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SUPREME COURT OF TEXAS
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NO. 18-0159

In the Supreme Court of Texas

GTECH CORPORATION,

Petitioner,

V.

JAMES STEELE, et al.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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

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II. Respondents:

See Appendix Tab C listing 1,238 plaintiffs and intervenors.

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See Appendix Tab C.

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ABBREVIATIONS

"Commission" means the Texas Lottery Commission.

"GTECH" means Petitioner GTECH Corporation.[1]

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

RECORD REFERENCES

The Appendix is cited as "Tab [tab letter]."

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#]."

HYPERLINKS

Text in blue and underlined is hyperlinked to the Appendix. After following a hyperlink, strike "Alt" and "left arrow" keys simultaneously to return to your location in the brief.

[1] GTECH and a former affiliate, GTECH Printing Corporation, were involved in the underlying events, but GTECH later succeeded to the interests of the affiliate. (Tab A at 772 n.2.) GTECH is now known as "IGT Global Solutions Corporation," but the parties and the courts below have continued to use "GTECH" to identify the defendant in this litigation.

STATEMENT OF THE CASE

***Nature of the Case*:** This appeal turns on whether GTECH, a contractor for the Texas Lottery Commission, has derivative sovereign immunity from a claim faulting it for following, rather than second-guessing, the Commission's directions as to the form of a $5 scratch-off lottery ticket. The Commission had statutory control over the ticket's design and specifications, and GTECH was contractually required to accept and support the Commission's directions. Even so, the court of appeals held that GTECH lacks immunity and permitted Plaintiffs (1,238 lottery ticket purchasers) to sue GTECH for fraud and seek more than $500 million in damages, based on their claim that the Commission-directed design of their lottery tickets misled them into believing they had won prizes. (CR3-20, 25-60, 72-120, 136-230, 696-704.)

***Trial Court*:** The case was filed in the 201st Judicial District Court of Travis County, Texas; the Honorable Amy Clark Meachum, presiding.

***Course of Proceedings*:** GTECH filed a plea to the jurisdiction asserting derivative sovereign immunity, which shields government contractors from suits arising from actions directed by a governmental entity. (CR231-374, 709-855.)

***Trial Court's Disposition*:** The trial court denied GTECH's plea to the jurisdiction but acknowledged that "there is a substantial ground for difference of opinion" and granted permission to appeal. (2d Supp. CR3-5; Tab D.)

***Court of Appeals' Disposition*:** The Third Court of Appeals at Austin agreed that there is a substantial ground for difference of opinion and accepted GTECH's appeal. (Tab E.) In a published opinion authored by Justice Pemberton and joined by Justices Puryear and Field, the court of appeals reversed the trial court's order in part, holding that GTECH is immune from Plaintiffs' claims for aiding and abetting the Commission's alleged fraud, tortious interference, and conspiracy. But the court of appeals held that GTECH lacks immunity from Plaintiffs' claim that GTECH itself committed fraud, and thus affirmed the trial court's order as to that claim. (The court of appeals' opinion is reported at 549 S.W.3d 768 and a copy is included at Tab A in the Appendix.)

The Fifth Court of Appeals at Dallas reached a different conclusion when it addressed an identical fraud claim regarding the same lottery ticket. It held that GTECH is entitled to immunity and affirmed the trial court's grant of GTECH's plea to the jurisdiction. *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017, pet. filed) (copy included at Tab G in the Appendix). Nettles has filed a petition for review, which is currently pending in this Court and is being briefed concurrently with this case. (Pet. for Review, No. 17-1010.)

STATEMENT OF JURISDICTION

This Court has jurisdiction under Section 22.001 of the Texas Government Code because this case presents important questions of law that have divided the courts of appeals. The Austin Court of Appeals held in this case that GTECH, a government contractor, lacks derivative sovereign immunity from a fraud claim based on GTECH's compliance with the Texas Lottery Commission's directions as to the form and content of a scratch-off lottery ticket. In a separate case involving the same allegations and the same lottery ticket, the Dallas Court of Appeals reached the opposite conclusion, upholding derivative sovereign immunity for GTECH.

The conflicting results in this litigation contribute to uncertainty among lower courts about how to interpret this Court's decision in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015). The court of appeals' decision in this case also creates an exception to derivative immunity that threatens to swallow the doctrine entirely. By denying derivative immunity solely on the theory that GTECH could have questioned the Commission's directions instead of following them, the court of appeals set the stage for artfully pleaded "failure to question" claims that will compromise sovereign decisions and destabilize government contracting. Government contractors across Texas will face the same threat GTECH faces here—potential exposure to massive liability merely because they implemented government decisions over which they had no control.

ISSUES PRESENTED

Does a government contractor lose derivative sovereign immunity from a claim attacking a governmental decision over which the contractor had no control merely because it did not question the government's decision?

Specifically:

1) Did the court of appeals correctly analyze and resolve the split of authority that has developed among courts of appeals about how to interpret *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)?

2) Did the court of appeals create an exception to derivative immunity that effectively eviscerates the doctrine by denying derivative sovereign immunity solely because GTECH did not second-guess the government's decision?

3) Does the court of appeals' opinion, by exposing GTECH to potential liability for implementing a decision over which it had no control, conflict with Texas statutes that give the Texas Lottery Commission total, nondelegable control over the form of Texas Lottery tickets?

STATEMENT OF FACTS

A. The Legislature delegated exclusive authority to the Commission to develop and control lottery games.

This case concerns the Texas Lottery, which generates billions of dollars that are statutorily directed to "the foundation school fund" and "the fund for veterans' assistance . . . ." *See* TEX. GOV'T CODE §§ 466.351, 466.355; CR171.[2] The Texas Lottery came into existence in 1991 as an exception to the state's constitutional prohibition against lotteries and gambling. *See* TEX. CONST. art. III, § 47(a). The constitutional amendment empowers the "Legislature by general law [to] authorize the State to operate lotteries." *Id.* § 47(e). Acting on this authority, the Legislature enacted a carefully controlled framework in which the lottery could operate. Within this framework, the Commission and its executive director "exercise strict control and close supervision over all lottery games conducted in this state" and "ensure that games are conducted fairly and in compliance with the law." TEX. GOV'T CODE §§ 466.014(a), 467.101(b).

The Commission's executive director is charged with "prescrib[ing] the form of [lottery] tickets" and adopting (through publication in the Texas Register) rules governing all aspects of lottery games, including ticket prices, the number of winning tickets, and ticket-validation requirements. *Id.* §§ 466.015, 466.251(a),

[2] *See* Tex. Lottery Comm'n, Summary Financial Info., https://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited December 26, 2018).

467.102; *see* 16 TEX. ADMIN. CODE § 401.302. The Commission's rules provide that if a dispute arises about whether a ticket is a winner, the claimant's "exclusive remedy" is reimbursement "for the cost of the disputed ticket." 16 TEX. ADMIN. CODE § 401.302(i).

B. The Commission exercised its statutory authority and contracted with GTECH to help it develop lottery tickets.

The constitutional amendment permitting lottery games in Texas also permitted the Legislature to "authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State." TEX. CONST. art. III, § 47(e). The Legislature, in turn, authorized the Commission to "contract with or employ a person to perform a function, activity, or service in connection with the operation of the lottery." TEX. GOV'T CODE § 466.014(b).

Under this authority, the Commission contracted with GTECH for assistance with the production and distribution of lottery tickets.[3] (CR265, 275.) GTECH's contracts provide that it will "work closely with [the Commission] to identify instant ticket games," but the Commission will "make all final decisions regarding the

[3] Two contracts governed the Commission's relationship with GTECH: (1) a "Contract for Lottery Operations and Services," and (2) a "Contract for Instant Ticket Manufacturing." (CR516-85, 587-98.) Each contract incorporated the Commission's request for proposal ("RFP"). (CR519, 588; RFP *available at* https://www.txlottery.org/export/sites/lottery/Documents/procurement/Book_1_ITM_RFP_FINAL_110711.pdf (last visited December 26, 2018)). Although the RFPs are not in the record, Plaintiffs' live pleading expressly references the RFPs by citing to the Commission's website (CR172-73), and as the court of appeals correctly noted, there has been no objection to considering the RFPs "as components of the two contracts." (Tab A at 794 n.146.)

selection" of a scratch-off ticket. (Tab A at 794.) The contracts further state:

> The Texas Lottery Commission is a part of the Executive Branch of Texas State Government. The [Commission] will not relinquish control over lottery operations. [GTECH] shall function under the supervision of the [Commission]. Its operations will be subject to the same scrutiny and oversight that would apply if all operations were performed by [the Commission's] employees.

(*Id.* at 795; RFP at 4.)

GTECH's role under the contracts is limited to submitting *proposed* specifications for lottery tickets. GTECH has no authority to determine *final* specifications. For example, the contracts specify that:

- "[f]inal decisions regarding the direction or control of the Lottery are always the prerogative of the [Commission] in its sole discretion" (Tab A at 795; RFP at 4);
- scratch-off tickets "shall in all respects conform to, and function in accordance with, Texas Lottery-approved specifications and designs" (CR527); and
- 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]" (Tab A at 795; RFP at 4).

The Commission selects lottery tickets to develop based on draft "working papers" that are submitted by GTECH, which include a proposed design, prize structure, and rules. (CR275, 283.) The Commission's staff members—who have decades of combined experience—mark up the draft working papers and direct GTECH to make specific changes. (CR274-75.) The changes directed by the

Commission range from stylistic and design preferences to revising the text shown on a ticket and the rules governing the lottery game. (*Id.*)

GTECH incorporates the Commission's changes into the draft working papers, and the Commission reviews the papers again. (CR275.) The Commission often makes several rounds of revisions to draft working papers before it approves final working papers. (*Id.*) The final working papers set forth detailed specifications that GTECH must follow when manufacturing a lottery ticket to be sold by the Commission through retail outlets. (*Id.*; CR277.)

C. The Commission selected the final design of the Fun 5's lottery ticket.

This case involves a Texas Lottery scratch-off ticket called "Fun 5's." In 2013, GTECH provided a prototype of what became the Fun 5's ticket to the Commission. (CR275.) GTECH's proposal was based on the ticket shown below, which had been used successfully by the Nebraska Lottery:

(CR258.)

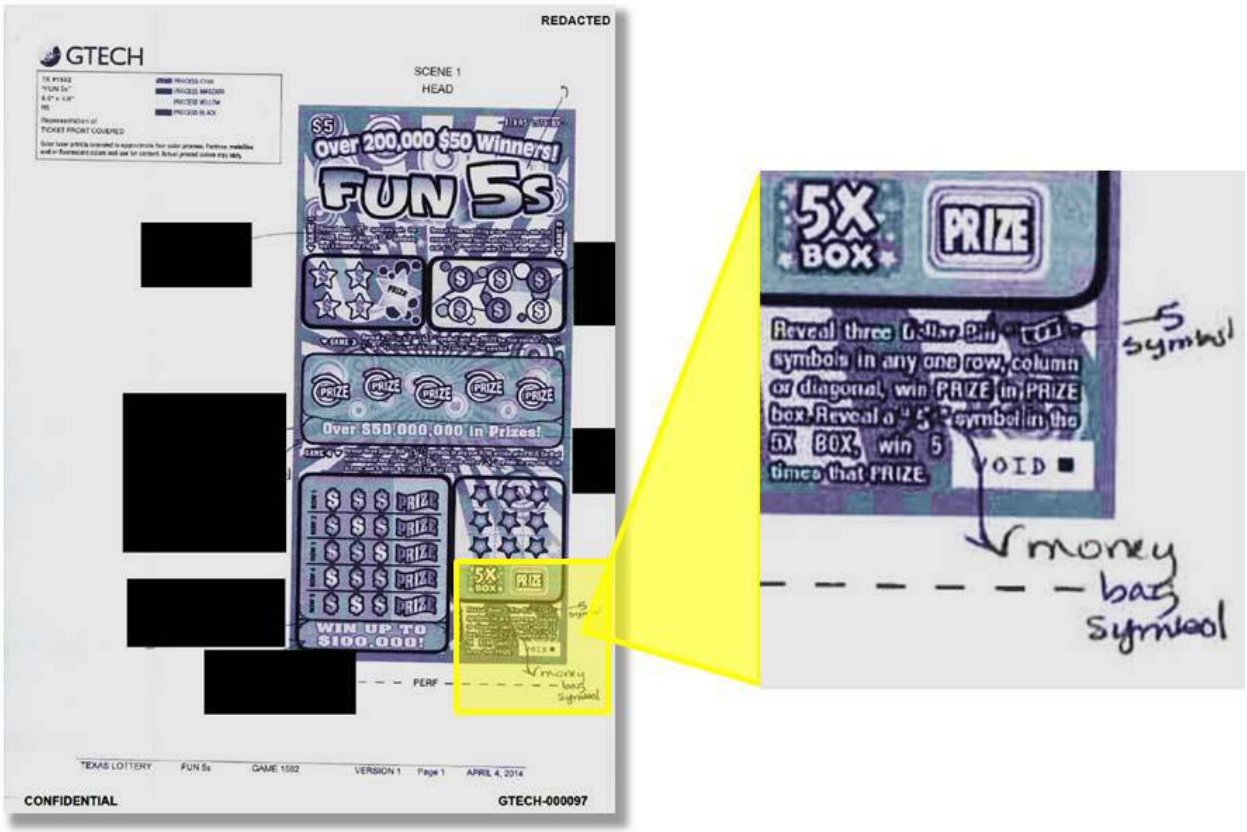
After the Commission expressed interest in the Fun 5's concept, GTECH sent draft working papers for the ticket. (CR275.) The proposed Texas Fun 5's ticket, like the Nebraska ticket, contained five games, including a tic-tac-toe game with a 3-by-3 grid of symbols, a "PRIZE" box, and a "5X BOX," which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

' symbols in any one row, column, or diagonal line," the player would win the prize revealed by scratching off the "PRIZE" box. (CR275, 295-97.) And if the player revealed a "5" symbol by scratching off the "5X BOX," then the player would win five times that prize. (CR275-76, 295-97.) The Fun 5's ticket GTECH initially proposed looked like this:

(CR296.)

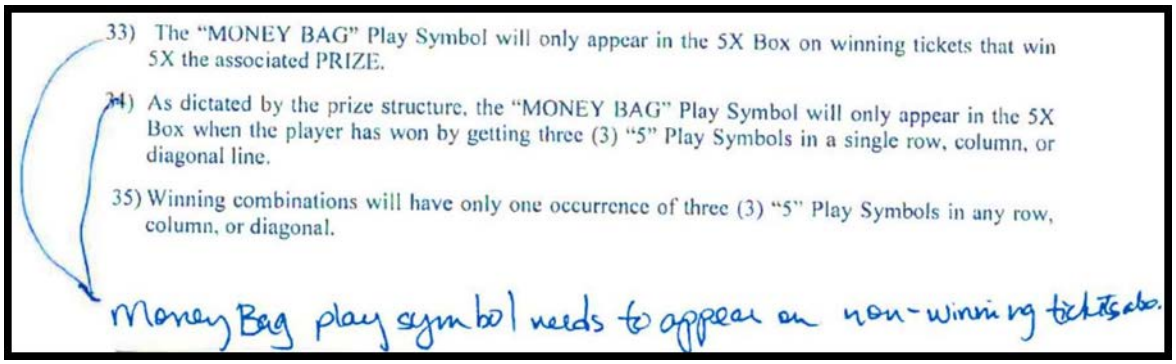
The initial draft working papers specified that a "5" symbol would appear in the multiplier "5X BOX" *only if* a ticket had three dollar-bill symbols in a single row, column, or diagonal. (CR276, 310.) Therefore, only tickets with a winning tic-tac-toe game would have a symbol in the "5X BOX." (CR265, 310.)

The Commission required GTECH to make several changes to the proposed tic-tac-toe game. (CR276, 315-34.) First, the Commission directed GTECH to change the "5" symbol to a "money bag" and the "dollar bill" symbol to a "5":



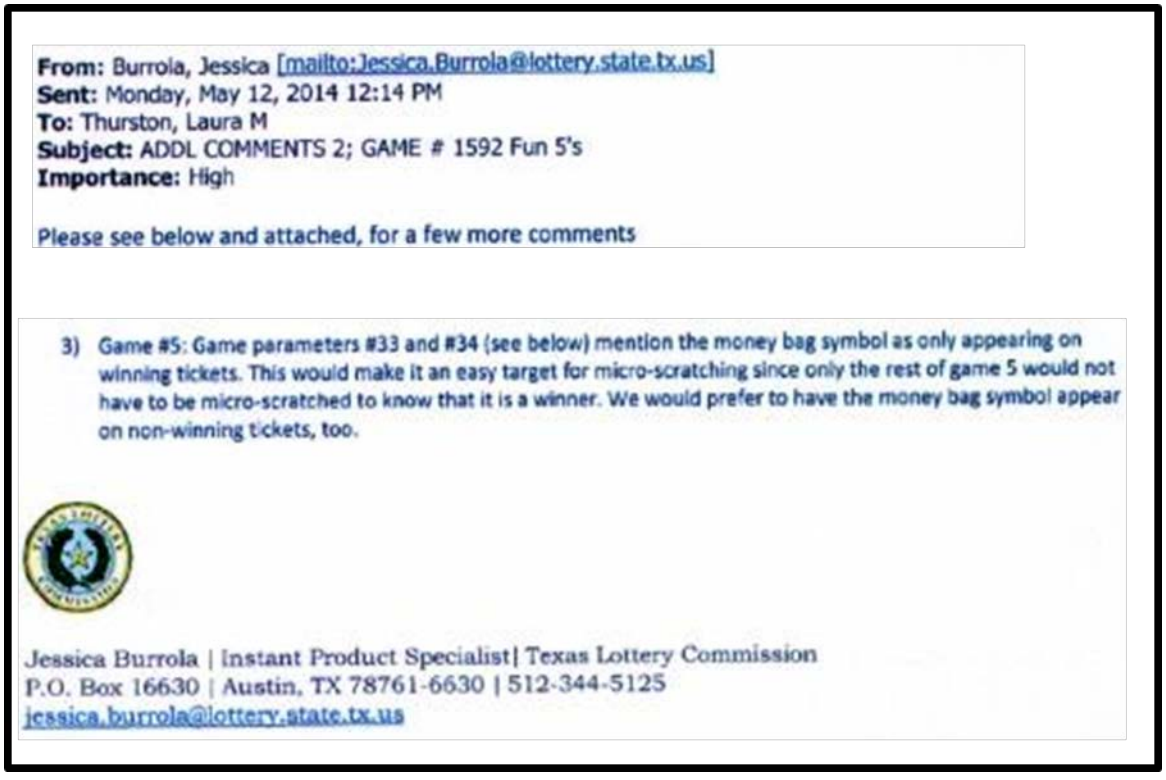
(CR276, 325 (Commission's handwritten notations).)

Next, and most important here, the Commission instructed GTECH that the "money bag" symbol for the multiplier "5X BOX" needed to appear on *both* winning tickets (those with tic-tac-toe) *and* non-winning tickets (those without tic-tac-toe):



(CR276, 334 (Commission's handwritten notations).)

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



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

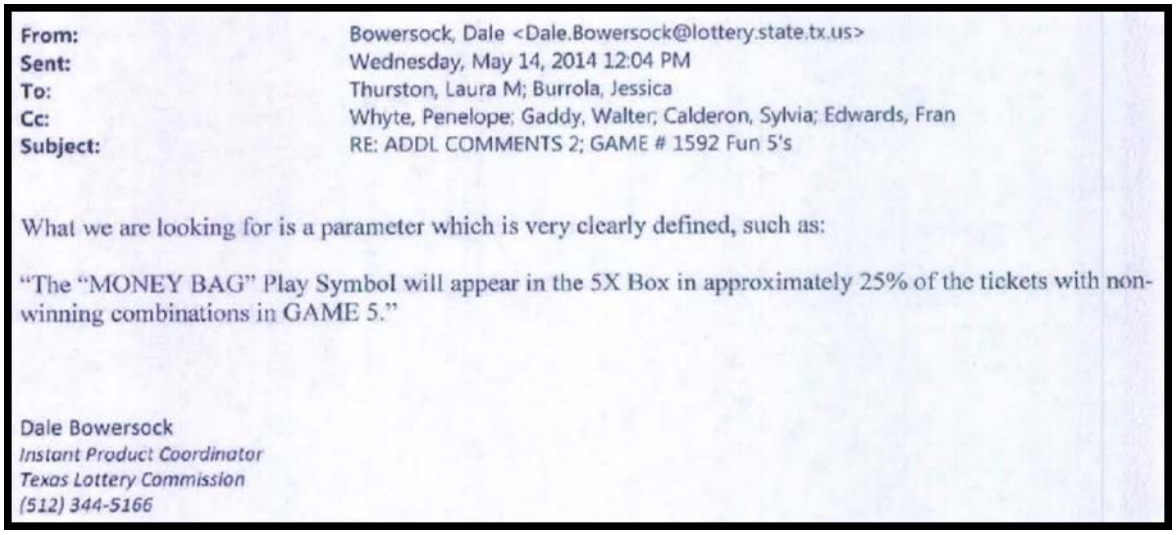
Please see below and attached, for a few more comments

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

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

(CR241, 276.)

The Commission directed GTECH to address this concern by printing a "money bag" symbol on approximately 25% of tickets without a winning combination of symbols in the tic-tac-toe game:



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

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

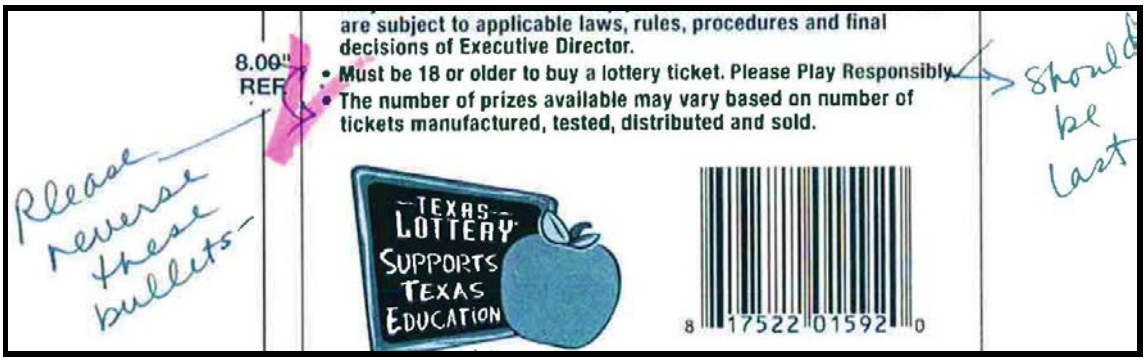
"The "MONEY BAG" Play Symbol will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in GAME 5."

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

(CR260-63, 271, 276.)

The Commission also directed GTECH to revise the phrase "Over $50 Million in Cash Prizes!" to "Over $50,000,000 in Prizes!":

(CR316 (Commission's handwritten notations).) And it required GTECH to change the order of the rules on the back of the ticket:



(CR321 (Commission's handwritten notations).)

Under its contract with the Commission, GTECH had to "accept and support" the Commission's directions and then prepare a set of final working papers for the Commission's approval. In those papers, the Fun 5's ticket and tic-tac-toe game looked like this:

(CR340.) As the Commission specified, a "money bag" symbol appeared on approximately 25% of tickets without tic-tac-toe, and the rules of the tic-tac-toe game read: "Reveal three '5' symbols in any one row, column or diagonal, win PRIZE in PRIZE box. Reveal a Money Bag '  ' symbol in the 5X BOX, win 5 times that PRIZE." (*Id.*)

After approving the final working papers for the Fun 5's ticket, the Commission prepared and published in the Texas Register official rules and specifications for the ticket. *See* Tex. Lottery Comm'n, Instant Game No. 1592 "Fun 5's," 39 Tex. Reg. 4799 (2014). GTECH had no authority to review (and did not review) the official rules and specifications before they were published. (CR274.) GTECH's name did not appear on the tickets, and GTECH did not sell any tickets or communicate with prospective purchasers. (CR274, 529-31.)

D. Hundreds of individuals sued GTECH, claiming to be defrauded by the tic-tac-toe game on the Fun 5's ticket.

About two weeks after the Commission began selling Fun 5's tickets, the media reported that Plaintiff Geraldine Steele was claiming to be confused by the tic-tac-toe game and that buyers of Fun 5's tickets might be able to sue.[4] Following

[4] *E.g.*, Brittney Martin, *A half-million win? Scratch that, lottery tells disappointed ticket buyers*, DALLAS MORNING NEWS (Sept. 16, 2014), http://www.dallasnews.com/news/state/headlines/20140916-a-half-million-win-scratch-that-lottery-tells-disappointed-ticket-buyers.ece (last visited December 26, 2018).

these reports, a lawsuit was filed in Dallas by lottery player Dawn Nettles.[5] An essentially identical lawsuit—this case—was filed in Austin by Steele, who was ultimately joined by more than 1,200 others. The ticket purchasers claim the design of the Fun 5's ticket misled them into believing they had won the tic-tac-toe game and were entitled to five times the prize in the "PRIZE" box, merely because they found a symbol in the "5X BOX," even though they did not have tic-tac-toe. (CR3-20, 25-60, 72-120, 136-230, 696-704.)

Plaintiffs could not sue the Commission because of sovereign immunity, so they sued GTECH instead. After amending their pleadings several times, Plaintiffs focused their complaints on GTECH and the Commission "jointly" deciding to print the "money bag" symbol on non-winning tickets and "jointly" deciding on the rules of the tic-tac-toe game. (CR81.) Based on those allegations, Plaintiffs in this case asserted fraud and other claims and sought more than $500 million in damages based on a "benefit of the bargain" theory, plus exemplary damages. (CR195-96.)

Meanwhile, in the Dallas case, GTECH filed a plea to the jurisdiction, asserting that it had immunity because the case arose from actions the Commission directed. The Dallas trial court agreed and dismissed the *Nettles* case. (CR694.)

[5] *Nettles v. GTECH Corp.*, No. DC-14-14838, 160th District Court, Dallas County. The *Nettles* case was appealed to the Dallas Court of Appeals (*see* Tab G) and is currently pending before this Court (Cause No. 17-1010).

The Dallas trial court's ruling prompted Plaintiffs in this case to file another amended pleading. (CR169-230, 696-704.) Though their fraud claim remained unchanged, Plaintiffs abandoned their allegation that GTECH and the Commission made joint decisions and instead alleged that "GTECH chose the wording" on the Fun 5's ticket "in its exercise of independent discretion." (CR180, 190.) Plaintiffs acknowledged that the decision to print "money bag" symbols on non-winning tickets was the Commission's decision alone. (CR179-80.) But they contended that GTECH should have second-guessed the Commission's directions regarding the form of the tic-tac-toe game. (Tab A at 800.) To support this theory, Plaintiffs pointed to testimony from GTECH employees who said they would have spoken up if they had seen any reason a player could become confused. (*See id.* at 801.)

E. GTECH's plea to the jurisdiction based on derivative immunity was denied as to the fraud claim against it.

GTECH filed a plea to the jurisdiction, as it had in the related *Nettles* case. But unlike the trial court in *Nettles*, which granted GTECH's plea, the trial court in this case denied the plea. (CR694-95.) The ruling in *Nettles* was appealed to the Dallas Court of Appeals, and GTECH appealed the ruling in this case to the Austin Court of Appeals.

The Dallas Court of Appeals affirmed the trial court's ruling in *Nettles*, holding that GTECH is entitled to derivative sovereign immunity. (Tab G at *1.)[6] But, in this case, the Austin Court of Appeals reached a different conclusion. It held that GTECH does not have immunity from Plaintiffs' fraud claim because GTECH's contracts "left it discretion to choose to . . . alert" the Commission that the specifications the Commission directed GTECH to implement could be misleading.[7] (Tab A at 802.)

[6] Nettles filed a petition for review (No. 17-1010), and this Court has requested full briefing.

[7] The Austin Court of Appeals held that GTECH *is* immune from Plaintiffs' claims for aiding-and-abetting fraud, tortious interference, and conspiracy because "each complain substantively of underlying decisions or directives of [the Commission], not any actions by GTECH within its independent discretion, thereby implicating sovereign immunity." (Tab A at 796.) Plaintiffs did not file a cross petition in this Court challenging the dismissal of those claims.

REASONS TO GRANT REVIEW

The doctrine of derivative sovereign immunity—recognized by this Court in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)—safeguards sovereign prerogatives by protecting state-directed decisions implemented by government contractors. But questions have arisen about the doctrine's application, resulting in conflicting outcomes and analyses. The Court should grant review for the following reasons:

***To resolve the direct conflict with* Nettles.** This is one of two cases pending before the Court involving the same claim about the same lottery ticket. In this case, the Austin Court of Appeals misjudged the boundaries of derivative immunity and permitted purchasers of Texas Lottery tickets to sue GTECH, a government contractor, on their claim that the form and content of the tickets misled them into believing they had won a prize. The court reached this conclusion despite the Texas Lottery Commission's complete control over the form and content of the tickets. And it denied immunity even though the Dallas Court of Appeals, in the related *Nettles* case (No. 17-1010), correctly held that GTECH is entitled to share in the Commission's immunity. This direct conflict necessitates review.

***To resolve broader confusion concerning* Brown & Gay.** Beyond the direct conflict, this case provides an opportunity to resolve open questions about the scope of derivative immunity. The threshold question concerns the degree of government

control needed to extend immunity to a private contractor—a question reserved by this Court in *Brown & Gay*. And there are open questions regarding how public-fisc justifications fit within the derivative-immunity analysis.

To protect the Commission's statutorily-mandated control over the Lottery. Review is also needed to protect the Commission's total, nondelegable control over the form of lottery tickets. Consistent with this control, GTECH's contracts with the Commission required GTECH to "accept and support" the Commission's decisions. Plaintiffs' fraud claim, which blames GTECH for implementing the Commission's decisions, necessarily attacks those decisions and undermines the sovereign will that they embody.

To preserve and restore coherence to derivative immunity. Finally, review is needed to correct the doctrinal missteps in this case by the court of appeals, which have far-reaching consequences. Unlike the Dallas Court of Appeals in *Nettles*, the court of appeals here held that even though GTECH was contractually required to "accept and support" the Commission's directions, GTECH nevertheless lacks immunity because it retained "discretion" to second-guess the Commission with non-binding observations. Because "discretion" to second-guess directions is inherent in the government-contracting relationship, the court of appeals' reasoning threatens the existence of derivative immunity as well as the coherence of this Court's broader sovereign-immunity jurisprudence.

SUMMARY OF THE ARGUMENT

This case presents an opportunity for the Court to resolve an outstanding conflict and provide guidance on the important doctrine of derivative sovereign immunity.

The Court held in *Brown & Gay* that *no* governmental control means *no* immunity. But it reserved for another day the question of what "degree of control" is sufficient to establish immunity. That question is presented here.

Under both statute and contract, the Texas Lottery Commission possessed and exercised control over the complained-of Fun 5's lottery ticket. The alleged misrepresentation on the Fun 5's ticket resulted from Commission decisions executed through GTECH, not any act of independent discretion by GTECH. The Commission's immunity should therefore shield GTECH from Plaintiffs' fraud claim, which collaterally attacks the Commission's decisions and seeks to hold GTECH liable for complying with the Commission's directions.

The court of appeals denied immunity for GTECH only because it concluded that GTECH retained "discretion to alert" the Commission that the Commission's decisions about the Fun 5's ticket might be problematic. But this "discretion to alert" reasoning should not deprive GTECH of immunity because the complained-of conduct is still the Commission's conduct (i.e., the content of the Fun 5's ticket, over which it had sole control). Further, the exception crafted by the court of appeals finds

no support in this Court's jurisprudence and creates a loophole that threatens to swallow the doctrine of derivative immunity. Virtually every government contractor could, in theory, question the government and alert it that its decisions might be mistaken. If that were enough to defeat immunity, the doctrine—though recognized and approved by this Court—would as a practical matter cease to exist. This is a bad outcome. Extending immunity to contractors for state-directed conduct is important because it shields sovereign decisions from collateral attack and protects contractors from liability merely because they carried out the state's choices.

The Court should also reject the plaintiffs' argument (both here and in the related *Nettles* case) that the claims against GTECH are not subject to immunity because they will not affect the public fisc. Under this Court's jurisprudence, sovereign immunity shields sovereign decisions—regardless of whether the decision is carried out by the government or its contractor. Sovereign decisions embody choices about public policy and the allocation of public resources. Thus, the fiscal justifications supporting immunity are served when sovereign decisions are protected from attack in the courts. Protecting the Commission's underlying decisions here will also guard against a disruption to revenue that is crucial for public education and veterans' programs.

By denying immunity, the court of appeals' opinion erroneously permits more than one thousand lottery ticket purchasers to sue GTECH for hundreds of millions

of dollars just because GTECH followed the Commission's directions. Sovereign immunity should bar this attack on the Commission's decisions.

ARGUMENT

I. Review is needed to resolve open questions and conflicting holdings regarding the doctrine of derivative sovereign immunity.

Derivative sovereign immunity plays an important role when the state contracts with private parties. The doctrine safeguards sovereign prerogatives by immunizing state-directed conduct and stabilizes government contracting by shielding contractors from suits that substantively attack the state's decisions.

This Court recognized derivative sovereign immunity in its landmark decision in *Brown & Gay*. But while recognizing that government contractors ought to derivatively share in the government's immunity in certain circumstances, the Court left for future determination the parameters of those circumstances. This case provides the Court with the proper vehicle to delineate these parameters.

A. Following this Court's opinion in *Brown & Gay*, significant questions remain.

In *Brown & Gay*, this Court for the first time sought to "directly address[] the extension of immunity to private government contractors." 461 S.W.3d at 124. There, a government tollway authority had engaged Brown & Gay, an independent engineering firm, to design the signs and traffic layout for a tollway. *Id.* at 119. Brown & Gay was solely responsible for the tollway's signage and design; it did not implement any government "specifications or follow[] any specific government directions or orders." *Id.* at 119-20, 126. After the tollway was completed and in use, a fatality occurred when an intoxicated driver entered an exit ramp. *Id.* at 119-20. A

negligence suit was filed against Brown & Gay based on the claim that it had failed to properly design and install traffic-control devices. *Id.* Brown & Gay filed a plea to the jurisdiction, contending that it was entitled to immunity. No party attributed the tollway's design to any government decisions or directives, so the specific question before the Court was "whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising independent discretion in performing government functions." *Id.* at 122-23. Based on a two-part analysis, the Court answered "no."

The Court first responded to and rejected Brown & Gay's position that granting immunity would "comport[] with and further[] the legitimate purposes that justify" sovereign immunity—including the need to "guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes." *Id.* at 123 (citations omitted). No such diversion was threatened, so this "rationale underlying the doctrine of sovereign immunity d[id] not support extending that immunity to Brown & Gay." *Id.* at 124.

Having rejected Brown & Gay's reliance on the fiscal justification for sovereign immunity, the Court next considered whether immunity extends to private contractors exercising independent discretion. *Id.* at 124-27. The Court analyzed prior cases in which private contractors were granted immunity and identified a

common thread: "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. The same could not be said in *Brown & Gay* because the plaintiffs did "not seek to hold Brown & Gay liable merely for following the government's directions," but for "its own" independent decisions in designing the tollway's safeguards. *Id.* at 126-27.

Chief Justice Hecht, joined by Justices Willett and Guzman, concurred. The concurring Justices would have simply asked whether Brown & Gay's acts were performed "as" the government (resulting in immunity) or merely "for" the government (resulting in no immunity). *Id.* at 130-31 (Hecht, C.J., concurring). Applying that analysis, they agreed with the majority's conclusion that Brown & Gay lacked immunity, reasoning that "[t]he discretion [it] retained separated it from the [government] and thus from the [government's] immunity." *Id.* at 131.

Brown & Gay thus recognized and laid the analytical groundwork for the doctrine of derivative sovereign immunity. But, as this litigation exemplifies, there are open issues causing uncertainty and disparate outcomes.

B. Lower courts disagree about the extent and type of government control required to establish derivative sovereign immunity.

First, there is the question of how much government control is needed for immunity to extend to a government contractor. In *Brown & Gay*, the Court held

that the contractor was *not* entitled to immunity because "the government's right to control . . . is utterly absent here. The evidence shows that Brown & Gay was an independent contractor with discretion to design the Tollway's signage and road layouts." *Id.* at 126. The Court determined that it did not "need [to] establish . . . whether some degree of control by the government would extend its immunity protection to a private party," leaving that question for another day. *Id.*

In this case and the related *Nettles* case now pending in this Court, two courts of appeals disagreed on the extent of government control needed to establish derivative immunity. Based on the same claim (fraud) against the same government contractor (GTECH) for the same allegedly misleading lottery ticket (the Fun 5's), the Dallas Court of Appeals in *Nettles* held that GTECH is immune, while the Austin Court of Appeals in *Steele* held the opposite. The Dallas Court of Appeals reasoned that GTECH "was acting as the [Commission], not exercising independent discretion, in making the changes to the Fun 5's tickets," so GTECH met its burden to show that it is entitled to immunity. (Tab G at *8-9.) The Austin Court of Appeals, however, concluded that GTECH lacks immunity because it retained "discretion to alert" the Commission that Commission-directed acts allegedly made the Fun 5's ticket misleading. (Tab A at 797, 800, 802-03.)

The Austin Court of Appeals said it was relying on "different reasoning" than the *Nettles* court, giving express acknowledgement to the conflict. (*Id.* at 787.) And

by concluding that immunity-depriving discretion exists whenever a contractor has "discretion to alert" the government to potential problems with a government-directed act, the Austin Court of Appeals created a loophole that could effectively swallow derivative immunity. *See* Part II.B.2, *infra*.

C. Lower courts disagree about the public-fisc component of the derivative-immunity analysis.

On the public-fisc inquiry, the two courts of appeals' reasoning generally aligns, but other cases illustrate open issues, as do the petitioner's filings in this Court in the *Nettles* case.

In *Nettles*, the Dallas Court of Appeals concluded that the proper approach is to "consider whether the contractor defendant 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." (Tab G at *7 (quotation marks omitted).) And it reasoned that claims substantively challenging a governmental entity's performance of duties assigned to it by the Legislature implicate the policy justifications for immunity. (*Id.* at *9.)

Similarly, the Austin Court of Appeals here reasoned that the fiscal justifications for immunity are intrinsically linked to government control over the complained-of conduct. (Tab A at 786-87.) Thus, claims "that substantively attack underlying governmental decisions and directives effected through a contractor . . . inherently implicate the underlying fiscal policies of sovereign

immunity" and obviate any requirement that the contractor "make any separate or further showing to satisfy the fiscal considerations" discussed in *Brown & Gay*. (*Id.* at 781-82, 786-87 & n.97.)

Consistent with these conclusions, most courts of appeals have approached the "fisc" issue by focusing on the government-control portion of *Brown & Gay*. *See, e.g.*, *Lenoir v. UT Physicians*, 491 S.W.3d 68, 82-86 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *Freeman v. Am. K-9 Detection Servs.*, 494 S.W.3d 393, 404-08 & n.3 (Tex. App.—Corpus Christi 2015), *rev'd on other grounds*, 556 S.W.3d 246 (Tex. 2018); *Brown v. Waco Transit Sys.*, 2017 WL 4872801, at *4 (Tex. App.—Amarillo Oct. 27, 2017, no pet.).

But the courts of appeals are not unanimous. At least one court has confined its analysis to public-fisc considerations without mentioning *Brown & Gay*'s control component, *Univ. of Incarnate Word v. Redus*, ___ S.W.3d ___, 2018 WL 1176652, at *4-5 (Tex. App.—San Antonio Mar. 7, 2018, pet. filed), though that court has since referenced both the public fisc and control when analyzing derivative immunity, *Orion Real Estate v. Sarro*, 559 S.W.3d 599, 605-06 (Tex. App.—San Antonio 2018, no pet.). And, in this Court, the petitioner in *Nettles* is taking the position that "GTECH must *conclusively establish* the existence of possible unforeseen expenses" to share in the Commission's immunity—even though the

Commission directed the complained-of conduct. (Pet. for Review, *Nettles v. GTECH Corp.*, No. 17-1010, at 14.)

This Court's guidance is needed to resolve both the conflicting results (in *Nettles* and *Steele*) and the competing views of the public-fisc analysis.

II. The Court should resolve the open questions regarding the doctrine of derivative sovereign immunity and hold that GTECH has immunity.

Plaintiffs' fraud claim seeks to hold GTECH liable for following the Commission's directions about the form of the Fun 5's lottery ticket. The question is thus whether the statutory and contractual control exercised by the Commission over the form of the Fun 5's ticket entitles GTECH to share in the Commission's immunity. The answer is "yes," and that should resolve this case.

The court of appeals' contrary "discretion to alert" exception finds no support in this Court's jurisprudence and would practically swallow an immunity doctrine that safeguards sovereign decisions and stabilizes government contracting. Shielding the Commission's decisions here also comports with the public-fisc justification for immunity. When a claim substantively attacks a sovereign decision—whether carried out by the government or a private party—the claim inherently seeks to control the government's policy and fiscal choices and, in turn, impinges on the fiscal prerogatives that immunity protects.

GTECH acted *as*, not merely *for*, the Commission. It should therefore share in the Commission's immunity.

A. The control requirement of derivative immunity is satisfied when, as here, the government controls the complained-of act.

The Commission is statutorily required to exercise complete control over all lottery games, and GTECH is contractually bound to "accept and support" the Commission's decisions. (*See* Tab A at 795; RFP at 4.) This suit substantively complains that GTECH followed (i.e., "accepted[ed] and support[ed]") the Commission's directions as to the form and content of the Fun 5's lottery ticket. Thus, Plaintiffs seek to hold GTECH liable for complying with Commission directives GTECH "had no power . . . to countermand." (Tab A at 796.) The Court should foreclose this collateral attack on the Commission's sovereign decisions.

1. As required by statute and contract, the Commission exercised strict control over all aspects of the Fun 5's ticket.

The Commission possessed and exercised total control over all aspects of the Fun 5's ticket, including whether to print a "money bag" symbol on certain tickets without a winning tic-tac-toe game. This control is mandated by the statutes that provide for and strictly govern the Texas Lottery, and it is reflected in the Commission's contracts with GTECH.

The legal history of lotteries in Texas sheds light on the plenary nature of the Commission's control. "Lotteries were constitutionally prohibited in Texas from 1845 until 1991." *Verney v. Abbott*, No. 03-05-00064-CV, 2006 WL 2082085, at *1 (Tex. App.—Austin July 28, 2006, no pet.). The original 1845 constitution provided

that "[n]o lottery shall be authorized by this State," TEX. CONST. art. VII, § 17 (1845), and it was later amended to affirmatively require the Legislature to "pass laws prohibiting the establishment of lotteries" and other gambling, TEX. CONST. art. III, § 47 (1876). This constitutional prohibition on state lotteries persisted until 1991, when after fierce public debate voters approved a constitutional amendment allowing for a state-run lottery.[8] The 1991 amendment creates a narrow exception to the prohibition against lotteries, permitting "[t]he Legislature [to] authorize the State to operate lotteries" and "to enter into a contract with one or more legal entities [to] operate lotteries on behalf of the State." TEX. CONST. art. III, § 47(a), (e).

This limited grant of authority for a state-run lottery led the Legislature to carve out a carefully controlled space in which a lottery could operate. In that space, the Texas Lottery Commission must "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 statutorily required "strict control and close supervision" is total, extending "over all activities authorized and conducted in this state under . . . Chapter 466," including all lottery tickets and the Commission's contractual relationship with GTECH. *Id.* § 467.101(a); *see also id.* § 466.251(a). In

[8] Section 47 was also amended in 1980 (to permit bingo) and in 1989 (to permit charitable raffles by certain nonprofit groups). *See* TEX. CONST. art. III, § 47 (b) & (d).

short, the constitutional and statutory mandate is clear: Ultimate authority over, and corresponding political accountability for, the Texas Lottery is vested in the Commission alone.

The terms of the Commission's contracts with GTECH reflect this mandated division of authority. "Final decisions" about the lottery "are always the prerogative of the [Commission] in its sole discretion." (Tab A at 795; RFP at 4.) Scratch-off tickets (like the Fun 5's) "shall in all respects conform to, and function in accordance with, [Commission]-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*.) And although GTECH is an "independent contractor" according to the contracts, "[i]ts operations [are nevertheless] subject to the same scrutiny and oversight that would apply if all operations were performed by [the Commission's] employees." (*Id*.)

These statutory and contractual provisions vest the Commission with plenary, nondelegable authority over all aspects of lottery tickets, including their form and content. And they guide any derivative-immunity analysis concerning claims based on Texas Lottery tickets.

2. Plaintiffs' fraud claim challenges decisions made by the Commission within its exclusive authority.

By suing GTECH for accepting and supporting the Commission's directions about the form and content of the Fun 5's ticket, Plaintiffs necessarily attack decisions made by the Commission.[9] The Court should hold that sovereign immunity bars this collateral attack on decisions the Commission made pursuant to its constitutional and statutory authority.

Plaintiffs complain of decisions directed and controlled by the Commission, such that the complained-of conduct was effectively "taken by the [Commission] *through* [GTECH]." *See Brown & Gay*, 461 S.W.3d at 125. Plaintiffs' live pleading alleges (1) fraud by misrepresentation and nondisclosure, (2) aiding and abetting the Commission's fraud, (3) tortious interference with an existing contract, and (4) conspiracy. (CR190-96.) Each of Plaintiffs' claims centers on the same core allegation that they were misled by the form and content of the Fun 5's ticket into believing they had won (when they had not) and that GTECH was responsible for the supposed deception in the Texas Lottery ticket. (*See id.*)

The court of appeals correctly concluded that the latter three claims are barred because "each complain substantively of underlying decisions or directions of [the

[9] Plaintiffs also seek far more (over $500 million) than the Commission's governing regulations allow—namely, the cost of the disputed tickets. 16 TEX. ADMIN. CODE § 401.302(i).

Commission], not any actions by GTECH within its independent discretion . . . ."[10] (Tab A at 796.) Plaintiffs do not challenge this holding.

Only Plaintiffs' fraud claim remains at issue here. Plaintiffs allege that "GTECH chose the wording of the representation it printed on the Fun 5's tickets. The wording was not dictated or required by the TLC. Instead, the wording was chosen by GTECH's customer service representatives in the exercise of their independent discretion." (CR190.) But the wording Plaintiffs complain about—i.e., "if the ticket revealed a Money Bag symbol in Game 5, the player would 'win'" (*see* CR183-91)—is allegedly misleading only because the Commission directed GTECH to include "money bag" symbols on some tickets without a winning tic-tac-toe game. (CR260-63, 271, 276.) Had the Commission accepted GTECH's original proposal without directing a change, the wording 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 would have been a winner. Plaintiffs' fraud claim is necessarily based on the change to the final ticket directed by the Commission. (CR190.) That change was, by statute and contract, "the prerogative of the [Commission] in its sole

[10] The court of appeals reasoned that Plaintiffs' claims for tortious interference, conspiracy, and aiding and abetting the Commission's fraud "implicat[e] sovereign immunity" because "GTECH had no power under [its contracts] to countermand [the Commission's] decision" regarding "the allegedly misleading Game 5 instructions." (Tab A at 796.) This reasoning is correct, and it also supports dismissal of Plaintiffs' fraud claim. *See infra* Part II.A.2.

discretion." (Tab A at 795.) TEX. GOV'T CODE § 466.014. And GTECH was required to "accept and support the decision of the [Commission]." (Tab A at 795; RFP at 4.)

Plaintiffs do not contest the Commission's plenary authority over the Texas Lottery, the terms of GTECH's contracts with the Commission, or the events that transpired during the Commission's selection and approval of the Fun 5's ticket. Nor do they dispute that GTECH was required to and did make changes as directed by the Commission. That should be the end of the analysis. When GTECH followed the Commission's explicit directions for 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).

Plaintiffs' contrary arguments are unpersuasive. Plaintiffs first try to obscure the Commission's total authority over the form and content of the Fun 5's ticket by referencing testimony from individual GTECH employees about what they "expected" GTECH would do as a matter of reasonable care and professionalism. (Resp. to Pet. at 9.) But, in context, this testimony reaffirms the Commission's total control over the tickets. One of the GTECH employees on whom Plaintiffs rely, for example, 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.) Regardless, the court of appeals correctly held that those 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." (Tab A at 802 n.153.)

Nor can Plaintiffs avoid the extension of immunity by reframing their complaint in this Court, as they attempted in their response to GTECH's petition for review. There, Plaintiffs for the first time complained of fraud in "GTECH's *original* design" or "its decision to suggest the game . . . *in the first place*."[11] (Resp. to Pet. at 5, 10-12 (emphasis added).) But the controlling question is whether GTECH exercised discretion over the "complained-of conduct," not whether it had discretion at some other point in time. *See Brown & Gay*, 461 S.W.3d at 125-26. Here, the fraud claim concerns the form and content of the *final* Fun 5's ticket—which was directed and controlled by the Commission—not the *initial*, never-published drafts. The court of appeals properly held 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." (Tab A at 800.)

Plaintiffs' claim thus turns on the decisions and directives of the Commission executed *through* GTECH, not GTECH's acts of independent discretion. That is the model fact pattern for the application of derivative immunity.

[11] Factually, Plaintiffs mischaracterize GTECH's early-stage role. GTECH did not choose the Fun 5's game. 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, after which it simply incorporated the Commission's changes exactly as directed by the Commission. (*See* CR260-63, 265, 276, 315-34.)

B. GTECH's ability to question the Commission's decisions should not strip it of immunity from Plaintiffs' fraud claim.

The court of appeals nevertheless declined to hold sovereign immunity applicable based on a novel "discretion to alert" exception. As a threshold matter, the exception created by the court of appeals should not alter GTECH's immunity. Regardless of GTECH's so-called discretion, the complained-of conduct remains the representation made by the Commission to Plaintiffs in the Fun 5's tickets, for which the Commission is solely responsible. *See* Part II.A, *supra*; *Brown & Gay*, 461 S.W.3d at 125-26.[12]

But that is not the only flaw in the court of appeals' "discretion to alert" analysis. The court justified its holding by comparing GTECH to government contractors in three of this Court's prior decisions: *K.D.F.*, *Brown & Gay*, and *Strakos v. Gehring*. (Tab A at 802.) None of those authorities supports the court of appeals' broad holding that derivative immunity is absent whenever a contractor retains "discretion" to alert the government to potential problems with government-directed actions. And the court of appeals' reasoning creates an exception that threatens to eliminate derivative immunity, depriving the state and its contractors of the doctrine's sound benefits.

[12] Under *Brown & Gay*, the jurisdictional question is whether a contractor exercised discretion over the "complained-of conduct." 461 S.W.3d at 125-26. The complained-of conduct here is the content of the Fun 5's tickets, and as the court of appeals correctly held, GTECH had no discretion as to the tickets' content. (Tab A at 796.)

1. The court of appeals' "discretion to alert" reasoning finds no support in this Court's jurisprudence.

The court of appeals reasoned that GTECH's position "perhaps most closely resembles the investment advisor in *K.D.F.*" (*Id.*) But that case involved an independent contractor whose role was "in the nature of advising [the state] how to proceed, rather than being subject to the direction and control of [the state]." *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994). Here, regardless of any advice GTECH could offer, it was subject to the Commission's direction and control. Once the Commission decided to proceed with the Fun 5's ticket, GTECH merely operated as an extension of the Commission, making changes as directed. (*E.g.*, CR276, 316, 321, 325, 334.) Every aspect of GTECH's work was controlled by the Commission and "subject to the same scrutiny and oversight that would apply if all [its] operations were performed by [the Commission's] employees." (Tab A at 795.) This contrasts sharply with the advisor in *K.D.F.*, whose "activities necessarily involve[d] considerable discretion." 878 S.W.2d at 597.

The court of appeals was also wrong to compare GTECH to Brown & Gay. (*See* Tab A at 802.) Brown & Gay was not "implementing [government] specifications or following any specific government directions or orders." 461 S.W.3d at 126. Rather, "Brown & Gay's decisions in designing the Tollway's safeguard's [were] its own" because the government completely "delegated the responsibility of designing road signs and traffic layouts to Brown & Gay." *Id.* at

119, 126. Indeed, the governmental entity in *Brown & Gay* "maintained no full-time employees." *Id.* at 119 n.1. And this Court held "only that *no control* [was] determinative." *Id.* at 126 (emphasis added).

The division of authority here is not comparable. The decisions made in preparing and approving the Fun 5's ticket were not—and could not have been—GTECH's own. No color, word, or specification on the ticket could result from GTECH's independent discretion because the Commission (fully staffed with lottery specialists) strictly supervised and controlled every step of the process. (*See* CR260-63, 265, 276, 315-34.) The Commission exercised absolute control over the allegedly fraudulent Fun 5's ticket. *See* TEX. GOV'T CODE § 466.014(a); Part II.A.1, *supra*. This is the paradigm for derivative immunity.

The other case emphasized by the court of appeals was *Strakos v. Gehring*, 360 S.W.2d 787 (Tex. 1962). (*See* Tab A at 802.) But *Gehring* did not involve derivative immunity and does not support the court of appeals' decision. The contractor in *Gehring* relocated a fence for Harris County and was sued when a passerby fell into an uncovered and unmarked hole. *Id.* at 788-89. The contractor defended itself, in part, by emphasizing that its contract did not include a requirement to fill the hole. *Id.* at 803. But contractual silence, the Court held, did not absolve the contractor of its tort-based duty to fill or mark the hole. *Id.* The Court emphasized

that "the act of leaving the hole" could not be deemed "the act of Harris County" because the contract did not include instructions about post holes. *Id.*

Here, GTECH does not rely on contractual silence to evade tort liability for any independent, discretionary conduct. Just the opposite. GTECH relies on express contract terms requiring it to implement the Commission's decisions that resulted in the allegedly misleading ticket. As the court of appeals acknowledged, no purchaser of the Fun 5's ticket could "profess resultant confusion about his or her entitlement to a prize" absent the Commission-directed changes, so GTECH is being sued only because it followed directions that it "had no power . . . to countermand." (Tab A at 796-97.) *Gehring* thus supports rather than refutes immunity here. *See* 360 S.W.2d at 803 (distinguishing the facts in *Gehring* from a situation where a contractor "merely follows plans and specifications which have been handed to [it] . . . with instructions that the same be literally followed").

GTECH is, however, comparable to the contractor in *Allen Keller Co. v. Foreman*, 343 S.W.3d 420 (Tex. 2011). The issue there was whether a contractor owed a duty to rectify or warn of an unreasonably dangerous condition created by government specifications for a roadway guardrail. *Id.* at 425. The Court held that the contractor did not owe any such duty because it did not have discretion "in performing the contract." *Id.* The same principle applies here. GTECH was required to "accept and support" the Commission's directions and ensure that the Fun 5's

ticket "in all respects conform[ed] to . . . Texas Lottery-approved specifications and designs." (CR527; Tab A at 795; RFP at 4.)[13] Thus, GTECH, like the contractor in *Keller* and unlike the contractors in *K.D.F.*, *Brown & Gay*, and *Gehring*, is being sued because it followed government instructions it was obligated to implement.

2. The court of appeals created a loophole that threatens to eviscerate derivative immunity and destabilize government contracting.

By letting Plaintiffs' fraud claim proceed merely because GTECH allegedly possessed, but did not exercise, "discretion" to provide non-binding guidance disagreeing with the Commission's directions, the court of appeals created a loophole to derivative immunity. This loophole will permit private litigants to stymie sovereign prerogatives and destabilize government contracting by exposing the state's contractors to suits that attack state decisions.

First, the court of appeals' reasoning creates an exception that will apply in virtually every case. Even when, as here, the state retains and exercises total control, a contractor inherently has *some* ability (or "discretion") to alert the state of potential issues raised by the state's directions. Plaintiffs will thus be able to plead around immunity and attack the state's decisions—decisions otherwise shielded by sovereign immunity—simply by couching their claims in terms of the contractor's

[13] Also bearing on the Court's analysis in *Keller* was evidence that government employees "frequently visited" and were "aware of conditions at the site." *Id.* at 426. Here, too, the Commission's experienced staff frequently reviewed the Fun 5's ticket and were necessarily "aware of" any potential for it to be misleading. (*E.g.*, CR276, 334.)

failure to alert the state to possible problems with the state's own decisions. This Court has rejected the notion that the limits of immunity can be defined by such "talismanic allegations," rather than the substance of the claims. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637-38 (Tex. 2012). The Court should not change course now.

The court of appeals' reasoning also threatens to destabilize government contracting. It would be both expensive and impractical to require contractors to constantly double-check government directives—especially when, as here, the government has substantial experience and expertise. (*See* CR274.) These duplicative efforts will increase the price and decrease the availability of quality private-sector assistance to the state. *See Keller*, 343 S.W.3d at 426 (citing cost concerns when rejecting duty to rectify). Indeed, this Court acknowledged in *Glade v. Dietert* that a government "contractor ought to be relieved from checking every order given him by the public authorities" because, otherwise, "the cost of public improvements would be immeasurably increased." 295 S.W.2d 642, 644 (Tex. 1956) (discussing *Wood v. Foster & Creighton Co.*, 235 S.W.2d 1, 3 (Tenn. 1950)).

Finally, if the court of appeals' loophole is permitted to stand, government contractors will be encouraged to bargain for contractual disclaimers that deprive them of "discretion" to alert the state to potential issues with the state's decisions. Even if the state would agree to such a disclaimer (a doubtful proposition), this

should not be the price for derivative immunity. Everyone benefits when contractors retain the ability—otherwise inherent in any government-contracting relationship—to warn the government if its directions might pose a problem. The court of appeals' reasoning discourages such beneficial communications.

C. Extending immunity to GTECH comports with the fiscal justifications supporting sovereign immunity.

Aside from its discretion-to-alert reasoning, the court of appeals would have granted GTECH immunity. That is the right result. Both here and in *Nettles*, however, the plaintiffs have argued that GTECH should not be entitled to immunity because their claims against GTECH do not pose a threat to the public fisc. This argument should be rejected.

Sovereign immunity protects sovereign decisions, which represent the state's policymaking and fiscal prerogatives. When, as here, a claim substantively attacks a sovereign decision—whether carried out by the government or a private party—the claim seeks to control the state's choices about the use of public funds and thus impinges on the fiscal prerogatives that immunity protects. In the context of this case, moreover, granting immunity to GTECH will guard against a potentially significant disruption of funding for education and veterans' programs.

1. Sovereign immunity safeguards the sovereign will, which is carried out through government decisions.

When a sovereign decision is implemented through a private party, derivative immunity ensures that the sovereign decision remains protected. This protection furthers the core principles and policy justifications of sovereign immunity, which are set forth in this Court's sovereign-immunity jurisprudence.

Since our state's founding, this Court has recognized the doctrine of sovereign immunity: "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847).[14] Though the Court has over time noted various justifications for immunity—from Blackstone's "[t]he King can do no wrong,"[15] to "shield[ing] the public from the costs and consequences of improvident actions of their governments,"[16] to "preserv[ing] separation-of-powers principles by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars"[17]—the inherent nature of immunity has not changed: "its roots remain secure within the sovereign." *Wasson*, 489 S.W.3d at 432.

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[14] By the time Texas joined the Union, the doctrine of sovereign immunity was already "an established principle of jurisprudence in all civilized nations," *Beers v. Arkansas*, 61 U.S. 527, 529 (1857), which the Framers had decades earlier described as "inherent in the nature of sovereignty." THE FEDERALIST NO. 81 (Alexander Hamilton); *see also Bd. of Land Comm'rs v. Walling*, Dallam 524, 525 (Tex. 1843).

[15] 1 WILLIAM BLACKSTONE, COMMENTARIES *246.

[16] *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

[17] *Brown & Gay*, 461 S.W.3d at 121.

Just two years ago, the Court in *Wasson* made clear immunity's inherent connection to the sovereign will. There, the Court examined when political subdivisions like cities—which possess "no immunity of [their] own"—can nevertheless share in the state's immunity. *Id.* at 433 (quotation omitted). The Court's holding turned on "the derivative nature of governmental immunity" as stemming from the sovereign will:

> [A] city is cloaked in the state's immunity when it acts as a branch of the state, but *only* when it acts as a branch of the state. When a city performs discretionary functions on its own behalf, it ceases to derive its authority—and thus its immunity—from the state's sovereignty. Such proprietary functions, therefore, do not stem from the root of immunity that is "the people," and lacking that common root, they cannot be performed as a branch of the state.

Id. at 436 (citations omitted).

The same principle is true regardless of who seeks to share in the state's immunity. The Court has, for example, held that sovereign immunity shields government officials, employees, or other agents who are sued in their official capacities (that is, when they act as the government), even though the agents are not themselves governmental entities. *See Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011); *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007). On the flip side, sovereign immunity does not protect non-sovereign decisions, regardless of the identity of the actor. *See Wasson*, 489 S.W.3d at 436-37. When government officials act "without legal authority or fail[] to perform a purely

ministerial act," they may be subject to an *ultra vires* suit. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).[18] Relatedly, when sued in their individual capacities, "public employees (like agents generally) have always been individually liable for their own torts"—as opposed to the torts of their principals—"even when committed in the course of employment . . . ." *Franka*, 332 S.W.3d at 382-83 (footnotes omitted). The reason is simple: Even when performed by public employees, private acts do not stem from the sovereign will. *See id*.

These cases reveal the common thread running through this Court's jurisprudence: Sovereign immunity protects the sovereign will, regardless of who is tasked with turning that will into action.

2. Plaintiffs' claim substantively attacks a government decision, thus implicating the state's choices about the use of public funds.

This same thread runs through the Court's analysis of derivative immunity. When the state directs or controls a private contractor's act, the act stems from the sovereign will and shares in the benefits of sovereignty—including immunity. *See Wasson*, 489 S.W.3d at 433-34; *Brown & Gay*, 461 S.W.3d at 124 (majority), 129 (Hecht, C.J., concurring). And because such governmental control is intrinsically linked to the state's policymaking and fiscal prerogatives, extending immunity to a

[18] An *ultra vires* suit is still subject to important qualifications. Even when an *ultra vires* claim may be brought, "the remedy may implicate immunity" if the plaintiff seeks retrospective (rather than prospective) relief from the government principal. *Heinrich*, 284 S.W.3d at 373-76.

private contractor's state-directed conduct serves the fiscal justifications supporting sovereign immunity. The Court impliedly recognized this principle in *Brown & Gay*, and it should expressly recognize it now.

Brown & Gay addressed whether a government contractor with *complete discretion* to design a tollway's signage and layout shared in the government's immunity when it was sued for the tollway's negligent design. 461 S.W.3d at 126. Because the extension of sovereign immunity depends on the expression of the sovereign will, the Court's answer in the negative was an easy one: the lack of *any* governmental control was "determinative." *Id.*

The Court stressed that "the complained-of conduct" was not and could not be "attributed to the government" because the plaintiffs' suit did "not seek to hold Brown & Gay liable merely for following the government's directions." *Id.* at 125, 127. The concurring Justices similarly emphasized that courts should resolve contractor-immunity questions by determining whether the contractor's acts were performed "as" the government (resulting in immunity) or merely "for" the government (resulting in no immunity). *Id*. at 130-31 (Hecht, C.J., concurring).

This is not to suggest that protection of the public fisc is not an important justification for immunity. It is.[19] The Court's precedent shows, however, that state-

[19] In some circumstances, an impact on the public fisc may independently implicate immunity, even absent a substantive attack on a government decision. In the *ultra vires* context, for example, a suit may implicate immunity *either* by attacking the sovereign's acts (i.e., acts within the

directed acts and the public fisc are intrinsically linked: an attack on the state's decisions inherently seeks to control the state's choices about the use of public funds and thus implicates the fiscal justifications supporting immunity. When the sovereign's policymaking prerogatives are protected, so too is the public purse.

In *Wasson*, for example, the Court observed that protecting acts "not done pursuant" to the sovereign will is "not an efficient way to ensure efficient allocation of state resources." 489 S.W.3d at 437. Likewise, in *Heinrich*, the Court distinguished acts deriving their authority from the sovereign will from those performed "without legal authority," concluding that "extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended." 284 S.W.3d at 372. And the author of the court of appeals' opinion below has thus described the link:

> [Sovereign immunity's] contemporary rationale derives not from the prerogative of royalty but from the tripartite form our democratic self-government has taken—namely, a view that the Legislature, not the Judiciary, is best suited to make the policy-laden judgments as to if and how state government resources should be expended. This principle of judicial deference embodied in sovereign immunity extends not only to the Legislature's choices as to whether state funds should be spent on litigation and court judgments versus other priorities, but equally to the policy judgments embodied in the constitutional or statutory delegations that define the parameters of an officer's discretionary authority and the decisions the officer makes within the scope of that authority.

official's legal authority) *or* by seeking retrospective relief from the state (i.e., monetary damages). *Heinrich*, 284 S.W.3d at 372-78.

Bacon v. Tex. Historical Comm'n, 411 S.W.3d 161, 172-73 (Tex. App.—Austin 2013, no pet.) (Pemberton, J.).

The link between purse and prerogative makes sense. The Court explained in *Brown & Gay* that the "disrupt[ion] [of] government services . . . that sovereign immunity addresses" is the disruption that occurs when a sovereign decision is attacked in court, thereby forcing the government's hand and "interfering with the Legislature's prerogative to allocate tax dollars." 461 S.W.3d at 121, 124. This understanding of sovereign immunity properly tethers the doctrine's fiscal justifications to its root function of preserving sovereign authority.[20] *See Wasson*, 489 S.W.3d at 433-34. When the complained-of conduct underlying a claim against a private contractor is directed by the state within its sovereign authority, the conduct is "effectively attributed to the government" and the state's immunity should apply. *See id.* at 433; *Brown & Gay*, 461 S.W.3d at 125. So it should here.

The plaintiffs have nevertheless argued against immunity (both here and in *Nettles*) by contending that granting immunity for GTECH would not protect the state from any direct and unforeseen financial impact. Their argument is misguided.

[20] This Court has implicitly recognized this link on other occasions, too. Take *Brown & Gay*, for example, in which the Court discussed separation-of-powers concerns together with the unanticipated diversion of public funds—and contrasted that diversion with fiscal impact alone. *See* 461 S.W.3d at 121, 123-24. Or consider the most recent *Wasson* decision, where the Court focused solely on whether the municipality acted "as a branch" of the state, not whether the suit independently impacted the public fisc. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 149-52 (Tex. 2018).

First, it ignores that the plaintiffs' claim attacks the Commission's underlying policy and fiscal choices. That is enough for immunity—sovereign choices are entitled to sovereign immunity.

The plaintiffs' argument also misperceives the consequences this lawsuit could have for important state-funded programs. Lottery ticket sales generate billions of dollars each year that the state relies on to fund education and veterans' programs. *See* TEX. GOV'T CODE § 466.355; CR171.[21] If the fraud claim attacking the Commission's choices is ultimately upheld, the negative publicity could cause lottery ticket sales to decline, forcing the state "to divert money previously earmarked" for other purposes to make up for lost lottery revenues. *Brown & Gay*, 461 S.W.3d at 124. This risk of a forced "diversion" of public funds is an additional reason why granting GTECH immunity comports with the justifications for sovereign immunity. Sovereign immunity is meant "to shield the public from the costs and consequences of improvident actions of their governments." *Wasson*, 489 S.W.3d at 432 (quoting *Tooke*, 197 S.W.3d at 332) (alteration omitted). It should do so here.

[21] *See* Tex. Lottery Comm'n, Summary Financial Info., https://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited December 26, 2018).

PRAYER

GTECH requests that the Court reverse the court of appeals' judgment insofar as it denies GTECH's plea to the jurisdiction and render judgment dismissing this case. GTECH also requests all further relief to which it may be entitled.

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 C on December 28, 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 2016 word-count function, it contains **9,940** 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
Kent Rutter

APPENDIX

Tab A — *GTECH Corp. v. Steele*, 549 S.W.3d 768 (Tex. App.—Austin 2018, pet. filed)

Tab B — Court of Appeals Judgment rendered January 11, 2018

Tab C — List of Respondents and Counsel for Respondents

Tab D — Amended Trial Court Order Overruling Defendant GTECH Corporation's First Amended Plea to the Jurisdiction (2d Supp. CR3-5)

Tab E — Court of Appeals Order dated April 15, 2015, accepting GTECH's permissive appeal

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

Tab G — *Nettles v. GTECH Corp.*, 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017)

Tab A

549 S.W.3d 768
Court of Appeals of Texas, Austin.

GTECH CORPORATION, Appellant
v.
James STEELE, et al., Appellees

NO. 03-16-00172-CV
|
Filed: January 11, 2018

Synopsis

Background: Lottery participants brought action against business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission, alleging a discrepancy between the game's instructions and its actual parameters, and asserting claims for aiding and abetting fraud, conspiracy, tortious interference with contract, and fraud by misrepresentation and nondisclosure. Business filed a plea to the jurisdiction. The District Court, Travis County, 201st Judicial District, Amy Clark Meachum, J., denied the plea. Business appealed.

Holdings: The Court of Appeals, Bob Pemberton, J., held that:

[1] business only had to prove lack of discretion to implicate Commission's sovereign immunity;

[2] business lacked discretion with respect to conduct underlying claims for aiding and abetting, conspiracy, and tortious interference;

[3] business had discretion to alert Commission to discrepancy, as relevant to the fraud claims; and

[4] fiscal justifications for sovereign immunity did not warrant extension of immunity as to the fraud claims.

Affirmed in part and reversed and rendered in part.

West Headnotes (15)

[1] **Appeal and Error** Jurisdiction

Because subject-matter jurisdiction is a question of law, the Court of Appeals reviews de novo a trial court's ultimate ruling on a plea to the jurisdiction.

Cases that cite this headnote

[2] **Pleading** Construction in General

Courts construe pleadings liberally in favor of jurisdiction, taking their factual allegations as true except to the extent negated by evidence.

Cases that cite this headnote

[3] **Evidence** Sufficiency to support verdict or finding

Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case.

Cases that cite this headnote

[4] **Pleading** Plea to the Jurisdiction
States Necessity of Consent

Sovereign immunity, which provides that no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent, encompasses an immunity from suit that implicates a trial court's jurisdiction to decide pending claims, and to this extent can properly be asserted through a plea to the jurisdiction.

Cases that cite this headnote

[5] **States** Liability and Consent of State to Be Sued in General

Sovereign immunity encompasses an immunity from liability that is an affirmative defense to the enforcement of a judgment.

Cases that cite this headnote

[6] **Pleading** Plea to the Jurisdiction
States What are suits against state or state officers

On plea to the jurisdiction, business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission was not required to make any showing regarding the underlying fiscal rationales of sovereign immunity to implicate the Commission's immunity, but was required to demonstrate only that its actions or decisions were attributable to Commission and not to business's own independent exercise of discretion, in lottery participants' action against business based on a discrepancy between game's instructions and its actual parameters; claims against a private entity that attacked underlying governmental decisions within delegated powers implicated sovereign immunity and its underlying fiscal justifications.

Cases that cite this headnote

[7] **States** Power to Waive Immunity or Consent to Suit
States Necessity of Consent

State and its government's departments and agencies inherently possess sovereign immunity in the first instance, subject to waiver by the sovereign people through the constitution or acts of the legislature.

Cases that cite this headnote

[8] **States** What are suits against state or state officers

A proper ultra vires claim, i.e., a suit to require state government to comply with its underlying delegation of power from the sovereign, does not implicate the sovereign's immunity because it attacks governmental actions lacking a nexus to the sovereign's will.

Cases that cite this headnote

[9] **States** What are suits against state or state officers

An ultra vires claim must formally be asserted against an appropriate governmental official, as opposed to the governmental principal, even though it lies against the official in his or her official capacity, because the objective is to restrain the governmental principal; such claim must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.

Cases that cite this headnote

[10] **States** What are suits against state or state officers

Although the form of the pleadings may be relevant in determining whether a particular suit implicates the sovereign's immunity, such as whether a suit is alleged explicitly against a government official in his official capacity, it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated.

Cases that cite this headnote

[11] **States**🔑What are suits against state or state officers

A sovereign may be the real party in interest, and its immunity correspondingly implicated, even in a suit that purports to name no defendant, governmental or otherwise, yet seeks relief that would control state action.

Cases that cite this headnote

[12] **Pleading**🔑Plea to the Jurisdiction
States🔑What are suits against state or state officers

Business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission lacked discretion with respect to its actions or decisions underlying lottery participants' claims for aiding and abetting fraud, conspiracy, and tortious interference with contract, and thus Commission's sovereign immunity applied with respect to those claims, in participants' action against business based on an asserted discrepancy between game's instructions and actual parameters in which business filed plea to the jurisdiction; business's conduct underlying the claims was its printing and distribution of the game and its programming of a computer system in accordance with the game parameters, which were tasks the business was contractually obligated to perform.

Cases that cite this headnote

[13] **Pleading**🔑Plea to the Jurisdiction
States🔑What are suits against state or state officers

Business that participated in the development, printing, and distribution of lottery game under contract with Texas Lottery Commission had discretion to alert Commission to potential discrepancy between game's instructions and actual parameters that resulted from a change to the game requested by the Commission, and thus Commission's sovereign immunity did not apply for purposes of plea to the jurisdiction with respect to fraud claims arising from the discrepancy in lottery participants' action against business; contract granted business wide discretion in determining the details of the game it submitted to Commission for ultimate approval, and evidence demonstrated that business and Commission expected that concerns would be communicated to Commission.

Cases that cite this headnote

[14] **Pleading**🔑Plea to the Jurisdiction
Pleading🔑Merits

The purpose of a plea to the jurisdiction is not to force a plaintiff to preview its case on the merits but to establish a reason why the merits of the plaintiff's claims should never be reached.

Cases that cite this headnote

[15] **Pleading**Plea to the Jurisdiction
StatesWhat are suits against state or state officers

Fiscal justifications for sovereign immunity did not warrant extension of Texas Lottery Commission's immunity, on plea to the jurisdiction, to business that participated in the development, printing, and distribution of lottery game with respect to lottery participants' fraud claims against business arising from business's alleged failure to independently exercise its discretion to alert Commission to potential discrepancy between game's instructions and actual parameters that resulted from a change to the game requested by the Commission; government contractors or employees could be held liable for consequences of their independent exercise of discretion, despite the possibility of secondary or tertiary fiscal effects on a government agency.

Cases that cite this headnote

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

Attorneys and Law Firms

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Ms. Nina Cortell, Haynes and Boone, LLP, 2323 Victory Avenue, Suite 700, Dallas, TX 75219, for Appellant.
Before Justices Puryear, Pemberton, and Field

OPINION

Bob Pemberton, Justice

This appeal requires us to ascertain the nature and parameters of "derivative" sovereign immunity for government contractors as recognized under current Texas law—a matter going to the trial court's jurisdiction to adjudicate a lawsuit and not necessarily the merits of the lawsuit itself. Our conclusions and their application to the record in this case require us to affirm in part and reverse in part.

BACKGROUND

In September 2014, the Texas Lottery launched retail sales of a "scratch-off" or "instant" ticket product known as "Fun 5's." As the name alludes, Fun 5's combined five different instant games onto a single ticket and was sold for a retail price of $5 each. A reduced-size image of the ***771** Fun 5's ticket sold at retail is provided below[1]:

[1] The ticket's actual dimensions were 8 inches by 4 inches.

Our focus is the game situated in the lower right-hand corner of the Fun 5's ticket and featured in the inset, labeled as "Game 5." In Game 5, a contestant won a prize if three "5" symbols appeared in any one row of the tic-tac-toe grid when the latex coating was removed. The amount of that prize was revealed in the "PRIZE" box below the grid, and ranged between $5 to $100,000. However, if a "moneybag" icon appeared in the "5x BOX" below the grid, the prize amount would be increased fivefold, elevating the range to between $25 and $500,000.

Although the moneybag icon was a prize multiplier having effect only on tickets that won in tic-tac-toe, Game 5 was configured so that the moneybag multiplier would appear not only on a subset of the winning tickets, but also on roughly 25 percent of non-winning tickets, a security measure deemed advisable by the Texas Lottery Commission (TLC) to prevent advance discovery of winning tickets merely by "microscratching" the 5x BOX to find moneybag icons. But after Fun 5's sales began, a number of purchasers who had uncovered moneybag icons on non-winning tickets in Game 5 asserted that the game instructions printed on the ticket—

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

***772** —meant or appeared to mean that the moneybag icon alone entitled them to a prize equaling five times the amount shown in the PRIZE box. In other words, these purchasers claimed to understand that the second sentence of the instructions, referencing the moneybag icon, promised an independent, alternative means of winning in Game 5 in addition to the tic-tac-toe game referenced in the first sentence, as opposed to describing what was actually a multiplier contingent upon a single method of winning a prize through tic-tac-toe. In some instances, including some that were reported in the media, this asserted discrepancy between Game 5's instructions versus actual parameters purportedly misled some Fun 5's purchasers to perceive themselves winners of large prizes when uncovering moneybag icons on their tickets, only to have their elation crushed when they attempted to collect. The TLC ultimately ended sales of Fun 5's earlier than it had planned, citing "feedback from some players expressing confusion regarding certain aspects of this popular game," and adding that "a few opportunistic individuals appear to be exploiting the situation."

Ensuing lawsuits grew to include over 1,200 original or intervening plaintiffs who had allegedly purchased Fun 5's tickets and incurred injury from the asserted discrepancy between Game 5's instructions and actual parameters. While a single plaintiff (Nettles) filed suit in Dallas County, the others (the Steele Plaintiffs) joined in the cause giving rise to this appeal, filed in Travis County district court. Both suits targeted GTECH Corporation (GTECH), which participated, under contract with the TLC, in the development, printing, and distribution of the Fun 5's product and programming of the computer system used to verify winners.[2] The merits of these claims or of their underlying reading of the Game 5 instructions are not yet before us. Our present concern, rather, relates to the sovereign immunity that would unquestionably be implicated were the claims asserted instead against TLC, a state agency,[3] and whether GTECH can "derivatively" benefit from that immunity here.[4]

2 To be precise, both GTECH and a former affiliate, GTECH Printing Corporation, were involved in the underlying events, but GTECH later succeeded to the interests of the affiliate. Furthermore, following the merger of its corporate parent with the International Game Technology company, GTECH has become known as "IGT Global Solutions Corporation." Because the parties have continued to identify the relevant entity simply as "GTECH," so have we.

3 *See, e.g.*, *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009) ("The State and other state agencies ... are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity." (citing *Texas Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004))).

4 The parties have referred to this concept in terms of "derivative governmental immunity," but such a derivation from TLC's immunity would more precisely be a form of the sovereign immunity that clothes the State of Texas and its agencies. *See*, *e.g.*, *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429-30 (Tex. 2016) (explaining that "governmental immunity" is the derivative form of sovereign immunity that may extend to "[p]olitical subdivisions of the state[,] such as counties, municipalities, and school districts"). Although most of our observations would apply to both forms, we describe the parties' contentions in terms of sovereign immunity rather than governmental immunity, consistent with their substance, because the distinction ultimately has some conceptual significance in our analysis.

GTECH filed a plea to the jurisdiction asserting that the Steele Plaintiffs' claims were barred by sovereign immunity derived from TLC's immunity, thereby depriving the Travis County district court of subject-matter jurisdiction to adjudicate ***773** the claims. GTECH had also asserted a similar plea in the *Nettles* suit. The Dallas district court granted that plea, and this ruling was recently upheld in a memorandum opinion of the Fifth Court of Appeals.[5] But the Travis County district court denied GTECH's plea as to the Steele Plaintiffs' claims. In this cause, GTECH has appealed that order to this Court, urging that the district court erred in failing to grant the plea based on derivative sovereign immunity.[6]

5 *See generally* *Nettles v. GTECH Corp.*, No. 05-15-01559-CV, 2017 WL 3097627 (Tex. App.—Dallas July 21, 2017, no pet. h.) (mem. op.).

6 GTECH first filed a notice of appeal under color of Civil Practice and Remedies Code Section 51.014, Subsection (a)(8), the

provision authorizing "[a] person [to] appeal from an interlocutory order of a district court ... that ... grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001." Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); *see also Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (holding that government official sued in official capacity can appeal, via Section 51.014(a)(8), denial of official's plea to the jurisdiction, as "the official is invoking the sovereign immunity from suit held by the government itself"). Subsequently, the district court amended its order to add the predicates for a permissive appeal from its denial of GTECH's plea, with the requisite "controlling question of law" being "GTECH Corporation's entitlement to derivative [sovereign] immunity." *See* Tex. Civ. Prac. & Rem. Code § 51.014(d) ("On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if: (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation."), (f) (authorizing court of appeals to "accept an appeal permitted by Subsection (d)" upon timely application). Upon GTECH's application, which the Steele Plaintiffs did not oppose, we accepted its appeal of the amended order. *See GTECH Corp. v. Steele*, No. 03-16-00172-CV, 2016 WL 1566886 (Tex. App.—Austin Apr. 15, 2016) (order). Because we possess jurisdiction through Subsection (f) to review the district court's order on the dispositive question of derivative sovereign immunity, we need not decide whether we also do so under Subsection (a)(8).

STANDARD OF REVIEW

[1] [2] [3]Because subject-matter jurisdiction is a question of law, we review de novo a trial court's ultimate ruling on a plea to the jurisdiction.[7] The Steele Plaintiffs had the burden in the first instance to plead or present evidence of facts that would affirmatively demonstrate the district court's jurisdiction to decide their claims.[8] We construe their pleadings liberally in favor of jurisdiction, taking their factual allegations as true except to the extent negated by evidence.[9] Both the Steele Plaintiffs and GTECH presented evidence each deemed material to the jurisdictional issue. In practical terms, this proof could negate jurisdictional facts alleged by the Steele Plaintiffs only to the extent it is conclusively in GTECH's favor.[10] We view the ***774** evidence in the light favorable to the Steele Plaintiffs.[11]

7 *See, e.g.*, *Houston Belt & Term. Rwy Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016).

8 *See, e.g.*, *Texas Parks & Wildlife Dep't v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Ex parte Springsteen*, 506 S.W.3d 789, 798 n.50 (Tex. App.—Austin 2016, pet. denied) (citing *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (per curiam)); *see also Creedmoor—Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 515-16 & nn.7 & 8 (Tex. App.—Austin 2010, no pet.) (emphasizing that facts, not merely legal conclusions, are required).

9 *See, e.g.*, *Miranda*, 133 S.W.3d at 226-27.

10 *See id.* at 227-28 (describing the jurisdictional analysis where jurisdictional facts overlap the merits, and noting that it "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)"). To the extent the evidence pertains to any material jurisdictional facts that are not intertwined with the merits, we would infer that the district court found those in the Steele Plaintiffs' favor. *See Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015) (per curiam) ("When a jurisdictional issue is not intertwined with the merits of the claims, which is the case here, [which involved a standing issue,] disputed fact issues are resolved by the court, not the jury."); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (in absence of written findings of fact and conclusions of law, "[i]t is ... implied that the trial court made all the findings necessary to support its judgment"). In that event, GTECH could overcome those implied findings and obtain an appellate judgment of dismissal only by establishing or negating the existence of contrary material jurisdictional facts as a matter of law through conclusive evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 815-17 (Tex. 2005) (explaining that conclusive evidence is the converse of no evidence

and affirmatively establishes a fact as a matter of law); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) ("When a party attacks the legal sufficiency of an adverse finding on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue."). "Evidence is conclusive only if reasonable people could not differ in their conclusions, a matter that depends on the facts of each case." *City of Keller*, 168 S.W.3d at 816 (footnote omitted).

11 *See Keller*, 168 S.W.3d at 807; *Miranda*, 133 S.W.3d at 228.

[4] [5]Sovereign immunity—the age-old common-law doctrine holding that " 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent' "[12]—encompasses an immunity from suit that implicates a trial court's jurisdiction to decide pending claims,[13] and to this extent can properly be asserted through a plea to the jurisdiction.[14] But sovereign immunity would come into play here only if GTECH has met an initial burden of establishing that the Steele Plaintiffs' claims against it actually implicate that immunity.[15] While the parties agree that it is theoretically possible for claims against a private government contractor like GTECH to implicate the government's sovereign immunity, they differ regarding the conditions ***775** under which this is so and, in turn, the showing that GTECH must make.

12 *Wasson*, 489 S.W.3d at 431 (quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

13 *See, e.g.*, *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015); *see also Engelman Irrigation Dist. v. Shields Bros. Inc.*, 514 S.W.3d 746, 750-53, 754-55 (Tex. 2017) (explaining nature of this jurisdictional impediment and that it operates prior to a judgment becoming final for appellate purposes). Sovereign immunity also encompasses an immunity from liability that is an affirmative defense to the enforcement of a judgment. *See, e.g.*, *Brown & Gay*, 461 S.W.3d at 121. Consistent with the posture of this appeal, our subsequent references to "sovereign immunity" are intended to denote the immunity-from-suit aspect.

14 *See, e.g.*, *Miranda*, 133 S.W.3d at 225-26 (citing *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999)).

15 *See Brown & Gay*, 461 S.W.3d at 120-29 (addressing whether private engineering firm had shown itself entitled to claim immunity derived from that of toll road authority, a governmental body); *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 77-90 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (op. on reh'g) (addressing whether clinic had shown itself entitled to claim sovereign immunity either as a governmental unit in itself or by virtue of immunity derived from a governmental entity); *cf. Lubbock Cty. Water Contr. & Imp. Dist. v. Church & Akin*, 442 S.W.3d 297, 305 (Tex. 2014) ("The Water District had the burden, in its plea to the jurisdiction, to establish that it is a governmental entity entitled to governmental immunity. Once it satisfied that burden, the burden shifted to [the claimant] to establish, or at least raise a fact issue on, a waiver of immunity.").

THE IMPORT OF *BROWN & GAY*

GTECH argues that it is derivatively shielded by the TLC's sovereign immunity if it can show that it is being sued merely for complying with the TLC's decisions or directives—i.e., for what were ultimately actions of or attributable to TLC that GTECH merely carried out—on which GTECH exercised no "independent discretion." While agreeing with GTECH to the extent that the contractor must have "exercised no discretion in activities giving rise to [their] claims," the Steele Plaintiffs urge that GTECH was also required to make an additional, independent showing that "extending" TLC's immunity to

GTECH under the particular circumstances of this case would actually advance the fiscal and policy rationales that underlie sovereign-immunity doctrine. The respective arguments are grounded in competing views of *Brown & Gay Engineering, Incorporated v. Olivares*,[16] the first case in which the Texas Supreme Court professed to "directly address[ ] the extension of immunity to private government contractors."[17]

16 461 S.W.3d 117.

17 *Id.* at 124.

Brown & Gay arose from a fatal automobile accident that occurred on a tollway under the purview of the Fort Bend County Toll Road Authority, a local-government corporation possessing delegated power to design, build, and operate the tollway.[18] Through a statutorily authorized contract, the Authority had delegated to Brown & Gay Engineering, an independent contractor, the responsibility of designing road signs and traffic layouts on the tollway, subject to the approval of the Authority's governing board.[19] The fatality occurred when, following construction, an intoxicated motorist drove onto the tollway through an exit ramp and continued for several miles in the wrong direction before colliding with a car driven by Pedro Olivares, killing both drivers.[20] Olivares' estate and his parents sued defendants that included Brown & Gay, alleging that the firm's negligent failure to design and install proper signs, warning flashers, and other traffic-control devices had proximately caused Olivares' death.[21]

18 *See id.* at 119.

19 *See id.* (citing Tex. Transp. Code § 431.066(b) (authorizing local government corporations to retain "engineering services required to develop a transportation facility or system")).

20 *See id.*

21 *See id.* at 120.

Brown & Gay interposed a plea to the jurisdiction predicated on the same governmental immunity enjoyed by the Authority (whose immunity was ultimately uncontested).[22] Brown & Gay prevailed in the trial court, lost in the court of appeals, and sought review in the Texas Supreme Court.[23] As Brown & Gay's jurisdictional theories had evolved by that juncture, its material arguments were that its status as an independent contractor of the Authority (as opposed to an Authority employee acting in official capacity) did not singularly foreclose its reliance on the Authority's immunity; that courts in Texas and elsewhere had previously recognized that independent government contractors could be shielded by the immunity of the governmental ***776** party to the contract; and that the underlying purposes of sovereign immunity are served by extending it to private entities performing authorized governmental functions for which the government itself would be immune, in a manner similar to the governmental immunity enjoyed by Texas's political subdivisions.[24]

22 *See id.*

23 *See id.*

[24] *See id.* at 120, 123-24, 126-27.

In the context of the Olivareses' claims and Brown & Gay's arguments, the Texas Supreme Court identified the question presented as whether "a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit [can] invoke the same immunity that the government itself enjoys,"[25] and more specifically, "whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising their independent discretion in performing government functions."[26] This framing of the issue, as further highlighted and confirmed by numerous similar subsequent references to Brown & Gay's "independent discretion," "independent negligence," "own negligence," and the like throughout the remainder of the opinion,[27] served to emphasize that the Olivareses were suing Brown & Gay for alleged conduct that neither party had attempted to attribute to the actions or directives of the Authority. That posture proves significant in understanding the analysis that followed.

[25] *See id.* at 122.

[26] *Id.* at 122-23.

[27] *See infra* note 68.

To resolve the question it had identified, the *Brown & Gay* court looked to two sets of considerations that are material to the present case. First, in a section of the opinion titled, "Extending Sovereign Immunity to Brown & Gay Does Not Further the Doctrine's Rationale and Purpose," the supreme court considered whether "extend[ing] sovereign immunity to private contractors like Brown & Gay ... comports with and furthers the legitimate purposes that justify this otherwise harsh doctrine."[28] This analysis responded to arguments advanced by Brown & Gay and an amicus, who, in an attempt to evoke the fiscal justifications underlying contemporary sovereign-immunity doctrine, had urged that immunizing contractors in the circumstances presented would ultimately reduce costs to government, at least over the long term, because contractors would otherwise pass on the costs associated with litigation exposure through higher contract prices.[29] The supreme court disagreed that this asserted concern justified extending sovereign immunity to Brown & Gay.

[28] *Id.* at 123.

[29] *See id.*

The supreme court first questioned the premise that the contractors' litigation costs would necessarily be passed on to the government, noting the "highly competitive world of government contract-bidding" and "the fact that private companies can and do manage their risk exposure by obtaining insurance."[30] "But even assuming that holding private entities liable for their own negligence in fact makes contracting with those entities more expensive for the government," the court maintained, sovereign immunity was not "strictly a cost-saving measure" and "has ***777** never been defended as a mechanism to avoid any and all increases in public expenditures."[31] Rather, the court explained, sovereign immunity was more precisely "designed to guard against the 'unforeseen expenditures' associated with the government's defending lawsuits and paying judgments 'that could hamper government functions' by diverting funds from their allocated purposes."[32] "Even if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors," the court reasoned, "those costs will be reflected in the negotiated contract price," thus enabling "the government to plan spending on the project with reasonable accuracy."[33]

"Accordingly," the supreme court concluded, "the rationale underlying the doctrine of sovereign immunity does not support extending that immunity to Brown & Gay."[34]

30 *See id.* In fact, as the court emphasized, Brown & Gay's contract had required it maintain insurance for the project, including workers' compensation, commercial general liability, automobile liability, umbrella excess liability, and professional liability. *See id.* at 119-20.

31 *Id.* at 123.

32 *Id.* (citing *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011) (per curiam); *Texas Nat. Res. Conserv. Comm'n v. IT–Davy*, 74 S.W.3d 849, 853 (Tex. 2002)).

33 *Id.*

34 *Id.* at 124.

In the *Brown & Gay* court's second set of considerations, preceded by the heading "Sovereign Immunity Does Not Extend to Private Contractors Exercising Independent Discretion," it sought to identity material features of the claims addressed in prior cases from other courts in which independent government contractors had been held immune.[35] In part, the court emphasized the line of federal cases that had emanated from the United States Supreme Court's decision in *Yearsley v. W.A. Ross Construction Company*.[36] In *Yearsley*, a private contractor had constructed dikes under a contract with the federal government and was later sued by a landowner who alleged that the dikes had caused erosion and loss of land.[37] It was undisputed that the contractor's work "was all authorized and directed by the Government of the United States," and that the government's actions were authorized by congressional act.[38] The *Yearsley* court held that where the government's "authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress," there is "no liability on the part of the contractor" merely for performing as the government had directed.[39] That court contrasted this situation with cases in which liability had been imposed on government contractors, which it characterized as having turned on acts exceeding the contractor's authority or authority that had not been validly conferred.[40]

35 *See id.* at 124-27.

36 309 U.S. 18, 60 S.Ct. 413, 84 L.Ed. 554 (1940).

37 *See id.* at 20, 60 S.Ct. 413.

38 *Id.*

39 *Id.* at 20-21, 60 S.Ct. 413.

[40] *See id.* at 21, 60 S.Ct. 413.

Although the United States Supreme Court did not explicitly couch *Yearsley*'s analysis in terms of sovereign immunity, and that court would later indicate in the *Campbell–Ewald* case that the protection would instead be a type of common-law "immunity" that is not "the Government's embracive immunity,"[41] a number of lower federal courts had deduced in the meantime ***778** that *Yearsley* recognized a form of immunity for government contractors, deriving from the government's sovereign immunity, arising when a contractor is sued for alleged acts or decisions that are substantively the government's alone. But *Brown & Gay* predated *Campbell–Ewald*, and the Texas Supreme Court cited the earlier federal lower-court cases as material to the parameters of derivative sovereign immunity under Texas common law.[42] The *Brown & Gay* court further quoted the following excerpt as "aptly summarizing the framework governing the extension of derivative immunity to federal contractors" in those cases:

> Where the government hires a contractor to perform a given task, and specifies the manner in which the task is to be performed, and the contractor is later haled into court to answer for a harm that was caused by the contractor's compliance with the government's specifications, the contractor is entitled to the same immunity the government would enjoy, because the contractor is, under those circumstances, effectively acting as an organ of government, without independent discretion. Where, however, the contractor is hired to perform the same task, but is allowed to exercise discretion in determining how the task should be accomplished, if the manner of performing the task ultimately causes actionable harm to a third party the contractor is not entitled to derivative sovereign immunity, because the harm can be traced, not to the government's actions or decisions, but to the contractor's independent decision to perform the task in an unsafe manner. Similarly, where the contractor is hired to perform the task according to precise specifications but fails to comply with those specifications, and the contractor's deviation from the government specifications actionably harms a third party, the contractor is not entitled to immunity because, again, the harm was not caused by the government's insistence on a specified manner of performance but rather by the contractor's failure to act in accordance with the government's directives.[43]

[41] *See Campbell-Ewald Co. v. Gomez*, —— U.S. ——, 136 S.Ct. 663, 672-73, 193 L.Ed.2d 571 (2016).

[42] *See Brown & Gay*, 461 S.W.3d at 124-25 & n.9 (discussing *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 464-66 (4th Cir. 2000); *Bixby v. KBR, Inc.*, 748 F.Supp.2d 1224, 1242 (D. Or. 2010)); *see also id.* at 125 & n.8 (discussing *Ackerson v. Bean Dredging Corp.*, 589 F.3d 196, 206-07 (5th Cir. 2009), while acknowledging that the Fifth Circuit had concluded that "the contractors' entitlement to dismissal was not jurisdictional").
In *Butters*, as the *Brown & Gay* court explained, a female employee of a private security firm hired by the Saudi Arabian government had sued the firm for discrimination after being declined a favorable assignment on orders of the Saudi government. *See id.* at 124 (citing *Butters*, 225 F.3d at 464-65). The Saudi government was held immune from suit under the Foreign Sovereign Immunities Act, and this immunity was held also to attach to the security firm, as the firm "was following Saudi Arabia's orders not to promote [the employee]." *See id.* at 124-25 (citing *Butters*, 225 F.3d at 465-66). The Fourth Circuit had also acknowledged the converse proposition, as the *Brown & Gay* court pointed out—the firm would not have been entitled to this "derivative immunity" had the firm rather than the sovereign made the decision to decline the promotion. *See id.* at 125 (citing *Butters*, 225 F.3d at 466).
In *Ackerson*, as the *Brown & Gay* court explained, federal contractors were sued for damages caused by dredging in connection with a federal public works project. *See id.* (citing *Ackerson*, 589 F.3d at 206-10). Relying on *Yearsley*, the Fifth Circuit "held that the contractors were entitled to immunity," as the supreme court described it, where the plaintiffs' allegations had merely " 'attack[ed] Congress's policy of creating and maintaining the [project], *not any separate act of negligence by the Contractor Defendants.*' " *Id.* (quoting *Ackerson*, 589 F.3d at 207 (emphasis added)).

43 *Id.* at 125 n.9 (quoting *Bixby*, 748 F.Supp.2d at 1242). The *Brown & Gay* court also distinguished these concepts from the federal qualified-immunity doctrine and the Texas official-immunity doctrine, maintaining that these embodied underlying policies that "are simply irrelevant" to Texas sovereign-immunity doctrine. *See id.* at 127-29.

***779** While acknowledging that it had not previously "directly addressed" whether these principles would apply to Texas government and its private contractors,[44] the *Brown & Gay* court observed that it had cited *Yearsley* favorably in an earlier case addressing the liability exposure of a government contractor for harm it inflicted due to a mistake by the government.[45] In that case, *Glade v. Dietert*, a city had contracted with Glade to construct a sewer line according to city-prepared plans and specifications.[46] The city was to furnish the right of way, and staked the area where Glade was to construct the line.[47] Part of the planned route traversed Dietert's property, but the city, apparently by inadvertence, had acquired only a portion of the easement needed there.[48] This resulted in Glade bulldozing an area of Dietert's property that the city had staked but that lay beyond the easement the city had secured.[49] Once the error was discovered, the city promptly commenced eminent domain proceedings and acquired the omitted right of way, but Dieter sued Glade seeking damages for the trespass that had occurred in the meantime.[50]

44 *Id.* at 124.

45 *See id.* at 125 (discussing *Glade v. Dietert*, 156 Tex. 382, 295 S.W.2d 642 (1956)).

46 *Glade*, 295 S.W.2d at 643.

47 *See id.*

48 *See id.*

49 *See id.*

50 *See id.*

Dieter prevailed in the lower courts, and Glade urged the supreme court that a contractor like him could not, "in the absence of any negligence or wanton or wilful conduct ... be held liable for damages to the real property or the owner" for "perform[ing] his contract under the directions of the municipality and in strict compliance with plans and specifications furnished to him."[51] Dietert countered by emphasizing the "general rule" that a servant could not avoid personal liability for torts he committed while obeying his master's command by attributing the act to his master.[52] The supreme court agreed with Glade. It distinguished Dietert's cases as "involv[ing] suits against private corporations and their agents" and held that the controlling rule was instead that a public-works contractor "is liable to third parties only for negligence in the performance of the work and not for the result of the work performed according to the contract."[53] The *Glade* court cited *Yearsley* in support of that conclusion.[54]

51 *Id.*

52 *See id.*

53 *Id.* at 644.

54 *See id.*

Glade did not, strictly speaking, address immunity or jurisdiction—as the *Brown & Gay* court later observed, the city's actions had effected a taking, giving rise to a claim for compensation for which the Texas Constitution would have waived immunity.[55] Yet the *Brown & Gay* court noted the following common thread running through ***780** *Glade* and the federal contractor-immunity cases:

> 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.[56]

The *Brown & Gay* court also deemed "instructive" its more recent decision in *K.D.F. v. Rex*.[57] The issue in *K.D.F.* was whether two private entities that had contracted with the Kansas Public Employees' Retirement System, a Kansas governmental entity, could benefit from the System's sovereign immunity and take advantage of a Kansas statute requiring all "actions 'directly or indirectly' against [the System]" to be brought in a particular Kansas county.[58] In answering that question, the supreme court had looked to features of the tort claims acts in both Texas and Kansas and determined that the controlling consideration was ultimately whether each company was performing ministerial functions under the control and direction of the System.[59] The court held that one of the entities, K.D.F., which held securities on the System's behalf, met this standard because it "operates solely upon the direction of [the System] and exercises no discretion in its activities," such that K.D.F. and the System were "not distinguishable from one another; a lawsuit against one is a lawsuit against the other."[60] But the court held that the other company, Pacholder, an independent investment advisor to the System, did not meet that standard because "[i]ts activities necessarily involve considerable discretion ... its role is more in the nature of advising [the System] how to proceed, rather than being subject to the direction and control of [the System]."[61] "This reasoning," the *Brown & Gay* court maintained, "implies that private parties exercising independent discretion are not entitled to sovereign immunity," adding that the proposition was "consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances."[62]

55 *See Brown & Gay*, 461 S.W.3d at 125; *see also Steele v. City of Hous.*, 603 S.W.2d 786, 791 (Tex. 1980) ("The [Texas] Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.").

56 *Brown & Gay*, 461 S.W.3d at 125.

57 878 S.W.2d 589 (Tex. 1994).

58 *See id.* at 596.

[59] *See id.* at 596-97.

[60] *Id.* at 597; *see id.* at 591.

[61] *Id.* at 597; *see id.* at 591.

[62] *Brown & Gay*, 461 S.W.3d at 124.

The *Brown & Gay* court contrasted the Olivareses' claims, observing that:

> the Olivareses do not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders. Under the contract at issue, Brown & Gay was responsible for preparing all "drawings, specifications, and details for all signs." Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown & Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay's decisions in designing the Tollway's safeguards are its own.[63]

The court similarly distinguished various Texas lower court cases on which Brown & Gay had relied to support application of the government's immunity to private contractors.[64] The gravamen of these decisions, ***781** the supreme court suggested, was that the claimants were deemed in the circumstances of those cases to have sought relief against the government rather than the contractor individually.[65]

[63] *Id.*

[64] *See id.* at 126-27 (discussing *Ross v. Linebarger, Goggan, Blair & Sampson, L.L.P.*, 333 S.W.3d 736 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Foster v. Teacher Ret. Sys.*, 273 S.W.3d 883 (Tex. App.—Austin 2008, no pet.)*; City of Hous. v. First City*, 827 S.W.2d 462 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

[65] *Ross* and *First City* had involved suits against law firms arising from their tax-collection work on behalf of governmental entities. The firms were held entitled to the government's immunity under the premise that they had been sued in their official capacities as agents for the government. *See Ross*, 333 S.W.3d at 742-43; *First City*, 827 S.W.2d at 479-80. "Regardless of whether these cases were correctly decided," the *Brown & Gay* court reasoned,

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

Brown & Gay, 461 S.W.3d at 126. As for *Foster*, that case had involved a suit by a retired teacher against the Teacher Retirement System of Texas and Aetna, the administrator of TRS's health-insurance plan for retired teachers, complaining of a denial of coverage for a claim. The *Brown & Gay* court observed that Aetna's sole role had been to act "as an agent of and in a fiduciary capacity for" TRS in the administration of a state-funded health insurance plan and, further, had been indemnified by TRS for any actions arising from its good-faith performance. *See id.* at 127 (citing *Foster*, 273 S.W.3d at 889-90). By contrast, the supreme court observed, "no fiduciary relationship exists between Brown & Gay and the Authority," and "the Olivareses do not effectively seek to recover money from the government." *Id.*

* * *

[6]The parties' disagreement regarding GTECH's required showing distills ultimately to whether *Brown & Gay*'s analyses regarding sovereign immunity's "Rationale and Purpose" and "Private Contractors Exercising Independent Discretion" imply a two-element test, both of which must be proven in order for a government contractor to enjoy the government's immunity (the Steele Plaintiffs' position), or reflect two alternative analyses, either of which could support derivation or extension of the government's immunity to the contractor (GTECH's position). We ultimately conclude that GTECH is closer to the mark—to the extent GTECH can demonstrate that the Steele Plaintiffs complain substantively of actions, decisions, or directives attributable to TLC and not of GTECH's own independent exercise of discretion, (i.e., that would satisfy the considerations in *Brown & Gay*'s "Sovereign Immunity Does Not Extend to Private Companies Exercising Independent Discretion" discussion), the claims would implicate TLC's sovereign immunity, and GTECH would not be required to make any separate or further showing to satisfy the fiscal considerations addressed in the opinion's "Rationale and Purposes" discussion.[66]

66 And because we agree with GTECH's view of the governing standard, we need not decide whether, as GTECH insists, appellees waived reliance on their competing version of the standard by failing to argue it before the district court. *But cf.* *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94-95 (Tex. 2012) (clarifying that jurisdictional aspects of sovereign immunity include susceptibility to being addressed for the first time on appeal).

It is true that, as the Steele Plaintiffs emphasize, the *Brown & Gay* court repeatedly alluded to both analyses, seemingly conjunctively, in support of its holding that immunity did not extend to the ***782** contractor there.[67] But these references must read alongside the supreme court's repeated emphases that the Olivareses' claims implicated only Brown & Gay's independent discretion rather than underlying governmental acts and decisions.[68] That is to say, the *Brown & Gay* court's analysis of "whether to extend sovereign immunity to private contractors like Brown & Gay" in light of "whether doing so comports with and furthers the [doctrine's] legitimate purposes" was speaking only to claims that also would not implicate the government's immunity under the rationale of the *Yearsley* line and other cases it cited in the "Private Contractors Exercising Independent Discretion" portion of the opinion. And claims within that category—those that substantively attack underlying governmental decisions and directives effected through a contractor rather than a contractor's own independent discretionary actions—would inherently implicate the underlying fiscal policies of sovereign immunity that are addressed in the "Rationale and Purpose" section. Although this relationship is admittedly not stated explicitly in *Brown & Gay*, it is evident from the broader body of Texas sovereign-immunity jurisprudence.

67 The Steele Plaintiffs point out that at the conclusion of the *Brown & Gay* court's discussion of "Private Contractors Exercising Independent Discretion," it returned to an explicit emphasis on sovereign immunity's "Rationale and Purpose":

> 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 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.

Brown & Gay, 461 S.W.3d at 127. Similarly, the Steele Plaintiffs observe, the court went on to close its opinion by "declin[ing] to extend sovereign immunity to private contractors based solely on the nature of the contractor's work when the very rationale for the doctrine provides no support for doing so." *Id.* at 129.

68 *See id.* at 119 ("In this case, a private engineering firm lawfully contracted with a governmental unit to design and construct a roadway, and a third party sued the firm for negligence in carrying out its responsibilities."), 122 ("In this case ... a private company that performed allegedly negligent acts in carrying out a contract with a governmental unit seeks to invoke the same immunity that the government itself enjoys."), 122-23 (summarizing the issue presented as "whether, as a matter of common law, the boundaries of sovereign immunity encompass private governmental contractors exercising their independent discretion in performing governmental functions"), 123 (referring to issue presented in terms of "holding a private party liable for its own improvident actions in performing a government contract"), 125-26 ("In this case, the Olivareses do not complain of harm caused by Brown & Gay's implementing the Authority's specifications or following any specific government directions or orders.... Further, the Olivareses do not complain about the decision to build the Tollway or the mere fact of its existence, but that Brown &

Gay was independently negligent in designing the signs and traffic layouts for the Tollway. Brown & Gay's decisions in designing the Tollway's safeguards are its own."), 126 ("[T]he Olivareses do not assert that Brown & Gay is liable for the Authority's actions; they assert that Brown & Gay is liable for its own actions."), 126 ("The evidence shows that Brown & Gay was an independent contractor with discretion to design the Tollway's signage and road layouts.").

[7]As reflected in the doctrine's name, sovereign immunity is considered to ***783** be "inherent in the nature of sovereignty,"[69] which in the State of Texas is vested in its People.[70] The state government is said to embody the People's sovereignty because it exists and functions legitimately by virtue of powers delegated through and under their Constitution and laws.[71] Accordingly, the State of Texas and its government's departments and agencies, such as the TLC, inherently possess sovereign immunity in the first instance,[72] subject to waiver by the sovereign People through their Constitution or acts of their Legislature.[73]

69 *Wasson*, 489 S.W.3d at 431.

70 *See id.* at 432.

71 *See id.* at 432-33.

72 *See, e.g.*, *Lueck*, 290 S.W.3d at 880 ("The State and other state agencies like TxDOT are immune from suit and liability in Texas unless the Legislature expressly waives sovereign immunity." (citing *City of Sunset Valley*, 146 S.W.3d at 641)); *Herring v. Houston Nat'l Exch. Bank*, 114 Tex. 394, 269 S.W. 1031, 1033-34 (1925) (observing that if Texas's Board of Prison Commissioners "can be sued without legislative consent, it being purely a governmental agency or department, then the government, the sovereignty, can be so sued").

73 *See Wasson*, 489 S.W.3d at 432 (" 'In Texas, the people's will is expressed in the Constitution and laws of the State,' and thus 'to waive immunity, consent to suit must ordinarily be found in a constitutional provision or legislative enactment.' " (quoting *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003))). But while the Legislature can thereby decide when or how to waive sovereign immunity once it is held to apply, the Judiciary is the arbiter of whether that immunity exists or applies in the first instance, as the doctrine has remained a creature of the common law. *See id.* (observing that sovereign immunity "has developed through the common law—and has remained there," and that "as the arbiter of the common law, the judiciary has historically been, and is now, entrusted with 'defin[ing] the boundaries of the common-law doctrine and ... determin[ing] under what circumstances sovereign immunity exists in the first instance' ") (citing *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)).

Although rooted historically in a perceived conceptual incompatibility of allowing the sovereign—originally embodied in the English monarch—to be sued in its own courts without its consent,[74] the modern justifications for the sovereign-immunity doctrine in Texas have centered, as the *Brown & Gay* court recognized, on shielding our state government (and, ultimately, the sovereign People who delegate it power and fund it through taxes) from the fiscal and policy disruptions that lawsuits and court judgments would otherwise cause to governmental functions.[75] Relatedly, sovereign immunity is said today to "preserve[ ] separation-of-powers principles by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars" and "leav[ing] to the Legislature the determination of when to allow tax resources to be shifted away from their intended purposes toward defending lawsuits and paying judgments."[76]

74 *See id.* at 431-32 & n.5.

75 *See id.* at 432; *Brown & Gay*, 461 S.W.3d at 121-22.

76 *Brown & Gay*, 461 S.W.3d at 121 (internal quotations omitted).

These concerns with protecting the state governmental functions deriving from the sovereign's will have informed the Texas Supreme Court's longstanding recognition that the sovereign's immunity may be implicated by lawsuits that do not explicitly name the State or the State government as a defendant. Although Texas's political subdivisions (e.g., counties, municipalities, or school districts) possess no inherent sovereignty of their own, they are said to ***784** "derive governmental immunity from the state's sovereign immunity" when performing "governmental" functions as a "branch" of the State.[77] But more critically here, the supreme court has long recognized that sovereign immunity can be implicated even by claims against defendants that are not themselves governmental entities. A suit against a governmental official, employee, or other agent in his or her official capacity (i.e., seeking relief that would lie against the governmental principal rather than the agent personally, such as compelling payment of funds from the public treasury[78]) is said to be "merely 'another way of pleading an action against the entity of which [the official] is an agent,' " as the governmental principal is the real party in interest.[79] It follows that official-capacity suits generally implicate the same sovereign immunity that would shield the governmental principal,[80] and to this extent the agent is said to enjoy the sovereign's immunity "derivatively."[81]

77 *See Wasson*, 489 S.W.3d at 429-30, 433-34. These "governmental" functions stand in contrast to the "proprietary" functions that municipalities can perform, described generally as discretionary functions "not done as a branch of the state, but instead 'for the private advantage and benefit of the locality and its inhabitants.' " *See id.* at 433-34 (quoting *City of Galveston v. Posnainsky*, 62 Tex. 118, 127 (1884)). Proprietary functions, the Texas Supreme Court has reasoned, are "[l]ike *ultra vires* acts" for sovereign-immunity purposes, in that "acts performed as part of a city's proprietary function ... are not performed under the authority, or for the benefit, of the sovereign." *Id.* at 434.

78 *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 377 (Tex. 2009).

79 *See id.* at 373 (quoting *Koseoglu*, 233 S.W.3d at 844 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985))).

80 *See Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011).

81 *Id.*

[8] [9]The exception to this general rule that an official-capacity claim implicates the governmental principal's immunity, the *ultra vires* claim, is itself shaped by the underlying relationship to sovereign will in a manner that is instructive here. In concept, a proper *ultra vires* claim—i.e., a suit to require state government to comply with its underlying delegation of power from the sovereign[82]—does not implicate the sovereign's immunity because it attacks governmental actions lacking a nexus to the sovereign's will.[83] But consistent with this notion that *ultra vires* acts are not acts "of the State," an *ultra vires* claim must formally be asserted against an appropriate governmental official, as opposed to the governmental principal, even though it lies against the official in his or her official capacity, because the objective is to restrain the governmental principal.[84] However, a proper *ultra vires* claim "must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act."[85] And if an ostensible *ultra vires* claim turns out not to meet this standard, it follows that the claim is actually seeking to judicially override the sovereign will embodied in the governmental

acts and decisions made within delegated authority—to "control ***785** state action"—and thereby implicates the sovereign's immunity.[86] Further, an otherwise-proper *ultra vires* claim also independently implicates the sovereign's immunity to the extent it seeks relief that either overtly or in effect goes beyond prospective injunctive or declaratory relief restraining the government's *ultra vires* conduct, such as through claims that would establish a right to retrospective monetary relief from the governmental principal, impose liability upon or interfere with the government's rights under a contract, or otherwise control state action.[87]

82 *See Heinrich*, 284 S.W.3d at 372-73.

83 *See Wasson*, 489 S.W.3d at 433 (observing that governmental acts "done 'without legal authority' are not done as a branch of the state. By definition, they fail to derive that authority from the root of our state's immunity—the sovereign will.").

84 *See Heinrich*, 284 S.W.3d at 372-73.

85 *Id.* at 372.

86 *See id.*; *Director of Dep't of Agric. & Env't v. Printing Indus. Ass'n of Tex.*, 600 S.W.2d 264, 265-66 (Tex. 1980); *see also Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 173 (Tex. App.—Austin 2013, no pet.) (observing that suit that complains of governmental actions within legal authority "implicates sovereign immunity because it seeks to 'control state action,' to dictate the manner in which officers exercise their delegated authority" (citing *Heinrich*, 284 S.W.3d at 372; *Creedmoor–Maha*, 307 S.W.3d at 515-16)).

87 *See Heinrich*, 284 S.W.3d at 373-76 (otherwise-proper *ultra vires* claims implicate immunity to extent remedy has effect of retrospective monetary relief); *IT–Davy*, 74 S.W.3d at 855-56 (contrasting permissible *ultra vires* claims with "suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities," which "are suits against the State ... because [they] attempt to control state action by imposing liability on the State"); *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 840 (1958) ("There is a clear distinction between [permissible *ultra vires* claims] and suits brought against an officer to prevent exercise by the state through some officer of some act of sovereignty, or suits against an officer or agent of the state to enforce specific performance of a contract made for the state, or to enjoin the breach of such contract, or to recover damages for such breach, or to cancel or nullify a contract made for the benefit of the state.") (quoting *Imperial Sugar Co. v. Cabell*, 179 S.W. 83, 89 (Tex. Civ. App.—Galveston 1915, no writ)); *see also Texas Dep't of Transp. v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (observing that "sovereign immunity will bar an otherwise proper [*ultra vires*] claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity") (citing *City of Hous. v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam)).

[10] [11]Importantly, although the form of the pleadings may be relevant in determining whether a particular suit implicates the sovereign's immunity, such as whether a suit is alleged explicitly against a government official in his "official capacity," it is the substance of the claims and relief sought that ultimately determine whether the sovereign is a real party in interest and its immunity thereby implicated.[88] In fact, as recognized in a recent ***786** decision from this Court, the sovereign may be the real party in interest, and its immunity correspondingly implicated, even in a suit that purports to name no defendant, governmental or otherwise, yet seeks relief that would control state action.[89]

88 *See*, *e.g.*, *Sawyer Trust*, 354 S.W.3d at 389 (regarding *ultra vires* claims, observing that "[t]he central test for determining jurisdiction" looks to whether 'the real substance' of the plaintiff's claims" is within the trial court's jurisdiction (citing *Dallas Cty. Mental Health & Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998))); *Heinrich*, 284 S.W.3d at 377 (concluding that claims asserted against individual members of governing body, without specifying capacity in which they were sued, implicated

their official capacities because the requested relief would compel payments from the public treasury and, as such, "would necessarily come from the Board, rather than the individual members"; further observing that capacity in which governmental agent is sued sometimes must be determined from "the nature of the liability sought to be imposed" as indicated in the "course of proceedings" (quoting *Graham*, 473 U.S. at 167 n.14, 105 S.Ct. 3099)); *Williams*, 216 S.W.3d at 828-29 (attempted *ultra vires* suit that would have effect of compelling payment of retrospective monetary relief from public treasury held barred by immunity); *City of Austin v. Utility Assocs., Inc.*, 517 S.W.3d 300, 311-13 (Tex. App.—Austin 2017, pet. denied) (otherwise-proper *ultra vires* claim would implicate governmental immunity to extent remedy would "undo" previously executed government contract); *Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 118-23 (Tex. App.—Austin 2007, no pet.) (same).

[89] *See Ex parte Springsteen*, 506 S.W.3d at 797, 802 (declaratory-judgment suit by former death-row inmate seeking determination of "actual innocence," though styled as an "ex parte" proceeding, did not avoid implicating sovereign immunity because "the substantive effect of any claim seeking to determine his status under the criminal law would operate against the State of Texas, in whose name and by whose authority the criminal law is enforced").

It follows from the same basic principles that the sovereign, as embodied in state governmental organs, may be the real party in interest, and its immunity implicated, by claims asserted against a private government contractor where those claims substantively attack underlying governmental decisions and directives made within delegated powers rather than the contractor's own independent discretionary acts—i.e., the sorts of claims that would implicate immunity under the "Private Contractors Exercising Independent Discretion" portion of *Brown & Gay*. This is so because the claims and any relief obtained would, through their effects on the contractor, impinge upon the *government's* exercise of its contract rights and underlying delegated authority. In these respects, such claims would be analogous to the ostensible *ultra vires* claims that would actually control state action by overriding government contracts[90] and sovereign will.[91] And while the immunity belongs to the government rather than the contractor, per se, that is no barrier to the contractor raising the issue. Because such immunity would implicate the trial court's subject-matter jurisdiction, the trial court would be required to address that issue regardless of how or by whom it is raised.[92]

[90] *See, e.g.*, *Dodgen*, 308 S.W.2d at 840; *Utility Assocs., Inc.*, 517 S.W.3d at 311-13; *Texas Logos, L.P.*, 241 S.W.3d at 118-23.

[91] *See*, *e.g.*, *Heinrich*, 284 S.W.3d at 372; *Printing Indus. Ass'n of Tex.*, 600 S.W.2d at 265-66.

[92] *See Utility Assocs., Inc.*, 517 S.W.3d at 307 ("This inquiry [regarding sovereign or governmental immunity as it bears on subject-matter jurisdiction] is not necessarily confined to the precise jurisdictional challenges presented by the parties, because jurisdictional requirements may not be waived and 'can be—and if in doubt, must be—raised by a court on its own at any time,' including on appeal.") (quoting *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993))).

In turn, claims against contractors that would substantively override underlying governmental decisions and directives in this way would inherently cause the unanticipated diversion of appropriated funds from their intended purposes—which brings us to the basic policy concern addressed in *Brown and Gay's* "Rationale and Purpose" discussion. This is so because the underlying governmental decisions and directives made within delegated authority are fueled by appropriations made (and, ultimately, taxes collected) for that purpose.[93] And such disruptions of ***787** governmental functions and finances are not merely the indirect or long-term economic effects on government from lawsuits against private government contractors for their own independent discretionary acts.[94] When government contractors are sued for their own independent discretionary acts, their position is analogous to that of government employees or agents who breach personal tort duties owed to third parties independently from duties owed by their governmental principals.[95] In such instances, the employees or agents "have always been individually liable for their own torts, even when committed in the course of employment," and are not shielded by sovereign immunity against suit in their individual capacities.[96] Suits whose substance would control the government's actions within delegated powers, in contrast, implicate the government's immunity and that immunity's underlying fiscal

justifications.[97]

[93] *See Heinrich*, 284 S.W.3d at 372 (recognizing that distinction between governmental action that is within delegated authority versus *ultra vires* reflects uses of appropriated funds that are for intended versus unintended purposes, respectively); *Bacon*, 411 S.W.3d at 173 (observing that "principle of judicial deference embodied in sovereign immunity extends not only to the Legislature's choices as to whether state funds should be spent on litigation and court judgments versus other priorities, but equally to the policy judgments embodied in the constitutional or statutory delegations that define the parameters of an officer's discretionary authority and the decisions the officer makes within the scope of that authority" (citing *Sefzik*, 355 S.W.3d at 621 (citing *Dodgen*, 308 S.W.2d at 839)); *Heinrich*, 284 S.W.3d at 372; *Printing Indus. Ass'n of Tex.*, 600 S.W.2d at 265).

[94] *See Brown & Gay*, 461 S.W.3d at 123-24.

[95] *See Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex. 1996) (noting example of an agent who negligently causes an automobile accident while acting within the course and scope of employment—both the principal and agent may be held liable, the former through *respondeat superior*, the latter by virtue of "the duty of reasonable care to the general public" owed by the agent "regardless of whether the auto accident occurs while driving for the employer" (citing Restatement (Second) of Agency §§ 343, 350 (1958))).

[96] *Franka*, 332 S.W.3d at 383 ("[P]ublic employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment." (footnotes omitted)); *see Heinrich*, 284 S.W.3d at 373 n.7 ("State officials may, of course, be sued in both their official and individual capacities."); *House v. Houston Waterworks, Co.*, 88 Tex. 233, 31 S.W. 179, 181 (1895) ("It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any injury occasioned by his own personal negligence or default in the discharge of his duties." (internal quotation marks and citation omitted)).

[97] This relationship also obviates any perceived potential tension between the *Brown & Gay* court's discussion of sovereign immunity's fiscal justification and the controlling-state-action line of cases. *See Brown & Gay*, 461 S.W.3d at 131 (Hecht, C.J., concurring) (citing *Sefzik* and urging that "[t]he Court's restricted view of the purpose of immunity is not supported by authority"). In any event, the *Brown & Gay* court did not profess to overrule that age-old line of cases. *See*, *e.g.*, *Sefzik*, 355 S.W.3d at 621; *Printing Indus. of Tex.*, 600 S.W.2d at 265; *Dodgen*, 308 S.W.2d at 839; *Short v. W.T. Carter & Bro.*, 133 Tex. 202, 126 S.W.2d 953, 962 (1939). Under the logic of the controlling-state-action line of cases, immunity would be implicated by the sorts of claims against contractors that the *Brown & Gay* court emphasized in the "Private Contractors Exercising Independent Discretion" portion of its opinion.

Accordingly, to the extent GTECH can show that the Steele Plaintiffs are substantively attacking actions and underlying decisions or directives of TLC and not GTECH's independent discretionary actions, the claims would implicate TLC's immunity, and no additional showing regarding immunity's underlying fiscal rationales is required. We note that the *Nettles* court reached the same ultimate conclusion, albeit while relying on somewhat different reasoning.[98] Other sister courts, while not directly addressing the issue, also appear to have read *Brown & Gay* the same way.[99]

[98] *See Nettles*, 2017 WL 3097627, at *8-9.

[99] *See Freeman v. American K-9 Detection Servs.*, 494 S.W.3d 393, 404 (Tex. App.—Corpus Christi 2015, pet. granted) ("[T]he Texas Supreme Court has held that a government contractor 'is not entitled to sovereign immunity protection unless it can demonstrate its actions were actions of the [governmental entity], executed subject to the control of the [governmental entity]' ... [i]n other words, 'private parties exercising independent discretion are not entitled to sovereign immunity.' " (quoting *Brown & Gay*, 461 S.W.3d at 124; *K.D.F.*, 878 S.W.2d at 597)); *Lenoir*, 491 S.W.3d at 82 ("The [*Brown & Gay*] Court held that a private

> entity contracting with the government may benefit from sovereign immunity if 'it can demonstrate that its actions were actions of the ... government' and that 'it exercise[d] no discretion in its activities.' " (quoting *Brown & Gay*, 461 S.W.3d at 124-25 (quoting *K.D.F.*, 878 S.W.2d at 597))).

***788** As a final observation, determining whether claims against government contractors implicate the government's immunity necessarily entails examination of the specific contracts that delineate the contractors' authority *vis a vis* the government. Such questions of contractual authority, relevant to immunity, may also have implications for, and thereby overlap or parallel, the merits-related analysis of whether the contractor owes tort duties to third parties with respect to alleged injuries arising during its performance of the contract. Consequently, precedents that analyze such questions of contractual authority as they bear upon duty may also be instructive regarding derivative immunity. Examples include, in addition to *Glade*, two pre-*Brown & Gay* decisions from the Texas Supreme Court that addressed the tort exposure of government contractors while performing their contracts.

The first of these cases, issued a few years after *Glade*, was *Strakos v. Gehring*.[100] Gehring had contracted with Harris County to relocate fences incident to a road-improvement project. After the county accepted this work as complete, Strakos fell into an uncovered and unmarked post hole that Gehring had left behind, causing injury.[101] Strakos sued Gehring in negligence, and a jury awarded Strakos damages.[102] The Court of Civil Appeals had reversed the trial-level judgment for Strakos, relying on the "accepted-work" doctrine, a privity-rooted concept that had relieved an independent contractor of any duty of care to the public with respect to dangerous conditions it creates on the sole basis that the work had been completed and accepted by the party hiring it.[103] On writ of error, the Texas Supreme Court rejected the accepted-work doctrine, which had the effect, as the court observed, of bringing contractors "within the general rules of tort litigation."[104] "Our rejection of the 'accepted work' doctrine is not an imposition of absolute liability on contractors," the *Gehring* court elaborated, but "simply reject[s] the notion that although a contractor is found to have performed negligent work or left premises in an unsafe condition and such action or negligence is found to be a proximate cause of injury, he must nevertheless be held immune from liability solely because his work has been completed and accepted in an unsafe condition."[105]

100 360 S.W.2d 787 (Tex. 1962).

101 *See id.* at 788-89.

102 *See id.* at 788-89, 793-94.

103 *See id.* at 789-90.

104 *See id.* at 790-91.

105 *Id.* at 790.

But an additional feature of *Gehring* is more critical here. The supreme court rejected an attempt by Gehring to claim as a defense that his contract with Harris County had imposed no affirmative requirement that he fill the holes in question.[106] While agreeing that Gehring's contract was "silent as to this matter," the ***789** court reasoned that the mere absence of any contractual requirement that he fill the holes did not obviate any duty he owed in tort.[107] However, the *Gehring* court

contrasted this contractual structure, which left Gehring discretion to comply (or not) with a tort duty to remedy the condition, with a contract that afforded no such discretion:

> [T]he contractual provisions ... are not couched in directory wording of that certainty which would require a conclusion that the act of leaving the hole was at the time of its origin and thereafter the act of Harris County and not that of the contractor, as is sometimes the case where a builder merely follows plans and specifications which have been handed to him by the other contracting party with instructions that the same be literally followed.[108]

106 *See id.* at 794, 803 (supp. op. on reh'g).

107 *Id.* at 794, 803 (supp. op. on reh'g).

108 *Id.* at 803 (supp. op. on reh'g).

More recently, the Texas Supreme Court had occasion to distinguish both *Glade* and *Gehring* in *Allen Keller Company v. Foreman*.[109] Keller, a road-construction contractor, was hired by Gillespie County to work on projects that included excavating a drainage channel through an embankment near a bridge over the Pedernales River.[110] The project served to widen a preexisting gap between the end of a bridge guardrail and the embankment, creating a physical effect that one local resident compared to a boat ramp.[111] Several months after the work was completed by Keller and accepted by the county, an out-of-control automobile went off the roadway through the gap and into the river below, where a passenger drowned.[112] Keller was subsequently named as a defendant in a wrongful-death action, with the plaintiffs relying on a premises-defect theory predicated on the gap being an unreasonably dangerous condition.[113] Keller moved for summary judgment on grounds that included the asserted absence of any duty owing to the victim even if one assumed that its work had created an unreasonably dangerous condition.[114]

109 343 S.W.3d 420 (Tex. 2011).

110 *See id.* at 422-23.

111 *See id.* at 423.

112 *See id.*

113 *See id.*

114 *See id.* at 423-24 & n.5.

Keller urged that it owed no such duty because its contract with Gillespie County had required it to construct the project

precisely as it had.[115] Keller's contract with the county, as the supreme court later noted, required Keller to adhere to specifications provided by O'Malley Engineers, which had designed and engineered the project, and imposed an "absolute" obligation on Keller to perform and complete the work in accordance with the contract documents.[116] These specifications provided for excavation of the channel in the manner described, widening the gap between the guardrail and the embankment, and did not include extending the guardrail to cover the gap.[117] The contract further provided that any changes to the contract would be made by the county or O'Malley, not Keller; that the county (either directly or through O'Malley as its agent) would visit the work site to verify progress and adherence to the design; and that upon completion O'Malley would inspect the site and certify that Keller had ***790** completed the work according to specifications.[118]

115 *See id.* at 423-26.

116 *Id.* at 422.

117 *See id.* at 422-23 & n.2.

118 *See id.* at 422.

Although the trial court granted Keller's motion, the court of appeals reversed, holding that the summary-judgment evidence raised a fact issue as to whether Keller's work had created a dangerous condition, thereby implicitly assuming that Keller would owe a duty in that event.[119] The court of appeals had derived this premise from its reading of *Gehring*.[120] The Texas Supreme Court held that this was error, explaining that the point of *Gehring* was merely to "reject[ ] the owners' acceptance of completed work as an affirmative defense," leaving contractors subject to "general negligence principles."[121] *Gehring*, the *Keller* court stressed, did not hold that a contractor would owe a duty of care "in all circumstances."[122]

119 *See id.* at 424.

120 *See id.*

121 *Id.*

122 *Id.*

On the other hand, the supreme court also rejected the view of Keller that *Glade* was controlling and compelled a holding that Keller owed no duty because its work had merely complied with its contract.[123] "While *Glade* is not inconsistent with our decision today," the court reasoned, "its facts differ significantly and it is not determinative."[124] Instead, the supreme court maintained, it was necessary to address whether Keller owed such a duty in light of its particular circumstances. As pertinent to the present case, the court considered whether Keller owed a duty to rectify what was assumed to be the unreasonably dangerous condition of the open gap between the bridge guardrail and the embankment by physically altering that feature, such as by extending the guardrail.[125]

123 *See id.* at 424-25.

124 *Id.* at 424. The *Keller* court summarized *Glade*'s holding as "the contractor could not be held liable because it was the City's responsibility to obtain the necessary right-of-way, not the contractor's." *Id.* at 425. "Our holding in *Glade*," it added, "stands for the limited proposition that, to the extent it operates within the parameters of the governing contract, a contractor is justified in assuming that the government entity has procured the necessary right-of-way." *Id.*

125 *See id.* at 425 & n.6.

The Texas Supreme Court held that Keller owed no such duty because Keller's contract afforded it no discretion to rectify the condition.[126] The court observed that "Keller's contract with the County required absolute compliance with the contract specifications," such that "any decision that Keller would have made to rectify the dangerous condition would have had the effect of altering the terms of the contract."[127] These features of Keller's contract, the court added, distinguished it from the contract addressed in *Gehring*, which by "neither requir[ing] nor forb[idding] the contractor from filling in or marking holes that comprised the dangerous condition, ... [had] left the choice to the contractor's discretion," leaving room ***791** for the application of the tort duty.[128] Keller's contract, the court further suggested, was instead like the contrasting example cited by the *Gehring* court, having "directory wording of that certainty which would require a conclusion that the [dangerous condition] was ... the act of [the government] and not that of the contractor."[129]

126 *See id.* at 425-26. In terms of the duty analysis, the court emphasized "the consequences of placing the duty on the defendant," Keller, in light of the contract terms. *See id.* at 425; *see also id.* ("Any ... determination [of duty] involves the balancing of a variety of factors, 'including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.' " (quoting *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010))).

127 *Id.* at 425-26.

128 *Id.* at 425 (citing *Gehring*, 360 S.W.2d at 794).

129 *Id.* (quoting *Gehring*, 360 S.W.2d at 803 (supp. op. on reh'g)).

Keller and *Gehring* were each addressed to the government contractor's duty of care rather than the government's immunity, per se, and the same is true of *Glade*. Yet the underlying distinctions between cases like *Keller* and *Glade* versus *Gehring* also inform the immunity inquiry, as the *Brown & Gay* concurrence, authored by Chief Justice Hecht, observed:

> We recognized in [*Keller*] that a government contractor owes no duty of care to design a highway project safely where the contractor acts in strict compliance with the governmental entity's specifications. We distinguished between "the duties that may be imposed upon a contractor that has some discretion in performing the contract and a contractor that is left none." [Citing portion of *Keller* that distinguished *Gehring*]. That such a contractor acts as the government and may therefore be entitled to its immunity follows from the same principle.[130]

By the same logic, a contractor in the posture of *Gehring* would not be "acting as the government," nor entitled to the government's immunity. And the distinction is the same as that identified by the *Brown & Gay* majority in the "Private Contractors Exercising Independent Discretion" portion of its opinion.

[130] *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring).

With the foregoing understanding of *Brown & Gay* and other relevant Texas Supreme Court precedents in mind, we now turn to the record in this case.

IS GTECH BEING SUED FOR ACTING "AS TLC"?

In their live petition, the Steele Plaintiffs seek to recover from GTECH, as "benefit-of-the-bargain" damages, the prize amounts corresponding to their reading of the Game 5 instructions as promising each, based on his or her discovery of a moneybag icon in the 5X BOX, but without need also to win in tic-tac-toe, five times the amount shown in the PRIZE box of the tickets—sums exceeding $500 million in the aggregate—plus exemplary damages. The Steele Plaintiffs expressly "do not contend that their tickets are 'winning tickets,' " and on the contrary concede "that their tickets are 'non-winning' tickets." Instead, they rely on the following causes of action:

- ***Fraud by misrepresentation and nondisclosure***. These causes of action rest upon the contention that GTECH is factually responsible, at least in part, for the wording of the Game 5 instructions. These actions by GTECH, in turn, are alleged to amount to fraud upon the Steele Plaintiffs, either affirmatively or through its silence.

- ***Aiding and abetting TLC's fraud***. This cause of action assumes that TLC is responsible for the Game 5 instructions and committed the asserted fraud through those instructions. The wrong alleged of GTECH is intentionally "assisting" TLC by printing and distributing the Fun 5's tickets, activating the ***792** tickets to make them available for sale, and operating the Texas Lottery computer system in a manner that declined to validate the Steele Plaintiffs' tickets as winners.

- ***Tortious interference with existing contracts***. The premise of this cause of action is that a contract was formed between TLC and each of the Steele Plaintiffs when the latter "exchanged $5 of their hard-earned cash for each of their Fun 5's tickets in return for the promise that they would be entitled to receive five times the amount in the Prize Box if their ticket revealed a Money Bag." GTECH "willfully and intentionally interfered" with these contracts, the Steele Plaintiffs maintain, "by using and continuing to use a non-conforming computer program" that omitted their tickets from the list of winning tickets.

- ***Conspiracy***. This cause of action asserts that GTECH and TLC had a "meeting of the minds" to "print misleading and deceptive instructions on Fun 5's tickets, to distribute the misleading and deceptive tickets for sale to lottery players in Texas, and to use GTECH's computer system to validate tickets as non-winners when the clear language of the tickets represented that they should be validated as winning tickets."

The latter three causes of action are founded on alleged acts by GTECH that would merely comply with TLC requirements and directives, and regarding which the relevant contracts left GTECH no discretion to do otherwise.

TLC possesses delegated power to design and sell Texas Lottery tickets and decide winners

As sovereign immunity must ultimately be rooted in the sovereign will, we first note that the design, sale, and distribution of the Fun 5's ticket was within the TLC's delegated powers, as was the determination of winning versus losing tickets. Through a 1991 constitutional amendment, the People of Texas empowered the "Legislature by general law [to] authorize the State to operate lotteries,"[131] and to that end their Legislature enacted the State Lottery Act, currently codified as Chapter 466 of the Government Code.[132] The Lottery Act vests in the TLC and its executive director "broad authority" and the duty 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."[133] The TLC is further required to "adopt all rules necessary to administer [the Lottery Act]" and it "may adopt rules governing the establishment and operation of the lottery," including the type of games to be conducted, the price of each ticket, the number of winning tickets, and "any other matter necessary or desirable as determined ***793** by the commission, to promote and ensure ... the integrity, security, honesty, and fairness or the operation and administration of the lottery."[134] The Act also specifically charges the executive director with "prescrib[ing] the form of tickets."[135]

131 Tex. Const. art. III, § 47(e); *cf. id.* § 47(a) ("The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), (d-1), and (e) of this section.").

132 *See generally* Tex. Gov't Code ch. 466.

133 *Id.* § 466.014(a); *see also id.* § 467.101(a) (TLC "has broad authority and shall exercise strict control and close supervision over all activities authorized and conducted in this state under ... Chapter 466 of this code."). The Lottery Act defines "lottery" as "the procedures operated by the state under this chapter through which prizes are awarded or distributed by chance among persons who have paid, or unconditionally agreed to pay, for a chance or other opportunity to receive a prize." *Id.* § 466.002(5).
The TLC and the office of executive director are established under Chapter 467 of the Government Code. *See generally id.* ch. 467.

134 *See id.* § 466.015; *see also id.* § 467.102 ("The commission may adopt rules for the enforcement and administration of this chapter and the laws under the commission's jurisdiction.").

135 *Id.* § 466.251(a).

The TLC has promulgated rules creating and governing each of several different categories of "Texas Lottery" games. Among these are "instant" or "scratch-off" games, like Fun 5's, which are distinguished by play entailing removal of a thin latex coating that conceals data used to determine eligibility for a prize.[136] The detailed procedures for each Texas Lottery instant game are published in the Texas Register and made available by request to the public.[137] However, the TLC's rules provide globally that a player's eligibility to win a prize in a given game is subject to ticket-validation requirements that include having a "validation number" on the ticket corresponding to the TLC's "official list of validation numbers of winning tickets" for that game.[138]

136 *See* 16 Tex. Admin. Code § 401.302 (2007) (Tex. Lottery Comm'n, Instant Game Rules); *see also id.* § 401.301(20) (2007) (Tex. Lottery Comm'n, Definitions) (defining "Instant game" as "[a]n instant ticket lottery game, developed and offered for sale to the public in accordance with commission rules, that is played by removing the latex covered play area on an instant ticket to reveal the ticket play symbols"), (35) (defining "Play symbol" as "[t]he printed data under the latex on the front of an instant ticket that is used to determine eligibility for a prize"). The "instant" moniker apparently references that a ticket's status as a winner can be ascertained immediately upon validation, in contrast to lottery games (such as the familiar Lotto Texas game) in which such status is determined through subsequent drawings.

137 *See id.* §§ 401.301(35) (play symbols "for individual games will be specified in individual instant game procedures"), .302(b) (describing contents of game procedures for instant games, which "shall be published in the Texas Register and shall be made available upon request to the public").

138 *See id.* § 401.302(c)(2), (d).

TLC's delegated power to determine winning versus losing tickets is further enhanced by Lottery Act provisions that deem a player's purchase of a ticket in a particular lottery game to be the player's agreement "to abide by and be bound by the commission's rules, including the rules applicable to the particular lottery game involved."[139] The ticket purchase is similarly deemed to be the player's agreement "that the determination of whether the player is a valid winner is subject to: (1) the [TLC's] rules and claims procedures, including those developed for the particular lottery game involved; and (2) any validation tests established by the [TLC] for the particular lottery game involved."[140] Similarly, the TLC's instant-game rules specify that by ticket purchase, "the lottery player agrees to comply with and abide by Texas law, all rules, procedures, and final decisions of the [TLC], and all procedures and instructions established by the executive director for the conduct of the instant game."[141] Ultimately, an aggrieved instant-game player's recourse against the TLC is confined to the following rule: "If a dispute arises between the [TLC] and a ticket claimant concerning whether the ticket is a winning ticket and if the ticket prize has not been paid, the ***794** executive director may, exclusively at his/her determination, reimburse the claimant for the cost of the disputed ticket."[142] "This shall be the claimant's exclusive remedy," the rule emphasizes.[143]

139 Tex. Gov't Code § 466.252(a).

140 *Id.*

141 16 Tex. Admin. Code § 401.302(k).

142 *Id.* § 401.302(i).

143 *Id.*

TLC was authorized to contract, and has contracted, with GTECH to assist with these delegated functions

The same constitutional amendment that allowed for State of Texas-run lottery games also empowered the Legislature to "authorize the State to enter into a contract with one or more legal entities that will operate lotteries on behalf of the State."[144] Through the Lottery Act, the Legislature has authorized the TLC's executive director, subject to certain limitations not material here, to "contract with or employ a person to perform a function, activity, or service in connection with the operation of the lottery as prescribed by the executive director."[145] Two such contracts have governed TLC's relationship with GTECH at relevant times: (1) a "Contract for Lottery Operations and Services," dated December 2010, under which GTECH is made the exclusive vendor of what can be summarized as infrastructure and services for the overall operations of Texas Lottery games, including warehousing and distributing games and providing the computer system used to verify winners (the Operations Contract); and (2) a "Contract for Instant Ticket Manufacturing," dated August 7, 2012, under which GTECH, alongside two other vendors that executed similar contracts, is to provide certain goods and services related to development and production of instant games (the Instant-Ticket Contract).[146] The Instant-Ticket contract is ultimately of greater significance to this case.

144 Tex. Const. art. III, § 47(e).

[145] Tex. Gov't Code § 466.014(b); *see also id.* §§ 466.014(c) (awardee must be eligible for sales agent license), .1005-.101 (procurement procedures).

[146] Each of the two contracts consists of an executed "contract" document with incorporated (and much lengthier) exhibits that include a preceding request for proposal (RFP). Although copies of the two "contract" documents are included in the appellate record, copies of the RFPs were not. However, appellees' live pleadings cross-referenced the RFPs by citing to the TLC's website, where the RFPs and other contract-related documents have been made available to the public. As there has been no objection to the district court's consideration of the RFPs as components of the two contracts, we have taken account of their material terms in our discussion and analysis.

Under the Instant-Ticket Contract, GTECH is required to provide the TLC "game planning services support" that entails "work[ing] closely with the [TLC] to identify instant ticket games" for potential inclusion in the TLC's "plan" or "plans" of new instant games to be developed and sold. To that end, GTECH "shall provide suggested game designs for inclusion in the plan," including, "at a minimum," (1) "[r]ecommendations for each price point and theme, including the game design and play style, together with an album of representative tickets," and (2) "Game Development Services to include but not be limited to graphic design, game design, artwork, prize structures, and play style." But the TLC "shall make all final decisions regarding the selection and inclusion of instant ticket games in the plan."

Assuming the TLC opts to include a GTECH-proposed game design in the plan, GTECH is to prepare "draft artwork and prize structures" for TLC approval in advance of the game's scheduled launch ***795** date, and "shall" provide such materials within five working days upon the TLC's request. If the draft artwork and prize structure are approved by the TLC, GTECH then has five business days in which it "must provide draft working papers to the [TLC]"—essentially a detailed version of the game's parameters and specifications—as well as color proofs of the ticket image, for TLC approval. "Upon review of the draft working papers, the [TLC] will provide requested changes to [GTECH]," following which GTECH "must provide final working papers to the [TLC] within two (2) business days of receipt of the requested changes." "Production of any instant game will not proceed until the [TLC] Executive Director or designee gives written authorization." The "[e]xecuted working papers must be complete and free of any errors." "Any changes made after the execution of working papers must be approved through the execution of a post executed change and signed by the [TLC] Executive Director or designee."

The Instant-Ticket Contract, as well as the Operations Contract, specify that GTECH is providing its services "as an independent contractor and not as an employee or agent of the [TLC]" and further disclaim the creation or implication of any "joint venture, partnership, employer/employee relationship, principal/agent relationship, or any other relationship between the parties." Each contract also requires that GTECH indemnify and hold the TLC harmless against claims or losses arising for or on account of the "works," goods, or services provided as a result of the contract, the former term being defined to include, *inter alia*, "lottery games, game names, game designs, ticket format and layout, manuals, instructions [and] printed material." Yet both contracts also emphasize that the TLC wields supervisory power over GTECH's work and ultimate control over lottery games and operations. In addition to the TLC's previously-described authority in the development of instant games, both contracts contain a provision stating that:

> The Texas Lottery Commission is a part of the Executive Branch of Texas State Government. The [TLC] will not relinquish control over lottery operations. [GTECH] shall function under the supervision of the [TLC]. Its operations will be subject to the same scrutiny and oversight that would apply if all operations were performed by [TLC] employees.

The Instant-Game Contract further provides that "[f]inal decisions regarding the direction or control of the Lottery are always the prerogative of the [TLC] in its sole discretion as an agency of the State of Texas"; that "[a]lthough GTECH comes from the private sector, its operations will be subject to the same scrutiny and oversight that would exist if all operations were performed by [TLC] employees"; and that:

> The [TLC] may rely upon the guidance of [GTECH] in all matters related to instant game development and manufacturing services, but reserves the sole right to reject that guidance for any reason. [GTECH], conversely, must accept and support the decision of the [TLC].

GTECH further "warrants and agrees" under the Instant-Ticket Contract "that its tickets, games, goods and services shall in all respects conform to, and function in accordance with, [TLC]-approved specifications and designs."

Most of the causes of actions complain substantively of underlying TLC decisions and directives and not GTECH's exercise of independent discretion

[12]As previously noted, the Steele Plaintiffs' causes of action for aiding and ***796** abetting fraud and conspiracy presume that TLC deliberately chose the allegedly misleading Game 5 instructions so as to mislead and harm them. If so, GTECH had no power under the Instant-Game Contract to countermand TLC's decision—rather, the contract expressly reserved to TLC "the sole right to reject [GTECH's] guidance for any reason" and obligated GTECH to "accept and support" TLC's decision. More critically, the gravamen of the alleged "aiding and abetting fraud" and participation in "conspiracy" by GTECH is that GTECH performed its contractual obligations to print and distribute Fun 5's and program game parameters into the Texas Lottery computer system once TLC had determined or approved the game design. GTECH had no discretion to do otherwise—instead, it was obligated to conform "its tickets, games, goods, and services" in accordance with TLC's specifications and designs. The same is true of the GTECH conduct made the basis of the Steele Plaintiffs' tortious-interference cause of action—GTECH's programming of the computer system in accordance with the game parameters, as GTECH was required to do under its contracts with TLC.

As such, the Steele Plaintiffs' causes of action for aiding and abetting fraud, tortious interference, and conspiracy each complain substantively of underlying decisions or directives of TLC, not any actions by GTECH within its independent discretion, thereby implicating sovereign immunity. But the analysis is more complicated with respect to the Steele Plaintiffs' remaining causes of action for fraud by misrepresentation or silence.

But the "fraud" causes of action complain, in part, of alleged GTECH acts within its independent discretion

The Steele Plaintiffs' fraud causes of action hinge on the assertion that GTECH rather than TLC is to blame, at least in part, for the complained-of features of the Game 5 instructions. The parties largely agree, at least factually, regarding the sequence of events that yielded the Fun 5's game in the form sold at retail. The concept of the Fun 5's game originated with GTECH, which had previously sold similar games to several other state lotteries, with much financial success and apparently no consumer complaints. In March 2013, GTECH presented TLC staff with a prototype closely resembling a game that GTECH had sold to the Nebraska state lottery. The Commission had opted to include this game design in its plan for new instant games, initially anticipating sale during the 2014 fiscal year.

Subsequently, in April 2014, GTECH personnel emailed artwork and draft working papers for the Fun 5's game to TLC staff. At this stage, the physical appearance of the game ticket, including Game 5, already had many similarities to that of the

finished product, with the differences consisting of an omitted apostrophe in the name (the working title was "Fun 5s" rather than the eventual "Fun 5's"), different icons used in Game 5,[147] and similar matters of form or style. Aside from references to the different icons being used at the time, the Game 5 instructions printed on the ticket—the eventual center of controversy—were substantively identical to those eventually appearing in the finished product. Within the month of April, TLC staff sent GTECH two rounds of comments, in the form of handwritten edits made to the artwork and working papers, making the changes that would yield the final version of the ticket image. The sole change made to the Game 5 instructions, ***797** aside from modifying the icons being referenced, was to delete a single word, "line," that did not impact meaning. GTECH incorporated these changes into a revised version of the artwork and working papers and sent them to TLC.

147 The initial version had used dollar-bill icons rather than "5s" in the tic-tac-toe grid, while "5s" rather than moneybag icons were used in the PRIZE box.

A subsequent round of comments from TLC staff was addressed specifically to the game parameters GTECH had set forth in the working papers. From their inception, GTECH's working papers had specified parameters for Game 5 that included—consistent with the product ultimately sold at retail—limiting prize eligibility solely to tickets having three play symbols in a row in tic-tac-toe, with the multiplier icon serving only to increase the size of a tic-tac-toe winner's prize. However, GTECH had included additional parameters specifying that the prize-multiplier icon in Game 5 would appear only on the tickets having winning tic-tac-toe combinations. Had these parameters survived, they would have ensured that no Fun 5's contestant could uncover a prize-multiplier icon on a non-winning ticket—or profess resultant confusion about his or her entitlement to a prize, as the Steele Plaintiffs now do.

But TLC staff objected through comments transmitted on May 12, stating that "Money Bag play symbol needs to appear on non-winning tickets also." In a cover email, staff explained that having the moneybag symbol appear only on winning tickets in Game 5 would render that game "an easy target for micro-scratching" because a wrongdoer would need only look for the moneybag icon in the 5X BOX "to know that it is a winner." In response, during the morning of May 14, GTECH transmitted a revised version of the working papers that simply deleted its prior parameters specifying that the moneybag icon would appear only on winning tickets, but did not state affirmatively that the icon would appear on non-winning tickets or indicate how often this would occur. Later that morning, TLC staff (by now, Dale Bowersock, TLC's Instant Product Coordinator) replied, "In Game 5 we need the parameter to state that the Moneybag 5x multiplier symbol will be used on non-winning tickets as well as winning tickets. I don't see where this concern was addressed." Bowersock later elaborated, "What we are looking for is a parameter that is very clearly defined, such as 'The 'MONEY BAG' Play Symbol will appear in the 5X Box in approximately [redacted] of the tickets with non-winning combinations in GAME 5."

Within the day, GTECH revised the working papers again, adding a new parameter tracking Bowersock's language and specifying that the moneybag symbol "will appear in the 5X Box in approximately 25% of the tickets with non-winning combinations in GAME 5." So revised, and with no further changes to any of the other features of the game, GTECH submitted the working papers to the TLC. Consequently, this revised version of the Fun 5's working papers incorporated (1) the new Game 5 parameters, originating with TLC, specifying that the moneybag-prize-multiplier icon would appear on both winning tickets and 25 percent of the non-winning tickets, in combination with (2) the preexisting Game 5 instructions, whose substance had originated with GTECH and had accompanied GTECH's previously proposed game parameters in which the moneybag icon could appear only on winning tickets. This version of the working papers was approved by the TLC's executive director, executed, and made the basis for the Fun 5's ticket sold at retail.

* * *

The essence of GTECH's immunity arguments, as they relate to the fraud causes of action, is that it is being sued merely for implementing TLC's decision or directive ***798** to change the Game 5 parameters to have moneybag icons appear on non-winning tickets. The Fifth Court of Appeals relied on this same basic rationale in affirming the dismissal in *Nettles*.[148] But as the Steele Plaintiffs urge, the posture of the case presented to this Court is not quite so straightforward.

148 *See Nettles*, 2017 WL 3097627, at *9.

[13]It is true, as GTECH urges, that the Steele Plaintiffs' fraud causes of action (and indeed all of their causes of action) are predicated factually on the presence of moneybag icons on non-winning tickets and that this feature was an alteration of Game 5's original proposed parameters that GTECH made at TLC's behest. To the extent the Steele Plaintiffs maintain that GTECH had discretion simply to refuse to make this parameter change, that view is contrary to the Instant-Game Contract, which required GTECH instead to conform to TLC's specifications and to support TLC's instant-game decisions. As if recognizing as much, the Steele Plaintiffs pleaded in their live petition that they "do not complain of the change in parameters requested by the TLC"—their focus, rather, is "the misleading and deceptive wording chosen for the Fun 5's tickets by GTECH in the exercise of its independent discretion." But while GTECH dismisses the distinction as mere "artful pleading," it remains that the Steele Plaintiffs are not complaining merely of the appearance of moneybag icons on non-winning tickets, but that this feature of Game 5 misled and injured the Steele Plaintiffs *when combined with* the accompanying instructions. Further, as the predicate for their fraud causes of action, the Steele Plaintiffs assert that the source of the instructions part of the mix was GTECH decisions made within its independent discretion, not decisions or directives from TLC. Consequently, the fraud causes of action cannot fairly be characterized as complaining solely of GTECH's implementation of TLC's chosen parameters. Although the parameter change by TLC could potentially become relevant to causation, proportionate responsibility, or other issues going to the merits of the Steele Plaintiffs' fraud causes of action, they would not singularly negate *jurisdiction* to adjudicate those causes of action. Instead, we must proceed to consider the scope of GTECH's contractual discretion in regard to the Game 5 instructions.

GTECH asserts that the "undisputed" evidence demonstrates that it possessed no independent discretion regarding the wording of the Game 5 instructions. It emphasizes that the Instant-Ticket Contract reserved to the TLC ultimate control over the product's form and design and required GTECH to comply with TLC's specifications, "not the other way around." GTECH similarly observes, correctly, that it lacked power or discretion under its contracts to implement game instructions or features unilaterally and instead operated under TLC's supervision and subject to the agency's approval. But the relevant contracts also disclaimed any employment, agency, or "any other relationship between" TLC and GTECH—instead, GTECH was explicitly an "independent contractor" with respect to the goods and services it provided, a term denoting TLC control only as to the end product or result of GTECH's work.[149] And TLC's right of ***799** ultimate control or approval of GTECH's work cannot alone be the controlling determinant of immunity—Brown & Gay's work was also subject to the approval of its governmental principal,[150] yet the Texas Supreme Court held it to have independent discretion, and thus no immunity, regarding the traffic designs and layouts it had fashioned prior to that approval.[151] A contrary view would effectively resurrect the pre-*Gehring* "accepted work" doctrine in the guise of an immunity principle.[152]

149 *See, e.g.*, *City of Bellaire v. Johnson*, 400 S.W.3d 922, 923 (Tex. 2013) (explaining that employer does not possess "right to control the progress, details, and methods of operations of the work" of an independent contractor); *Industrial Indemnity Exch. v. Southard*, 138 Tex. 531, 160 S.W.2d 905, 907 (1942) ("A[n] [independent] contractor is any person who ... undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details." (citing *Shannon v. West Indem. Co.*, 257 S.W. 522, 524 (Tex. Comm'n App. 1924, judgm't adopted))).

150 *See Brown & Gay*, 461 S.W.3d at 119 (observing that under the relevant contract, "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" (emphasis added)).

151 And this feature of *Brown & Gay* belies GTECH's view that the Texas Supreme Court there endorsed the "line of federal cases involving the federal government contractor defense" that emanate from *Boyle v. United Tech. Corp.*, 487 U.S. 500, 513, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988), and hold that "immunity" extends to contractors who contribute an allegedly defective design "so long as the specification was reviewed by the government and included in the final specifications approved by the government." The "federal case law" cited favorably by the *Brown & Gay* court instead emanates from *Yearsley*. *See Brown & Gay*, 461 S.W.3d at 124-26. While the concepts are sometimes confused or conflated by lower courts, *Boyle* actually recognized a federal common-law "government-contractor defense" or "military contractor defense," distinct from the *Yearsley* concept, that is rooted in preemption concepts. *See Campbell*, 136 S.Ct. at 583-84 (more recently applying *Yearsley* concept with no mention of *Boyle* or its contractor-immunity standard); *see also* Jason Malone, *Derivative Immunity: The Impact of* Campbell-Ewald Co. v. Gomez, 50 Creighton L. Rev. 87, 103-15 (2016) (distinguishing the *Yearsley* and *Boyle* lines of precedents and noting how courts have

sometimes confused them). The Texas Supreme Court has elsewhere recognized the character of the *Boyle* concept, *see Torrington v. Stutzman*, 46 S.W.3d 829, 846-47 (Tex. 2000) (explaining that *Boyle* "government-contractor defense, also called the military contractor defense, is a federal-common law defense ... based upon the premise that liability claims arising from government procurement contracts could create a significant conflict between state tort law and the federal interest in immunizing the federal government from liability for performing a 'discretionary function,' an act for which the government may not be sued under the Federal Tort Claims Act"), and this is not the concept it addressed in *Brown & Gay*. *Cf. Brown & Gay*, 461 S.W.3d at 124-26.

152 *Cf. Brown & Gay*, 461 S.W.3d at 129 (citing *Gehring* with approval as "holding, in the context of rejecting the 'accepted work' doctrine, that a county contractor hired to relocate fencing alongside widened roads was not insulated from tort liability for injuries that occurred after the county accepted the work but were caused by the condition in which the contractor left the premises").

Instead, we must proceed farther to examine the scope of GTECH's discretion in fashioning the Game 5 instructions prior to TLC's ultimate approval. In essence, we must inquire whether, on this record, viewed through our standard of review, GTECH's role in developing the Game 5 instructions was analogous to (1) the contractor in *Keller*, merely complying with TLC specifications without discretion to do otherwise, such that it effectively acted "*as* TLC"; or was (2) more like the contractors in *Brown & Gay* and *Gehring*, or the investment advisor in *K.D.F.*, possessing discretion in fashioning Game 5 instructions *for* TLC that it could have exercised so as to refrain from its acts now alleged to constitute fraud.

While reserving to TLC ultimate control and final approval over the design and form of instant games, the Instant-Game Contract inescapably granted wide discretion ***800** to GTECH in determining such details in the work it submitted for TLC's approval. The TLC-GTECH relationship, as the Steele Plaintiffs observe, was not one "where TLC set out specific parameters dictating the type of game it want[s] and the language, artwork, and design to be selected for the game." Instead, the contract contemplated that GTECH would have broad creative leeway in fashioning *for* TLC approval, as opposed to acting "*as* TLC" in effectuating agency decisions already made, the myriad details of "Game Development Services" (which "include but [are] not ... limited to graphic design, game design, artwork, prize structures, and play style"), "draft artwork and prize structures," and "draft working papers." And the Steele Plaintiffs presented evidence, presumed true in the posture of this appeal, confirming that this was how TLC and GTECH operated in practice in regard to the game instructions printed on tickets. This evidence included the deposition testimony of the TLC's executive director, Gary Grief, who explained that the agency "do[es] rely" on GTECH and other instant-game vendors, "at least as a starting point, when we're looking at language that goes on tickets," as "[t]hey've got the experience in the industry."

GTECH counters that any discretion it could have possessed in originating the Fun 5's game and Game 5 instructions has no bearing on its immunity in this case. GTECH again emphasizes TLC's intervening parameter change to add moneybag icons to non-winning tickets, urging that the Steele Plaintiffs are in essence suing it over a different Game 5 than the Game 5 it had originally proposed. GTECH makes a valid point—had TLC approved GTECH's original version of Game 5, moneybag icons would have appeared only on winning tickets, and that is not the Game 5 of which the Steele Plaintiffs now complain. Consequently, we agree with GTECH that its discretion in originating the Fun 5's game and Game 5 instructions is ultimately immaterial to its claim of derivative sovereign immunity against the fraud causes of action asserted by the Steele Plaintiffs. But GTECH's origination of the game and Game 5 instructions is not the Steele Plaintiffs' primary focus.

The Steele Plaintiffs' core focus, rather, is GTECH's acts or omissions once TLC directed the change in the Game 5 parameters to add moneybag icons to non-winning tickets. The primary root of GTECH's fraud liability, the Steele Plaintiffs reason, is GTECH's failure or refusal to alert TLC that the parameter change, *in combination with the preexisting wording of the Game 5 instructions*, would cause the instructions to be misleading to Fun 5's purchasers who uncovered moneybag icons on non-winning tickets. And GTECH had independent discretion to alert TLC to the potential problem, the Steele Plaintiffs continue, if not an affirmative duty to do so. Accordingly, the Steele Plaintiffs conclude, GTECH enjoys no sovereign immunity against their fraud causes of action.

GTECH insists that its contracts left it no discretion to alert TLC to any such perceived problem with the instructions, further portraying the Steele Plaintiffs' argument as confirming that their suit complains only of GTECH's compliance with TLC's directives. From the same premise, GTECH urges that the Steele Plaintiffs "would effectively bring[ ] contractor immunity in Texas to an end" by permitting suits founded on contractor "discretion" to disregard or "second-guess" the government's

directives. But contractor immunity in a given case turns on the particular contracts and facts involved, and GTECH's premise is valid only if, upon receiving TLC's directive to add moneybag icons to non-winning Game 5 tickets, GTECH had ***801** no discretion but to implement the change *without attempting to revisit with TLC* the potential need for conforming changes to the preexisting proposed Game 5 instructions.

In insisting this discretion was lacking, GTECH suggests that TLC had already finalized and approved the Game 5 instructions by the time TLC prescribed the change in game parameters. GTECH emphasizes that TLC staff had previously made edits to the Game 5 instructions and artwork that GTECH had already incorporated into the Fun 5's working papers. But GTECH overreaches in assuming that the Game 5 instructions, in that preexisting form, were already fixed and immutable when TLC directed the change in Game 5 parameters, amounting to TLC specifications and directives with which GTECH had no discretion but to comply without reservation or further comment. On the contrary, the controlling act of finalization under the Instant-Game Contract was approval and execution of the final working papers by TLC's executive director—and this event had not yet occurred when TLC directed the parameter change. Further, the Contract contemplated that GTECH could propose further changes to working papers not only at that pre-approval juncture, but even for a period afterward, explicitly permitting "changes made after the execution of working papers ... through the execution of a post executed change and signed by the [TLC] Executive Director or designee."

And the Steele Plaintiffs presented evidence that GTECH and TLC actually operated in this manner under the Instant-Game Contract. Joseph Lapinski, GTECH's account-development manager regarding the Texas Lottery, acknowledged that if GTECH personnel "saw a change come through from [TLC] [that they] anticipated or believed ... would harm the game or [TLC]," GTECH would expect them to "either say something to [TLC]" or "let someone know so ... we can discuss or address it with [TLC]." Lapinski termed this expectation of GTECH employees "professionalism" and "good customer service." Likewise, Bowersock, the TLC instant-game coordinator, echoed the expectation that "[i]f [GTECH] saw concerns with the game they would report it to us."

Furthermore, the GTECH personnel having primary responsibility over the Fun 5's working papers and their various revisions confirmed not only that GTECH had the opportunity to alert TLC to potential problems with the Game 5 instructions after the parameter change, but also *made a conscious decision to forego raising any such concerns* with TLC. Laura Thurston, a GTECH customer-service representative who prepared the final rounds of revised working papers, including those implementing the parameter change, testified that a parameter change from TLC triggered a "comprehensive[ ]" internal review by the GTECH "teams" who were impacted by the change to determine if further changes to the game—including the instructions—were warranted. Thurston recounted that following the parameter change, she "did the examination" of the Game 5 instructions and also "had this examined by software [personnel]." Thurston "felt that [the instruction language] was clear" and accordingly "did not consider changing the language." The second GTECH customer-service representative, Penelope Whyte, had drafted the original version of the Fun 5's working papers but had been away from the office when Thurston made the final changes. Whyte echoed Thurston's understanding of GTECH's prerogative to suggest further changes in light of an intervening parameter change, acknowledging that these were "part of my job" as a customer-service representative ***802** and "also part of [GTECH's] internal review." She also recounted that upon her return to work, she had "looked at the instructions" and, like Thurston, "saw that they didn't need to be changed."

By deciding not to revisit the Game 5 instructions with TLC after the agency prescribed the parameter change, GTECH, the Steele Plaintiffs insist, violated their obligation under the Instant-Game Contract to provide TLC "[e]xecuted working papers" that are "complete and free of any errors."[153] But we need not decide whether GTECH contracts affirmatively *required* it (i.e., deprived it of discretion not to act) to alert TLC to a perceived discrepancy with the Game 5 instructions at that juncture. Rather, the consideration controlling GTECH's immunity is whether its contracts left it discretion to choose to so alert TLC. Consistent with the conduct and understanding of GTECH's Thurston and Whyte, the contracts plainly afforded GTECH that discretion. While it remained TLC's prerogative to reject GTECH's guidance, GTECH possessed discretion to provide the guidance nonetheless. In this limited respect, GTECH's position is that of the government contractors in *Brown & Gay* and *Gehring* rather than that of *Keller*, and perhaps most closely resembles the investment advisor in *K.D.F.*[154]

153 The Steele Plaintiffs also emphasize deposition testimony in which their counsel succeeded in extracting acknowledgments from various GTECH or TLC witnesses that GTECH owed TLC "reasonable care" in providing non-misleading game instructions. GTECH disputes the competence or materiality of this testimony, observing that the scope of its discretion or duties relevant to the

immunity inquiry are controlled by the two contracts, whose meaning is initially a question of law. We agree with GTECH. Such testimony regarding the existence of extra-contractual duties, if material to any issue, could go only to the merits of the Steele Plaintiffs' causes of action. And as we emphasize below, the merits are not properly before us.

154 *See K.D.F.*, 878 S.W.2d at 597 (advisor's "activities necessarily involve considerable discretion ... its role is more in the nature of advising [the government] how to proceed, rather than being subject to the direction and control of [the government]").

[14]Beyond this, GTECH disputes whether or how this exercise of discretion not to revisit the Game 5 instructions with TLC could actually amount to fraud or otherwise breach any cognizable tort duty. Similarly, GTECH appears to question the extent of any legal injury or damage to the Steele Plaintiffs, pointing out the Lottery Act provisions and rules deeming ticket purchases to be the buyer's agreement "to abide by and be bound by" the commission's rules and validation processes, including rules limiting their remedy—at least against TLC—merely to a refund of the $5 purchase price of each ticket.[155] Whatever the validity of GTECH's concerns (and we intend no comment), they go beyond the limited jurisdictional inquiry currently before us. It is true that if a government contractor's contract would leave it no discretion to comply with an asserted tort duty, that feature may both establish the existence of derivative immunity and negate the existence of the tort duty, as Chief Justice Hecht observed in the *Brown & Gay* concurrence.[156] To this extent, the jurisdictional inquiry may overlap the merits, and this would neither prevent nor excuse courts from addressing the scope of contractual discretion to the extent necessary to resolve the jurisdictional issue.[157] But if, as here, the court ***803** determines that the relevant contracts would leave the government contractor discretion to comply with the asserted tort duty and avoid the conduct alleged to be wrongful, there is no derivative immunity and the jurisdictional inquiry is at end. Our own jurisdiction here extends no farther, as the purpose of the plea to the jurisdiction GTECH has asserted, and that is the sole focus of this appeal, "is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached."[158]

155 *See* Tex. Gov't Code § 466.252(a); 16 Tex. Admin. Code § 401.302(k), (i).

156 *Brown & Gay*, 461 S.W.3d at 130 n.6 (Hecht, C.J., concurring).

157 *See, e.g.*, *Miranda*, 133 S.W.3d at 227-28 (recognizing that jurisdictional challenges based on sovereign immunity may overlap the merits).

158 *Wheelabrator Air Pollution Ctr., Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016) (quoting *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)).

DOES *BROWN & GAY*'S "RATIONALE AND PURPOSE" ANALYSIS OTHERWISE AID GTECH?

[15]One additional contention by GTECH remains to be addressed, however. Although GTECH's primary position is that it is being sued solely for complying with underlying TLC directives—i.e., acting "as TLC" and not within its own independent discretion—and need not make any further showing in order to enjoy TLC's sovereign immunity, it argues in the alternative that the fiscal justifications addressed in the "Rationale and Purpose" portion of the *Brown &Gay* opinion[159] would independently justify the application or extension of that immunity to it here. We consider this argument with respect to the

portion of the Steele Plaintiffs' fraud cause of action that we have held to survive the jurisdictional analysis under GTECH's primary rationale.

159 *See Brown & Gay*, 461 S.W.3d at 123-24.

In support of this alternative argument, GTECH posits that "[i]n the unlikely event that Plaintiffs' fraud claims were ultimately upheld," "adverse publicity" from the judgment would "tarnish the excellent reputation of the Texas Lottery, causing ticket sales to decline," such that "the State will be forced to make unforeseen expenditures to cover the shortfall, largely in the area of education," the chief beneficiary of Texas Lottery revenues. But a similar argument could have been made in *Brown & Gay*—a judgment against the contractor for negligently designing toll-road signs and traffic layouts, proximately causing a fatal wrong-way collision, would tend to fuel a perception of dangerousness dissuading toll-road use, potentially requiring unforeseen shifts in governmental expenditures to make up for the resultant drop in revenue. For that matter, such secondary or tertiary effects on government and its functions could often be expected to flow from a judgment against a government contractor, not to mention one against a government agent or employee, with the latter arguably tending to have the greater potential negative impact. Nevertheless, the Texas Supreme Court has never extended sovereign immunity to governmental employees or agents acting within their individual as opposed to official capacities—on the contrary, such persons "have always been individually liable for their own torts, even when committed in the course of employment."[160] And *Brown & Gay*, as we have seen, stands for the parallel proposition that the "rationale and purpose" of sovereign immunity would support recognition of immunity for government contractors only to the extent the suit complains of what are substantively underlying acts, directives, or decisions of the government—i.e. in essence a species of suit seeking to control state action through the contractor—and not the contractor's ***804** exercise of independent discretion.

160 *Franka*, 332 S.W.3d at 383; *see Leitch*, 935 S.W.2d at 117.

To the extent GTECH is advocating a novel expansion of sovereign immunity to its benefit, this intermediate appellate court must instead adhere to the existing parameters of Texas sovereign-immunity doctrine unless and until the Texas Supreme Court instructs us otherwise.[161] And in the absence of such developments, GTECH has not shown that the Steele Plaintiffs' fraud causes of action, to the extent they complain of GTECH's actions following the Game 5 parameter change, implicate TLC's sovereign immunity.

161 *See, e.g.*, *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565(Tex. App.—Austin 2004, no pet.).

CONCLUSION

The district court did not err in denying GTECH's plea to the jurisdiction with respect to the Steele Plaintiffs' fraud causes of action to the extent they are predicated on GTECH's failure or refusal, following TLC's change in the Game 5 parameters to have moneybag icons appear on non-winning tickets, to raise with TLC the now-complained-of asserted discrepancy between the Game 5 instructions and actual parameters. We emphasize again that the merits of these causes of action are not before us in this appeal, which concerns only immunity and jurisdiction. However, in its other components, the Steele Plaintiffs' suit implicates sovereign immunity by substantively seeking to control the actions and decisions of TLC within its delegated authority. As the Steele Plaintiffs can point to no legislative waiver of this immunity, the district court lacks subject-matter jurisdiction to adjudicate these portions of their suit. To this extent, we reverse the district court's order and render judgment dismissing the causes of action for want of subject-matter jurisdiction.

All Citations

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Tab B

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JANUARY 11, 2018

NO. 03-16-00172-CV

GTECH Corporation, Appellant

v.

James Steele, et al., Appellees

APPEAL FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY
BEFORE JUSTICES PURYEAR, PEMBERTON, AND FIELD
AFFIRMED IN PART, REVERSED AND RENDERED IN PART—
OPINION BY JUSTICE PEMBERTON

This is an appeal from the order signed by the district court on February 25, 2016. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the court's order. Therefore, the Court affirms the district court's order only with respect to the portion of appellees' causes of action for fraud by misrepresentation or silence that are predicated on GTECH's failure or refusal, following the Texas Lottery Commission's change in the Game 5 parameters to have moneybag icons appear on non-winning Fun 5's tickets, to raise with TLC the asserted discrepancy between the Game 5 instructions and actual parameters. The Court otherwise reverses the district court's order and renders judgment dismissing the appellees' causes of action for want of subject-matter jurisdiction. Costs relating to this appeal, both in this Court and in the court below, are taxed 75 percent to appellees and 25 percent to GTECH.

Tab C

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Tab D

CAUSE N°. D-1-GN-14-005114

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

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

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

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

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

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

SIGNED on this 28th day of March, 2016

Presiding Judge

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Tab E

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00172-CV

GTECH Corporation, Appellant

v.

James Steele, et al., Appellees

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

O R D E R

PER CURIAM

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

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

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

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

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

It is ordered on April 15, 2016.

Before Chief Justice Rose, Justices Pemberton and Bourland

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

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

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

Tab F

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

BROWN & GAY ENGINEERING, INC., Petitioner,
v.
Zuleima OLIVARES, Individually and as the Representative of the Estate of Pedro Olivares, Jr., & Pedro Olivares, Respondents

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

Synopsis

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

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

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

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

Affirmed.

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

See also 316 S.W.3d 114.

West Headnotes (13)

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

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

4 Cases that cite this headnote

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

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

7 Cases that cite this headnote

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

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

3 Cases that cite this headnote

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

States Liability and Consent of State to Be Sued in General

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

2 Cases that cite this headnote

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

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

4 Cases that cite this headnote

[6] **States** Independent contractors

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

2 Cases that cite this headnote

[7] **States** Liability and Consent of State to Be Sued in General

States Necessity of constitutional or statutory consent

Sovereign immunity is a common-law creation, and it remains the judiciary's responsibility to define the boundaries of the doctrine and to determine under what circumstances sovereign immunity exists in the first instance; by contrast, the legislature determines when and to what extent to waive that immunity.

3 Cases that cite this headnote

[8] **States** Independent contractors

Absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity encompass private government contractors exercising their independent discretion in performing government functions.

16 Cases that cite this headnote

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

Extension of sovereign immunity to private engineering firm that was contracted by county toll road authority to design a tollway would not further the doctrine's rationale, in a case in which firm was sued by representative of driver who was killed when his vehicle was struck by a vehicle driven by an intoxicated driver traveling the wrong way on the tollway; sovereign immunity was designed to guard against the unforeseen expenditures associated with the government's defending lawsuits and paying judgments that could hamper government functions by diverting funds from their allocated purposes, and immunizing firm would in no way further that rationale.

6 Cases that cite this headnote

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

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

2 Cases that cite this headnote

[11] **Public Employment** Qualified immunity

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

Cases that cite this headnote

[12] **Public Employment** Qualified immunity

Qualified immunity is a uniquely federal doctrine.

3 Cases that cite this headnote

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

Public Employment Privilege or immunity in general

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

9 Cases that cite this headnote

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

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Opinion

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

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

I. Background

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

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

1 The Authority maintained no full-time employees.

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

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

Brown & Gay then filed its own plea to the jurisdiction, arguing that it was an employee of the Authority being sued in its official capacity and was therefore entitled to governmental immunity. *See Tex. Adjutant General's Office v. Ngakoue,* 408 S.W.3d 350, 356 (Tex.2013) (explaining that a suit against a government official acting in an official capacity is "merely another way of pleading an action against the entity of which the official is an agent" (internal quotation marks and citation omitted)). The trial court granted the plea, but the court of appeals reversed, holding that Brown & Gay was not entitled to governmental immunity because it was an independent contractor, not an "employee" of the Authority as that term is defined in the Texas Tort Claims Act.[3] 401 S.W.3d 363, 378–79 (Tex.App.–Houston [14th Dist.] 2013).

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

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

*121 II. Analysis

A. Origin and Purpose of Sovereign Immunity

[1] [2] [3] Once again we are presented with questions about the parameters of sovereign immunity, the well-established doctrine "that 'no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent.' " *Tooke v. City of Mexia,* 197 S.W.3d 325, 331 (Tex.2006) (quoting *Hosner v. DeYoung,* 1 Tex. 764, 769 (1847)). While sovereign immunity developed as a common-law doctrine, we "have consistently deferred to the Legislature to waive such immunity." *Reata Constr. Corp. v. City of Dall.,* 197 S.W.3d 371, 375 (Tex.2006) (emphasis omitted). Referred to as governmental immunity when applied to the state's political subdivisions,[4] *Travis Cent. Appraisal Dist. v. Norman,* 342 S.W.3d 54, 57–58 (Tex.2011), sovereign immunity encompasses both immunity from suit and immunity from liability, *Reata Constr. Corp.,* 197 S.W.3d at 374. Immunity from liability is an affirmative defense that bars enforcement of a judgment against a governmental entity, while immunity from suit bars suit against

the entity altogether and may be raised in a plea to the jurisdiction. *State v. Lueck,* 290 S.W.3d 876, 880 (Tex.2009); *Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 696 (Tex.2003).

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

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

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

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

B. Effect of Statutes Extending or Limiting Immunity

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

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

On the other hand, the Olivareses contend that affirmative statutory extensions of immunity to private contractors in some instances demonstrate legislative intent to foreclose such immunity absent a specific legislative grant. For example, the Transportation Code provides that an independent contractor of a regional transportation authority that "performs a function of the authority or [certain other specified entities] is liable for damages only to the extent that the authority or entity would be liable" for performing the function itself. TEX. TRANSP. CODE § 452.056; *see also id.* § 452.0561 (extending the same immunity to independent contractors of certain statutory transportation entities). The Olivareses argue that the absence of similar legislation applicable to contractors of local government corporations like the Authority evinces legislative intent to deprive such contractors of immunity. That may be the case, but it does not answer the question before us.

[7] **[8]** Sovereign immunity is a common-law creation, and "it remains the judiciary's responsibility to define the boundaries of the ... doctrine and to determine under what circumstances sovereign immunity exists in the first instance." *Reata Constr. Corp.,* 197 S.W.3d at 375. By contrast, as noted above, the Legislature determines when and to what extent to waive that immunity. *Id.* Accordingly, the absence of a statutory grant of immunity is irrelevant to whether, as a matter of common law, the boundaries of sovereign immunity ***123** encompass private government contractors exercising their independent discretion in performing government functions. [6] For the reasons discussed below, we hold that they do not.

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

C. Sovereign Immunity and Private Contractors

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

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

Seizing on the general purpose of protecting the public fisc, Brown & Gay argues that immunity for government contractors will save the government money in the long term. More specifically, while Brown & Gay recognizes that its exposure to defense costs and a money judgment will not affect the Tollway project's cost to the government, Brown & Gay asserts that the increased costs generally associated with contractors' litigation exposure will be passed on to the government, resulting in higher contract prices and government expense. Citing the same rationale, an amicus brief urges us to adopt a framework that would extend sovereign immunity to a private entity performing discretionary government work, so long as the contractor is authorized to do so and the government would be immune had it performed the work itself. In proposing this test, the amicus contends that, just as sovereign immunity has been extended to political subdivisions performing governmental functions, it should be extended to private entities authorized to perform those functions.

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

Sovereign immunity has never been defended as a mechanism to avoid any and all increases in public expenditures. Rather, it was designed to guard against the "unforeseen expenditures" associated with the government's defending

lawsuits and paying judgments "that could hamper government functions" by diverting funds from their allocated purposes. *Sefzik,* 355 S.W.3d at 621; *IT–Davy,* 74 S.W.3d at 853. Immunizing a private contractor in no way furthers this rationale. Even if holding a private party liable for its own improvident actions in performing a government contract indirectly leads to higher overall costs to government entities in engaging private contractors, those costs will be reflected in the negotiated contract price. This allows the government to plan spending on the project with reasonable accuracy.

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

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

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

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

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

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

The control requirement discussed in *K.D.F.* is consistent with the reasoning federal courts have utilized in extending derivative immunity to federal contractors only in limited circumstances. For example, in *Butters v. Vance International, Inc.,* a female employee of a private security firm hired to supplement security at the California residence of Saudi Arabian royals sued the firm for gender discrimination after being declined a favorable assignment. 225 F.3d 462, 464 (4th Cir.2000). Although the firm had recommended the employee for the assignment, Saudi military supervisors rejected the recommendation on the grounds that the assignment would offend Islamic law and Saudi cultural norms. *Id.* Concluding that the Saudi government would be immune from suit under the Foreign Sovereign Immunities Act, the Fourth Circuit then considered ***125** whether that immunity attached to the security firm. *Id.* at 465. Holding that it did, the court relied on the fact that the firm "was following Saudi Arabia's orders not to promote [the employee]," expressly noting

that the firm "would not [have been] entitled to derivative immunity" had the firm rather than the sovereign made the decision to decline the promotion. *Id.* at 466.

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

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

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

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

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

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

Bixby v. KBR, Inc., 748 F.Supp.2d 1224, 1242 (D.Or.2010).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Brown & Gay also argues that declining to extend sovereign immunity to contractors like Brown & Gay will make it difficult for the government to engage talented private parties fearful of personal liability. As noted above, such speculation fails to take into account a private party's ability to manage that liability exposure through insurance. It also ignores the countervailing considerations that make contracting with the government attractive, not the least of which is lack of concern about the government's ability to pay.

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

III. Conclusion

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

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

Justice Brown did not participate in the decision.

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

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

Government Code, which provides that "[a] private vendor operating under a contract [for correctional facilities and services] may not claim sovereign immunity in a suit arising from the services performed". [2]

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

2 *Id.* § 495.005.

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

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

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

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

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

The Fort Bend County Toll Road Authority tasked Brown & Gay with selecting ***131** and designing road signs and supervised the firm's work. But the Authority did not tell Brown & Gay *how* to do the work. The discretion Brown & Gay retained separated it from the Authority and thus from the Authority's immunity. [7] I therefore concur in the Court's judgment.

7 The Legislature has also recognized that compliance with governmental direction may be a prerequisite for limits on liability. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 97.002 ("A contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from

> the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.").

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

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

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Tab G

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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
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Opinion Filed July 21, 2017
|
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Synopsis

Background: Lottery ticket purchaser brought action against independent contractor of the state for fraud in the sale of lottery scratch-off tickets. The 160th Judicial District Court, Dallas County, Jim Jordan, J., granted independent contractor's plea to the jurisdiction and dismissed the case. Purchaser appealed.

[Holding:] The Court of Appeals, Richter, J., Retired, sitting by assignment, held that purchaser's claims were barred by sovereign immunity.

Affirmed.

West Headnotes (1)

[1] **States** Independent contractors

Lottery ticket purchaser's claims against independent contractor of the state for fraud in the sale of lottery scratch-off tickets were barred by sovereign immunity; purchaser's claims arose from decisions made by state lottery agency, not contractor, contract between contractor and state agency did not permit contractor to evaluate and reject state agency's decisions, and state agency's review of contractor's working papers was extensive and detailed.

2 Cases that cite this headnote

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