

No. 05-15-01559-CV

In the Fifth Court of Appeals
Dallas, Texas

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
1/18/2017 3:29:00 PM

LISA MATZ
Clerk

DAWN NETTLES,
Appellant,

v.

GTECH CORPORATION AND THE TEXAS LOTTERY COMMISSION,
Appellees.

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

APPELLANT'S POST-SUBMISSION BRIEF

Peter M. Kelly (Lead Counsel)
State Bar No. 00791011
KELLY, DURHAM & PITTARD, L.L.P.
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498
Email: pkelly@texasappeals.com

Thad D. Spalding
State Bar No. 00791708
KELLY, DURHAM & PITTARD, LLP
P.O. Box 224626
Dallas, Texas 75222
Telephone: 214.946.8000
Facsimile: 214.946.8433

Richard L. LaGarde
State Bar No. 11819550
Mary Ellis LaGarde
State Bar No. 24037645
LAGARDE LAW FIRM, P.C.
3000 Wesleyan Street, Suite 380
Telephone: 713.993.0660
Facsimile: 713.993.9007
Houston, Texas 77027

Manfred Sternberg
State Bar No. 19175775
MANFRED STERNBERG & ASSOCIATES
4550 Post Oak Place Dr. #119
Houston, Texas 77027
Telephone: 713.622.4300
Facsimile: 713.622.9899

Counsel for Appellant

TO THE HONORABLE FIFTH COURT OF APPEALS:

Appellant Dawn Nettles, files this post-submission brief to briefly address matters raised during oral argument.

I. Extending governmental immunity to private contractors such as GTECH contravenes the public policy of the State of Texas.

At oral argument, GTECH emphasized that the Texas Legislature has enacted a “comprehensive” statutory scheme governing the Texas Lottery Commission and its private contractors. The Legislature can modify sovereign immunity by limiting it, as it has by the Texas Tort Claims act, or extending it, for instance by granting some immunity to private entities that contract with the government. The Legislature has done the latter for two different classes of private contractors. That The Legislature’s comprehensive statutory scheme does not extend immunity to GTECH (or any other private entity with whom the Texas Lottery Commission might contract) is dispositive here.

A. The Legislature has extended governmental or sovereign immunity to private companies that contract with government entities in only two limited instances.

Research has revealed two instances in which the Texas Legislature has expanded governmental or sovereign immunity to include private contractors. Curiously, both of those instances involve private contractors engaged in transportation projects.

In the Texas Transportation Code, a limited governmental immunity is extended to private corporations engaged by public transportation authorities. *See* TEX. TRANSP. CODE §§ 452.056, 452.0561. The Legislature also extended limited sovereign immunity to private corporations constructing or repairing roads on behalf of the Texas Department of Transportation. *See* TEX. CIV. PRAC & REM CODE § 97.002.

The Legislature could have enacted a similar provision to extend immunity to contractors of the Texas Lottery Commission, but has not elected to do so.

B. The Legislature’s expansion of immunity in those two instances demonstrates that governmental or sovereign immunity does not extend to private contractors as a matter of course.

Immunity for private corporations that contract with the government is not a feature of the Texas legal landscape. *See, e.g., Strakos v. Gehring*, 360, S.W.2d 787 (1962) (injured motorist sued general contractor of an Harris County highway construction project; nary a mention of sovereign or governmental immunity). Were private contractors in the employ of governmental units already immune from liability, there would have been no need for the Legislature to extend immunity to certain classes of them. Those statutes would be “useless acts.”

“[T]he legislature is never presumed to do a useless act.” *Hunter v. Fort Worth Cap. Corp.*, 620 S.W.2d 547, 551 (Tex. 1981); *see also Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 569 n.17 (Tex. 2014) (court “cannot ‘lightly presume that the

Legislature may have done [such] a useless act”’) (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex. 1998)). A statute is presumed to have been enacted by the Legislature with complete knowledge of the existing law and with reference to it. *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139 (Tex. 2013). Thus, the Court here must presume that the Legislature here has complete knowledge of the common-law doctrine of sovereign immunity, including its outer limits. This Court further presumes that when the Legislature acts, it acts intentionally, and that the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind. *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); see *In re Caballero*, 272 S.W.3d 595, 599 (Tex. 2008); *Chastain v. Koonce*, 700 S.W.2d 579, 582 (Tex. 1985).

GTECH asks this Court to declare CPRC § 97.002 and Transportation Code §§ 452.056 and 452.0561 to be “useless acts.” This Court should not abandon the Texas judiciary’s long-held deference to the legislative function to fabricate a new rule absolving the government’s private contractors of liability for their torts.

C. The Legislature’s silence with respect to GTECH or other of the Texas Lottery Commission’s private contractors demonstrates that the Legislature did not intend to extend immunity to them.

When the Legislature expresses its intent regarding a subject in one setting, but, as here, remains silent on that subject in another, a court abides by the rule that

such silence is intentional.¹ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497, 497 n.4 (Tex. 2013) (citing *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 175 (Tex. 2013); *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 859 (Tex. 2002); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 358 (Tex. 2001); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 885 (Tex. 2000)). Accordingly, this Court “must give effect to the statute’s silence on this issue and the Legislature’s decision not to confer” immunity to contractors such as GTECH. See *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 139 (Tex. 2013); *Seay v. Hall*, 677 S.W.2d 19, 25 (Tex. 1984) (“While this court may properly write in areas traditionally reserved to the judicial branch of government, it would be a usurpation of our powers to add language to a law where the [L]egislature has refrained.”); *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920) (“[Courts] are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law.”).

The Legislature saw fit to extend immunity to two limited classes of private contractors. The Legislature has apparently made the policy determination that extension of immunity to the Texas Lottery Commission’s private contractors does

¹In *Adcock*, the court says it will “generally” abide by the rule, but research has revealed no instance in which it has not done so.

not advance Texas public policy. The courts should not interfere with the legislative balancing of policy interests.

E. Public policy considerations do not support the extension of immunity to private contractors in the employ of the government.

The most common reason given to consider extending governmental immunity to private contractors is that such an act will improve the public fisc. GTECH can point to no study, quantification, or other determination of this supposed benefit. GTECH has nothing in the record to substantiate that point, and the most it can offer is conjecture.

In Texas, the extension of immunity proposed by GTECH may only come after careful legislative fact-finding and balancing of competing policy concerns. The record here is devoid of any information that would assist the Court in making such a determination on its own, so the wisest and safest, and least judicially active, course is to let the Legislature do what legislatures are supposed to do.

Respectfully submitted,

KELLY, DURHAM & PITTARD, L.L.P.

/s/ Peter M. Kelly

Peter M. Kelly (Lead Counsel)

State Bar No. 00791011

1005 Heights Boulevard

Houston, Texas 77008

Telephone: 713.529.0048

Facsimile: 713.529.2498

Email: pkelly@texasappeals.com

/s/ Thad D. Spalding

Thad D. Spalding
State Bar No. 00791708
P.O. Box 224626
Dallas, Texas 75222
Telephone: 214.946.8000
Facsimile: 214.946.8433
Email: tspalding@texasappeals.com

LAGARDE LAW FIRM, P.C.

/s/ Richard L. LaGarde

Richard L. LaGarde, Co-Counsel
State Bar No. 11819550
Mary Ellis LaGarde
State Bar No. 24037645
3000 Wesleyan Street, Suite 380
Houston, Texas 77027
Telephone: 713.993.0660
Facsimile: 713.993.9007
Email: richard@lagardelaw.com
Email: mary@lagardelaw.com

MANFRED STERNBERG & ASSOCIATES, PC

/s/ Manfred Sternberg

Manfred Sternberg, Co-Counsel
State Bar No. 19175775
4550 Post Oak Place Dr. #119
Houston, Texas 77027
Telephone: 713.622.4300
Facsimile: 713.622.9899
Email: manfred@msternberg.com

***Counsel for Appellant
Dawn Nettles***

CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this post-submission brief (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, issues presented, signature, proof of service, and certificate of compliance) is 1,088.

This brief complies with the typeface requirements of TRAP 9 because:

WordPerfect X6 in 14-point Aldine401 BT.

/s/ Peter M. Kelly

Peter M. Kelly

CERTIFICATE OF SERVICE

A true and correct copy of this *Appellant's Post-Submission Brief* has been forwarded to all counsel of record on January 18, 2017, as follows:

Nina Cortell, Lead Counsel
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Fax: 214.651.5940
nina.cortell@haynesboone.com

Kent Rutter
HAYNES AND BOONE, LLP
1221 Mckinney Street, Suite 2100
Houston, Texas 77010-2007
Fax: 713.547.2600
kent.rutter@haynesboone.com

Kenneth E. Broughton
kbroughton@reedsmith.com
Michael H. Bernick
mbernick@reedsmith.com
Arturo Munoz
amunoz@reedsmith.com
REED SMITH, LLP
811 Main Street, Ste 1700
Houston, Texas 77002-6110
Fax: 713.469.3899

Ryan S. Mindell
ASSISTANT ATTORNEY GENERAL
Financial Litigation, Tax and
Charitable Trust Division
P.O. Box 12548
Austin, Texas 78711-2548
Fax: 512.477.2348
Counsel for Appellee
Texas Lottery Commission

Counsel for Appellee
GTECH Corporation

/s/ Peter M. Kelly
Peter M. Kelly