and properly granted GTECH's plea to the jurisdiction. Its judgment should be affirmed.

I. GTECH has immunity because the TLC 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 D.)

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 recognized 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, the TLC determined the final specifications of the "Fun 5's" ticket. Indeed, Nettles ***concedes*** that ***all*** of her complaints about the "Fun 5's" tickets arise from decisions made by the TLC, not GTECH:

> Q. And you know from sitting through those depositions that ***each of the complaints that you are making*** in this lawsuit about the Fun 5's game ***were changes that were requested by the Texas Lottery Commission, correct?***
>
> A. ***Yes.*** I know that now.

(CR484 (emphasis added).)

> Q. And you also understand that ***it was the Texas Lottery who made the changes that you're complaining about?***
>
> A. ***Yes.***

(CR486 (emphasis added).) Nettles also admits that GTECH followed the TLC's directions to the letter:

> The Court: So did GTECH do anything contrary to what the TLC signed off on?

[Nettles's counsel]: They did not. They did not.

(RR13.)

Under *Brown & Gay*, Nettles's admissions are fatal to her efforts to defeat GTECH's immunity. The trial court correctly granted GTECH's plea to the jurisdiction, and this Court should affirm.

II. Nettles's complaint about "unforeseen expenditures" provides no basis for reversal.

Nettles cannot circumvent her own admissions by complaining, as she does in Issue 1(a), that the trial court erred by granting GTECH's plea to the jurisdiction because "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." (Appellant's Br. at xi.) That complaint was not preserved for this Court's review, and it is based on a misreading of *Brown & Gay*.

A. Nettles's complaint was not preserved for this Court's review.

As an initial matter, Nettles's complaint about unforeseen expenditures was not preserved in the trial court for review by this Court. An appellate court may not consider a complaint on appeal unless the appellant shows that she presented the complaint to the trial court "with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.1(a)(1)(A).

Nettles cannot avoid the preservation requirement on the ground that her complaint is jurisdictional in nature. It is true that when a trial court concludes that jurisdiction ***exists*** and the appellant raises a new argument on appeal that jurisdiction is ***absent,*** the appellate court should address the new argument and dismiss the case for lack of jurisdiction. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). In that situation, the court must consider the new argument because, when jurisdiction is absent, dismissal is the only disposition allowed by the Constitution. *Id.*

But the reverse is not true. When—as here—the trial court concludes that jurisdiction is ***absent*** and the appellant raises a new argument on appeal that jurisdiction ***exists,*** there is no Constitutional impediment to enforcing the preservation rules and affirming the judgment of dismissal. *See Schronk v. City of Burleson*, 387 S.W.3d 692, 711 n.18 (Tex. App.—Waco 2009, pet. denied) (refusing to consider an argument that the defendant judicially admitted causation, because the plaintiffs "did not rely on this 'admission' in the trial court as a basis for denial of the . . . plea to the jurisdiction"); *City of San Antonio v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197, at *4 n.3 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (mem. op.) (refusing to consider an argument that the defendant waived its immunity by filing a motion to consolidate, because the plaintiff "never presented this theory to the trial court");

Liberty Mut. Ins. Co. v. Sharp, 874 S.W.2d 736, 739-40 (Tex. App.—Austin 1994, writ denied) (refusing to consider an argument that the plea to the jurisdiction was not verified, because the "objection was not raised at the trial-court level, and appellant may not raise the issue for the first time on appeal").

Nettles was required not only to present her complaint to the trial court, but to do so in her response to GTECH's plea to the jurisdiction, just as a party opposing a summary judgment motion must present every ground for opposing the motion in her response. The procedures applicable to pleas to the jurisdiction "mirror" the procedures applicable to summary judgment motions. *Harris County Flood Control Dist. v. Kerr*, ___ S.W.3d ___, ___, No. 13-0303, 2016 WL 3418246, at *4 (Tex. June 17, 2016) (quoting *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004)); *Dallas County v. Gonzales*, 183 S.W.3d 94, 99 (Tex. App.—Dallas 2006, pet. denied). For example, just as an appellate court will presume that the trial court did not consider late-filed evidence in a summary judgment proceeding unless the record shows otherwise, the same rule applies in proceedings on a plea to the jurisdiction. *Grant v. Espiritu*, 470 S.W.3d 198, 203 (Tex. App.—El Paso 2015, no pet.).

A fundamental tenet of summary judgment practice is that every ground for opposing the motion must be stated in the response. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993). If the response omits a ground

for opposing the motion, the appellant may not assert that ground as a basis for reversal on appeal. *State Bd. of Ins. v. Westland Film Indus.*, 705 S.W.2d 695, 696 (Tex. 1986); *Griggs v. Capitol Mach. Works, Inc.*, 701 S.W.2d 238, 238 (Tex. 1985); *Mavex Mgmt. Corp. v. Hines Dallas Hotel Ltd. P'ship*, 379 S.W.3d 456, 462 (Tex. App.—Dallas 2012, no pet.). Likewise, Nettles cannot assert any basis for reversing the trial court's judgment that was not included in her response to GTECH's plea to the jurisdiction. *See Grant*, 470 S.W.3d at 203.

In her response, Nettles urged the trial court to deny GTECH's plea to the jurisdiction on three enumerated grounds:

- "A. GTECH was an independent contractor, not an employee of the TLC."
- "B. Because GTECH exercised 'independent discretion', it is not entitled to 'derivative immunity'."
- "C. The fact that GTECH's working papers were subject to approval by the TLC does not give GTECH immunity from suit."

(CR341, 346, 354.) On appeal, Nettles reasserts those same three arguments in parts II.B.1, II.B.2, and II.B.3 of the argument section of her brief. (Appellant's Br. at 21 -24.)

In contrast, nowhere in her response did Nettles argue that GTECH's immunity turns on whether the contractor's liability would force the government to make unforeseen expenditures. In the preliminary section of her response, Nettles

included a general overview of *Brown & Gay* which stated that the opinion "also noted" that immunity protects the government from unforeseen expenditures. (CR345.) But Nettles did not mention unforeseen expenditures anywhere in the argument section of her response, much less argue (as she does on appeal) that GTECH's immunity turns on whether the TLC or the State could be forced to make unforeseen expenditures. (Appellant's Br. at xi, 16-20.) Nor did Nettles mention GTECH's "hold harmless" agreement in her response, much less argue (as she does on appeal) that the "hold harmless" agreement protects the TLC from unforeseen expenditures. (Appellant's Br. at 17-19.) Nettles did not mention the "Contract for Instant Ticket Manufacturing and Services" either, much less argue (as she does on appeal) that this agreement protects the TLC from unforeseen expenditures. (Appellant's Br. at 19-20.) Finally, Nettles did not argue in her response (as she does on appeal) that the claims in this case are covered by those two agreements. (Appellant's Br. at 20.) Because none of these arguments were presented to the trial court, they provide no basis for reversing the trial court's judgment. TEX. R. APP. P. 33.1.

B. Nettles misreads *Brown & Gay*.

Nettles's argument about unforeseen expenditures, besides not having been preserved below, is based on a misreading of *Brown & Gay*. Nettles argues that if a contractor's liability would not expose the government to unforeseen expenditures,

that is the beginning and end of the analysis under *Brown & Gay*. (Appellant's Br. at xi.) But the court in *Brown & Gay* did not discuss that single policy consideration and end its opinion there. Instead, after discussing unforeseen expenditures in approximately one page of its opinion, the court devoted approximately four pages to its analysis of nine federal and state cases which support its ultimate conclusion that a government contractor 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). It is not plausible that the court analyzed those nine cases for no reason at all, in mere dicta.

When the *Brown & Gay* opinion is read in its entirety, it is apparent that the discussion of unforeseen expenditures is not the heart of the court's analysis. Rather, that discussion sets the stage for the court's analysis by explaining why it is unnecessary, from the standpoint of fiscal policy, to extend immunity broadly to every government contractor in every case. If the fiscal purpose of immunity was to reduce the costs of contracting generally, then it would make sense to extend immunity to all government contractors, given 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." *Id.* at 123. But as the court explained, the fiscal purpose of contractor immunity is not to

reduce costs generally, but to eliminate "unforeseen" expenditures specifically. *Id.* at 124-25. Therefore, the court concluded that immunity should be extended to contractors "only in limited circumstances." *Id.* at 124.

To define the circumstances in which immunity should be extended to contractors, the *Brown & Gay* court examined nine federal and state cases, including a federal decision that "aptly summarized" an additional, non-fiscal rationale for contractor immunity:

> 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.***

Id. at 125 n.9 (quoting *Bixby v. KBR, Inc.*, 748 F. Supp. 2d 1224, 1242 (D. Or. 2010)) (emphasis added). Consistent with that non-fiscal rationale for immunity, the *Brown & Gay* court was clear that it was ***not*** eliminating immunity for contractors whose actions were "actions of the . . . government" and that "exercised no discretion." *Id.* at 124-25 (quoting *K.D.F.*, 878 S.W.2d at 597).

Later decisions interpreting *Brown & Gay* have confirmed that the decision extends immunity to contractors who implement governmental directions without

exercising independent discretion. For example, the First Court of Appeals recently summarized *Brown & Gay* as follows:

> The Court [in *Brown & Gay*] held that a private entity contracting with the government may benefit from sovereign immunity if "it can demonstrate its actions were actions of the . . . government" and that "it exercise[d] no discretion in its activities."

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.) (quoting *Brown & Gay*, 461 S.W.3d at 124-25); *see also 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) (summarizing *Brown & Gay* and *K.D.F.* in a similar fashion); *Kuwait Pearls Catering Co., WLL v. Kellogg Brown & Root Servs., Inc.*, No. H-15-0754, 2016 WL 1259518, at *10 (S.D. Tex. Mar. 31, 2016) (summarizing *Brown & Gay* in a similar fashion).

As these decisions confirm, Nettles is interpreting *Brown & Gay* incorrectly. In the event this Court reaches Nettles's argument concerning unforeseen expenditures, it should reject that argument as a misreading of *Brown & Gay*.

C. GTECH's immunity comports with the policy considerations discussed in *Brown & Gay*.

Nettles not only misreads *Brown & Gay*, but also ignores the reality that GTECH cannot be held liable without exposing the government to unforeseen

expenditures. (Appellant's Br. at 16-20.) In the unlikely event that Nettles's fraud claims are ultimately upheld, the financial consequences would extend far beyond any damages awarded in this case. The resulting publicity would unquestionably tarnish the excellent reputation of the Texas Lottery, causing ticket sales to decline. Currently, Texas Lottery ticket sales exceed $4.3 billion per year. (CR418.) If that major revenue stream were diminished, the State would be forced to make unforeseen expenditures to cover the shortfall, largely in the area of education.[4]

GTECH's immunity also comports with the other policy considerations recognized in *Brown & Gay*, including the policy of shielding a contractor from liability when it is "effectively acting as an organ of government." 461 S.W.3d at 125 n.9 (quoting *Bixby*, 748 F. Supp. 2d at 1242). Extending immunity to the contractor in *Brown & Gay* would not have furthered that purpose, because that case involved an allegedly dangerous highway design that had been prepared by the ***contractor.*** 461 S.W.3d at 126. Here, in contrast, Nettles admits that she is suing GTECH based on decisions made by the ***TLC.*** (CR484, 486.) Thus, GTECH is not asking that governmental immunity be ***extended*** to cover a decision made by

[4] The State directs approximately 99% of its revenue from Texas Lottery ticket sales to a fund used exclusively for education, and allocates the remainder to a teaching hospital and the Texas Veterans Commission. *See* Texas Lottery Commission, Summary Financial Information, *available at* http://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited July 14, 2016).

a ***contractor;*** it is simply asking that governmental immunity be ***applied*** to decisions made by the ***government,*** just as the court in *Brown & Gay* intended.

Finally, there is no tension between GTECH's immunity and the *Brown & Gay* court's stated interest in not foreclosing lawful remedies in personal injury and wrongful death cases. In personal injury and wrongful death cases, the overriding policy goal is to impose the costs and consequences of accidents on the tortfeasors who cause them. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984). The doctrine of immunity creates a narrow exception to that policy by "plac[ing] the burden of shouldering those 'costs and consequences' on injured individuals" instead, but only when the accident is caused by an act attributable to the government. *Brown & Gay*, 461 S.W.3d at 121 (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)); *see id.* at 124.

Here, of course, Nettles is not seeking compensation for the wrongful death of a family member; she is seeking to parlay her $5 scratch-off tickets into a litigation jackpot in excess of $4 million. There is no public policy in favor of providing litigation remedies to dissatisfied purchasers of Texas Lottery tickets. To the contrary, the Texas Administrative Code provides:

> If a dispute arises between the [TLC] and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the

> disputed ticket. This shall be the claimant's exclusive remedy.

TEX. ADMIN. CODE § 401.302(i). While the *Brown & Gay* court was understandably concerned about depriving the decedent's family of any remedy in that case, no such concern arises here. GTECH's immunity fully comports with the policy considerations discussed in *Brown & Gay*.

III. Nettles's argument that GTECH exercised discretion provides no basis for reversal.

Nettles next attempts to defeat GTECH's jurisdiction by arguing, in Issue 1(b), that "GTECH was specifically required to exercise its independent discretion with respect to the design of the games." (Appellant's Br. at xi.) That is incorrect.

A. Nettles's argument about independent contractors is a red herring.

Nettles begins her discussion about independent discretion by arguing that under *Brown & Gay*, GTECH has no immunity because it is an independent contractor, rather than an employee or agent of the TLC. (Appellant's Br. at 21-22.) But the court in *Brown & Gay* mentioned the contractor's independent contractor status only in the context of noting that the Texas Tort Claims Act does not extend ***statutory*** immunity to independent contractors. 461 S.W.3d at 120 & n.3. That has no relevance here, because GTECH claims derivative ***sovereign***

immunity,[5] not ***statutory*** immunity. (CR107-11.) "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.'" *Brown & Gay*, 461 S.W.3d at 122 (quoting *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)). "Accordingly, the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors . . . ." *Id.* at 122-23.

Because this case involves sovereign immunity rather than statutory immunity, the question is not whether GTECH is an independent contractor, but whether "its actions were actions of the . . . government" and "it exercised no discretion in its activities." *Id.* at 124 (quoting *K.D.F.*, 878 S.W.2d at 597). As discussed below, GTECH exercised no discretion in implementing the directions it received from the TLC.

[5] Sovereign immunity is referred to as governmental immunity when applied to subdivisions of the State. *Brown & Gay*, 461 S.W.3d at 121. The Texas Supreme Court uses the terms interchangeably. *See id.* at 121 n.4.

B. GTECH has immunity because it did not exercise independent discretion.

Nettles concedes that ***all*** of her complaints about the "Fun 5's" tickets arise from decisions made by the TLC, not GTECH. She testified that "each of the complaints that [she is] making in this lawsuit about the Fun 5's game were changes that were requested by the Texas Lottery Commission" and that "it was the Texas Lottery who made the changes that [she is] complaining about." (CR484, 486.)

Despite these admissions, Nettles argues that GTECH has "independent discretion" arising from a purported duty to review the TLC's decisions and decide whether to accept or reject them. This duty, Nettles contends, arises "[u]nder the contractual language and according to the witnesses' testimony." (Appellant's Br. at 23.)

The record reveals otherwise. First, there is no contract that requires—or even allows—GTECH to second-guess the TLC's decisions. To the contrary, GTECH contractually promised the TLC that "its tickets, games, goods and services ***shall in all respects conform to,*** and function in accordance with, ***Texas Lottery-approved specifications and designs.***" (CR130 (emphasis added).) Nettles does not point to any contractual provision to the contrary, instead relying on testimony that GTECH is required to produce work that is "free from errors."

(Appellant's Br. at 5, 7.) That is exactly what GTECH did when it prepared working papers and game tickets that accurately, and without errors, implemented the design and wording choices made by the TLC. Indeed, Nettles concedes that GTECH did not "do anything contrary to what the TLC signed off on." (RR13.)

Because the duties owed by GTECH are defined by contract, GTECH did not owe a tort-based duty of "reasonable care." In Texas, "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract." *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 243 (Tex. 2014) (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 3 (Tentative Draft No. 1, 2012)). GTECH was required by contract to implement the TLC's decisions, and Texas law required it to do no more.

Nettles cannot manufacture an extra-contractual duty by citing testimony from witnesses who believe that GTECH should (and does) exercise "reasonable care" in performing its contracts with the TLC. As this Court has held, "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.).

Nettles's insistence that GTECH owed a duty of "reasonable care," besides being unsupported by the record, stands at odds with her decision to abandon her negligence claims and replace them with claims of fraud. (CR14-15, 439-43.) 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 Nettles's third amended petition "arise from" a purported failure to exercise "ordinary care," because she is not suing GTECH for negligence—she is suing GTECH for fraud. (CR439-43.)

Finally, Nettles's argument has been rejected by the U.S. Supreme Court and should 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 Nettles argues that GTECH, having participated in the design of the "Fun 5's" tickets, was required to identify any potential problems, the plaintiff in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) 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." *Id.* at 513 (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.*

In summary, GTECH had no contractual or common-law duty to second-guess the directions it received from the TLC, and it exercised no discretion in implementing the TLC's directions. Accordingly, GTECH has immunity. *See Brown & Gay*, 461 S.W.3d at 124-25.

C. GTECH also has immunity because the TLC approved the final specifications for the "Fun 5's" tickets.

GTECH's immunity is further established by the undisputed evidence that the TLC reviewed the final specifications for the "Fun 5's" tickets and approved them in their entirety. *See Brown & Gay*, 461 S.W.3d at 129 & n.1; *Boyle*, 487 U.S. at 512.

Nettles disputes this. She argues that governmental approval does not always guarantee the contractor's immunity, citing *Brown & Gay* as a case where the contractor lacked immunity even though a governmental entity approved its work. (Appellant's Br. at 23-24.) But the governmental entity in *Brown & Gay*—a county toll road authority—could not have meaningfully reviewed the contractor's work, because the contractor's work involved the complex task of designing and engineering an entire toll road, and the authority had no full-time employees to review the work. 461 S.W.3d at 119 & n.1.

It is true that "rubber stamp" approval of that kind does not automatically confer contractor immunity, as federal courts have explained. Federal courts addressing contractor immunity look to whether the government approved "reasonably precise specifications" submitted by the contractor—a requirement which "assure[s] that the design feature in question was ***considered by*** a Government officer, and not merely by the contractor itself." *Boyle*, 487 U.S. at 512 (emphasis added). Thus, "mere government acceptance of the contractor's work does not resuscitate the defense unless there is approval based on ***substantive review and evaluation*** of the contractor's design choices." *Trevino v. Gen. Dynamics Corp.*, 865 F.2d 1474, 1486 (5th Cir. 1989) (emphasis added). The Fifth Circuit applied this requirement in *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir. 1991), holding that a thorough review had occurred where the government, after receiving a contractor's initial proposal, "critiqued the layout, made changes in the preliminary drawings, and then approved the preliminary design." *Id.* at 333. The court concluded: "We hold that evidence in this record shows that the government did indeed approve reasonably precise specifications . . . . We reach this conclusion because of the [government's] thorough review of the design." *Id.* at 336.

That is what happened here. The TLC has a large and experienced staff that reviewed GTECH's draft working papers with a fine-tooth comb, making changes

both large and small before approving the final working papers in their entirety. (*E.g.*, CR426, 428, 432, 466, 476.) The TLC reviewed and revised the "Fun 5's" tickets for more than a year, beginning in March 2013 and not concluding until May 2014. (CR425, 431.) That is far longer than the review found to be amply sufficient in *Stout*, which "lasted several days." 933 F.2d at 333.

The federal cases further establish that because the TLC reviewed and approved the final working papers in their entirety, it makes no difference whether any particular aspect of the "Fun 5's" tickets originated with the TLC or GTECH. 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 establishes that the TLC considered the specifications proposed by GTECH, modified those specifications in some respects, and signed off on the modified specifications when it approved the final working papers. (CR431.) Accordingly, GTECH has immunity.

CONCLUSION AND PRAYER

Nettles admits that all of her complaints about the "Fun 5's" tickets arise from decisions made by the TLC, not GTECH. GTECH is contractually obligated to implement the TLC's decisions, and it has no discretion to second-guess the TLC's decisions. Therefore, GTECH has immunity.

GTECH respectfully requests that this Court affirm the trial court's judgment granting its plea to the jurisdiction. GTECH also requests all further relief to which it is entitled.

Respectfully submitted,

HAYNES AND BOONE, LLP

/s/ Nina Cortell

Nina Cortell
State Bar No.04844500
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Telephone: (214) 651-5000
Facsimile: (214) 651-5940
nina.cortell@haynesboone.com
Kent Rutter
State Bar No. 00797364
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010-2007
Telephone: (713) 547-2000
Facsimile: (713) 547-2600
kent.rutter@haynesboone.com

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

ATTORNEYS FOR APPELLEE, GTECH CORPORATION

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

I hereby certify that this Brief of Appellee contains a total of **6,901** words, excluding the parts of the brief exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2010. This Brief of Appellee is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Dated: July 14, 2016.

/s/ Kent Rutter
Kent Rutter
Counsel for Appellee,
GTECH Corporation

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this *Brief of Appellee* was served on the following counsel of record via e-service on this 14th day of July, 2016:

Counsel for Appellants:

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

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

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

Counsel for Appellee Texas Lottery Commission:

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

/s/ Kent Rutter
Kent Rutter

APPENDIX

Tab A — Order Granting Texas Lottery Commission's Plea to the Jurisdiction (CR317)

Tab B — Order Granting GTECH Corporation's First Amended Plea to the Jurisdiction (CR490)

Tab C — Court of Appeals Order granting Nettles's unopposed motion to dismiss her appeal as to the Texas Lottery Commission, issued May 23, 2016

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

TAB A

Order Granting Texas Lottery Commission's Plea to the Jurisdiction
(CR317)

CAUSE NO. DC-14-14838

DAWN NETTLES *Plaintiff,*	§	**IN THE DISTRICT COURT**
v.	§	**DALLAS COUNTY, TEXAS**
GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION, *Defendants.*	§	**160th JUDICIAL DISTRICT**

ORDER GRANTING TEXAS LOTTERY COMMISSION'S PLEA TO THE JURISDICTION

On the 17TH day of November, 2015, the Court heard the Plea to the Jurisdiction of Defendant, Texas Lottery Commission. After considering, the Plea, Plaintiff's Response, the pleadings and arguments of counsel, the Court finds that the plea should be GRANTED.

IT IS THEREFORE ORDERED that the Texas Lottery Commission's Plea to the Jurisdiction is hereby GRANTED, and Plaintiff's causes of action brought against the Texas Lottery Commission, as alleged in Plaintiff's Second Amended Original Petition, are hereby dismissed. The Court awards Texas Lottery Commission judgment for its taxable costs of court against Plaintiff Dawn Nettles.

Signed this 17 day of November, 2015.

JUDGE PRESIDING

TAB B

Order Granting GTECH Corporation's
First Amended Plea to the Jurisdiction (CR490)

458H 594

CAUSE NO. DC-14-14838

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

ORDER

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

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

Signed December 15, 2015.

JIM JORDAN, JUDGE 160TH DISTRICT COURT

TAB C

Court of Appeals Order granting Nettles's unopposed motion to dismiss her appeal as to the Texas Lottery Commission, issued May 23, 2016

Order entered May 23, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01559-CV

DAWN NETTLES, Appellant

V.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION, Appellees

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

ORDER

We **GRANT** appellant's May 19, 2016 motion to dismiss her appeal as to the Texas Lottery Commission only and **ORDER** the Texas Lottery Commission dismissed from this appeal. Appellant's appeal will proceed as to GTECH Corporation only. Appellee GTECH Corporation's brief is due June 23, 2016.

/s/ CRAIG STODDART
JUSTICE

TAB D

Brown & Gay Engineering, 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

Will W. Allensworth, William R. Allensworth, Allensworth & Porter L.L.P., Austin, for Amicus Curiae American Council of Engineering Companies of Texas.

Murray Fogler, Beck Redden LLP, Houston, for other interested party Mike Stone Enterprises, Inc.

Sean Higgins, Wilson Elser Moskowitz Edelman & Dicker LLP, Houston, for Petitioner Brown & Gay Engineering, Inc.

Peter M. Kelly, Kelly, Durham & Pittard, L.L.P., Ricardo Molina, Molina Law Firm, Houston, for Respondent Zuleima Olivares, Individually and as the Representative of the Estate of Pedro Olivares, Jr., & Pedro Olivares.

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).

All Citations

461 S.W.3d 117, 58 Tex. Sup. Ct. J. 678

