No. 05-15-01559-CV

In the Fifth Court of Appeals
Dallas, Texas

DAWN NETTLES,
Appellant,

v.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION,
Appellees.

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

APPELLANT'S MOTION FOR *EN BANC* RECONSIDERATION

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ISSUES PRESENTED FOR RECONSIDERATION

Rehearing Issue No. 1:

According to the Texas Supreme Court, the protections of sovereign immunity should only be extended to private entities that contract with the government if a finding of liability would expose the government to unforeseen expenditures. Because sovereign immunity is an affirmative defense, GTECH bears the burden of pleading and proving that defending this suit would cause unforeseen expenditures. The panel erred by not recognizing that GTECH presented no evidence at all of such a risk, and that GTECH's indemnity of the State guarantees that there will be none.

Rehearing Issue No. 2:

According to the Texas Supreme Court, the protections of sovereign immunity should only be extended to private entities that contract with the government in instances where the private party exercised no discretion at all. The panel erred by failing to recognize that, at the very least, there is a fact issue about the extent to which GTECH exercised discretion.

TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellant Dawn Nettles moves this court for *en banc* reconsideration the panel opinion issued July 21, 2017. *See Nettles v. GTECH Corp.*, No. No. 05–15–01559–CV, 2017 WL 3097627 (Tex. App.–Dallas July 21, 2017, n.p.h.) (mem. op.) (attached at Tab A). Copies of the slip opinion and judgment are attached at Tabs B & C, respectively.

STATEMENT OF FACTS

The Texas Lottery Commission was created by the Legislature and is composed of five political appointees. The Legislature has mandated that the TLC must exercise its powers to "promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery". The TLC is obligated, by statute, to "ensure that games are conducted fairly." GTECH is the U.S. subsidiary of an Italian gaming company which operates lotteries, sports betting, and commercial bookmaking throughout the world. GTECH has the exclusive contract to operate the Texas lottery through the year 2020.

GTECH's fee is 2.21 % of sales. Accordingly, GTECH is financially benefitted by increased lottery ticket sales. The Texas Lottery generates sales in excess of $4.3 billion annually. GTECH receives approximately $100 million per year from the TLC under its contract.

In 2014, GTECH issued a defective scratch-off issued for purchase by the public. Plainitff Dawn Nettles purchased a winning ticket, but when she was told that the printed instructions were erroneous, and that the ticket was not a winner, she brought suit. GTECH asserted in a plea to the jurisdiction that, as an independent contractor working for an arm of the government, it is entitled to "derivative sovereign immunity." The trial court granted the plea to the jurisdiction, and a panel of this Court affirmed.

In a parallel proceeding in Travis County involving the same facts, the trial court denied the plea to the jurisdiction, and GTECH has appealed. That appeal is pending in the Third Court of Appeals as Cause No. 03-16-00172-CV, GTECH Corp. v. Steele, and was submitted by oral argument on October 26, 2016.

Nettles respectfully refers the court to her principal brief for a more thorough exposition of the contractual relationship between the TLC and GTECH, and the process by which the defective game was designed and approved.

SUMMARY OF ARGUMENT

GTECH, a private contractor, argued to the court below that it is immune from suit under the doctrine of "derivative sovereign immunity." Sovereign immunity is an affirmative defense, so GTECH bears the burden on pleading ad

proving–conclusively establishing–the elements of the defense. The panel erred in not holding GTECH to its heavy burden.

Under recent Texas Supreme Court precedent, "derivative sovereign immunity" cannot operate under the facts of this case. *See Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015).

The Court's analysis in *Olivares* starts with an examination of the record to determine if the independent contractor presented any evidence to justify an expansion of the doctrine of sovereign immunity to protect the contractor. Here, as in *Olivares* the record does not support such an expansion–there is no evidence at all to suggest that holding GTECH liable for its negligent or fraudulent acts will pose any threat to the public fisc.

The *Olivares* court went on to examine whether the independent contractor exercised sufficient independent discretion to be held independently liable for its own actions; GTECH can only be immune if it exercised no discretion at all. Here, Nettles's allegations and the deposition testimony make clear that GTECH exercised independent discretion when it formulated the misleading and deceptive language used in the instructions for the Fun 5s scratch-off tickets. GTECH is thus not immune from suit under the doctrine of "derivative immunity."

ARGUMENT AND AUTHORITY

I. *En banc* reconsideration is generally disfavored but in cases like this one where the criteria are met, it is essential.

En banc reconsideration of a panel's decision is reserved for the relatively small number of cases "that meet one or both of two hard-to-satisfy requirements." *In re Marriage of Harrison*, 507 S.W.3d 259, 260 (Tex. App.—[14th Dist.] April 26, 2016, order) *as corrected* May 10, 2016 (Frost, J., dissenting to partial grant of *en banc* reconsideration). As set forth in Texas Rule of Appellate procedure 41.2(c), *en banc* reconsideration of a panel's decision "should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require *en banc* consideration." The Texas Supreme Court has adopted this policy disfavoring *en banc* reconsideration to ensure that "the appellate trains . . . run on time" and to conserve already scarce appellate resources. *See Harrison*, 507 S.W.3d at 261 (Frost, J., dissenting in partial grant of *en banc* reconsideration).

Despite this exacting standard, however, *en banc* reconsideration is "essential" in some cases. *Id.* For instance, as Justice Frost recently recognized "*en banc* review is the only way for an intermediate court of appeals to resolve a conflict in the court's precedents and thereby restore predictability to the law and consistency in the court's decision-making." *Id.* at *6-7. This case is one of those rare cases where

the panel's decision was such a fundamental departure from this Court's prior precedent (and indeed, of Texas law) that *en banc* reconsideration is essential; specifically, that a party asserting an affirmative defense such as derivative sovereign immunity must plead it *and prove it. Cadle Co. v. Jenkins*, 266 S.W.3d 4, 7 (Tex. App.—Dallas 2008, no pet.) (citing Tex. R. Civ. P. 94 (requirement of pleading) and *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989) (burden of proof)).

Further, the subject matter of this case, derivative sovereign immunity, presents an extraordinary circumstance. It is a common law rule with profound public policy implications. Indeed, the Texas Supreme Court has recently written on the subject, in *Brown & Gay Engineering v. Olivares*. The en banc court should examine and correct the panel's erroneous application of the rule announced in *Olivares* to ensure that this court's precedent comports with the public policies identified by the Texas Supreme Court.

II. The panel erred by not holding GTECH to its burde of pleading and proving both elements of the affirmative defense of derivative sovereign immunity.

Texas law regards sovereign immunity as an affirmative defense that must be pleaded and proved by the party asserting it. *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 128 (Tex. 2015). An affirmative defense is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim,

even if all the allegations in the complaint are true." *In Interest of M.S.C.*, No. 05-14-01581-CV, 2016 WL 929218, at *5 (Tex. App.—Dallas Mar. 11, 2016, no pet.) (mem. op.) (quoting Defense: Affirmative Defense, Black's Law Dictionary (10th ed. 2014), and citing *In re Office of Attorney Gen.*, 422 S.W.3d 623, 631 n.10 (Tex. 2013) (quoting Black's Law Dictionary)).

GTECH raised its affirmative defense by a plea to the jurisdiction A plea to the jurisdiction is a dilatory plea, the purpose of which is generally to defeat an action "without regard to whether the claims asserted have merit." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). Typically, the plea challenges whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* However, a plea to the jurisdiction can also properly challenge the existence of those very jurisdictional facts. In those cases, the court can consider evidence as necessary to resolve any dispute over those facts, even if that evidence "implicates both the subject-matter jurisdiction of the court and the merits of the case." *Id.*

In those situations, a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion. *Id.* Initially, the defendant carries the burden to meet the summary judgment proof standard for its assertion that the trial court lacks jurisdiction. If it does, the plaintiff is then required to show that a disputed material fact exists regarding the jurisdictional issue. If a fact issue exists,

the trial court should deny the plea. But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law. *Id.*

And when, as here, a party is asking for an extension of a common law rule–especially an extension that was recently rejected by the Texas Supreme Court–the reviewing court should be even more cognizant of the burdens of proof. Both the trial court and the panel apparently overlooked the heavy burdens associated with a plea to the jurisdiction and the harsh remedy of immunity. The en banc court can correct those errors, and find that GTECH is not entitled to derivative sovereign immunity.

A. GTECH did not meet its burden of establishing that this suit will have an adverse effect on the public fisc by causing unforeseen expenditures.

The panel properly noted that the Supreme Court in Olivares "explained that the doctrine of immunity is not 'strictly a cost-saving measure'; instead, the purpose of immunity is to protect the government from 'unforeseen expenditures' that could '"hamper government functions' by diverting funds from their allocated purposes."'" *Nettles*, 2017 WL 3097627, at *5. The panel, though, did not take the next logical step: that if there is no danger to the public fisc from unforeseen expenditures, there is no reason to extend immunity to a nongovernmental actor.

That is precisely what the Supreme Court did in *Olivares*: "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." *Olivares* at 129. To be prevail on its affirmative defense, then, which requires an extension of sovereign immunity, the GTECH must *conclusively establish* the existence of possible unforeseen expenses.

GTECH has utterly failed to meet its burden. The record contains no evidence at all of the risk of unforeseen expenses. Nettles raised this issue in her principal brief, yet GTECH could not point to anything in the record to support its position.

Indeed, the record establishes the precise opposite of the risk of unforeseen expenditures. GTECH agreed under the Operations Contract and the Printing Contract to indemnify and defend the Texas Lottery Commission in lawsuits arising out of its work, and to maintain insurance, including general liability and errors and omission insurance. CR 423, 139.[1] If it were the other way around–if the TLC had agreed to indemnify GTECH–then GTECH might have a point. But the contract is clear that there is no risk to the public fisc.

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[1]Please *see* Nettles's Principal Brief at 17-20 for description of the hold–harmless and indemnity provisions.

GTECH conjured an attenuated theory of financial risk to the State:

> The resulting publicity [of an adverse judgment] 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.

GTECH Br. at 22. The panel adopted that speculation as a basis for affirming. *Nettles*, 2017 WL 3097627, at *5. But GTECH's statement falls far short of conclusively establishing the threshold element of risk to the public fisc. There is simply no evidence that an adverse judgment would lead to a decline in sales; no prior examples, no expert testimony, nothing other than the rank speculation of counsel. When the Supreme Court laid out the rules for conclusively establishing an affirmative defense, it could hardly have imagined that unsupported argument of counsel would suffice.

The argument is also illogical. If the issue is confidence in the lottery games designed by GTECH, surely the gambling public would want to know that there are effective remedies for intentional or unintentional errors and omissions. Public confidence would only be *enhanced* by the prospect of practical accountability. Granting immunity to GTECH, and allowing it evade responsibility for potentially defrauding the public, would make the lottery look more like a racket, leading to casual players being less likely to purchase tickets.

GTECH failed to bring forth a record that demonstrates a risk to the public fisc. Rather, the record establishes precisely the opposite, that the public fisc is protected by GTECH's agreement to indemnify the TLC for any losses. Further, GTECH's attenuated, unsupported theory about a possible decline in sales just makes no sense. Because GTECH has failed to conclusively establish this threshold matter, it was error for the trial court to grant the plea to the jurisdiction, and it was error for the panel to affirm. The en banc court should correct those errors.

B. GTECH did not meet its burden of establishing that GTECH exercised no discretion at all in the design of the defective tickets.

The panel's analysis of the second prong of derivative sovereign immunity (which this Court need not even reach) is also erroneous. The proper question is not whether GTECH exercised *absolute* discretion in the preparation of the ticket, but whether GTECH exercised *some* discretion in an activity that gave rise to the plaintiffs' claims. *See Olivares*, 461 S.W.3d at 124-25 (immunity applies where contractor's actions were that of the government and it exercised "no discretion" (emphasis added)); *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 82 (Tex. App.—Houston [1st. Dist.] 2016, pet. filed) (same)).

Nettles' complaint centers not on the use of the money bag symbol, but on the fact that GTECH's selected language is misleading. Although the TLC requested modifications to the game, at no point did it waive GTECH's contractual obligation to offer an error-free game that was not misleading. GTECH exercised independent discretion in determining that no changes needed to be made to the game's instructions after it implemented the TLC's modifications, and the TLC relied on GTECH as the expert to prepare a final draft that was not misleading or deceptive. GTECH had a duty to review the final working papers, determine whether further changes were necessary, and bring to the attention of the TLC any additional, necessary changes. The panel further failed to consider GTECH's exercise of this discretion in determining that GTECH was entitled to derivative governmental immunity. Because GTECH exercised at least some discretion in the final preparation of the ticket, it is not entitled to derivative governmental immunity; the judgment of the trial court should be reversed.

At the very least, Nettles demonstrated to the panel that there is a fact issue about the exercise of discretion. Nettles's Statement of Facts walked the court through the deposition testimony describing the design and approval process, and how all the participants expected GTECH–who after all got the franchise because of its supposed expertise in designing lottery games–to spot and correct any errors.

In cases such as this one, disputed evidence of jurisdictional facts that also implicate the merits of the case may require resolution by the finder of fact. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); (citing *Gates v. Pitts*, 291 S.W. 948, 949 (Tex. Civ. App.—Amarillo 1927, no writ); *Gentry v. Bowser*, 2 Tex. Civ. App. 388, 21 S.W. 569, 570 (Fort Worth 1893, no writ); *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 n.3 (1st Cir. 2001) (observing that in certain situations, the predicate facts can be so inextricably linked to the merits of the controversy that the district court may "defer resolution of the jurisdictional issue until the time of trial"); *Cameron v. Children's Hosp. Med. Ctr.,* 131 F.3d 1167, 1170 (6th Cir. 1997) ("[W]hether a district court has subject matter jurisdiction is a question for the court, not a jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case."); and *Williamson v. Tucker,* 645 F.2d 404, 413 n.6, 416 n.10 (5th Cir. 1981) (suggesting that a federal district court's role in determining jurisdictional facts may be more limited in cases in which the jurisdictional attack implicates the merits of plaintiff's cause of action)). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. *Miranda*, 133 S.W.3d at 227-28.

Of course once this case gets to trial, GTECH will have the opportunity to invoke Chapter 33 of the Civil Practice and Remedies Code to have the jury what, if any, responsibility the TLC bears for Nettles's damages. But concluding at this stage of the proceedings that GTECH can never bear any responsibility at all is entirely premature. The trial court and the panel erroneously reasoned that because GTECH did not exercise *absolute* discretion, it should get off scot-free. The en banc court should correct those errors by holding that so long as GTECH exercised *some* discretion, it should be made to stand trial.

CONCLUSION AND PRAYER

To be entitled to derivative sovereign immunity, GTECH must conclusively establish both elements of that affirmative defense. GTECH presented no evidence at all with respect to the first element, the risk to the public fisc of unforeseen expenditures. At the very least, there is a fact issue with respect to the second issue, whether GTECH exercised at least some discretion in the design and approval of the defective games. Nettles there fore prays this Court grant her motion for en banc reconsideration, withdraw or otherwise vacate this Court's previously issued opinion and judgment, reverse the judgment of the trial couret, and remand this cause for further proceedings. Nettles also prays for other and further general relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this motion (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, issues presented, signature, proof of service, certificate of conference and certificate of compliance) is **2,955**.

/s/ Peter M. Kelly
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CERTIFICATE OF SERVICE

A true and correct copy of this *Appellant's Motion for Rehearing* has been forwarded to all counsel of record on October 6, 2017, as follows:

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SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Dallas.

Dawn NETTLES, Appellant
v.
GTECH CORPORATION, Appellee

No. 05–15–01559–CV
|
Opinion Filed July 21, 2017

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

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Before Justices Lang–Miers, Myers, and Richter [1]

1 The Honorable Martin Richter, Justice of the Court of Appeals for the Fifth District of Texas—Dallas, Retired, sitting by assignment.

MEMORANDUM OPINION

Opinion by Justice Richter

***1** Appellant Dawn Nettles sued appellee GTECH Corporation, a private contractor, for fraud in the sale of a Texas Lottery scratch-off ticket called "Fun 5's." The trial court granted GTECH's plea to the jurisdiction and dismissed Nettles's suit. In this appeal, we consider whether derivative sovereign immunity bars Nettles's claims against GTECH. We conclude that it does, and affirm the trial court's order granting GTECH's plea.

BACKGROUND

A. Nettles's claims

Nettles purchased tickets in the Texas Lottery's "Fun 5's" scratch-off game. The tickets included a tic-tac-toe game containing a three-by-three grid of symbols, a "prize box," and a box labeled "5X," known as a "multiplier." Nettles contends that the instructions on the tickets misled her to believe that she would win five times the amount in the tickets' prize box, when in fact her tickets were "non-winning."

Nettles alleges the instructions described two ways to win five times the amount in the prize box, by either (1) matching three symbols in a row, column, or diagonal in the grid, or (2) finding a "money bag" symbol in the multiplier box. The tickets, however, were non-winning unless both of these conditions were met. On some of the tickets Nettles purchased, one or the other of the conditions was met, but not both. When she learned that her tickets were non-winning, Nettles sued GTECH for an amount in excess of $4,000,000 that she alleges she should have won.

B. The Texas Lottery and GTECH

The Texas Lottery is owned and operated by the Texas Lottery Commission ("TLC"), a state agency. The TLC and its executive director "have broad authority and shall exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery." TEX. GOV'T CODE ANN. § 466.014(a) (West Supp. 2016). By statute, the executive director of the TLC "shall prescribe the form of tickets." TEX. GOV'T CODE ANN. § 466.251(a) (West 2012).

GTECH [2] is the United States subsidiary of an Italian gaming company which operates lotteries, sports betting, and commercial bookmaking throughout the world.

On December 14, 2010, TLC and GTECH executed a "Contract for Lottery Operations and Services" (the "Operations Contract") that gives GTECH the exclusive right to operate the Texas Lottery through 2020. According to the Operations Contract, GTECH is an independent contractor and not an employee or agent of the TLC. In the "warranties" section, the Operations Contract provides:

> GTECH warrants and agrees that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs.

[2] The record reflects that GTECH is now known as "IGT Global Solutions Corporation." The parties' briefs, however, refer to appellee as "GTECH."

Section 3.33.1 of the Operations Contract provides in relevant part, "GTECH shall indemnify, defend and hold the Texas Lottery, its commission members, [and] the State of Texas ... harmless from and against any and all claims ... arising out of a Claim for or on account of the Works, or other goods, services, or deliverables provided as the result of this Contract ...." Section 3.34 of the Operations Contract addresses requirements for bonds and insurance. Among other coverages, GTECH must maintain general liability insurance and errors and omissions insurance.

***2** In her operative petition, Nettles cites to a "Request for Proposals for Instant Ticket Manufacturing and Services" available on the TLC's website, alleging that "GTECH is obligated, under Section 7.8 of the Instant Ticket RFP to provide working papers for each instant game and is further obligated to provide executed working papers that 'must be complete and free from any errors.' " Joseph Lapinski, an account development manager for GTECH, also testified that GTECH submits "draft working papers" to the TLC containing specifications for proposed scratch-off tickets, including the design, artwork, prize structures, and rules of the game. Lapinski also testified that the TLC then notifies GTECH of any desired changes to the working papers.

C. Development of the Fun 5's game

In March 2013, GTECH made a presentation to the TLC, providing examples of scratch-off games that had been successful in other states. The TLC selected the Fun 5's game as one of the scratch-off games it intended to purchase from GTECH for use during fiscal year 2014. Although the Fun 5's game ticket included five different games, only Game 5 is at issue here.

Penny Whyte, GTECH's customer service representative, prepared the initial draft of the working papers for the Fun 5's game. Whyte testified that before the draft was sent to the TLC, GTECH undertook an internal review of the artwork, instructions, and parameters for the game. Lapinski testified that initial draft working papers were based on the game that GTECH had operated in other states. He explained that the instructions for the game in the initial draft working papers were based on a game used in Nebraska. The instructions for Game 5 provided:

> Reveal three Dollar Bill [graphic of symbol] symbols in any one row, column, or diagonal line, win PRIZE in PRIZE box. Reveal a "5" symbol in the 5X BOX, win 5 times that PRIZE.

Gary Grief, the Executive Director of the TLC, testified that because GTECH has "experience in the industry," the TLC "do[es] rely on them, at least as a starting point, when we're looking at language that goes on tickets." He agreed that he expected GTECH to exercise reasonable care to propose language that is not misleading.

Lapinski testified that after the working papers were submitted to the TLC, the TLC requested changes to Game 5. First, the TLC requested that the "5" symbol be changed to a "Money Bag" symbol. Second, the TLC requested that the "Dollar Bill" symbol be changed to a "5" symbol. Third, the TLC requested that GTECH change the parameters of Game 5. In an email marked "High Importance" from Jessica Burrola, an Instant Product Specialist for the TLC, to Laura Thurston, a client services representative of GTECH, the TLC instructed:

> 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.

Walter Gaddy, a Regional Sales Manager for GTECH, explained in an affidavit that:

> The TLC ordered this change as a security measure against "micro-scratching." Micro-scratching consists of someone using a small sharp object to unveil a microscopic portion of the play area of the scratch ticket to discern whether a ticket is a winner or a non-winner in a way that is largely undetectable. If the Money Bag symbol only appeared on winning tickets, this might make the game 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.

Gaddy also testified that "[u]pon the instructions of the TLC, GTECH incorporated the TLC's changes to the game's parameters and programmed its computers so that 25% of the tickets that had not won the tic-tac-toe game would reveal a Money Bag Play symbol in the 5X box."

***3** GTECH then prepared a set of final working papers for the TLC's approval. In accordance with the TLC's instructions, a "money bag" symbol appeared on approximately 25% of the non-winning tickets, and the rules for Game 5 read:

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

In her operative petition, Nettles alleges that on May 16, 2014, TLC Executive Director Grief "executed the final working papers and approved the Fun 5's game as proposed by GTECH." Nettles's operative pleading also acknowledges that the parameters of the game were changed "[a]t the request of the TLC."

Nettles elicited testimony from both GTECH and TLC witnesses that she relies on to support her allegations that it was GTECH's responsibility to (1) check the parameters of the game in the working papers, (2) conduct a comprehensive review of the game's instructions to make sure that the change in parameters requested by the TLC did not require a change in the language of the game's instructions, (3) compare the language on the tickets to make sure it was not misleading or deceptive, and (4) make sure the final executed working papers were free of errors. She alleges that GTECH's customer service representative and software department had the knowledge and expertise necessary to ensure that the language was clear, unambiguous, and not misleading, and that the TLC expected GTECH to exercise reasonable care in doing so. And she contends that Thurston and Whyte, both of GTECH, were the decision-makers "that GTECH would not change the wording of the instructions to make them less misleading or deceptive."

Nettles also alleges in her operative petition that GTECH and the TLC began to receive complaints about the Fun 5's tickets from retailers and players almost immediately after sales began on September 2, 2014. [3] The complaints arose from confusion about the presence of the money bag symbol on non-winning tickets and the accompanying instructions. Sales of the tickets were discontinued by the TLC on October 21, 2014.

[3] GTECH's brief also recites that more than 1,200 other Fun 5's ticket purchasers sued GTECH in Travis County seeking damages in excess of $500 million, plus exemplary damages. *James Steele, et al. v. GTECH Corp.*, No. D–1–GN–14–005114 (201st Judicial District Court of Travis County, Texas). In that case, the trial court denied GTECH's plea to the jurisdiction. *Id.* (Amended Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction, Mar. 28, 2016). GTECH's appeal of that ruling is pending. *GTECH Corp. v. James Steele, et al.*, No. 03–16–00172–CV (Tex. App.–Austin) (submitted Oct. 26, 2016).

D. Trial court disposition

Nettles added the TLC as a defendant in her second amended petition. The TLC and GTECH filed pleas to the jurisdiction. The trial court granted both pleas and

dismissed the case. Nettles filed this appeal complaining of both rulings, but later moved to dismiss her appeal as to the TLC. This Court granted Nettles's motion on May 23, 2016, and this appeal has proceeded as to GTECH only.

ISSUES

In one issue with two subparts, Nettles contends the trial court erred by granting GTECH's plea to the jurisdiction. In subpart 1(a), Nettles contends that sovereign immunity should not be extended to GTECH because a finding of liability against GTECH will not expose the government to unforeseen expenditures. In subpart 1(b), Nettles contends that sovereign immunity should not be extended to GTECH because GTECH exercised independent discretion with respect to the design of the Fun 5's game.

STANDARD OF REVIEW

***4** A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether the trial court has subject matter jurisdiction is a question of law that we review de novo. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015). When the plea to the jurisdiction challenges the existence of jurisdictional facts, we consider the relevant evidence submitted by the parties when it is necessary to resolve the jurisdictional issue. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). This procedure generally mirrors that of a summary judgment under rule of civil procedure 166a(c). *Id.* at 228. The plaintiff has the burden to plead facts affirmatively showing the trial court has subject matter jurisdiction. *Id.* at 226–27. The defendant then has the burden to assert and support its contention, with evidence, that the trial court lacks subject matter jurisdiction. *Id.* at 228. If it does so, the plaintiff must raise a material fact issue regarding jurisdiction to survive the plea to the jurisdiction. *Id.*

In our review, we construe the pleadings liberally in favor of the plaintiff and look to the plaintiff's intent. *Id.* at 226–27. We consider the pleadings and the evidence pertinent to the jurisdictional inquiry. *Id.* If the evidence creates a fact issue concerning jurisdiction, the plea to the jurisdiction must be denied. *Id.* at 227–28. If the evidence is undisputed or fails to raise a fact issue concerning jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

ANALYSIS

Both Nettles and GTECH rely on *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), in support of their arguments regarding derivative immunity. In that case, a private engineering firm (Brown & Gay) contracted with a governmental unit (the Fort Bend County Toll Road Authority) to design and construct a roadway. *Id.* at 119. Under their written 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. *Id.* An intoxicated driver entered an exit ramp of the roadway (referred to by the court as "the Tollway") and collided with a car driven by Pedro Olivares, Jr., who was killed. *Id.* Olivares's parents sued the Authority and Brown & Gay, 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. *Id.* at 120. Brown & Gay filed a plea to the jurisdiction alleging it was entitled to governmental immunity. *Id.* The trial court granted the plea, but the court of appeals reversed, concluding that Brown & Gay was not entitled to governmental immunity.[4] *Id.* at 119. The supreme court affirmed the court of appeals's judgment. *Id.* at 129.

4 The court discussed the distinction between "sovereign immunity" and "governmental immunity," but then used the term "sovereign immunity" to refer to the doctrine in the remainder of its opinion, as do we. *See Brown & Gay*, 461 S.W.3d at 121 & n.4.

In its opinion, the supreme court considered whether "a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit" could "invoke the same immunity that the government itself enjoys." *Id.* at 122. The court answered this question in the negative, holding that the private company was not immune from suit for the consequences of its own actions taken in the exercise of its own independent discretion. *See id.* at 124–27. The court relied on its reasoning in *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994), in which it explained that a private entity "is not entitled to sovereign immunity protection unless it can demonstrate

its actions were actions of" the government, "executed subject to the control of" the governmental entity. *K.D.F.*, 878 S.W.2d at 597. According to the court in *Brown & Gay*, *K.D.F.*'s "control requirement" is "consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances." *Brown & Gay*, 461 S.W.3d at 124. The court explained:

> ***5** 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.

Id. at 125. Similarly, in Texas appellate court decisions relied on by Brown & Gay, "the government's right to control" led the courts to extend immunity to a private government contractor. *Id.* at 126.

As Chief Justice Hecht explained in his concurring opinion, governmental immunity does not protect an independent contractor unless the contractor acts "*as* the government," implementing the government's decisions. *Id.* at 129–30 (Hecht, C.J., concurring). On this point, the Chief Justice agreed with the court, which had explained that the plaintiffs did "not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders." *Id.* The court continued:

> Under the contract at issue, Brown & Gay was responsible for preparing "drawings, specifications and details for all signs." Further, the [plaintiffs] 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.**

Id. at 126 (emphasis added).

The court in *Brown & Gay* also held that extending the government's immunity to a private contractor for actions taken in the contractor's own discretion did not further the immunity doctrine's rationale and purpose. *Id.* at 123. The court described sovereign immunity as a "harsh doctrine" because it "foreclos[es] ... the litigation and judicial remedies that would be available to the injured person had the complained-of acts been committed by a private person." *Id.* at 122. The court explained that the doctrine of immunity is not "strictly a cost-saving measure"; instead, the purpose of immunity is to protect the government from "unforeseen expenditures" that could " 'hamper government functions' by diverting funds from their allocated purposes." *Id.* at 123 (quoting *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam)). The higher costs of engaging private contractors who are liable for their own improvident actions are not "unforeseen" because they can be reflected in the negotiated contract price, and because private contractors "can and do manage their risk exposure by obtaining insurance." *Id.*

The court summarized its discussion of "sovereign immunity and private contractors" as follows:

> 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.

***6** *Id.* at 127 (emphasis added).

Nettles contends that under the court's reasoning in *Brown & Gay*, the first question we must answer is whether her lawsuit would cause "unforeseen expenditures" that could "hamper government functions by diverting funds from their allocated purposes." *See id.* at 123. She contends that because GTECH has agreed to defend and indemnify the TLC, her suit would not cause any unforeseen expenditures. As a result, she argues, the TLC's immunity does not extend to GTECH. In her reply brief, Nettles contends that if we conclude her lawsuit would not cause unforeseen expenditures to the TLC, we need not undertake any further analysis. [5]

5 Again relying on *Brown & Gay*, Nettles also argues that derivative immunity does not apply because GTECH was an independent contractor, not an employee or agent of the TLC. The court's reference to whether Brown & Gay was "an independent contractor rather than a government employee," however, was in its discussion of Brown & Gay's argument in the courts below that it was an "employee" of the Authority for purposes of the Texas Tort Claims Act. *Brown & Gay*, 461 S.W.3d at 120. Here, however, GTECH does not claim statutory immunity under the Texas Tort Claims Act. Instead, it relies on common law sovereign immunity. As the court in *Brown & Gay* explained, because sovereign immunity "is a common-law creation," the "absence of a statutory grant of immunity is irrelevant" in determining its boundaries. *Id.* at 122–23.

GTECH in turn relies on *Brown & Gay* to argue that the controlling question is whether GTECH exercised independent discretion or whether its actions were executed subject to the control of the TLC. *See id.* at 124. GTECH contends that the decision of which Nettles complains—to include the money bag symbol on tickets in which players did not win the tic-tac-toe game—was the TLC's.

Neither the court in *Brown & Gay* nor our sister courts applying *Brown & Gay* limited their analysis to whether the extension of immunity would protect the public fisc from unforeseen expenditures. The court's opinion in *Brown & Gay* included an extensive discussion of whether sovereign immunity extends to private parties exercising independent discretion. *See id.* at 124–27. Similarly, courts relying on *Brown & Gay* have considered both the purposes of sovereign immunity and the independent discretion of the defendant contractor.

In *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 87–88 (Tex. App.–Houston [1st Dist.] 2016, pet. pending) (op. on reh'g), a physicians' clinic ("UTP") contracted with the University of Texas Health Science Center at Houston ("UTHSCH"), "which has immunity from suit." *Id.* at 77. The contract "extended discretion to UTP," including management of the nursing staff and "the nurse alleged to have acted negligently in this case." *Id.* at 86. The court held that UTHSCH's immunity did not extend to UTP for the plaintiffs' claims arising from the death of a patient and her unborn twins after receiving prenatal care at UTP. *Id.* at 72–73. The court reasoned:

> ***7** The contract evinces UTP's right to direct the nursing staff, control its compensation, and insure against professional liability for its acts. In doing so, UTP was granted discretion. It acted *for* the government—assisting in its provision of medical services and education—not *as* the government without discretion or diversion. *Cf. K.D.F.*, 878 S.W.2d at 597 ("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."). As such, immunity does not extend. *Brown & Gay*, 461 S.W.3d at 124–25 & n. 9, 126.

Id. at 86.

In *City of Rio Grande City v. BFI Waste Services of Texas, LP*, No. 04–15–00729–CV, 2016 WL 5112224, at *3–4 (Tex. App.–San Antonio Sept. 21, 2016, pet. filed) (mem. op.), the court affirmed the trial court's denial of pleas to the jurisdiction filed by Grande Garbage Collection Co., L.L.C. ("Grande") and Patricio Hernandez, Grande's owner (referred to collectively in the court's opinion as "the Grande Defendants"). Grande contracted with the City of Rio Grande City for solid waste disposal services. *Id.* at *1. The plaintiff (referred to in the court's opinion as "Allied") filed suit alleging breach of and interference with an existing contract under which Allied was the exclusive provider of solid waste disposal services within the City's limits. *Id.* Allied alleged that the Grande Defendants willfully and intentionally interfered with its contract with the City, among other claims. *Id.* at *3. Citing *Brown & Gay*, the court explained, "[t]he events that form the basis of Allied's allegations against the Grande Defendants were not actions the Grande Defendants took within the scope of their contract with the City for solid waste disposal services." *Id.* The court concluded:

> Extending immunity to the Grande Defendants for the commission of acts not within the scope of contracted services with the City and for which the Grande Defendants exercised independent discretion does not further the rationale supporting governmental immunity. *See Brown and Gay*, 461 S.W.3d at 123. Consequently, the Grande Defendants are not entitled to derivative immunity, and the trial court retains jurisdiction over the claims against the Grande Defendants.

Id. at *3–4.

In *Freeman v. American K–9 Detection Services, L.L.C.*, 494 S.W.3d 393, 396 (Tex. App.–Corpus Christi 2015, pet. pending), a military contractor ("AMK9") claimed derivative immunity in a suit involving a trained military dog that allegedly attacked the plaintiff. *Id.* at 397. The trial court granted AMK9's plea to the jurisdiction, and the plaintiff appealed. *Id.* The court of appeals reversed, concluding that AMK9 was not entitled to derivative sovereign immunity. *Id.* at 408. The court discussed *Brown & Gay*, explaining:

> ***8** In *Brown & Gay*, ... the plaintiffs did not complain of harm caused by Brown & Gay's "implementing the Authority's specifications or following any specific government directions or orders," nor did they complain about the decision to build the roadway at issue or 'the mere fact of its existence.' [*Brown & Gay*, 461 S.W.3d at 125]. Instead, the plaintiffs argued that Brown & Gay was "independently negligent in designing the signs and traffic layouts" for the roadway. *Id.* Thus, the supreme court rejected Brown & Gay's "contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself." *Id.* at 127.

Id. at 405. The court concluded that AMK9 was not derivatively immune because the plaintiff's allegations arose from AMK9's "independent acts of negligence," in violation of its contract with the military and military policy. *Id.* at 408–09.

Like the courts in *Brown & Gay*, *Lenoir*, *Rio Grande City*, and *Freeman*, we consider whether the defendant contractor met its burden to establish that it was acting *as* the government, not *for* the government, in addition to considering "protection of the public fisc." *See Brown & Gay*, 461 S.W.3d at 121, 125. The record is undisputed that Nettles's claims arise from decisions made by the TLC, not GTECH. Nettles testified:

> 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. I did not know that when I bought the tickets.

Nettles contends that GTECH had an independent duty, arising under its contract with the TLC, to conduct a "comprehensive review" of the TLC's decisions to ensure that "the language [in the game's instructions] was not defective or problematic." But the contract between GTECH and the TLC does not permit GTECH to evaluate and reject the TLC's decisions. Instead, it requires that "tickets, games, goods, and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs." Although Nettles points to testimony that GTECH's work must be "free from errors," she does not cite any evidence that GTECH's working papers erred in incorporating the TLC's decisions. In the trial court, Nettles's counsel conceded that GTECH did not "do anything contrary to what the TLC signed off on."

The record also shows that the TLC's review of GTECH's working papers was extensive and detailed. Over the course of a year, the TLC reviewed the Fun 5's games and requested the changes that are the basis for Nettles's claims. In *Brown & Gay*, in contrast, the Authority had no full-time employees; the approval of Brown & Gay's plans was made by the Authority's board of directors. *Brown & Gay*, 461 S.W.3d at 199 & n.1. There is no indication that the decisions that were the basis for the plaintiffs' claims in *Brown & Gay*—regarding 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—were made by the Authority. As the court explained, "the Olivarises do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions." *Id.* at 126. Here, after detailed review and required modifications, the TLC approved GTECH's final working papers. We conclude that GTECH met its burden to establish that it was acting as the TLC, not exercising independent discretion, in making the changes to the Fun 5's tickets that are the basis for Nettles's claims.

***9** Regarding the "rationale and purpose" of the sovereign immunity doctrine to guard against unforeseen expenditures that disrupt or hamper government services, GTECH relies on the *Brown & Gay* court's discussion of "the origin and purpose of sovereign immunity." The court explained that sovereign immunity is "inherently connected to the protection of the public fisc" as well as preserving separation-of-powers principles "by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars." *Id.* at 121. GTECH argues that the Legislature has expressly tied the operation of the Texas lottery to the public fisc by requiring that money in the state lottery account (after payment of prizes and other specific costs) be transferred to the fund for veterans' assistance and the foundation school fund. *See* TEX. GOV'T CODE ANN. § 466.355 (West Supp. 2016).

GTECH also relies on the Legislature's requirement that the TLC "exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery." *See id.* § 466.014(a). Nettles's suit challenges the integrity, honesty, and fairness of a decision made by the TLC. Although the TLC will not incur further defense costs in this case, the suit will challenge the TLC's performance of the duties assigned to it by the Legislature. Sovereign immunity shields the government from such an inquiry, however. *See Brown & Gay*, 461 S.W.3d at 122 (citing *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 172 (Tex. App.–Austin 2013, no pet.) for the proposition that "sovereign immunity generally shields our state government's improvident acts"). Sovereign immunity places the burden of shouldering the costs and consequences of the government's improvident actions on injured individuals. *Id.* Here, however, the "costs and consequences" to Nettles are the cost of her $5 tickets. *See* 16 TEX. ADMIN. CODE 401.302(i) [6] (claimant's exclusive remedy for disputed ticket is reimbursement for cost of ticket).

6 West, Westlaw through 42 TEX. REG. No. 3381, dated June 23, 2017 (Texas Lottery Commission, Administration of State Lottery Act, Instant Game Rules).

We conclude that GTECH met its burden to establish that Nettles's claims are barred by sovereign immunity. We overrule Nettles's issues 1(a) and 1(b).

CONCLUSION

We affirm the trial court's order granting GTECH Corporation's plea to the jurisdiction.

All Citations

Not Reported in S.W.3d, 2017 WL 3097627

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AFFIRM; and Opinion Filed July 21, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01559-CV

DAWN NETTLES, Appellant
V.
GTECH CORPORATION, Appellee

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

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Richter[1]
Opinion by Justice Richter

Appellant Dawn Nettles sued appellee GTECH Corporation, a private contractor, for fraud in the sale of a Texas Lottery scratch-off ticket called "Fun 5's." The trial court granted GTECH's plea to the jurisdiction and dismissed Nettles's suit. In this appeal, we consider whether derivative sovereign immunity bars Nettles's claims against GTECH. We conclude that it does, and affirm the trial court's order granting GTECH's plea.

BACKGROUND

A. Nettles's claims

Nettles purchased tickets in the Texas Lottery's "Fun 5's" scratch-off game. The tickets included a tic-tac-toe game containing a three-by-three grid of symbols, a "prize box," and a box

[1] The Honorable Martin Richter, Justice of the Court of Appeals for the Fifth District of Texas—Dallas, Retired, sitting by assignment.

labeled "5X," known as a "multiplier." Nettles contends that the instructions on the tickets misled her to believe that she would win five times the amount in the tickets' prize box, when in fact her tickets were "non-winning."

Nettles alleges the instructions described two ways to win five times the amount in the prize box, by either (1) matching three symbols in a row, column, or diagonal in the grid, or (2) finding a "money bag" symbol in the multiplier box. The tickets, however, were non-winning unless both of these conditions were met. On some of the tickets Nettles purchased, one or the other of the conditions was met, but not both. When she learned that her tickets were non-winning, Nettles sued GTECH for an amount in excess of $4,000,000 that she alleges she should have won.

B. The Texas Lottery and GTECH

The Texas Lottery is owned and operated by the Texas Lottery Commission ("TLC"), a state agency. The TLC and its executive director "have broad authority and shall exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery." TEX. GOV'T CODE ANN. § 466.014(a) (West Supp. 2016). By statute, the executive director of the TLC "shall prescribe the form of tickets." TEX. GOV'T CODE ANN. § 466.251(a) (West 2012).

GTECH[2] is the United States subsidiary of an Italian gaming company which operates lotteries, sports betting, and commercial bookmaking throughout the world. On December 14, 2010, TLC and GTECH executed a "Contract for Lottery Operations and Services" (the "Operations Contract") that gives GTECH the exclusive right to operate the Texas Lottery through 2020. According to the Operations Contract, GTECH is an independent contractor and

[2] The record reflects that GTECH is now known as "IGT Global Solutions Corporation." The parties' briefs, however, refer to appellee as "GTECH."

not an employee or agent of the TLC. In the "warranties" section, the Operations Contract provides:

> GTECH warrants and agrees that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs.

Section 3.33.1 of the Operations Contract provides in relevant part, "GTECH shall indemnify, defend and hold the Texas Lottery, its commission members, [and] the State of Texas . . . harmless from and against any and all claims . . . arising out of a Claim for or on account of the Works, or other goods, services, or deliverables provided as the result of this Contract . . . ." Section 3.34 of the Operations Contract addresses requirements for bonds and insurance. Among other coverages, GTECH must maintain general liability insurance and errors and omissions insurance.

In her operative petition, Nettles cites to a "Request for Proposals for Instant Ticket Manufacturing and Services" available on the TLC's website, alleging that "GTECH is obligated, under Section 7.8 of the Instant Ticket RFP to provide working papers for each instant game and is further obligated to provide executed working papers that 'must be complete and free from any errors.'" Joseph Lapinski, an account development manager for GTECH, also testified that GTECH submits "draft working papers" to the TLC containing specifications for proposed scratch-off tickets, including the design, artwork, prize structures, and rules of the game. Lapinski also testified that the TLC then notifies GTECH of any desired changes to the working papers.

C. Development of the Fun 5's game

In March 2013, GTECH made a presentation to the TLC, providing examples of scratch-off games that had been successful in other states. The TLC selected the Fun 5's game as one of

the scratch-off games it intended to purchase from GTECH for use during fiscal year 2014. Although the Fun 5's game ticket included five different games, only Game 5 is at issue here.

Penny Whyte, GTECH's customer service representative, prepared the initial draft of the working papers for the Fun 5's game. Whyte testified that before the draft was sent to the TLC, GTECH undertook an internal review of the artwork, instructions, and parameters for the game. Lapinski testified that initial draft working papers were based on the game that GTECH had operated in other states. He explained that the instructions for the game in the initial draft working papers were based on a game used in Nebraska. The instructions for Game 5 provided:

> Reveal three Dollar Bill [graphic of symbol] symbols in any one row, column, or diagonal line, win PRIZE in PRIZE box. Reveal a "5" symbol in the 5X BOX, win 5 times that PRIZE.

Gary Grief, the Executive Director of the TLC, testified that because GTECH has "experience in the industry," the TLC "do[es] rely on them, at least as a starting point, when we're looking at language that goes on tickets." He agreed that he expected GTECH to exercise reasonable care to propose language that is not misleading.

Lapinski testified that after the working papers were submitted to the TLC, the TLC requested changes to Game 5. First, the TLC requested that the "5" symbol be changed to a "Money Bag" symbol. Second, the TLC requested that the "Dollar Bill" symbol be changed to a "5" symbol. Third, the TLC requested that GTECH change the parameters of Game 5. In an email marked "High Importance" from Jessica Burrola, an Instant Product Specialist for the TLC, to Laura Thurston, a client services representative of GTECH, the TLC instructed:

> 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.

Walter Gaddy, a Regional Sales Manager for GTECH, explained in an affidavit that:

> The TLC ordered this change as a security measure against "micro-scratching." Micro-scratching consists of someone using a small sharp object to unveil a microscopic portion of the play area of the scratch ticket to discern whether a ticket is a winner or a non-winner in a way that is largely undetectable. If the Money Bag symbol only appeared on winning tickets, this might make the game 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.

Gaddy also testified that "[u]pon the instructions of the TLC, GTECH incorporated the TLC's changes to the game's parameters and programmed its computers so that 25% of the tickets that had not won the tic-tac-toe game would reveal a Money Bag Play symbol in the 5X box."

GTECH then prepared a set of final working papers for the TLC's approval. In accordance with the TLC's instructions, a "money bag" symbol appeared on approximately 25% of the non-winning tickets, and the rules for Game 5 read:

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

In her operative petition, Nettles alleges that on May 16, 2014, TLC Executive Director Grief "executed the final working papers and approved the Fun 5's game as proposed by GTECH." Nettles's operative pleading also acknowledges that the parameters of the game were changed "[a]t the request of the TLC."

Nettles elicited testimony from both GTECH and TLC witnesses that she relies on to support her allegations that it was GTECH's responsibility to (1) check the parameters of the game in the working papers, (2) conduct a comprehensive review of the game's instructions to make sure that the change in parameters requested by the TLC did not require a change in the language of the game's instructions, (3) compare the language on the tickets to make sure it was not misleading or deceptive, and (4) make sure the final executed working papers were free of errors. She alleges that GTECH's customer service representative and software department had

the knowledge and expertise necessary to ensure that the language was clear, unambiguous, and not misleading, and that the TLC expected GTECH to exercise reasonable care in doing so. And she contends that Thurston and Whyte, both of GTECH, were the decision-makers "that GTECH would not change the wording of the instructions to make them less misleading or deceptive."

Nettles also alleges in her operative petition that GTECH and the TLC began to receive complaints about the Fun 5's tickets from retailers and players almost immediately after sales began on September 2, 2014.[3] The complaints arose from confusion about the presence of the money bag symbol on non-winning tickets and the accompanying instructions. Sales of the tickets were discontinued by the TLC on October 21, 2014.

D. Trial court disposition

Nettles added the TLC as a defendant in her second amended petition. The TLC and GTECH filed pleas to the jurisdiction. The trial court granted both pleas and dismissed the case. Nettles filed this appeal complaining of both rulings, but later moved to dismiss her appeal as to the TLC. This Court granted Nettles's motion on May 23, 2016, and this appeal has proceeded as to GTECH only.

ISSUES

In one issue with two subparts, Nettles contends the trial court erred by granting GTECH's plea to the jurisdiction. In subpart 1(a), Nettles contends that sovereign immunity should not be extended to GTECH because a finding of liability against GTECH will not expose the government to unforeseen expenditures. In subpart 1(b), Nettles contends that sovereign

[3] GTECH's brief also recites that more than 1,200 other Fun 5's ticket purchasers sued GTECH in Travis County seeking damages in excess of $500 million, plus exemplary damages. *James Steele, et al. v. GTECH Corp.*, No. D-1-GN-14-005114 (201st Judicial District Court of Travis County, Texas). In that case, the trial court denied GTECH's plea to the jurisdiction. *Id.* (Amended Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction, Mar. 28, 2016). GTECH's appeal of that ruling is pending. *GTECH Corp. v. James Steele, et al.*, No. 03-16-00172-CV (Tex. App.—Austin) (submitted Oct. 26, 2016).

immunity should not be extended to GTECH because GTECH exercised independent discretion with respect to the design of the Fun 5's game.

STANDARD OF REVIEW

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether the trial court has subject matter jurisdiction is a question of law that we review de novo. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015). When the plea to the jurisdiction challenges the existence of jurisdictional facts, we consider the relevant evidence submitted by the parties when it is necessary to resolve the jurisdictional issue. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). This procedure generally mirrors that of a summary judgment under rule of civil procedure 166a(c). *Id.* at 228. The plaintiff has the burden to plead facts affirmatively showing the trial court has subject matter jurisdiction. *Id.* at 226–27. The defendant then has the burden to assert and support its contention, with evidence, that the trial court lacks subject matter jurisdiction. *Id.* at 228. If it does so, the plaintiff must raise a material fact issue regarding jurisdiction to survive the plea to the jurisdiction. *Id.*

In our review, we construe the pleadings liberally in favor of the plaintiff and look to the plaintiff's intent. *Id.* at 226–27. We consider the pleadings and the evidence pertinent to the jurisdictional inquiry. *Id.* If the evidence creates a fact issue concerning jurisdiction, the plea to the jurisdiction must be denied. *Id.* at 227–28. If the evidence is undisputed or fails to raise a fact issue concerning jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

ANALYSIS

Both Nettles and GTECH rely on *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), in support of their arguments regarding derivative immunity. In that case, a private engineering firm (Brown & Gay) contracted with a governmental unit (the Fort Bend County Toll Road Authority) to design and construct a roadway. *Id.* at 119. Under their written 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. *Id.* An intoxicated driver entered an exit ramp of the roadway (referred to by the court as "the Tollway") and collided with a car driven by Pedro Olivares, Jr., who was killed. *Id.* Olivares's parents sued the Authority and Brown & Gay, 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. *Id.* at 120. Brown & Gay filed a plea to the jurisdiction alleging it was entitled to governmental immunity. *Id.* The trial court granted the plea, but the court of appeals reversed, concluding that Brown & Gay was not entitled to governmental immunity.[4] *Id.* at 119. The supreme court affirmed the court of appeals's judgment. *Id.* at 129.

In its opinion, the supreme court considered whether "a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit" could "invoke the same immunity that the government itself enjoys." *Id.* at 122. The court answered this question in the negative, holding that the private company was not immune from suit for the consequences of its own actions taken in the exercise of its own independent discretion. *See id.* at 124–27. The court relied on its reasoning in *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994), in which it

[4] The court discussed the distinction between "sovereign immunity" and "governmental immunity," but then used the term "sovereign immunity" to refer to the doctrine in the remainder of its opinion, as do we. *See Brown & Gay*, 461 S.W.3d at 121 & n.4.

explained that a private entity "is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of" the government, "executed subject to the control of" the governmental entity. *K.D.F.*, 878 S.W.2d at 597. According to the court in *Brown & Gay*, *K.D.F.*'s "control requirement" is "consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances." *Brown & Gay*, 461 S.W.3d at 124. The court explained:

> 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.

Id. at 125. Similarly, in Texas appellate court decisions relied on by Brown & Gay, "the government's right to control" led the courts to extend immunity to a private government contractor. *Id.* at 126.

As Chief Justice Hecht explained in his concurring opinion, governmental immunity does not protect an independent contractor unless the contractor acts "*as* the government," implementing the government's decisions. *Id.* at 129–30 (Hecht, C.J., concurring). On this point, the Chief Justice agreed with the court, which had explained that the plaintiffs did "not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders." *Id.* The court continued:

> Under the contract at issue, Brown & Gay was responsible for preparing "drawings, specifications and details for all signs." Further, the [plaintiffs] 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.**

Id. at 126 (emphasis added).

The court in *Brown & Gay* also held that extending the government's immunity to a private contractor for actions taken in the contractor's own discretion did not further the

immunity doctrine's rationale and purpose. *Id.* at 123. The court described sovereign immunity as a "harsh doctrine" because it "foreclos[es] . . . the litigation and judicial remedies that would be available to the injured person had the complained-of acts been committed by a private person." *Id.* at 122. The court explained that the doctrine of immunity is not "strictly a cost-saving measure"; instead, the purpose of immunity is to protect the government from "unforeseen expenditures" that could '"hamper government functions' by diverting funds from their allocated purposes." *Id.* at 123 (quoting *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam)). The higher costs of engaging private contractors who are liable for their own improvident actions are not "unforeseen" because they can be reflected in the negotiated contract price, and because private contractors "can and do manage their risk exposure by obtaining insurance." *Id.*

The court summarized its discussion of "sovereign immunity and private contractors" as follows:

> 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.

Id. at 127 (emphasis added).

Nettles contends that under the court's reasoning in *Brown & Gay*, the first question we must answer is whether her lawsuit would cause "unforeseen expenditures" that could "hamper government functions by diverting funds from their allocated purposes." *See id.* at 123. She contends that because GTECH has agreed to defend and indemnify the TLC, her suit would not cause any unforeseen expenditures. As a result, she argues, the TLC's immunity does not extend

to GTECH. In her reply brief, Nettles contends that if we conclude her lawsuit would not cause unforeseen expenditures to the TLC, we need not undertake any further analysis.[5]

GTECH in turn relies on *Brown & Gay* to argue that the controlling question is whether GTECH exercised independent discretion or whether its actions were executed subject to the control of the TLC. *See id.* at 124. GTECH contends that the decision of which Nettles complains—to include the money bag symbol on tickets in which players did not win the tic-tac-toe game—was the TLC's.

Neither the court in *Brown & Gay* nor our sister courts applying *Brown & Gay* limited their analysis to whether the extension of immunity would protect the public fisc from unforeseen expenditures. The court's opinion in *Brown & Gay* included an extensive discussion of whether sovereign immunity extends to private parties exercising independent discretion. *See id.* at 124–27. Similarly, courts relying on *Brown & Gay* have considered both the purposes of sovereign immunity and the independent discretion of the defendant contractor.

In *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 87–88 (Tex. App.—Houston [1st Dist.] 2016, pet. pending) (op. on reh'g), a physicians' clinic ("UTP") contracted with the University of Texas Health Science Center at Houston ("UTHSCH"), "which has immunity from suit." *Id.* at 77. The contract "extended discretion to UTP," including management of the nursing staff and "the nurse alleged to have acted negligently in this case." *Id.* at 86. The court held that UTHSCH's immunity did not extend to UTP for the plaintiffs' claims arising from the death of a

[5] Again relying on *Brown & Gay*, Nettles also argues that derivative immunity does not apply because GTECH was an independent contractor, not an employee or agent of the TLC. The court's reference to whether Brown & Gay was "an independent contractor rather than a government employee," however, was in its discussion of Brown & Gay's argument in the courts below that it was an "employee" of the Authority for purposes of the Texas Tort Claims Act. *Brown & Gay*, 461 S.W.3d at 120. Here, however, GTECH does not claim statutory immunity under the Texas Tort Claims Act. Instead, it relies on common law sovereign immunity. As the court in *Brown & Gay* explained, because sovereign immunity "is a common-law creation," the "absence of a statutory grant of immunity is irrelevant" in determining its boundaries. *Id.* at 122–23.

patient and her unborn twins after receiving prenatal care at UTP. *Id*. at 72–73. The court reasoned:

> The contract evinces UTP's right to direct the nursing staff, control its compensation, and insure against professional liability for its acts. In doing so, UTP was granted discretion. It acted *for* the government—assisting in its provision of medical services and education—not *as* the government without discretion or diversion. *Cf. K.D.F.*, 878 S.W.2d at 597 ("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."). As such, immunity does not extend. *Brown & Gay*, 461 S.W.3d at 124–25 & n. 9, 126.

Id. at 86.

In *City of Rio Grande City v. BFI Waste Services of Texas, LP*, No. 04-15-00729-CV, 2016 WL 5112224, at *3–4 (Tex. App.—San Antonio Sept. 21, 2016, pet. filed) (mem. op.), the court affirmed the trial court's denial of pleas to the jurisdiction filed by Grande Garbage Collection Co., L.L.C. ("Grande") and Patricio Hernandez, Grande's owner (referred to collectively in the court's opinion as "the Grande Defendants"). Grande contracted with the City of Rio Grande City for solid waste disposal services. *Id.* at *1. The plaintiff (referred to in the court's opinion as "Allied") filed suit alleging breach of and interference with an existing contract under which Allied was the exclusive provider of solid waste disposal services within the City's limits. *Id.* Allied alleged that the Grande Defendants willfully and intentionally interfered with its contract with the City, among other claims. *Id.* at *3. Citing *Brown & Gay*, the court explained, "[t]he events that form the basis of Allied's allegations against the Grande Defendants were not actions the Grande Defendants took within the scope of their contract with the City for solid waste disposal services." *Id.* The court concluded:

> Extending immunity to the Grande Defendants for the commission of acts not within the scope of contracted services with the City and for which the Grande Defendants exercised independent discretion does not further the rationale supporting governmental immunity. *See Brown and Gay*, 461 S.W.3d at 123. Consequently, the Grande Defendants are not entitled to derivative immunity, and the trial court retains jurisdiction over the claims against the Grande Defendants.

Id. at *3–4.

In *Freeman v. American K-9 Detection Services, L.L.C.*, 494 S.W.3d 393, 396 (Tex. App.—Corpus Christi 2015, pet. pending), a military contractor ("AMK9") claimed derivative immunity in a suit involving a trained military dog that allegedly attacked the plaintiff. *Id.* at 397. The trial court granted AMK9's plea to the jurisdiction, and the plaintiff appealed. *Id.* The court of appeals reversed, concluding that AMK9 was not entitled to derivative sovereign immunity. *Id.* at 408. The court discussed *Brown & Gay*, explaining:

> In *Brown & Gay*, . . . the plaintiffs did not complain of harm caused by Brown & Gay's "implementing the Authority's specifications or following any specific government directions or orders," nor did they complain about the decision to build the roadway at issue or 'the mere fact of its existence.' [*Brown & Gay*, 461 S.W.3d at 125]. Instead, the plaintiffs argued that Brown & Gay was "independently negligent in designing the signs and traffic layouts" for the roadway. *Id.* Thus, the supreme court rejected Brown & Gay's "contention that it is entitled to share in the Authority's sovereign immunity solely because the Authority was statutorily authorized to engage Brown & Gay's services and would have been immune had it performed those services itself." *Id.* at 127.

Id. at 405. The court concluded that AMK9 was not derivatively immune because the plaintiff's allegations arose from AMK9's "independent acts of negligence," in violation of its contract with the military and military policy. *Id.* at 408–09.

Like the courts in *Brown & Gay*, *Lenoir*, *Rio Grande City*, and *Freeman*, we consider whether the defendant contractor met its burden to establish that it was acting *as* the government, not *for* the government, in addition to considering "protection of the public fisc." *See Brown & Gay*, 461 S.W.3d at 121, 125. The record is undisputed that Nettles's claims arise from decisions made by the TLC, not GTECH. Nettles testified:

> 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. I did not know that when I bought the tickets.

Nettles contends that GTECH had an independent duty, arising under its contract with the TLC, to conduct a "comprehensive review" of the TLC's decisions to ensure that "the language [in the game's instructions] was not defective or problematic." But the contract between GTECH and the TLC does not permit GTECH to evaluate and reject the TLC's decisions. Instead, it requires that "tickets, games, goods, and services shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs." Although Nettles points to testimony that GTECH's work must be "free from errors," she does not cite any evidence that GTECH's working papers erred in incorporating the TLC's decisions. In the trial court, Nettles's counsel conceded that GTECH did not "do anything contrary to what the TLC signed off on."

The record also shows that the TLC's review of GTECH's working papers was extensive and detailed. Over the course of a year, the TLC reviewed the Fun 5's games and requested the changes that are the basis for Nettles's claims. In *Brown & Gay*, in contrast, the Authority had no full-time employees; the approval of Brown & Gay's plans was made by the Authority's board of directors. *Brown & Gay*, 461 S.W.3d at 199 & n.1. There is no indication that the decisions that were the basis for the plaintiffs' claims in *Brown & Gay*—regarding 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—were made by the Authority. As the court explained, "the Olivarises do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions." *Id.* at 126. Here, after detailed review and required modifications, the TLC approved GTECH's final working papers. We conclude that GTECH met its burden to establish that it was acting as the TLC, not exercising independent discretion, in making the changes to the Fun 5's tickets that are the basis for Nettles's claims.

Regarding the "rationale and purpose" of the sovereign immunity doctrine to guard against unforeseen expenditures that disrupt or hamper government services, GTECH relies on the *Brown & Gay* court's discussion of "the origin and purpose of sovereign immunity." The court explained that sovereign immunity is "inherently connected to the protection of the public fisc" as well as preserving separation-of-powers principles "by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars." *Id.* at 121. GTECH argues that the Legislature has expressly tied the operation of the Texas lottery to the public fisc by requiring that money in the state lottery account (after payment of prizes and other specific costs) be transferred to the fund for veterans' assistance and the foundation school fund. *See* TEX. GOV'T CODE ANN. § 466.355 (West Supp. 2016).

GTECH also relies on the Legislature's requirement that the TLC "exercise strict control and close supervision over all lottery games conducted in this state to promote and ensure integrity, security, honesty, and fairness in the operation and administration of the lottery." *See id.* § 466.014(a). Nettles's suit challenges the integrity, honesty, and fairness of a decision made by the TLC. Although the TLC will not incur further defense costs in this case, the suit will challenge the TLC's performance of the duties assigned to it by the Legislature. Sovereign immunity shields the government from such an inquiry, however. *See Brown & Gay*, 461 S.W.3d at 122 (citing *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 172 (Tex. App.—Austin 2013, no pet.) for the proposition that "sovereign immunity generally shields our state government's improvident acts"). Sovereign immunity places the burden of shouldering the costs and consequences of the government's improvident actions on injured individuals. *Id.* Here, however, the "costs and consequences" to Nettles are the cost of her $5 tickets. *See* 16

TEX. ADMIN. CODE 401.302(i)[6] (claimant's exclusive remedy for disputed ticket is reimbursement for cost of ticket).

We conclude that GTECH met its burden to establish that Nettles's claims are barred by sovereign immunity. We overrule Nettles's issues 1(a) and 1(b).

CONCLUSION

We affirm the trial court's order granting GTECH Corporation's plea to the jurisdiction.

/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

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[6] West, Westlaw through 42 TEX. REG. No. 3381, dated June 23, 2017 (Texas Lottery Commission, Administration of State Lottery Act, Instant Game Rules).

C

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAWN NETTLES, Appellant

No. 05-15-01559-CV V.

GTECH CORPORATION, Appellee

On Appeal from the 160th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-14838.
Opinion delivered by Justice Richter; Justices Lang-Miers and Myers, participating.

In accordance with this Court's opinion of this date, the trial court's Order granting the first amended plea to the jurisdiction of appellee GTECH Corporation is **AFFIRMED**.

It is **ORDERED** that appellee GTECH Corporation recover its costs of this appeal from appellant Dawn Nettles.

Judgment entered this 21st day of July, 2017.