NO. 03-16-00172-CV

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

GTECH CORPORATION,

Appellant,

v.

JAMES STEELE, et al.,

Appellees.

GTECH'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Secondary Sources

ARGUMENT IN REPLY

I. GTECH's immunity may not be denied on policy grounds.

For the first time on appeal, Plaintiffs argue that GTECH's immunity should be denied on policy grounds, under the theory that recognizing GTECH's immunity would not further the goal of protecting the government from unforeseen expenditures. That argument fails for several independent reasons: (1) Plaintiffs failed to assert the argument below; (2) the argument is based on an incorrect reading of *Brown & Gay*; and (3) GTECH's immunity does, in fact, protect the government from unforeseen expenditures.

A. Plaintiffs failed to preserve their argument in the trial court.

As an initial matter, Plaintiffs failed to preserve their argument for this Court's review. In the trial court, GTECH established its immunity in accordance with *Brown & Gay* by proving that "its actions were actions of the . . . government" and "it exercised no discretion in its activities." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124-25 (Tex. 2015). At that point, the burden shifted to Plaintiffs. When Plaintiffs responded to GTECH's plea to the jurisdiction, they ***agreed*** with GTECH that under *Brown & Gay*, GTECH's burden was to prove that its actions were the actions of a governmental entity, performed without independent discretion. In Plaintiffs' own words:

> The Texas Supreme Court has held that a government contractor "is not entitled to sovereign immunity

> protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity].” In other words, “private parties exercising independent discretion are not entitled to sovereign immunity.”

(CR392 (quoting *Brown & Gay*, 461 S.W.3d at 124-25) (alterations in original; citations omitted).) Nowhere in their response did Plaintiffs mention unforeseen expenditures, much less suggest that GTECH’s immunity turned on whether the government might incur unforeseen expenditures. Instead, GTECH urged the trial court to deny GTECH’s plea to the jurisdiction on three enumerated grounds that have nothing to do with government expenditures:

- “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 the TLC signed GTECH’s Order Confirmation form attached to GTECH’s final working papers does not give GTECH immunity from suit.”

(CR396, 398, 399.)

Plaintiffs seek to avoid their waiver by emphasizing their status in this Court as appellees. They observe that “in general,” appellees are allowed to assert arguments on appeal that they did not raise below. (Appellees’ Br. at 16 (quoting *Alford v. State*, 400 S.W.3d 924, 928 (Tex. Crim. App. 2013).) But that general rule does not apply in appeals like this one, where the issue is the defendant’s

immunity.

Immunity appeals are different because immunity defenses are asserted in summary judgment motions or pleas to the jurisdiction. 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, that ground may not be raised for the first time on appeal. *State Bd. of Ins. v. Westland Film Indus.*, 705 S.W.2d 695, 696 (Tex. 1986); *Hawthorne v. Countrywide Home Loans, Inc.*, 150 S.W.3d 574, 578 (Tex. App.—Austin 2004, no pet.); *Felts v. Bluebonnet Elec. Co-op., Inc.*, 972 S.W.2d 166, 170 n.2 (Tex. App.—Austin 1998, no pet.). The same is true in appeals involving pleas to the jurisdiction, because 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)).[1] Accordingly, whether a defendant asserts an immunity defense in a plea to the jurisdiction or summary judgment motion, the plaintiff must assert

[1] 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.).

every ground for opposing the immunity defense in his response, and any grounds not asserted in the trial court may not be raised on appeal. *See City of San Antonio v. Reed S. Lehman Grain, Ltd.*, No. 04-04-00930-CV, 2007 WL 752197 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied); *Vasquez v. Hernandez*, 844 S.W.2d 802 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.).

In *Reed S. Lehman Grain*, the City of San Antonio denied the plaintiff's application to connect to a City sewer line, and the plaintiff sued. 2007 WL 752197, at *1.The City filed a motion to consolidate the case with two others and a plea to the jurisdiction. *Id.* at *1, 4 n.3. When the trial court partially denied the plea to the jurisdiction, the City took an interlocutory appeal. *Id.* at *1. On appeal, the plaintiff/appellee argued for the first time that the City waived its immunity and submitted itself to the court's jurisdiction when it filed the motion to consolidate. *Id.* at *4 n.3. The court of appeals, however, concluded that it could not affirm on that ground because the plaintiff/appellee "never presented this theory to the trial court." *Id.*

The same conclusion was reached in *Vasquez*. In that case, the plaintiffs sued the City of San Antonio and one of its police officers, and the defendants filed a summary judgment motion asserting official immunity. 844 S.W.2d at 803. The trial court denied the motion, and the defendants appealed. *Id.* The plaintiffs/appellees urged the court of appeals to affirm on the ground that the

police officer had not acted in good faith—an argument they had not made below. *Id.* at 804-05. The court of appeals refused to consider the new argument and reversed, explaining that "the non-movants [plaintiffs/appellees] may not urge on appeal a defense to the qualified immunity defense which was not expressly presented in writing to the trial court." *Id.* at 804.

As these cases illustrate, Plaintiffs' status as appellees does not give them a license to assert arguments in this Court that they did not raise below. Thus, it is too late for Plaintiffs to argue that even if GTECH followed the Commission's directions without exercising discretion, its immunity should still be denied on the ground that its immunity would not protect the government from unforeseen expenditures.

B. Plaintiffs misread *Brown & Gay*.

Plaintiffs' argument, besides having been waived, also fails on the merits because it is based on an incorrect interpretation of *Brown & Gay*. Plaintiffs' argument conflicts with not only the *Brown & Gay* decision itself, but also Plaintiffs' own interpretation of *Brown & Gay* in the trial court, as well as the interpretation of *Brown & Gay* set forth in subsequent appellate cases applying that decision.

While this case was pending in the trial court, Plaintiffs understood *Brown & Gay* perfectly well, accurately stating that a government contractor must prove that

"its actions were actions of the [governmental entity]" and that it performed those actions without "exercising independent discretion." (CR392 (alteration in original; citations omitted).) Plaintiffs did not mention unforeseen government expenditures in their response, much less suggest that a contractor's immunity turns on whether the government might incur unforeseen expenditures. But Plaintiffs shift course on appeal, arguing that a contractor must prove not only that its actions were actions of the government and that it exercised no discretion, but also that its immunity would protect the government from unforeseen expenditures.

Plaintiffs' new interpretation of *Brown & Gay* is based on statements about policy that occupy approximately one page of the opinion, at the beginning of the section on contractor immunity. When the opinion is read in its entirety, it is apparent that this preliminary policy discussion is a prelude to the court's analysis of contractor immunity, not the analysis itself. The policy discussion sets the stage for the court's analysis by explaining at the outset why there is no need, 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 in general, 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 the court stated

that the fiscal purpose of contractor immunity is not to reduce costs generally, but to eliminate unforeseen expenditures specifically. *Id.* at 124-25. For that reason, the court concluded that immunity should not be extended broadly to ***all*** contractors, but "only in limited circumstances" to ***some*** contractors. *Id.* at 124.

After describing the policy reason to impose limits on contractor immunity, the court turned to the logical next question: which contractors are entitled to immunity, and which are not? To answer that question, the court devoted the next four pages of its opinion to an analysis of nine federal and state cases. "In each of these cases," the court observed, "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).

In the course of its discussion, the court made it clear that the fiscal rationale for contractor immunity (the policy of protecting the government from unforeseen expenditures) is not the only rationale supporting contractor immunity. In addition, the court identified a non-fiscal rationale which, it noted, was "aptly summarized" in a federal decision:

> 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). That policy rationale is consistent with the nine federal and state cases the *Brown & Gay* court discussed with approval, ultimately holding that a contractor has immunity if "its actions were actions of the . . . government" and it "exercise[d] no discretion." *Id.* at 124-25 (quoting *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994)).

Subsequent decisions confirm that this is the holding of *Brown & Gay*. For example, the First Court of Appeals summarized the holding of *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, 491 S.W.3d 68, 82 (Tex. App.—Houston [1st Dist.] 2016, pet. filed) (quoting *Brown & Gay*, 461 S.W.3d at 124-25) (emphasis added). Instead of referring to the policy discussion in *Brown & Gay* in its statement of the court's holding, the *Lenoir* court mentioned elsewhere in its opinion that the *Brown*

& Gay majority "also noted the fiscal rationale for extending immunity to contractors." *Id.* at 84. The *Lenoir* court also mentioned that Chief Justice Hecht, in his concurring opinion, "stat[ed] [the] opposite view" and opined that the policy considerations have no relevance at all. *Id.*

The Corpus Christi court of appeals reached the same conclusion about the Texas Supreme Court's holding:

> [T]he Texas Supreme Court has ***held*** that a government contractor "is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity]." In other words, "private parties exercising independent discretion are not entitled to sovereign immunity."

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) (quoting *Brown & Gay*, 461 S.W.2d at 124, and *K.D.F.*, 878 S.W.2d at 597) (emphasis added). Like the *Lenoir* court, the *Freeman* court did not refer to the policy discussion in *Brown & Gay* in its statement of the holding. It instead relegated its mention of the policy discussion to a footnote, where it stated that "[t]he *Brown & Gay* Court also noted . . . the policy rationales underlying the doctrine." *Id.* at *9 n.5.

Finally, a federal district court in Texas summarized *Brown & Gay* as

> ***holding*** that sovereign immunity does not extend to private independent contractors hired on a government

> contract and exercising independent discretion for the actions allegedly causing the plaintiff's loss, for which they were sued.

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) (emphasis added). The *Kuwait Pearls* court saw no reason to mention the policy discussion in *Brown & Gay* at all.

As these decisions confirm, Plaintiffs interpreted *Brown & Gay* correctly in the trial court, and interpret it incorrectly on appeal. Under *Brown & Gay*, GTECH has immunity because its actions were actions of the government and it exercised no discretion. 461 S.W.3d at 124. And GTECH also would have immunity under the analysis of the concurring Justices in *Brown & Gay*, who would focus exclusively on whether the contractor was "simply implementing the government's decisions." *Id.* at 130 (Hecht, C.J., concurring).

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

Finally, Plaintiffs' argument is meritless because GTECH's immunity does, in fact, protect the government from unforeseen expenditures. In the unlikely event that Plaintiffs' fraud claims were ultimately upheld, the financial consequences would extend far beyond any damages awarded in this case. The resulting publicity would tarnish the excellent reputation of the Texas Lottery, causing ticket sales to decline. Currently, Texas Lottery ticket sales exceed $4.3 billion per year.

(CR171.) If this major revenue stream is diminished in any way, the State will be forced to make unforeseen expenditures to cover the shortfall, largely in the area of education.[2]

Plaintiffs dismiss as "speculation" GTECH's observation that adverse publicity regarding the Texas Lottery would affect the State treasury. (Appellees' Br. at 14.) But the record reflects that adverse publicity is a paramount concern for the Texas Lottery, as underscored by the "Code of Conduct" in its contract with GTECH:

> The Texas Lottery is an extremely sensitive enterprise because its success depends on maintaining the public trust by protecting and ensuring the security of Lottery Products. The Texas Lottery incorporates the highest standards of security and integrity in the management and sale of entertaining lottery products, and lottery vendors are held to the same standards, Therefore, it is essential that operation of the Texas Lottery, and the operation of other enterprises which would be linked to it in the public mind, avoid not only impropriety, but also the appearance of impropriety.

(CR549.) The Commission is undoubtedly correct that adverse publicity would affect lottery revenue, and the connection between lottery revenue and the State

[2] The State directs approximately 99% of its revenue from Texas Lottery ticket sales to a fund used exclusively for education, and allocates the remaining 1% 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).

treasury is spelled out in the Government Code. *See* TEX. GOV'T CODE § 466.351 ("revenue received from the sale of tickets . . . shall be deposited in the state treasury"). While the precise dollar value of the impact may be difficult to predict, it is beyond question that an impact would occur.

Plaintiffs also attempt to draw a distinction between "unforeseen expenditures" and "unforeseen losses," arguing that *Brown & Gay* was concerned about the former but not the latter. (Appellees' Br. at 14.) But the *Brown & Gay* court itself drew no such distinction, presumably because there is no real difference between "expenditures" and "losses" in this context. Here, for example, if a portion of the lottery revenue available for education is lost, then the State will be forced to make unforeseen expenditures because "the only option may be to divert money previously earmarked for another purpose." *Brown & Gay*, 461 S.W.3d at 124. "It is this diversion—and the associated risk of disrupting government services—that sovereign immunity addresses." *Id.*

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." *Id.* 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, Plaintiffs are suing GTECH based on decisions made by the Commission. (CR177, 179-80, 276, 316, 325.) Thus, GTECH is not asking that governmental immunity be ***extended*** to cover a decision made by 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, Plaintiffs are not seeking compensation for the wrongful death of a family member; they are seeking to parlay their $5 scratch-off tickets into a litigation jackpot in excess of $500 million. (CR195.) 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 precludes such remedies:

> If a dispute arises between the [Commission] 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*.

II. GTECH did not forfeit its immunity by exercising discretion.

In the remainder of their brief, Plaintiffs point to various instances in which GTECH purportedly forfeited its immunity by exercising discretion with respect to the "Fun 5s" game. Those arguments are without merit.

A. GTECH's initial proposal is not the basis of Plaintiffs' claims.

Plaintiffs begin by asserting that GTECH exercised discretion in originally designing a prototype of the "Fun 5s" game, "deciding to present it to the [Commission]," and "preparing the initial draft working papers." (Appellees' Br. at 25.) To the extent that may be true, it is entirely beside the point because the

Plaintiffs don't allege that the original draft working papers were misleading or deceptive.

As Plaintiffs acknowledge (*see* Appellees' Br. at 19), 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 v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20 (1940)). Plaintiffs' claims do not "arise from" GTECH's initial proposal to the Commission. In fact, the opposite is true. Plaintiffs complain that the rules of the game implied that all tickets with a symbol in the multiplier "5X BOX" were winners. That implication would have been correct if the Commission had approved the draft working papers initially proposed by GTECH, which provided that a symbol would appear in the multiplier "5X BOX" only on winning tickets. (CR265, 276, 310.) Under Plaintiffs' theory of the case, the instructions purportedly became misleading only when the Commission changed GTECH's initial proposal and directed that a symbol must appear in the multiplier "5X BOX" on non-winning tickets as well. (CR177.) Thus, Plaintiffs' claims do not "arise from" GTECH's initial proposal.

B. GTECH did not owe any duty that called for the exercise of discretion.

Next, Plaintiffs allege that GTECH exercised discretion when it purportedly decided whether to implement the Commission's requested changes to the draft working papers, and when it purportedly decided whether to manufacture the

tickets and program the computer system in accordance with the Commission-approved final working papers.

That argument falls flat because GTECH's contract with the Commission did not allow—much less require—GTECH to second-guess the Commission at any time during the process. To the contrary, GTECH contractually promised the Commission that "its tickets, games, goods and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs." (CR527.) Thus, it was the ***Commission's*** role to approve or disapprove ***GTECH's*** work and direct changes in the specifications for Texas Lottery tickets—not the other way around.

Instead of acknowledging GTECH's role under the contract, Plaintiffs attempt to manufacture extra-contractual duties that would have called for GTECH to exercise discretion. Throughout their brief, Plaintiffs assert more than 20 times that GTECH owed a duty to guarantee that consumers would not find the game "misleading"—a duty that supposedly required GTECH to exercise discretion by second-guessing the Commission's directions when necessary. (Appellees' Br. at 3, 5-7, 26, 28-30, 33-34.) But sheer repetition cannot make that claim true, and nothing in the record supports it. Plaintiffs cite:

- their own pleadings, which are not proof of a duty (CR178-80);
- deposition testimony that does not refer to any such duty (CR464);

- testimony that even if some consumers found a game misleading, that would not mean the game contained "errors" for which GTECH would be responsible (CR482-83);

- a page of a contract requiring GTECH to provide goods and services that "conform to, and function in accordance with, Texas Lottery-approved specifications and designs" (CR527); and

- a page of a contract requiring GTECH to adhere to an ethical "code of conduct" (CR549).

In addition, Plaintiffs cite testimony from various employees about what they "expected" GTECH would do in the exercise of "reasonable care." However, that testimony cannot create a duty where none exists under the law. "A duty can be assumed by contract or imposed by law." *J.P. Morgan Chase v. Texas Contract Carpet*, 302 S.W.3d 515, 530 (Tex. App.—Austin 2009, no pet.). Here, the scope of GTECH's duties must be determined by the language of the contracts, as interpreted under Texas law—not by testimony from witnesses. *See Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 786 (Tex. App.—Dallas 2013, no pet.); *Boren v. Texoma Med. Ctr., Inc.*, 258 S.W.3d 224, 228 n.3 (Tex. App.—Dallas 2008, no pet.).[3]

Plaintiffs argue that the employees' testimony is relevant because they "interpreted" contractual provisions stating that GTECH's work would be "high

[3] Plaintiffs point out that *Boren* held that "[***e*]*xpert*** testimony could not create a duty where none exists as a matter of law." (Appellees' Br. at 30 n.5.) However, lay witnesses have no greater power to manufacture a legal duty than expert witnesses do.

quality," "professional," and "competent." (Appellees' Br. at 30 n.5.) In truth, however, the employees did not refer to those provisions in any way. (CR421, 482-83.) Moreover, when the contract is read as a whole, it is apparent that GTECH was required to do "high quality," "professional," and "competent" work in connection with implementing the Commission's decisions—not second-guessing them. (CR527.)

Plaintiffs also refer to testimony that GTECH's work was to be "error-free." (Appellees' Br. at 28-29, 33-34.) As the record shows, it was. Instead of exercising discretion and deciding which of the Commission's directions to follow, GTECH prepared working papers and game tickets that accurately, and without errors, implemented all of the design and wording choices made by the Commission. Because GTECH implemented the Commission's directions without exercising discretion, it is entitled to immunity. *Brown & Gay*, 461 S.W.3d at 124.

C. GTECH also has immunity because the Commission approved the final specifications.

As set forth above, GTECH did not owe a duty to second-guess the Commission's decisions relating to the "Fun 5s" game. In any event, even if GTECH had owed such a duty for any reason, it still would have immunity because the Commission approved the final specifications for the game. (CR283, 336.)

The federal courts have decided numerous cases in which the contractor and the government worked in tandem during the design process, and the government reviewed and approved the final specifications in their entirety at the end of the process. In that situation, the contractor has immunity. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1987); *see also Tozer v. LTV Corp.*, 792 F.2d 403, 407 (4th Cir. 1986); *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 718-19 (D. Md. 1997); *Maguire v. Hughes Aircraft Corp.*, 725 F. Supp. 821, 824 (D.N.J. 1989); *Wilson v. Boeing Co.*, 655 F. Supp. 766, 773 (E.D. Pa. 1987), *aff'd*, 912 F.2d 67 (3d Cir. 1990).

Plaintiffs urge this Court to disregard *Boyle* and its progeny. First, they note that in *Boyle*, the U.S. Supreme Court was called on to address an issue that is not present here—namely, whether a state-law action brought against a federal government contractor implicates uniquely federal concerns. While it is true that the *Boyle* court addressed that issue, the court also addressed a separate issue that ***is*** present here—namely, whether a contractor has immunity based on the government's review and approval of final specifications. *Boyle* merits this Court's consideration on the latter issue.

Plaintiffs further argue that *Boyle* is inconsistent with Texas law because it observes that imposing liability on contractors may cause them to reject federal government work or charge a higher price. But the *Boyle* court made that

observation in connection with the issue that is not relevant to this case—whether state-law actions against federal contractors implicate federal concerns. 487 U.S. at 507. The *Boyle* court cited a different rationale for the holding that ***is*** relevant to this case—the holding that a contractor has immunity based on the government's review and approval of final specifications. The *Boyle* court's rationale for that holding had nothing to do with any concern about contractors rejecting government work or charging a higher price; instead, its rationale related to the nature of the working relationship between the contractor and the government after the price is agreed and the contract is signed. The *Boyle* court adopted a rule that favors cooperation between the government and the contractor, explaining that it would not be sound policy "to penalize, and thus deter, active contractor participation in the design process." *Id.* at 513. That common-sense observation is entirely consistent with Texas law.

Plaintiffs also contend that *Boyle* and its progeny should be disregarded because "the federal government contractor defense [is] an entirely different defense than derivative governmental immunity under state law." (Appellees' Br. at 32 n.6.) The Texas Supreme Court obviously does not agree with that premise, given that it derived its holding in *Brown & Gay*—a case involving the immunity of a county toll-road authority under state law—from a line of cases involving the federal government contractor defense. 461 S.W.3d at 124-125. For similar

reasons, *Boyle* and its progeny may not be disregarded merely because they were decided by federal courts. Texas courts, including the Texas Supreme Court, have a history of looking to the extensive body of federal case law for guidance on the contours of contractor immunity. *See id.*

In sum, even if GTECH had somehow assumed a duty to second-guess the Commission during the design process, at the end of that process the Commission approved the final working papers in their entirety. (CR283, 336.) For this additional reason, GTECH has immunity. *See, e.g.*, *Boyle*, 487 U.S. at 513.

D. Plaintiffs' arguments would end contractor immunity entirely.

There is one final reason why Plaintiffs' arguments should be rejected. In the end, Plaintiffs' theory is that GTECH lacks immunity because it could have exercised discretion and chosen to second-guess or disobey the Commission's directions. But the same could be said of every government contractor in every case. Every contractor with a telephone or an email account has the ability to contact the government and second-guess its decisions. And every contractor has free will and the ability to breach its contract by refusing to follow the government's directions, if it so chooses. If that were sufficient to establish that a government contractor is exercising discretion, then no contractor would ever have immunity—a result the *Brown & Gay* court plainly did not intend. This Court

should reject Plaintiffs' arguments, hold that GTECH has immunity, and reverse the erroneous order of the trial court.

CONCLUSION AND PRAYER

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

Respectfully submitted,

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

I hereby certify that this Reply Brief contains a total of **5,016** words, excluding the parts of the brief exempted under TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2010. This Brief of Appellant is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(B).

Dated: September 30, 2016.

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this Reply Brief was served via e-service on the counsel of record listed in Tab A of the Appendix to GTECH's Brief of Appellant on this 30th day of September, 2016.

/s/ Kent Rutter
Kent Rutter