

NO. 18-0159

In the Supreme Court of Texas

GTECH CORPORATION,

Petitioner,

V.

JAMES STEELE, et al.,

Respondents

REPLY IN SUPPORT OF PETITION FOR REVIEW

On Petition for Review from the
Court of Appeals for the Third District of Texas

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ABBREVIATIONS

“Commission” means the Texas Lottery Commission.

“GTECH” means Petitioner GTECH Corporation.

“Plaintiffs” means the 1,238 plaintiffs and intervenors in this case.

RECORD REFERENCES

The Clerk’s Record is cited as “CR: [pg.#].”

The Supplemental Clerk’s Record is cited as “Supp. CR: [pg#].”

The Second Supplemental Clerk’s Record is cited as “2d Supp. CR: [pg#].”

INTRODUCTION

Plaintiffs' response paints a picture of a government-contracting relationship awash in discretion, where the Commission contracts away its exclusive statutory authority and Texas Lottery tickets are the product of GTECH's "broad creative leeway." It then goes on to claim, remarkably, that the decision below "is not the subject of a conflict among the courts of appeals." Both arguments blink reality.

There is a clear conflict among the courts of appeals that merits the Court's review. This case is illustrative. The court below held that GTECH was not entitled to immunity. But based on the *same* lottery ticket, the *same* alleged misrepresentation, the *same* contract, and the *same* statutory scheme, the Dallas Court of Appeals held just the opposite. This conflict, which centers on the proper derivative-immunity analysis under this Court's decision in *Brown & Gay Engineering v. Olivares*, is ripe and well-developed. The Court should resolve it.

On the merits, Plaintiffs sidestep, but cannot overcome, the Commission's statutory mandate to "exercise strict control and supervision over all lottery games," which includes the statutory requirement that the Commission "prescribe the form of tickets." Plaintiffs also disregard the relevant contract between GTECH and the Commission, under which the Commission retained "sole discretion" over all "[f]inal decisions" and GTECH was, in turn, obligated to "accept and support the decision of the [Commission]." Nothing in the record shows otherwise.

Scrambling to respond, Plaintiffs resort to testimony about GTECH's discretion "in the first place" when providing initial ticket designs to the Commission. Plaintiffs' argument misses the point. Under *Brown & Gay*, a contractor's immunity does not turn on whether it exercised some discretion at some point in time, but specifically on whether the state directed the "complained-of conduct." This conduct-specific inquiry shields sovereign decisions and, in so doing, stabilizes government contracting by protecting private parties from suit for merely implementing government choices. Plaintiffs' contrary approach has neither benefit, and the court of appeals' decision threatens to undo both.

This Court should grant review.

ARGUMENT

I. The Court should grant review to resolve a direct conflict among the courts of appeals.

Plaintiffs claim that “the actual basis of the court of appeals’ decision [denying GTECH immunity] is not the subject of a conflict among the courts of appeals.” (Resp. 6.) Yet in a parallel case involving the same facts and the same claim, the Dallas Court of Appeals reached the opposite conclusion, holding that GTECH is entitled to derivative sovereign immunity. *Compare GTECH Corp. v. Steele*, 549 S.W.3d 768 (Tex. App.—Austin 2018, pet. filed), with *Nettles v. GTECH Corp.*, 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017, pet. filed). This direct conflict merits review of this case.

The conflict between this case and *Nettles* amplifies a broader division among the courts of appeals about how to interpret and apply this Court’s decision in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015). Most courts have rightly focused on whether the complained-of act was directed or controlled by the government, but the court in *University of Incarnate Word v. Redus*, 2018 WL 1176652 (Tex. App.—San Antonio Mar. 7, 2018, pet. filed), confined its analysis to the fiscal implications of the plaintiff’s suit. *Compare id.* at *4-5, with *Brown v. Waco Transit Sys.*, 2017 WL 4872801, at *4 (Tex. App.—Amarillo Oct. 27, 2017, no pet.), and *Lenoir v. UT Physicians*, 491 S.W.3d 68, 82-86 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).

Plaintiffs note that *Redus* did not involve a government contractor. (Resp. 17.) But *Redus* nevertheless held that a demonstrable effect on the public fisc is dispositive for private-entity immunity under *Brown & Gay*. See 2018 WL 1176652, at *5-6. That conclusion is at odds with the correct, majority view that a private entity acting “as the government” is entitled to immunity for its government-directed acts. *Brown & Gay*, 461 S.W.3d at 129 (Hecht, C.J., concurring); see *Steele*, 549 S.W.3d at 781-82; *Brown*, 2017 WL 4872801, at *4; *Lenoir*, 491 S.W.3d at 82-86.

By granting review in this case, the Court can resolve both the direct conflict between the opinion below and *Nettles* and the broader conflict among the courts of appeals concerning the proper analysis under *Brown & Gay*.

II. The Court should grant review to bar Plaintiffs’ collateral attack on the Texas Lottery Commission’s decisions about the Texas Lottery.

Turning to the merits, Plaintiffs attempt to defeat GTECH’s immunity in two ways:

- *First*, Plaintiffs contend that GTECH had general discretion “in selecting and preparing” the Fun 5’s ticket for the Commission—even though, by statute and contract, GTECH had no discretion over the final ticket about which Plaintiffs complain. (Resp. 9-10.)
- *Second*, Plaintiffs contend that GTECH’s original, never-published draft working papers were themselves purportedly fraudulent—even though the original papers are not the basis of Plaintiffs’ fraud claim. (Resp. 11-12.)

Both arguments fail. The first ignores the governing statutory regime and controlling contracts, and the second disregards the undisputed evidence and divorces the immunity analysis from the “complained-of conduct.” *See Brown & Gay*, 461 S.W.3d at 125.

A. The Commission had exclusive authority over the complained-of lottery ticket.

Plaintiffs argue that the court of appeals’ “factual analysis established that the Contract gave GTECH ‘wide discretion’ and ‘broad creative leeway.’” (Resp. 6, 9-10.) But this ignores that GTECH’s contract is consistent with the Texas Lottery Act. That Act gives the Commission plenary and nondelegable control over the Texas Lottery, including the final form of lottery tickets.

By statute, the Commission is required to “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 § 466.014(a). This control extends “over *all activities* authorized and conducted in this state under . . . Chapter 466,” including all lottery tickets and the Commission’s contractual relationship with GTECH. *See id.* § 467.101(a) (emphasis added); *see also id.* § 466.251(a) (the Commission “shall prescribe the form of tickets”).

GTECH’s contract reflects this statutorily mandated division of authority:

- “Final decisions regarding the direction or control of the Lottery are always the prerogative of the [Commission] in its sole discretion.” 549 S.W.3d at 795.
- Scratch-off tickets “shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs.” *Id.*
- The Commission “reserves the sole right to reject [GTECH’s] guidance for any reason” while “[GTECH], conversely, must accept and support the decision of the [Commission].” *Id.*

Thus, the Commission, not GTECH, has complete authority (and hence exclusive discretion) over all lottery ticket decisions and the final tickets.

Plaintiffs obscure this division of authority by referencing testimony from individual GTECH employees about what they “expected” GTECH would do as a matter of reasonable care and professionalism. (Resp. 9.) But Plaintiffs overstate the substance of this testimony, which in context reaffirms the Commission’s total control over the tickets. For example, one of the GTECH employees Plaintiffs rely on testified that “the buck stops [with] the lottery,” not GTECH, “when it comes to making sure that the instructions are clear and unambiguous.” (*E.g.*, CR466-67.) In any event, these subjective opinions of individual employees are beside the point, because they cannot alter the statutory and contractual division of authority between GTECH and the Commission. As the court of appeals correctly held, these individuals’ opinions are neither competent nor material evidence because “the scope of [GTECH’s] discretion or duties relevant to the immunity inquiry are controlled by the two contracts.” 549 S.W.3d at 802 n.153.

Plaintiffs do not contest the Commission’s plenary statutory control over the lottery. Nor do they dispute the terms of the Commission’s contract with GTECH, which makes clear that the Commission, not GTECH, had total authority and sole discretion over the form and content of the Fun 5’s ticket—consistent with the Texas Lottery Act. Thus, when GTECH followed the Commission’s explicit directions in creating the ticket containing the complained-of “misrepresentation,” it was—in every sense—acting “as the [Commission].” *See Brown & Gay*, 461 S.W.3d at 129 (Hecht, C.J., concurring).

B. GTECH had no discretion over the complained-of ticket.

Seeking refuge from the controlling statutes and contracts, Plaintiffs scramble to find “discretion” at *some* point in the proposal and drafting process, focusing on initial drafts. (Resp. 9.) The court of appeals rightly rejected the materiality of any such early-stage discretion, recognizing that GTECH’s “discretion in originating the Fun 5’s game and Game 5 instructions is ultimately immaterial to its claim of derivative sovereign immunity.” 549 S.W.3d at 800. In their response, Plaintiffs turn against the court of appeals opinion and (for the first time) argue that “GTECH’s *original* design of the game or its decision to suggest the game . . . *in the first place*” was itself fraudulent, thus defeating immunity. (Resp. 10-12 (emphasis added).)

The threshold problem with Plaintiffs' new argument is just that—it is new. Plaintiffs did not plead any claim based on the draft working papers or GTECH's discretion "in the first place." Rather, Plaintiffs alleged that the final ticket available for purchase misrepresented that "if the ticket revealed a Money Bag symbol in Game 5, the player would 'win.'" (*E.g.*, CR183-91.) Had the Commission accepted GTECH's original proposal without directing changes, the representation Plaintiffs point to would have been accurate: every ticket with a Money Bag symbol in Game 5 would have had tic-tac-toe and thus have been a winner. Plaintiffs' fraud claim is necessarily based on changes to the final ticket directed by the Commission, not the original draft GTECH proposed to the Commission. (CR190.)

Nor would Plaintiffs' new fraud theory, if actually alleged, make any sense. (Resp. 11-12.) GTECH presented initial draft papers only to the Commission, and they were never published. Plaintiffs therefore did not (and could not) rely on any representations in the unseen draft papers, and those papers could not cause Plaintiffs any damages. Plaintiffs cannot defeat GTECH's derivative immunity based on a never-pled, nonsensical claim.

Plaintiffs' new theory also mischaracterizes GTECH's role. GTECH did not "select" the Fun 5's game, as Plaintiffs allege. (*See* Resp. 9, 11.) Instead, GTECH merely provided examples of tickets from other states to the Commission, and the

Commission alone selected the Fun 5's game as a concept to be developed for a lottery game in Texas. (CR275.) GTECH then presented initial draft working papers, and after that it simply incorporated the Commission's changes exactly as directed by the Commission.

Finally, Plaintiffs' new theory conflicts with *Brown & Gay*, which focused on whether the contractor exercised discretion over "the complained-of conduct." 461 S.W.3d at 125-26. There, the complained-of conduct was a contractor's independent decisions "in designing the signs and traffic layouts for the Tollway." *Id.* at 126. The plaintiffs complained that the Tollway was negligently designed, and because the contractor exercised discretion over the Tollway's final design, immunity for the state's decisions was not implicated. *Id.* at 126.

Under *Brown & Gay*, the question here is whether GTECH exercised discretion over the "complained-of conduct"—the final form of the Fun 5's ticket. It did not. The Commission completely controlled and specifically directed the content of the final ticket Plaintiffs purchased. Any discretion GTECH had over the initial draft proposal is, as the court of appeals concluded, "immaterial." *See* 549 S.W.3d at 800.¹

¹ Plaintiffs also seek to shore up the court of appeals' opinion based on three of this Court's cases (Resp. 13-14), but those cases support immunity here for the reasons previously detailed in GTECH's Petition. (PFR 16.)

III. The Court should grant review to correct the court of appeals’ broadly applicable “discretion to alert” holding, which leaves sovereign decisions open to attack.

Plaintiffs’ final argument against review is that the court of appeals did not apply a “discretion to alert” analysis that will apply in other cases, “but instead merely applied the law to the facts.” (Resp. 14-15.) To the contrary, the court of appeals’ broad holding means that every contractor may be sued in every case in which its contract does not specifically disclaim discretion to second-guess the state’s directions and warn of the potential consequences:

[W]e need not decide whether GTECH contracts affirmatively *required it* (i.e., deprived it of discretion not to act) to alert [the Commission] to a perceived discrepancy with the Game 5 instructions [after the Commission prescribed the change in parameters]. Rather, the consideration controlling GTECH’s immunity is whether its contracts left it discretion to choose to so alert [the Commission] While it remained [the Commission’s] prerogative to reject GTECH’s guidance, GTECH possessed discretion to provide the guidance nonetheless.

See 549 S.W.3d at 802. By its own terms, this analysis applies regardless of the state’s “prerogative” or authority to make the complained-of decision. It would therefore subject sovereign decisions to judicial attack in countless situations.

Government contractors invariably have some “discretion” to alert the state of potential issues raised by the state’s directions. Must they now do so—or else face suit for the state’s decisions—in every case? Does immunity turn on the capability of the private entity, such that sophisticated contractors are on the hook

for not alerting the state to every potentially troublesome government decision, while others are shielded because the state's mistake was beyond their level of expertise? Under this Court's precedent, the answer to both questions is no. Yet the court of appeals' discretion-to-alert analysis invites such arbitrary line-drawing. This Court should grant review to prevent opening this Pandora's Box.

CONCLUSION AND PRAYER

Derivative sovereign immunity turns on whether the "complained-of conduct" was directed by the state, such that the conduct is effectively "taken by the government *through* the contractor." *Brown & Gay*, 461 S.W.3d at 125. Here, the complained-of conduct is the alleged misrepresentation in the Fun 5's ticket Plaintiffs purchased. Under the Texas Lottery Act, the Commission controlled the ticket's content, and the misrepresentation Plaintiffs allege would not exist but for the changes the Commission directed to the ticket. So, under *Brown & Gay*, GTECH shares in the Commission's immunity.

Nothing in Plaintiffs' response casts doubt on GTECH's request that the Court grant review, reverse the court of appeals' judgment insofar as it denies GTECH's plea to the jurisdiction, and render judgment dismissing this case.

Respectfully submitted,

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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 Petition for Review was served via e-service and/or e-mail on the counsel of record listed in Tab A on September 4, 2018.

/s/ Kent Rutter

Kent Rutter

CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e), (i)

1. This petition complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because, according to the Microsoft Word 2010 word count function, it contains **2,371** words excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(e)(i)(1).
2. This petition complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Kent Rutter

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Tab A

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