



A Professional Corporation

HOUSTON

The Lanier Law Firm, PC
6810 FM 1960 West
Houston, TX 77069
Post Office Box 691448
Houston, TX 77269
(713) 659-5200
Fax (713) 659-2204

LOS ANGELES

The Lanier Law Firm, PC
10866 Wilshire Blvd.
Suite 400
Los Angeles, CA 90024
(310) 277-5100
Fax (310) 277-5103

NEW YORK

The Lanier Law Firm, PLLC
Tower 56
126 East 56th Street
6th Floor
New York, NY 10022
(212) 421-2800
Fax (212) 421-2878

lanierlawfirm.com

July 27, 2017

Via electronic filing

Mr. Jeffrey D. Kyle, Clerk
Third Circuit Court of Appeals
Price Daniel Sr. Building
209 West 14th Street, Room 101
Austin, Texas 78701

Re: No. 03-16-00172-CV; ***GTECH Corporation v. James Steele, et al.***; In the Court of Appeals for the Third District at Austin; **Response to Appellants' July 14, 2017 Letter**

Dear Mr. Kyle:

The above-referenced appeal was argued before Justice Puryear, Justice Pemberton, and Justice Field on October 26, 2016. On July 24, 2017, Appellants filed a letter to “bring...to the attention of the panel” a recent opinion by the Dallas Court of Appeals styled *Nettles v. GTECH Corp.*, No. 05-15-1559-CV, 2017 WL 3097627, *1 (Tex. App.—Dallas July 21, 2017, no pet. h.). But *Nettles* does not compel or even strongly support this Court’s reversal of the judgment of the trial court. Appellees in this appeal have presented different arguments than those presented by *Nettles*, and the Dallas Court of Appeals overlooked important factual and legal aspects of the dispute.

The Dallas Court of Appeals placed little emphasis on the purpose and rationale behind the doctrine of governmental immunity. It recognized that the Supreme Court in *Brown & Gay Engineering, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015), explained that “the purpose of immunity is to protect the government from ‘unforeseen expenditures,’” and that “[t]he 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.’” *Nettles*, 2017 WL 3097627 at *5 (quoting *Brown & Gay*, 461 S.W.3d at 123). Nevertheless, the court declined to engage in a public fisc analysis, rationalizing its omission on the basis that “*Brown & Gay* included an extensive discussion of whether sovereign immunity extends to private parties exercising independent discretion.” *Id.* at *6. But *Brown & Gay*’s discussion of the statute’s rationale and purpose of protecting the public fisc from unforeseen expenditures was also extensive. *See Brown & Gay*, 416 S.W.3d at 121-124.

Indeed, the Court stated that “[g]uiding [its] 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 th[e] otherwise harsh doctrine.” *Id.* at 123 (emphasis added). And even after addressing the second prong of derivative immunity, the Court circled back to the doctrine’s rationale and purpose, stating “[i]n sum,...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.” *Id.* at 127.

GTECH has not explained how defending this lawsuit and being held liable in this case would result in “unforeseen expenditures” to the TLC. *See* Appellees’ Brief, Argument, Part II, at 14-15. GTECH agreed to indemnify and defend the TLC in lawsuits arising out of its work, and to maintain insurance, including general liability and errors and omissions insurance. *See id.* at 14. Thus, the underlying rationale for extending immunity is absent here, just as it was in *Brown & Gay*.

Further, the court of appeals’ analysis in *Nettles* of the second prong of derivative immunity is flawed. The question before the Court is not whether GTECH exercised *absolute* discretion in the preparation of the ticket, but whether GTECH exercised *some* discretion in an activity that gave rise to the plaintiffs’ claims. *See Brown*, 461 S.W.3d at 124-25 (immunity applies where contractor’s actions were that of the government and it *exercised “no discretion”* (emphasis added)); *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 82 (Tex. App.—Houston [1st. Dist.] 2016, pet. filed) (same)).

Appellees’ complaint centers not on the use of the money bag symbol, but on the fact that GTECH’s selected language is misleading. Although the TLC requested modifications to the game, at no point did it waive GTECH’s contractual obligation to offer an error-free game that was not misleading. *See* Appellees’ Brief, Argument, Part III.D.2., at 26. GTECH exercised independent discretion in determining that no changes needed to be made to the game’s instructions after it implemented the TLC’s modifications, and the TLC relied on GTECH as the expert to prepare a final draft that was not misleading or deceptive. *Id.* at 26-28. GTECH had a duty to review the final working papers, determine whether further changes were necessary, and bring to the attention of the TLC any additional, necessary changes. *Id.* at 29. And the *Nettles* court failed to consider GTECH’s exercise of this discretion in determining that GTECH was entitled to derivative governmental immunity. Because GTECH exercised discretion in the final preparation of the ticket, it is not entitled to derivative governmental immunity and the judgment of the trial court should be affirmed.

Appellees appreciate the Court’s consideration of this letter in response to Appellants’ July 24, 2017 letter.

Mr. Jeffrey D. Kyle, Clerk
July 27, 2017
Page 3

Respectfully submitted,

THE LANIER LAW FIRM, P.C.

By: /s/ Natalie Armour

W. Mark Lanier

SBN: 11934600

Kevin P. Parker

SBN: 15494020

Chris Gadoury

SBN: 24034448

Natalie V. Armour

SBN: 24070785

Telephone: (713) 659-5200

Facsimile: (713) 659-2204

WML@lanierlawfirm.com

Kevin.Parker@lanierlawfirm.com

Chris.Gadoury@lanierlawfirm.com

Natalie.Armour@lanierlawfirm.com

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I certify that a true and correct copy of this letter was served via e-service on all counsel of record on this 27th day of July, 2017.

/s/ Natalie Armour

Natalie V. Armour