IN THE SUPREME COURT OF TEXAS

No. 15-0932

AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTER, LLC, PETITIONERS,

v.

LATASHA FREEMAN, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued December 7, 2017

(Filed Jun. 29, 2018)

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE BROWN, and JUSTICE BLACKLOCK joined.

JUSTICE GUZMAN filed a dissenting opinion.

JUSTICE DEVINE filed a dissenting opinion, in which JUSTICE GUZMAN joined.

To protect the separation of powers essential to the structure and function of American governments, the political question doctrine teaches that the Judicial Branch will abstain from matters committed by constitution and law to the Executive and Legislative

Branches.[1] "The complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."[2] Among United States military troops stationed in war zones are dogs who protect soldiers and others by sniffing out enemy improvised explosive devices ("IEDs"). The claim in this case is that because of negligent training and handling by private military contractors, one such dog bit the plaintiff on a U.S. Army base in Afghanistan. The defense is that the incident was caused by the Army's use and prescribed manner of quartering the dog. We conclude that the dispute cannot be resolved without inquiry into military judgments that the political question doctrine precludes. We hold that the claim is nonjusticiable and, therefore, the district court correctly dismissed it. We reverse the judgment of the court of appeals[3] and render judgment accordingly.

I

In 2011, respondent LaTasha Freeman, a civilian employed as an administrative clerk by a private military contractor, was stationed at Camp Mike Spann, a U.S. Army base near Mazar-i-Sharif in northern

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[1] *See Baker v. Carr*, 369 U.S. 186, 210-211 (1962); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777-778 (Tex. 2005).

[2] *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

[3] 494 S.W.3d 393 (Tex. App.—Corpus Christi 2015).

Afghanistan. The base was a secured military position supporting tactical combat operations in the heart of the war zone. Named for the first American combat casualty in Afghanistan after the fall of the Taliban in 2001, the base opened in 2006 and once held some 2,000 coalition troops. The United States turned it over to the Afghans in April 2014.

Stationed among the troops at Camp Mike Spann were explosive-detection dogs provided to the Army to sniff for IEDs. IEDs have been called "the No. 1 killer of civilians and troops in Afghanistan."[4] The Pentagon has reportedly concluded that "the best weapon against IEDs [is] still a handler and his dog."[5] Another report states that "[o]n average, these four-footed soldiers are 98 percent accurate in their detection abilities . . . and depending on the task and climate, can work up to 12 hours a day."[6]

One such dog, Kallie, was owned by petitioner American K-9 Detection Services, LLC ("AMK9"), a Florida company, which contracts with the Department of Defense to provide teams of "contract working

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[4] Sean Carberry, *Sniffing Out Bombs in Afghanistan: A Job That's Gone to the Dogs*, NPR (March 8, 2013), http://www.npr.org/2013/03/10/17381569/sniffing-out-bombs-in-afghanistan-a-job-thats-gone-to-the-dogs.

[5] Rebecca Frankel, Essay, *Military Dogs Sniff Out IEDs, Save Lives*, WALL STREET J. (Oct. 31, 2014), http://www.wsj.com/articles/military-dogs-sniff-out-ieds-save-lives-1414772453.

[6] Maryann Mott, *Dogs of War: Inside the U.S. Military's Canine Corps*, NAT'L GEOGRAPHIC (Apr. 9, 2003), http://news.nationalgeographic.com/news/2003/04/0409_030409_militarydogs.html.

dog[s]" and handlers to the Armed Services. The dog-handler teams are trained in the United States, then deployed to Afghanistan. As Freeman concedes, "AMK9 provides these services which protect our national security. . . . The job that they do as far as training and having their dogs go out and sniff for bombs to protect our soldiers out in the field is absolutely critical to protecting our soldiers, protecting our civilians". Kallie was trained by AMK9 and a Texas company, petitioner Hill Country Dog Center, LLC.

One morning, Freeman had walked with a coworker to a security checkpoint to escort arriving vehicles to their parking places. She was standing a few yards from the animal shelter in which Kallie was housed. The AMK9 incident report states that Kallie's handler was nearby, as well as another dog handler who was searching a vehicle, but Freeman says she did not see them. According to Freeman, Kallie ran through the shelter's open door towards her and jumped at the back of her left shoulder. Kallie bit Freeman's shoulder and "shook [Freeman's] left arm violently back and forth." Kallie then bit Freeman's right buttock and pulled down on her pants pocket. The incident report states that Kallie's handler quickly regained control of her. Freeman says a bystander pulled Kallie off her. Kallie's bites did not break Freeman's skin. The incident report states: "Injured Person(s) . . . NONE", "Nature of injury . . . NONE", "Details of First Aid/Medical Attention/Hospitalization/Evacuation/Leave . . . NONE", and "Nature of Damage/Loss . . . Small puncture mark on left sleeve of jacket."

Kallie's kennel in the shelter had 2 adjacent holding pens separated by a vertical divider and open at the top. The door to Kallie's side of the kennel was shut, but the door to the adjoining pen was not. According to the incident report, Kallie managed to jump over the divider between the 2 pens and escape out that pen's and the shelter's open doors. She was running over to her handler when she saw Freeman. "In her playful yet rough manner", the report continues, Kallie "jumped up against" Freeman "to play and seek attention, but in doing so snapped her jaw and punctured the left front sleeve of [Freeman's] jacket."

A week later, AMK9's project manager emailed Freeman to apologize for the incident. "The Army guys", he said, "had built new kennels" without tops on them, and Kallie had jumped over a divider between pens in the kennel and run out the open door of the other pen. Following the incident, the manager said, "[t]ops [were] put on the kennels and the handler was reprimanded." He explained that Kallie was "a very playful dog", that "the soldiers play tug a war and the dogs will mouth them as well as jump[ ] around," and that Kallie "was just trying to play with" Freeman. Freeman had not been "attacked', he said; "when these dogs are given the command attack, there are serious injuries to follow". "These Dogs are here to help keep you, me, soldiers and everyone else at these [forward operating bases] as safe as possible," he said. "[T]he last thing we want is one of our own being injured by the dogs[;] we are all on the same team over here." The manager offered to replace Freeman's jacket.

In 2013, Freeman filed a claim against her employer and its carrier under the Defense Base Act,[7] an extension of the Longshore and Harbor Workers' Compensation Act,[8] which she later settled for $250,000. She also sued AMK9 and Hill Country, alleging that they were negligent in training Kallie and her handler and in failing to restrain her. She now claims to suffer from complex regional pain syndrome and to be completely disabled. She seeks $1 million in damages.

According to AMK9, the Army designed and built Kallie's kennel with no top and required AMK9 to use it. Because the kennel design allowed Kallie to escape, AMK9 asserts that Freeman's injuries were caused by the Army. AMK9 filed a plea to the jurisdiction asserting that Freeman's claims are nonjusticiable under the political question doctrine because they require an assessment of the Army's involvement in causing her alleged injuries.[9] AMK9 also moved to have the Army and the Department of Defense named responsible third parties under Chapter 33 of the Texas Practice and Remedies Code.[10] The trial court granted that motion, granted AMK9's plea, and dismissed the case.

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[7] 42 U.S.C. §§ 1651–1654.

[8] 33 U.S.C. §§ 901–950.

[9] AMK9's plea also asserted that it is entitled to derivative sovereign immunity and that Freeman's claims are preempted under the Federal Tort Claims Act's combatant-activities exception, 28 U.S.C. § 2680(j), and under the Defense Production Act of 1950, 50 U.S.C. §§ 4501–4568.

[10] TEX. CIV. PRAC. & REM. CODE §§ 33.001–.017.

The court of appeals reversed and remanded the case for further proceedings.[11] The court acknowledged AMK9's assertion that the Army's actions were the proximate cause of the incident but rejected the application of the political question doctrine, concluding that AMK9 had "produced [no] evidence that the Army, in failing to design and build the kennel such that the pen dividers extended to the ceiling, could have reasonably foreseen that such failure would result in injuries to a person outside the kennel."[12] The court also faulted AMK9 for not having "presented any evidence establishing that the Army was actually negligent in designing the kennel."[13]

We granted AMK9's and Hill Country's petitions for review.[14]

II

A

In *Marbury v. Madison*, Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[15] To the courts alone belongs the power to authoritatively

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[11] 494 S.W.3d 393, 411 (Tex. App.–Corpus Christi 2015).

[12] *Id.* at 403.

[13] *Id.*

[14] 60 Tex. Sup. Ct. J. 1606 (Sept. 1, 2017).

[15] 5 U.S. (1 Cranch) 137, 177 (1803).

interpret the constitution.[16] But the limits on judicial power are as important as its reach. "The province of the court", Chief Justice Marshall wrote,

> is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[17]

The Supreme Court expanded on this political question doctrine in *Baker v. Carr*, setting out 6 tests for identifying issues beyond the courts' power to decide.[18] Important here are the first 2: "a textually

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[16] *See W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) ("The final authority to determine adherence to the Constitution resides with the Judiciary.").

[17] *Marbury*, 5 U.S. (1 Cranch) at 170.

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> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a

demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it".[19] The 2 tests, the Supreme Court has explained, are related: "the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[20]

Baker was careful to note that the doctrine "is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."[21] The issue in *Baker*

> political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

Baker distinguished between nonjusticiable issues, like political questions, and jurisdictional issues. Unlike cases over which the court lacks jurisdiction, "[i]n the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* at 198. In Texas, "[s]ubject matter jurisdiction requires . . . that the case be justiciable." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Some cases "lack[ ] justiciability from the moment of pleading," while in others, "the court must retain certain limited authority" to develop the issue and dispose of the case. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 865 (Tex. 2010).

[19] *Baker*, 369 U.S. at 217.

[20] *Nixon v. United States*, 506 U.S. 224, 228–229 (1993).

[21] *Baker*, 369 U.S. at 217.

was deeply political: whether states could apportion legislative districts with unequal numbers of voters.[22] Indeed, as the Supreme Court has observed, *Marbury* itself "was also a 'political' case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered."[23] The application of the doctrine depends not at all on whether an issue is political—few statutory and constitutional issues are not at least in some sense political—but rather on whether an issue is committed to another branch of government and therefore outside the judiciary's authority to address.

"The nonjusticiability of a political question", as *Baker* states, "is primarily a function of the separation of powers."[24] In the federal courts, "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[25] The separation of the powers of government, implicit in the United States Constitution, is explicit in the Texas Constitution, which states:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those

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[22] *See id.* at 192–195.

[23] *INS v. Chadha*, 462 U.S. 919, 943 (1983).

[24] 369 U.S. at 210.

[25] *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

> which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[26]

We have assumed that the *Baker* factors that "define nonjusticiable political questions for purposes of demarcating the separation of powers in the federal government under the United States Constitution . . . serve equally well in defining the separation of powers in the state government under the Texas Constitution".[27] But in this case, we must consider the separation of powers among the Texas judiciary and the federal Executive and Legislative Branches. We think that separation is implicitly required by our state constitutional provision, as well as by principles of federalism, and mirrors the same separation of powers among the branches of government in Texas. So while we are guided in our view of the political question doctrine by *Marbury* and *Baker* as well as by other federal-court decisions, we apply the doctrine here as required for the separation of powers mandated by the Texas Constitution.

"The [United States] Constitution emphatically confers authority over the military upon the executive

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[26] TEX. CONST. art. II, § 1.

[27] *Neeley v. W. Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 778 (Tex. 2005).

and legislative branches of [the federal] government."[28] Article I gives Congress the power to declare war and to raise, organize, support, arm, and discipline the military.[29] And Article II makes the President Commander-in-Chief of the Armed Forces.[30] As the Supreme Court has observed, "[t]he complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches."[31] Moreover, "the Government's interests in military matters reasonably include limiting its own expenditure of scarce resources on the unmilitary task of participating in lawsuits as well as reducing contractors' liability exposure for the sake of future procurement efforts."[32] Just as the federal political question doctrine limits federal-court review of military decisions, Texas' political question doctrine limits state-court review of those decisions.[33]

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[28] *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997).

[29] U.S. CONST. art. I, § 8, cl. 11–16.

[30] *Id.* art. II, § 2.

[31] *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

[32] *McManaway v. KBR, Inc.*, 554 F. App'x 347, 350 (5th Cir. 2014) (Jones, J., dissenting from the denial of rehearing en banc).

[33] *Cf. Ghane v. Mid-S. Inst. of Self Defense Shooting, Inc.*, 137 So. 3d 212, 217-218 (Miss. 2014). The Mississippi Supreme Court has followed a similar trajectory in adopting a political question doctrine gleaned from the federal doctrine. In *In re Hooker*, 87 So. 3d 401, 404 (Miss. 2012), the court borrowed from federal jurisprudence to analyze a case implicating the separation of powers

Not all cases involving the military are foreclosed by the political question doctrine.[34] Ordinary tort suits, for example, may be within the competence of a court to decide, even when touching on military matters,[35] but not when "[t]he interjection of tort law into the realms of . . . military affairs would effectively permit judicial reappraisal of judgments the Constitution has committed to the other branches."[36] Each case requires "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial

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within the Mississippi government, that is, between the Mississippi governor and judiciary, because its "state government was modeled after the federal system." In *Ghane*, the court applied the doctrine to a tort claim involving military decisions and a private military contractor, noting that it had "adopted the political question doctrine in [*Hooker*]." 137 So. 3d at 217.

[34] *See Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *Gilligan*, 413 U.S. at 11–12 ("[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel".).

[35] *See McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1364 (11th Cir. 2007) (in a suit against a civilian company that contracted with the military to provide air travel to service members, explaining that the second *Baker v. Carr* factor did not apply because "[i]t is well within the competence of a federal court to apply negligence standards to a plane crash").

[36] *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

action."[37] The political question must be "inextricable from the case".[38] Importantly, the court "must analyze [the case] as it would be tried, to determine whether a political question will emerge."[39] And "[i]f we must examine the Army's contribution to causation, 'political question' will loom large."[40]

B

In determining how to apply the political question doctrine to a claim against a private military contractor like the claim in this case, an initial consideration is whether adjudicating the claim will require reexamination of a military decision.[41] When a contractor operates under the military's plenary control, the contractor's decisions may be considered de facto military decisions.[42] In one case, for example, the wife of an

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[37] *Baker*, 369 U.S. at 211–212.

[38] *Id.* at 217.

[39] *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1202 (5th Cir. 1978).

[40] *Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008).

[41] *See Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 466 (3d Cir. 2013) ("Because defense contractors are not coordinate branches of government, a determination must first be made whether the case actually requires evaluation of military decisions."); *Lane*, 529 F.3d at 560 (explaining that the first, "textual commitment" *Baker v. Carr* factor requires the defendant to "demonstrate that the claims against it will require reexamination of a decision *by the military*" (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1359 (11th Cir. 2007))).

[42] *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1276–1277 (11th Cir. 2009).

Army sergeant who was injured while escorting a large military convoy sued the contractor that operated the tanks.[43] She asserted that the contractor-employed driver of the tank on which her husband was injured had negligently driven too fast under the circumstances, failed to keep a proper lookout, and failed to inspect the tank before operating it.[44] She sued the contractor for the driver's negligence and for negligent hiring and entrustment.[45] The court concluded that the case would require reexamination of military decisions, "includ[ing] the military's decision to utilize civilian contractors in conducting the war in Iraq" and to utilize them in the mission in which the sergeant was injured.[46] The military had plenary control over the convoy, including deciding the date and time for departure, the route, the size, the speed, and the security measures.[47] Even if the driver bore some blame for the accident, the court reasoned, the contractor would surely argue that the military commander was negligent in his decisions about the convoy.[48] And while the driver was physically in control of the tank and could have ignored his orders, the contractor's defense would necessarily involve military orders.[49] Thus, the case would require evaluating decisions over which the

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[43] *Id.* at 1275–1276.

[44] *Id.* at 1279.

[45] *Id.*

[46] *Id.* at 1281.

[47] *Id.* at 1281–1282.

[48] *Id.* at 1286.

[49] *See id.* at 1284.

military retained plenary control, and the court upheld the district court's dismissal.[50]

Even when the contractor retains discretion over its actions, unreviewable military decisions may still be implicated by either the plaintiff's claims or the defendant's defenses.[51] "We must look beyond the complaint, considering how the Plaintiff[] might prove [her] claims *and* how [the defendant] would defend."[52] Causation defenses, in particular, often pose political questions when the court must disentangle the military's and contractor's respective causal roles.

A proportionate-liability defense may inject a nonjusticiable political question into a case.[53] For example, the family of a soldier electrocuted while showering in military barracks sued a contractor for failing to properly ground the water pump.[54] The contractor argued in defense that the military's actions were the sole proximate cause of the death because it had chosen unsafe barracks with significant electrical

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[50] *Id.* at 1296.

[51] *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 467 (3d Cir. 2013).

[52] *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008).

[53] *Harris*, 724 F.3d at 474; *cf. Fisher v. Halliburton*, 667 F.3d 602, 621 (5th Cir. 2012) ("Whether this case presents a nonjusticiable political question is a significant issue, particularly since [the contractor] sought to have the role of the United States considered under section 33.004(I) of [the] Texas Civil Practice and Remedies Code not as a party to the litigation, but as a responsible third party.").

[54] *Harris*, 724 F.3d at 463.

problems.[55] The court reasoned that a sole-cause defense would not raise nonjusticiable issues because, while it would require determination of facts related to strategic military decisions, it would not require the fact-finder "to reexamine their wisdom."[56] On the other hand, the court explained, determining whether the military was a proximate cause for apportioning responsibility would create nonjusticiable issues because "there is simply no way to determine damages without evaluating military decisions. The fact-finder cannot decide the respective degrees of fault as between a military contractor . . . and the military without evaluating the decisions made by each".[57] In the latter situation, the court concluded that "[e]liminating the plaintiff['s] claims for [those] damages [was] the appropriate solution".[58]

Similarly, a contributory-negligence defense may require reexamination of military decisions if it requires considering the fault of a military decision-maker.[59] After a power outage, a Marine was

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[55] *See id.* at 470–472.

[56] *Id.* at 473.

[57] *Id.* at 474.

[58] *Id.* at 475. *Harris* held that the political question doctrine would apply only if a proportionate-liability system applied. *Id.* The district court had not yet ruled which state's law applied, so the circuit court remanded the case with instructions to dismiss if the district court found that the law of a state with a proportionate-liability scheme (including Texas) applied. *Id.* at 482.

[59] *See Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411–412 (4th Cir. 2011).

electrocuted while trying to install a backup generator.[60] Despite being told not to turn on the main generator because a group of Marines was working on it, the contractor turned it on, resulting in the Marine's injuries.[61] The contractor asserted a contributory-negligence defense, which would have required the court to decide whether the Marines were reasonable in trying to install the additional generator and whether backup power should have been supplied to that area.[62] The defense made the claim nonjusticiable.[63]

C

Even if a claim requires reexamination of a military decision, that decision must be one that is "insulated from judicial review."[64] "[D]ecisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments" beyond judicial review.[65] Some decisions, such as whether to employ military force or the proper tactics to use during combat, are clearly professional military judgments that are beyond the judiciary's

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[60] *Id.* at 404.

[61] *Id.*

[62] *Id.* at 411–412.

[63] *Id.* at 412.

[64] *Lane v. Halliburton*, 529 F.3d 548, 560 (5th Cir. 2008) (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1360 (11th Cir. 2007)).

[65] *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

competence.[66] But other decisions, at first glance appearing to be decisions similar to those civilians make and subject to judicial review, are still yet "complex[,] subtle, and professional decisions"[67] that bear on military strategy.

As one circuit court has observed, "[h]ousing and maintenance decisions on a battlefield are exactly this type of decision".[68] In the case of the soldier electrocuted while showering, the contractor's proportionate-liability defense injected a political question into the case.[69] The fact-finder would be required to review "the military's decisions to house troops in unsafe barracks that would not be repaired."[70] To choose which barracks in which to house troops and whether to repair them, the military must consider issues unique to the battlefield such as the danger relative to other options and the cost of repair relative to other uses of its scarce resources. Judges lack not only the constitutional authority but also the expertise to evaluate these decisions.

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[66] *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

[67] *Gilligan*, 413 U.S. at 10.

[68] *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 478 (3d Cir. 2013).

[69] *Id.* at 474.

[70] *Id.*

III

We turn now to the "discriminating analysis"[71] required to apply these considerations in the political question doctrine to this case.

AMK9 contends that the Department of Defense (with which it contracted to provide Kallie) and the Army (in which Kallie served) caused Freeman's injuries, in part because the Army built (and rebuilt) Kallie's kennel to comply with its regulations and required AMK9 to use it. The trial court granted AMK9's motion to designate the Department and the Army as responsible third parties, thereby requiring "[t]he trier of fact . . . [to] determine [their] percentage of responsibility . . . for . . . causing or contributing to cause" Freeman's injury.[72] Thus, as one court has observed, the political question doctrine "loom[s] large."[73]

Freeman argues that the Department and the Army cannot be joined as responsible third parties because, as alleged by AMK9, their only duty to construct dog kennels was contractual and does not supply a sufficient legal standard for determining an allocation of responsibility to them. We think the contractual duty is sufficient, but in any event, the Army undertook to build Kallie's kennel and remediate it and required Kallie to use it. Had the actor been a private entity rather than the Army, these facts alone would support a

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[71] *Baker v. Carr*, 369 U.S. 186, 211 (1962).

[72] TEX. CIV. PRAC.& REM. CODE § 33.003(a).

[73] *Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008).

negligent-undertaking claim.[74] Therefore, we must decide whether litigating this case, including AMK9's proportionate-responsibility defense, will necessarily require reexamination of sensitive military decisions.

The military had plenary control over at least some of the decisions implicated by Freeman's claim. AMK9's contention that Freeman's alleged injury occurred when Kallie jumped over an internal partition between pens and escaped through an adjacent pen's open door calls into question the Army's design decisions not to extend the internal partition to the ceiling and not to cover the kennel. The Army designed and constructed the kennel and required AMK9 to use it. While Freeman argues that only AMK9's negligent failure to train and control Kallie caused her injury, AMK9 argues, and will argue at trial, that the Army's design was to blame. AMK9's proportionate-liability defense requires the fact-finder to evaluate these decisions. The Army's design decisions would be front and center at trial. On that point, this case is virtually indistinguishable from *Harris*, in which the United States Court of Appeals for the Third Circuit held that a private contractor's proportionate-liability defense would render the case nonjusticiable.[75] If this case were to proceed, the fact-finder would be required to determine the degree to which the Army was

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[74] *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000) (recognizing "a duty to use reasonable care . . . when a person undertakes to provide services to another, either gratuitously or for compensation").

[75] 724 F.3d at 474.

responsible for Freeman's injury. This inquiry would require a reexamination of Army decisions, contrary to *Baker*'s first factor.

The Army's decisions about designing and constructing the kennels are unreviewable military decisions because they go to the equipping of the military, constitutionally committed to the federal political branches. This includes decisions about base configuration, including the design for kennels that house trained explosive-detection dogs like Kallie. Such decisions are similar to decisions about the quartering of soldiers and require similar risk-weighing judgments and allocation of scarce resources. Here, it is undisputed that the Army did not comply with its internal requirement to construct the kennel in a certain way, and a court should not insert itself into determining whether the Army should or should not have followed its guidelines. Were the roofs left off in order to allow the dogs to escape in the event of an attack? Or for ventilation in the desert heat? Or because those responsible for construction were summoned to other tasks? Or to conserve budgetary or material resources for additional structures? Only the Army can answer these questions in accounting for the construction of Kallie's kennel.

JUSTICE DEVINE argues that whether the Army actually caused Freeman's injury is a disputed issue of fact, which can be decided only by the jury.[76] Of course, we agree. But the dissenting JUSTICES argue that the

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[76] *See post* at ___ (Devine, J., dissenting).

determination of whether to apply the political question doctrine must await full discovery and the jury's verdict.[77] If the Army is found not to have caused Freeman's injury, then the case went to trial as it should have, and if the Army is found to have caused Freeman's injury, then the case should have been dismissed for want of jurisdiction—which no longer matters. Whether the political question doctrine applies or not, in the dissenting JUSTICES' views, the case must be tried. The doctrine is reduced to an irrelevance. But the doctrine does not protect against determining the Army's liability. No one argues that the Army can be liable for Freeman's injury. Rather, the doctrine protects against judicial reexamination of military decisions.[78] At least AMK9's defenses, and perhaps even Freeman's claim, cannot be adjudicated without putting the Army's conduct and decisions on trial. The political question doctrine requires us to be mindful of the broader implications of reviewing sensitive military decisions, such as maintaining respect for the separation of powers and the federalism system outlined in the United States Constitution, minimizing interference with military prerogatives, limiting military

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[77] *Post* at ___ (Guzman, J., dissenting); *post* at ___ (Devine, J., dissenting); *see Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–228 (Tex. 2004) ("If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.").

[78] *See U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 457–458 (1992) ("When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue.").

expenditures on participating in lawsuits (such as in discovery requests), and reducing contractors' liability for the sake of future procurement efforts.[79] The inextricable involvement of military decisions in this case is not a matter of fact but a matter of law.

The dissenting JUSTICES argue incorrectly that our analysis ignores our usual process for deciding jurisdictional issues.[80] As we have explained,

> [w]hen the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable.[81]

In this case, the trial court properly exercised its discretion to dismiss the case early on. "If the evidence creates a fact question *regarding the jurisdictional issue*, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder."[82] The dissenting JUSTICES assume that the issue in determining whether to apply the political question doctrine in this case is whether, in fact, the

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[79] *See McManaway v. KBR, Inc.*, 554 F. App'x 347, 350 (5th Cir. 2014) (Jones, J. dissenting from the denial of rehearing en banc).

[80] *See post* at ___ (Guzman, J., dissenting); *post* at ___ (Devine, J., dissenting).

[81] *Miranda*, 133 S.W.3d at 227.

[82] *Id.* at 227–228 (emphasis added).

Army is responsible for causing Freeman's alleged injury. But the issue is not whether the Army can be held liable; all agree that it cannot be. The *jurisdictional* issue is whether litigating the case inextricably involves reviewing military decisions. It certainly does. The dissenting JUSTICES ignore "the fundamental precept that a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided."[83]

JUSTICE DEVINE's dissent also argues that today's decision "bars all tort suits where a military contractor—or any other defendant—is able to muster a mere allegation that a government actor whose decisions are insulated by the political-question doctrine partly caused the alleged harm."[84] This is simply not true. The cases we have cited differentiate among claims in which military decisions are or are not inextricably involved. If, for example, Kallie bit Freeman while being routinely exercised by her civilian-contractor handler, her biting Freeman would have had nothing to do with the military. The political question doctrine is not always easy to apply, but it certainly cannot be invoked to bar all claims that merely happen to have a military setting.

Whether the Army was justified in ignoring its requirements and constructing the kennel as it did is not a question a Texas court can answer. Thus, we hold that this case is nonjusticiable due to the presence of

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[83] *Id.* at 228.

[84] *Post* at ___ (Devine, J., dissenting).

an inextricable political question. We need not consider the other grounds that AMK9 asserts for dismissal.

IV

Hill Country did not join AMK9's plea to the jurisdiction or file its own. The court of appeals held that the trial court's *sua sponte* dismissal of the claims against Hill Country was erroneous because Hill Country did not submit authority to establish either Hill Country's immunity or the trial court's lack of subject matter jurisdiction. "Subject matter jurisdiction is an issue that may be raised for the first time on appeal[,] it may not be waived by the parties",[85] and it may—indeed, *must*—be raised by an appellate court on its own.[86] The political question doctrine examines justiciability, a jurisdictional matter. Thus, it may be raised at any time or by the court *sua sponte*.

Freeman's claims against Hill Country must be dismissed on the same political question grounds outlined above. Pragmatically, the case will almost certainly require examination of the same apportionment-of-liability questions outlined above, though up to this point Hill Country has not had to join or separately file a motion to designate a responsible third party. Because we favor early resolution of justiciability issues, we hold that the trial court was correct to dismiss Freeman's claims against Hill Country.

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[85] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993).

[86] *See id.* at 445–446.

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The district court correctly concluded that Freeman's claims inextricably involve a reexamination of military decisions beyond its power to conduct. The judgment of the court of appeals is reversed and judgment is rendered that all claims be dismissed.

Nathan L. Hecht
Chief Justice

Opinion delivered: June 29, 2018

IN THE SUPREME COURT OF TEXAS

No. 15-0932

AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTER, LLC, PETITIONERS,

v.

LATASHA FREEMAN, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE GUZMAN, dissenting.

Over the past two decades, the military's use of private contractors to support its overseas missions has skyrocketed.[1] "At times, the number of contract employees has exceeded the number of military personnel alongside whom they work in these warzones."[2] In a decision carrying serious ramifications for those injured by private contractors in combat zones, the Court holds that contractors can escape liability for their actions merely by pointing the finger at the military. The Court's analysis turns on a dangerous misapplication of the political question doctrine and runs counter to our plea-to-the-jurisdiction jurisprudence. I therefore join JUSTICE DEVINE's dissenting opinion and write separately to expound on these substantive and procedural shortcomings.

I

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid."[3] The political question doctrine is a "narrow exception" to that charge,[4] applying *only* when a political question "is inextricable from the case at bar."[5] But with virtually no United States Supreme Court guidance on the topic, courts have been inconsistent in

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[1] *In re KBR, Inc. (Burn Pit Litig.)*, 744 F.3d 326, 331 (4th Cir. 2014).

[2] *Id.*

[3] *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (internal quotation marks omitted).

[4] *Id.* at 195.

[5] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

determining how entwined a political question must be for it to be "inextricable" from a case. Multiple approaches have been employed, and this case presents a prime example of the lingering uncertainty.

The Court views the Army as a responsible third party on AMK9's mere say so and dismisses the case without any evidence of that fact, concluding that simply designating the Army as a potentially responsible party means the merits of the case could never be determined without evaluating the military's battlefield decisions. I believe courts must first determine whether a fact issue exists that could obviate any need to assess the military's decisions—here, whether the Army actually caused an injury. Other Courts have taken different analytical paths, such as declining to focus the inextricability determination on the defensive theories that have been asserted—as the Court does here—because that "'give[s] defendants too much power to define the issues.'"[6] Though the existing political-question jurisprudence is fairly well-developed, it is decidedly uneven regarding inextricability, and the Supreme Court has not weighed in to settle the matter.

One thing is clear, however; federal courts confronting the issue have applied a much more searching standard than the Court adopts today, defining

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[6] *Ghane v. Mid-S. Inst. of Self Defense Shooting, Inc.*, 137 So. 3d 212, 221 (Miss. 2014) (quoting *McMahon v. Gen. Dynamics Corp.*, 933 F. Supp. 2d 682, 695 (D.N.J. 2013)).

inextricable to mean the political question is certain,[7] required,[8] and impossible to avoid.[9] Declining to dismiss a suit unless a political question meets the inextricability standard preserves access to the courts and fulfills the judiciary's obligation to resolve disputes. But, here, the Court gives short shrift to this crucial precept, summarily concluding a merits-based disposition is beyond judicial ken.[10] Rather than ensuring the inextricable presence of a political question, the Court holds dismissal is required if a contractor asserts—without evidence—that the military might be a causal contributor. The Court abjures its responsibility to decide justiciable cases by embracing a legal standard that terminates litigation before any determination

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[7] *See Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) ("[A] court must satisfy itself that [a] political question will certainly and inextricably present itself.").

[8] *See Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1215 (9th Cir. 2017) (framing the issue as whether the claims or causation defense "would actually require the court to review the wisdom of the Navy's decisions"); *In re KBR, Inc. (Burn Pit Litig.)*, 744 F.3d 326, 340 (4th Cir. 2014) (discussing whether causation defense "require[s] evaluation of the military's decision making"); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1358 (11th Cir. 2007) ("A case may be dismissed on political question grounds if—and only if—the case will require the court to decide a question possessing one of these six [*Baker*] characteristics.").

[9] *See Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282–83 (11th Cir. 2009) (analyzing whether "it would be impossible to make any determination" regarding negligence without scrutinizing military decisions).

[10] *Ante* at 21 ("[W]e hold that this case is nonjusticiable due to the presence of an inextricable political question.").

has been made that a political question is actually in play.

Though a court must be careful not to exercise jurisdiction it lacks, it must be equally careful not to decline to exercise jurisdiction it has.[11] The Court strikes the wrong balance here. The bright-line rule the Court adopts (1) favors tortfeasors over injured parties, (2) ignores the Supreme Court's holding that only inextricable political questions render a matter nonjusticiable, and (3) is repugnant to our plea-to-the-jurisdiction precedent. Applying the appropriate legal standard and following proper procedures may ultimately lead to dismissal of LaTasha Freeman's lawsuit. But if the military had no part in causing Freeman's injury, the political question doctrine does not bar a merits-based disposition.

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[11] As Chief Justice Marshall explained in *Cohens v. Virginia*:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

19 U.S. (6 Wheat.) 264, 404 (1821).

II

Whether a political question necessarily arises here remains to be seen. Discovery is still in the early stages, and the trial court dismissed the case without even ruling on Freeman's request for causation-related discovery. The Court concludes these circumstances portend nothing of consequence, holding a political question exists based solely on the contractor's allegations. This approach is misguided.

The existence of a political question requires a "discriminating inquiry into the precise facts and posture of the particular case" rather than "resolution by any semantic cataloguing."[12] The Court contravenes this directive by concluding that—despite the evidentiary void and without regard to the lawsuit's procedural posture—a political question is presented whenever a defendant alleges the military contributed to the harm claimed. The Court's analysis to the contrary notwithstanding, the procedural context is significant.

This case was decided on a plea to the jurisdiction, and under our well-settled procedures, naked allegations are not enough to sustain a jurisdictional plea. As we have explained time and again, when the jurisdictional inquiry and merits intertwine, as they do on the causation issue here, dismissal is improper absent proof that jurisdiction is lacking. Because such a plea invokes a summary-judgment type proceeding, any

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[12] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

fact disputes must be resolved by the factfinder.[13] The trial court does not, as the Court implies, have discretion to ignore the evidence and "dismiss the case early on."[14] Courts have discretion regarding *when*, not *whether*, the evidence should be considered.[15]

The point is illustrated in many of our sovereign-immunity cases. For example, a plea to the jurisdiction alleging sovereign immunity may not be granted on the bare assertion that the governmental unit was not grossly negligent and was thus immune from suit under the Tort Claims Act.[16] If, as here, the plea proceedings go beyond the pleadings, the trial court determines whether the evidence creates a fact issue regarding subject-matter jurisdiction, and if so, the case cannot be dismissed.[17] Indeed, a governmental entity may not be released from the case until the factfinder has resolved all facts necessary to determine the jurisdictional matter.[18] Concerning the political question doctrine, if a fact issue about the Army's responsibility exists, the political question doctrine may—depending on inextricability—preclude judicial

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[13] *See Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770–71 (Tex. 2018); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004).

[14] *Ante* at 20.

[15] *See Miranda*, 133 S.W.3d at 227.

[16] *Cf. id.* at 224–25, 231–32 (evaluating affirmative evidence that the governmental entity was not grossly negligent).

[17] *See Alamo*, 544 S.W.3d at 770; *Miranda*, 133 S.W.3d at 232.

[18] *See San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015).

resolution of the disputed fact. But in both sovereign-immunity and political-question cases, dismissal is neither warranted nor required unless evidence raising a fact issue is produced in the first instance.

The Court handwaves established procedure, saying fealty to our precedent would reduce the political question doctrine "to an irrelevance."[19] But this is little more than unfounded hyperbole. The Court fails to acknowledge that the political-question and sovereign-immunity doctrines involve common concerns, such as the need to avoid judicial second-guessing.[20] Our plea-to-the-jurisdiction procedures have not rendered sovereign immunity a nullity, and the political question doctrine is no more endangered by those procedures. The Court's analysis is conspicuously bereft of a compelling justification to jettison established precedent in favor of a special rule for political-question cases.

And this is not the only defect in the Court's analysis. A more disconcerting error lies in the evidentiary void the Court downplays. Because discovery was prematurely halted, the facts of this case have not been developed. The Court's disposition is contrary to the

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[19] *Ante* at 19.

[20] *Compare Baker v. Carr*, 369 U.S. 186, 217 (1962) (including as political-question factors "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government" and any "need for unquestioning adherence to a political decision already made"), *with Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994) ("The public would suffer if government officers, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions.").

approach taken by federal appellate courts, which look to the evidence, not the allegations, to determine whether a political question is genuinely in play. In case after case, federal courts have remanded for additional discovery and other proceedings necessary to determine whether a political question is actually—rather than potentially—inextricable from the case.[21]

This is a sound course of action we would be wise to follow because it fulfills our obligation to take cases that may be decided without encroaching on matters

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[21] *See Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1217 (9th Cir. 2017) ("As the facts develop, it may become apparent that resolving [the] superseding causation defense would require the district court to evaluate the wisdom of the Navy's decisions. . . . But at this point, that is not clear."); *In re KBR, Inc. (Burn Pit Litig.)*, 744 F.3d 326, 339 (4th Cir. 2014) ("[A]lthough the evidence shows that the military exercised some level of oversight over [KBR], we simply need more evidence to determine whether KBR or the military chose how to carry out these tasks. We therefore cannot determine whether the military control factor renders this cause nonjusticiable at this time."); *Lane v. Halliburton*, 529 F.3d 548, 567 (5th Cir. 2008) ("The Plaintiffs' negligence allegations move precariously close to implicating the political question doctrine, and further factual development very well may demonstrate that the claims are barred. However, . . . we cannot say at this point that [the] negligence claims necessarily implicate the political question doctrine."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1362 (11th Cir. 2007) ("At this early stage of the litigation, we therefore cannot say it is evident that McMahon's suit will call into question decisions made by the military, must less the kind of military decisions that might be insulated by the political question doctrine."); *see also Harris v. Kellogg, Brown & Root Servs., Inc.*, 724 F.3d 458, 469 (3d Cir. 2013) ("If there is sufficient evidence to support the defense, then the District Court must determine whether the defense actually presents a nonjusticiable issue.").

committed to the political branches and accords with our plea-to-the-jurisdiction procedures. But even though Freeman is entitled to jurisdictional discovery before her case is dismissed, the Court says Chapter 33's proportionate-responsibility provisions make evaluation of the military's role inevitable. On this point, the Court is demonstrably incorrect because a factual determination that the military was involved in the chain of causation is not equivalent to finding the military responsible.[22] Even if Chapter 33 inexorably implicates the military's liability, dismissal at this juncture is precipitous because the Army may not remain designated as a responsible third party. Though the trial court must grant a request to designate a responsible third party if the designation is supported by the pleadings and timely requested,[23] Chapter 33 requires the court to strike the designation if, after discovery, the proponent cannot back up its claim with evidence:

> After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court *shall grant* the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of

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[22] *See post* at 8-9 (Devine, J., dissenting).

[23] TEX. CIV. PRAC. & REM. CODE § 33.004(a)-(g); *see In re Coppola*, 535 S.W.3d 506, 507-08 (Tex. 2017) (orig. proceeding).

> fact regarding the designated person's responsibility for the claimant's injury or damage.[24]

Chapter 33 thus allows Freeman to extricate the Army from the case and avoid a political-question dismissal if evidence of responsibility is lacking after an adequate time for discovery. Yet Freeman has been denied the benefit of the safeguards the statute provides. The district court granted AMK9's plea to the jurisdiction a mere five days after granting the motion to designate the Army as a responsible third party. Five days is rarely an adequate time for discovery. And more importantly, AMK9 has not produced any evidence that the Army caused or contributed to Freeman's injury. The Court is affording the Army's designation as a responsible third party far more weight than Chapter 33 allows.

The Court does not mention Section 33.004(*l*), merely stating that the trial court has discretion to dismiss cases raising jurisdictional issues early in the proceedings.[25] But Chapter 33 does not allow such discretion; it requires the trial court to strike a responsible-third-party designation if the defendant cannot—with evidence—support the designation. This scenario would, in this case, eliminate the existence of any political question.

Under Chapter 33, a responsible-third-party designation is permitted only on the terms and conditions provided in that statute, and through the process

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[24] TEX. CIV. PRAC.& REM. CODE § 33.004(*l*) (emphasis added).

[25] *Ante* at 20.

provided in Section 33.004(*l*), the alleged political question may be extricated from this case.[26] As the adage goes, he who lives by the sword today, may die by the sword tomorrow. Thus, rather than summarily dismissing on the basis of a political question, the cause should be remanded to the trial court to allow the parties to more fully engage the discovery process as required by Chapter 33, our plea-to-the-jurisdiction precedent, and the inextricability requirement.

III

The Supreme Court's most recent political-question guidance serves as a reminder that courts must not shirk their "responsibility to decide cases properly before [them]."[27] In *Zivotofsky v. Clinton*, the Court refused to find a political question precluded the third branch from passing on the constitutionality of certain parts of the Foreign Relations Act.[28] In so holding, the Court emphasized the judicial branch's duty to decide cases, observing that judges "appropriately exercise[]" the authority to determine the constitutionality of statutes on a regular basis.[29] "This is what courts do."[30]

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[26] *See Lane*, 529 F.3d at 566-67 (refusing to dismiss the lawsuit under Federal Rule of Civil Procedure 12(b)(1) because "we cannot say that all plausible sets of facts that would permit the recovery from KBR would also raise a political question").

[27] *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012).

[28] *See id.* at 194-96.

[29] *Id.* at 197.

[30] *Id.* at 201.

As a concurring opinion in *Zivotofsky* put it, courts may not "decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches."[31] After all, deciding such cases "is the role assigned to courts by the Constitution."[32]

Here, the Court abdicates that role in favor of a bright-line rule that unnecessarily and improperly tilts to the advantage of tortfeasors, allowing wrongdoers to evade responsibility by accusing others. Dismissal on "the mere chance that a political question may eventually present itself" is inappropriate[33] and works an injustice on those who risk their lives working alongside military contractors. Because we do not know now, with any certainty, that the potential political question cannot be extricated from this case,

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[31] *Id.* at 205 (Sotomayor, J., concurring).

[32] *Id.*; *see also* TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

[33] *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 (11th Cir. 2007); *see also Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (before dismissing on political-question grounds, "a court must satisfy itself that [a] political question will certainly and inextricably present itself").

dismissal is premature and improper. I respectfully dissent.

Eva M. Guzman
Justice

OPINION DELIVERED: June 29, 2018

IN THE SUPREME COURT OF TEXAS

No. 15-0932

AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTER, LLC, PETITIONERS,

v.

LATASHA FREEMAN, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE DEVINE, joined by JUSTICE GUZMAN, dissenting.

Standards of review dictate appellate review. The standard here is extremely deferential to LaTasha Freeman, the nonmovant: we view the facts and pleadings in the light most favorable to her and must deny

American K-9 Detection Services, LLC's (AMK9's) plea if a fact question about jurisdiction exists that also implicates the case's merits. *See Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004). This includes when jurisdiction depends on a fact question about proximate cause. *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 929 (Tex. 2015) (denying plea to the jurisdiction when the allegations "generate[d] a fact issue" about "proximate cause"). AMK9's plea is based on its allegation that the Army at least partly caused Freeman's injuries; but Freeman alleges that AMK9, not the Army, proximately caused her injuries. This is a classic fact-question.

So long as this fact question remains, we cannot grant AMK9's plea. Yet the Court flips the standard of review on its head by viewing the evidence in the light most favorable to AMK9, the movant. The Court does this through heavy reliance on the pronouncements—some of which are dicta—of several federal courts. I am unconvinced by their reasoning. The U.S. Supreme Court has not endorsed their views on the political-question doctrine in proportionate-responsibility systems, and we are not otherwise bound by their holdings. I would instead hold that when a political-question doctrine claim depends on a causal finding, we cannot dismiss the suit while causation is disputed. Because the Court's dismissal contravenes well-established plea-to-the-jurisdiction jurisprudence, and because no other ground AMK9 or Hill Country Dog Center, LLC asserts can sustain the plea, I dissent.

I. Jurisdiction over Freeman's claims against American K-9 Detection Services, LLC

A. Political-Question Doctrine

AMK9 argues in its plea that we lack jurisdiction because the Army at least partly caused Freeman's injuries, thereby implicating the political-question doctrine. A plea to the jurisdiction is a dilatory plea that defeats a cause of action whether the claims have merit or not. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). A defendant can use a plea to challenge jurisdiction based on the sufficiency of the plaintiff's pleadings or on the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 226. AMK9 challenges the jurisdictional facts. "[W]hether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is . . . a question of law" that we review de novo. *Id.*; *see also Tex. Nat'l Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). When the evidence is undisputed or does not raise a fact question about jurisdiction, the trial court rules on the plea as a matter of law. *Miranda*, 133 S.W.3d at 228. But when the evidence (1) creates a fact question about jurisdiction and (2) implicates the case's merits, "the trial court cannot grant the plea" and the fact-finder must resolve the fact question. *Id.* at 227-28. In such situations, we determine whether a fact question exists by taking all evidence favorable to the nonmovant as true, indulging every reasonable inference and resolving any doubts in her favor. *Id.* at 228.

This review essentially mirrors our summary-judgment standard: after the defendant presents evidence that the trial court lacks jurisdiction—and when such evidence also implicates the case's merits—the plaintiff must show only that a jurisdictional fact is disputed to survive the plea. *Id.* This standard of review saves plaintiffs from having to "put on their case simply to establish jurisdiction" in response to a dilatory plea, which "should be decided without delving into the [case's] merits." *Bland*, 34 S.W.3d at 554. Otherwise, a plaintiff like Freeman "would be required to try [her] entire case" just to show jurisdiction. *Id.*

Here, Freeman alleges that AMK9 was negligent for leaving Kallie unattended, not properly training her or her handler, not keeping her under restraint, and not securing the kennel. Freeman does not allege that the Army or its kennel design caused her injuries. AMK9 alleges these things. Thus, Freeman's allegations dispute that the Army proximately caused her injuries. This proximate-cause issue is what potentially raises a political question because if the Army caused Freeman's injuries, we might have to evaluate the Army's military decisions as a responsible third-party. The political-question doctrine, however, bars this suit if and only if a political question—here, the Army's military decisions—is "inextricable from the case." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The elements of proximate cause are cause-in-fact and foreseeability. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005). "Because proximate cause is ultimately a question for a fact-finder," we must sustain

AMK9's plea if Freeman's petition "'creates a fact question' regarding the causal relationship between [the Army's conduct] and the alleged injuries." *Ryder*, 453 S.W.3d at 929 (quoting *Miranda*, 133 S.W.3d at 228). AMK9 alleges that it had to use the Army's kennels, and that the Army's failure to place a top on these kennels at least partly caused Kallie's escape. Maybe so. But a juror might reasonably infer that, had AMK9 closed every kennel door, as well as the kennel building's outer door, the lack of a top would have been causally irrelevant.

Even if the Army was aware that this design might allow a dog to scale the internal dividers between kennel pens, that a successful escape was foreseeable to the Army is far from clear. As Freeman points out, the Army required AMK9 to close all of the kennel's doors and the kennel was inside a building. Had AMK9 closed either the kennel's or building's doors—as the Army required it to do—Kallie's escape attempt would have been futile. That arguably makes the foreseeability of her escape doubtful. And we resolve doubts in Freeman's favor. *See Miranda*, 133 S.W.3d at 228.

Furthermore, a juror could reasonably infer that an escape was as foreseeable to AMK9 as to the Army. In fact, because AMK9, not the Army, trained and handled Kallie, a juror could reasonably infer that AMK9 knew better than anyone whether Kallie might escape as she did. By indulging every reasonable inference and resolving any doubts in Freeman's favor, a juror could find that Kallie's escape was not foreseeable to

the Army and that AMK9's actions were the escape's cause-in-fact.

But no matter who proximately caused Kallie's escape, a juror could reasonably conclude that AMK9's allegedly negligent training was the attack's sole proximate cause. Freeman alleges that AMK9 trained Kallie such that she—contrary to the Army's contractual specifications—attacked without cause and without being ordered. Viewing these facts favorably to Freeman, a juror could reasonably conclude that a dog trained to the Army's specifications presents no attack threat to people like her. Thus, even if the Army partly caused Kallie's escape, a juror could reasonably conclude that an attack was not foreseeable to the Army and that AMK9's training was the attack's cause-in-fact. We must, therefore, conclude that a fact question about proximate cause exists.

Indulging every reasonable inference and resolving any doubts in Freeman's favor and taking all evidence favorable to her as true, a juror could reasonably conclude that AMK9's actions—and only AMK9's actions—caused the alleged attack. *See id.* at 228. AMK9, of course, disputes this. It alleges that the Army at least partly caused Kallie's escape and, therefore, this suit necessarily requires evaluating sensitive military decisions. We, however, cannot decide that issue while an underlying causal fact-question exists because that question affects whether the military's decisions are "inextricable from the case." *Baker*, 369 U.S. at 217. Thus, answering the political-question doctrine issue now, as the Court does, is premature.

The Court actually agrees that causation is a disputed fact-question here that can be decided only by a jury. *Ante* at ___ (citing *Miranda*, 133 S.W.3d at 227-28). Nevertheless, the Court is unmoved by that bar to its judgment. Despite that we cannot determine whether the doctrine is implicated without first resolving that fact question, the Court retorts that my analysis here, which simply applies our plea-to-the-jurisdiction standard, makes the doctrine "an irrelevance." *Ante* at ___. That is not true. If AMK9 is correct, it might get the suit dismissed under the doctrine, which is very relevant. We would not reduce the doctrine to an irrelevance by making AMK9 actually prove the facts of its defense. That makes the doctrine no more irrelevant than in any other suit where a potentially dispositive defense depends on a fact question that can be determined only through trial.

Furthermore, the Court's holding has a worrisome consequence to our jurisprudence. The holding essentially bars all tort suits where a military contractor—or any other defendant—is able to muster a mere allegation that a government actor whose decisions are insulated by the political-question doctrine partly caused the alleged harm. Even if the Court's view of that doctrine is otherwise right, its application here throws out cases where unproven, disputed factual allegations affect whether the doctrine is, in fact, implicated. That, in my view, throws the baby out with the bathwater.

For example, if a soldier sued a contractor for negligently making a tank hatch contrary to Army requirements such that it did not open properly, trapping

him inside and injuring him, the contractor could obtain dismissal by merely alleging that the Army at least partly caused the hatch's failure. The Army, the contractor might argue, decided to park the tank in an area without a cover, and this exposure to the elements caused the hatch to fail. Thus, the Army's wartime military decision partly caused the injury, implicating the political-question doctrine. If that truly did cause the hatch to fail, the contractor might be entitled to dismissal. But if the soldier disputes that the Army's actions caused the failure, instead alleging that the contractor's actions are the sole proximate cause, this causal fact-question should allow him to survive a plea to the jurisdiction. Otherwise, we deny all relief even when the soldier's allegations prove true.

The Court attempts to cabin this slippery slope, but in doing so shows why a jury needs to resolve the fact question here. The Court states that had "Kallie bit Freeman while being routinely exercised by her civilian-contractor handler," the attack "would have had nothing to do with the military." *Ante* at ___. But that does not solve the problem because in that scenario AMK9 has not alleged that the Army partly caused anything. Based on the Court's opinion here, AMK9 would be foolish not to make such an easy-to-manufacture allegation. For example, AMK9 could argue that the Army partly caused this attack by not providing enclosed yards for exercising these working dogs, thereby implicating the Army's equipment decisions. That causal allegation might be without merit,

but that's the point—so might AMK9's actual allegation. The problem is that AMK9 is getting this case dismissed as a matter of law based on a disputed fact-question. The Court's scenario does not solve this problem because the scenario does not address this problem. Instead, the Court's scenario avoids the issue: how do we handle cases where a defendant's disputed causal allegation might implicate a military decision given that the allegation might be wrong? If AMK9 is wrong here, this case, too, has "nothing to do with the military." *Id.* That is why a fact-finder must resolve this fact question.

Because AMK9's jurisdictional plea and Freeman's case on the merits both depend on the same fact question—whether the Army or AMK9 proximately caused Freeman's injury—we should deny AMK9's plea, leaving this fact question for the fact-finder. *See Miranda*, 133 S.W.3d at 227-28.

The foregoing analysis should be enough to deny AMK9's plea. The Court, however, effectively sidesteps this in holding that AMK9's proximate-cause defense would require the jury to impermissibly evaluate the Army's decisions about the kennel's design and construction. *Ante* at ___. That completely ignores the possibility that the Army might not be a cause at all. That move, however, is consistent with several federal cases. The Court endorses those cases, but their reasoning on that point cannot withstand scrutiny.

In *Harris v. Kellogg Brown & Root Services, Inc.*, the Third Circuit held that a sole-proximate-cause

defense would not implicate the political-question doctrine because that dispute is "simply about who did what." 724 F.3d 458, 473 (3d Cir. 2013). But the court then concluded that, in a proportionate-responsibility system, determining whether the military was *a* proximate cause (rather than the *sole* proximate cause) would require a court to impermissibly second-guess military decisions. *Id.* at 474. *In re KBR, Inc., Burn Pit Litigation*, relying on *Harris*, also held that a proximate-cause defense does not make a suit nonjusticiable unless the military at least partly caused the plaintiffs' injuries and the suit was in a proportionate-responsibility system. 744 F.3d 326, 340-41 (4th Cir. 2014). The *Harris* court's explanation for this distinction was that, when determining partial cause, "there is simply no way to determine damages without evaluating military decisions" because the fact-finder "cannot decide the respective degrees of fault" between the military and the contractor "without evaluating the decisions made by each. . . ." *Harris*, 724 F.3d at 474. But that does not explain the distinction.

Rather, this explanation skips a step. It incorrectly assumes that finding that the military partly caused the injury means finding that the military negligently caused it. The latter might be a political question, but the former is not. Determining "who did what" does not require second-guessing any decisions, military or otherwise. *See id.* at 473. Causal questions are objective, not normative. Objective questions do not inexplicably become normative just because Texas uses a proportionate-responsibility system. Holding otherwise

conflates the distinction between causation and negligence.

Negligence assessments require multiple findings. In Texas, a court must find (1) the existence of a legal duty, (2) a breach of that duty, and (3) damages proximately caused by that breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). No party is ever negligent merely by causing an event; something more is always required. This is true as a matter of basic tort law. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965) (Statement of the Elements of a Cause of Action for Negligence). A factfinder also must determine that the party should have acted otherwise. This determination—whether the party should have acted as it did—is the potential political question. "[W]ho did what" is not. *Harris*, 724 F.3d at 473.

Nothing about our proportionate-responsibility system changes that a causal finding does not second-guess anything. And neither the Court nor its cited authorities explain how it could. Thus, resolving the factual dispute here—whether the Army or AMK9 proximately caused Freeman's injuries—does not raise a political question even if this suit eventually raises one because AMK9's allegations prove true. AMK9's allegations have to actually be true first. This is why I cannot condone the Court's reasoning or its reliance on any case that holds that our proportionate-responsibility system somehow transforms a causal finding into a political question. The causal finding might raise a

political question later in the suit, but the finding is not itself a political question.

We cannot avoid a fact question now just because a dispositive legal one might arise later. At no point in a factual who-did-what determination will the court or jury re-examine a military decision. *See id.* Why the Army made that decision and whether the decision was justified are irrelevant to that inquiry. The decision was made. All that matters is whether it caused Freeman's injuries, as AMK9 claims, or not, as Freeman claims.

This untenable distinction between causation defenses is rendered even more inexplicable when we consider that, had AMK9 argued only that the Army was the sole proximate cause, the Court would not dismiss this suit—that defense does not raise a nonjusticiable issue. *Ante* at ___ (citing *Harris*, 724 F.3d at 473; *In re KBR*, 744 F.3d at 340-41). Apparently, a defendant is better off admitting that he partly caused an injury than that he did not cause it at all, so long as he also asserts that the military partly caused the injury—*i.e.*, admitting partial fault will get your case dismissed; denying fault completely will not. That cannot be right, and is probably why the U.S. Supreme Court has not endorsed this view.

The Court dismisses this entire suit on the mere allegation that the Army might have at least partly caused Freeman's injuries. Because that causal fact-question is disputed, and because nothing about our proportionate-responsibility system mutates such a

causal finding into a political question, we should not yet hold that a political question is "inextricable from the case." *Baker*, 369 U.S. at 217. Until a political question is so intertwined, I cannot join the Court's judgment.

B. Preemption under the Federal Tort Claims Act

AMK9 argues that the Federal Tort Claims Act preempts Freeman's Texas tort-law claims because the Act's combatant-activities exception applies here. *See* 28 U.S.C. § 2680(j) (2012). The Tort Claims Act is a limited waiver of sovereign immunity, 28 U.S.C. § 2674, and under the combatant-activities exception, the United States retains its immunity for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* But "[u]nlike complete preemption, which is a jurisdictional issue," preemption based on the combatant-activities exception is "only an affirmative defense." *McManaway v. KBR, Inc.*, 852 F.3d 444, 447 n.2 (5th Cir. 2017); *see also Spear Mktg., Inc. v. BancorpSouth Bank*, 844 F.3d 464, 467 n.3 (5th Cir. 2016), *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1260 n.16 (11th Cir. 2011). "[N]o court has held[ ] that" preemption under this exception "constitutes complete preemption," and "[a]bsent complete preemption, whether a plaintiff's claims are preempted relates to the merits." *Harris*, 724 F.3d at 463. I see no reason to disagree with the federal circuits on this matter.

The combatant-activities exception does not preempt all state-law tort claims; it preempts only those claims "arising out of" combatant activities. 28 U.S.C. § 2680(j). Such claims are only a small subset of potential tort claims, not the entire substantive field of tort claims or even the entire field of tort claims against contractors overseas. *See Spear Mktg.*, 844 F.3d at 467 n.3. Because the combatant-activities exception does not convert all such state-law tort claims into federal claims—*i.e.*, despite the exception, state-law tort claims continue to exist—the exception is merely "ordinary" preemption, not "complete" preemption. *See GlobeRanger Corp. v. Software AG*, 691 F.3d 702, 705 (5th Cir. 2012) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)); 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3722.2 (4th ed. 2016). AMK9's preemption argument is, therefore, only a defense. Even if the exception applies to Freeman's claims, the exception goes to the merits and, hence, cannot sustain a jurisdictional plea.

C. *Westfall* Immunity

AMK9 next argues that it is entitled to *Westfall* immunity, a form of absolute official immunity. This argument was not one of AMK9's original bases for its jurisdictional plea. AMK9 originally argued derivative sovereign immunity, but on appeal has abandoned that ground in favor of *Westfall* immunity. Because *Westfall* immunity is immunity from suit, defendants can raise it for the first time on appeal. *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015).

The original test for determining whether absolute official immunity applies comes from *Westfall v. Erwin*, 484 U.S. 292 (1988). That decision has been superseded by statute, *see* 28 U.S.C. § 2679(d) (2012), but the *Westfall* test is still used to determine when such immunity applies to nongovernmental entities for state-law tort claims. *Houston Cmty. Hosp. v. Blue Cross and Blue Shield of Texas, Inc.*, 481 F.3d 265, 269 (5th Cir. 2007); *accord Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 174 (2d Cir. 2006); *see also Beebe v. Washington Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997). Under this test, a nongovernmental entity is entitled to immunity when it makes discretionary decisions within the scope of its duties to perform an official government function. *Houston Cmty. Hosp.*, 481 F.3d at 269.

Here, AMK9 handles bomb-sniffing working dogs at a forward-operating base during war. These dogs work with active combat-units in the field, supplementing the military's own working dogs. Such overseas combat-related work that is integrated with the military is quintessentially governmental in nature. But Freeman is not alleging that AMK9 erred in any of its discretionary acts while performing these government functions. Freeman is claiming that AMK9 failed to do what the Army required—*i.e.*, to close all of the kennel's doors, to not leave any dogs unattended, and to train the dogs so that they would attack only when ordered or given cause. AMK9 did not have discretion to violate its contractual duties or the Army's policies. Indeed, official immunity is not meant "to protect an

erring official, but to insulate the decision-making process" from litigation. *Westfall*, 484 U.S. at 295. The Army already prescribed AMK9's actions—the relevant official decisions were already made. Hence, Freeman is not challenging AMK9's discretionary decisions; she is challenging its failure to do what the Army already decided that AMK9 must do. Whether these alleged failures proximately caused Freeman's injuries is a separate question that goes to the merits. But for purposes of evaluating AMK9's immunity argument, AMK9 has failed to demonstrate that it is immune from suit by, as Freeman alleges, *not* doing what the Army required.

AMK9 points out, however, that it had discretion in how to train its dogs. True, but Freeman is not challenging AMK9's discretionary decisions in picking particular training methods. She claims that AMK9 failed to deliver working dogs that met the Army's performance-based contract requirements. Performance-based contracts "describe the work in terms of the required results rather than . . . 'how' the work is to be accomplished. . . ." *Saleh v. Titan Corp.*, 580 F.3d 1, 10 (D.C. Cir. 2009) (quoting 48 C.F.R. § 37.602(b)(1)). One of those requirements was that these dogs would attack only when commanded or when given cause. AMK9 therefore had discretion in how to train its dogs to meet these requirements, not whether its dogs met them. For that reason, this argument fails. Thus, *Westfall* immunity cannot sustain AMK9's plea to the jurisdiction.

D. Defense Production Act

Finally, AMK9 argues that it is immune from suit because its contract with the Army is a "rated order" contract under the Defense Production Act. The Act authorizes the President to "require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order. . . ." 50 U.S.C. § 4511(a) (Supp. IV 2016). The Act later states that "[n]o person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this [Act]. . . ." *Id.* § 4557. Hence, the Act provides immunity to contractors who give their "rated order" contracts priority over other contracts or orders when their actions (or inactions) in doing so might otherwise subject them to liability.

Assuming that the Act applies here, it cannot sustain AMK9's jurisdictional plea. Even though the Act "plainly provides immunity," it does so "[b]y expressly providing a *defense* to liability." *Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996) (emphasis added). The Act, therefore, provides immunity from liability, not suit. *See Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015) ("Immunity from liability is an affirmative defense . . . while immunity from suit bars suit against the entity altogether and may be raised in a plea to the jurisdiction."). Thus, whether the Act applies to tort suits like this one or not, AMK9's

Defense Production Act-based defense cannot sustain its jurisdictional plea.

* * *

Because none of AMK9's arguments establish a lack of subject-matter jurisdiction, the trial court erred in granting AMK9's plea to the jurisdiction.

II. Jurisdiction over Freeman's claims against Hill Country Dog Center, LLC

Hill Country Dog Center did not file a plea to the jurisdiction. It did file a Rule 91(a) motion, but the trial court did not rule on it. *See* TEX. R. CIV. P. 91(a). On appeal, Hill Country argues that, under Texas law, liability for a dog attack runs only to the owner at the time of the incident, not to the former owner. It also argues that no causes of action for negligently training a dog or for strict liability for a non-owner exist. Hence, Hill Country argues that the trial court was correct to find, *sua sponte*, that it lacked jurisdiction over Freeman's claims.

Whether these arguments are correct statements of Texas law or not, Hill Country provides no authority that they deprive the trial court of subject-matter jurisdiction. Its arguments, even if meritorious, offer immunity only from liability, not suit. Thus, the trial court erred in dismissing Freeman's claims against Hill Country based on a lack of subject-matter jurisdiction.

III. Conclusion

Freeman alleges that AMK9's supervision and training of its dog was the cause-in-fact of her injuries. AMK9 alleges that the Army was partly to blame. Although the Court does not know whether either allegation is true, it nonetheless dismisses Freeman's claim against AMK9 because the Army *might* have contributed to causing her injuries. Even assuming that the Court otherwise correctly applies the political-question doctrine to such partial-cause scenarios, I simply cannot understand how the mere allegation that the Army might have partly caused Freeman's injuries is sufficient to defeat her claim—a claim that does not even raise that issue. The Court ignores these deficiencies to sustain AMK9's jurisdictional plea notwithstanding the existence of unresolved factual questions necessary to the doctrine's application. Thus, I respectfully dissent.

_____

John P. Devine
Justice

OPINION DELIVERED: June 29, 2018

IN THE SUPREME COURT OF TEXAS

NO. 15-0932

AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTERS, LLC, PETITIONERS,

v.

LATASHA FREEMAN, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Thirteenth District, and having considered the appellate record, briefs, and counsel's arguments, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) Judgment is rendered that respondent LaTasha Freeman take nothing; and

3) Petitioners American K-9 Detection Services, LLC and Hill Country Dog Center, LLC shall recover, and respondent LaTasha Freeman

shall pay, the costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Thirteenth District and to the District Court of Bandera County, Texas, for observance.

Opinion of the Court delivered by
Chief Justice Hecht, joined by Justice Green,
Justice Johnson, Justice Lehrmann, Justice Boyd,
Justice Brown, and Justice Blacklock

Dissenting opinion filed by Justice Guzman

Dissenting opinion filed by Justice Devine,
joined by Justice Guzman

June 29, 2018
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IN THE SUPREME COURT OF TEXAS

NO. 15-0932

AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTER, LLC,
PETITIONER

v.

LATASHA FREEMAN, RESPONDENT

MANDATE

To the Trial Court of Bandera County, Greetings:

Before our Supreme Court on June 29, 2018, the Cause, upon petition for review, to revise or reverse your Judgment.

No. **15-0932** in the Supreme Court of Texas

No. **13-14-00726-CV** in the **Thirteenth** Court of Appeals

No. **CV-13-246** in the **198th District Court** of **Bandera** County, Texas, was determined; and therein our said Supreme Court entered its judgment or order in these words:

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Thirteenth District, and having considered the appellate record, briefs, and counsel's

arguments, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) Judgment is rendered that respondent LaTasha Freeman take nothing; and

3) Petitioners American K-9 Detection Services, LLC and Hill Country Dog Center, LLC shall recover, and respondent LaTasha Freeman shall pay, the costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court's opinion are certified to the Court of Appeals for the Thirteenth District and to the District Court of Bandera County, Texas, for observance.

Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have recognized, obeyed, and executed.

BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS,

with the seal thereof annexed, at the City of Austin, this the 19th day of October, 2018.

Blake A. Hawthorne, Clerk

/s/ Blake A. Hawthorne

By Monica Zamarripa, Deputy Clerk

[SEAL]

NUMBER 13-14-00726-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LATASHA FREEMAN, Appellant,

v.

AMERICAN K-9 DETECTION SERVICES, L.L.C. AND HILL COUNTRY DOG CENTER, L.L.C., Appellees.

On appeal from the 198th District Court of Bandera County, Texas.

OPINION

(Filed Oct. 29, 2015)

Before Justices Garza, Benavides and Longoria
Opinion by Justice Garza

This case involves personal injuries allegedly caused by a contract working dog ("CWD") on a United States military base in Afghanistan. Appellant LaTasha Freeman argues that the trial court erred in granting a plea to the jurisdiction dismissing her suit against appellees, American K-9 Detection Services,

LLC ("AMK9") and Hill Country Dog Center, LLC ("HCDC"). We reverse and remand.[1]

I. BACKGROUND

Freeman was employed as an administrative clerk by Honeywell International, Inc., a private military contractor that provided support to the United States Army's operations at Camp Mike Spann, a forward operating base in Afghanistan. AMK9 is a Florida corporation that trains and deploys military working dogs and their handlers; HCDC is a Texas corporation that also trains dogs for government work.

In her petition, Freeman alleged that, on or about November 9, 2011, while in the course and scope of her employment at Camp Mike Spann, she was attacked by an unprovoked CWD owned by AMK9 and "negligently left unattended" by its handler, an AMK9 employee. She alleged that the dog at issue, named Callie or Kallie, was "trained, certified, received veterinary services, and/or were purchased" by AMK9 from HCDC in Bandera County, Texas; that the dog's handler "while stationed overseas" was "trained, managed, and employed" by AMK9; and that HCDC also trained the handler. Freeman alleged that AMK9 was negligent for failing to properly train the dog, failing to properly train the dog's handler, failing to keep the dog under

[1] This appeal was transferred from the Fourth Court of Appeals pursuant to a docket-equalization order issued by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

restraint, leaving the dog unattended, and failing to secure the kennel in which the dog was being held. She also raised theories of negligence per se and strict liability as to AMK9. As to HCDC, Freeman contended that it was negligent for failing to properly train the dog, failing to properly train the handler, and failing to provide the handler with proper equipment. She requested damages for lost wages, medical expenses, pain and suffering, mental anguish, physical impairment and disfigurement, and loss of enjoyment of life, both in the past and in the future.

AMK9 filed an answer asserting, among other things, that its actions were not a proximate cause of Freeman's injuries. AMK9 also filed a plea to the jurisdiction alleging that it was immune to suit due to its status as a private defense contractor. In particular, AMK9 asserted that it is immune "under four separate theories: the 'Political Question' Doctrine, the Combat Activities Exclusion of the Federal Tort Claims Act, the Derivative Immunity Doctrine, and the preemption provided by the Defense Production Act of 1950."

AMK9 later filed a motion for leave to designate the United States Army ("Army") and/or the United States Department of Defense ("DOD") as responsible third parties "to the extent that [Freeman] claims that the failure to control the CWD was tortious or otherwise somehow the cause of her injury." According to AMK9, the Army negligently designed and built the pen in which the dog was held at the time of the incident.

The trial court granted AMK9's plea to the jurisdiction without specifying its grounds and dismissed the suit as to both defendants. It later granted AMK9's motion to designate responsible third parties. This appeal followed, in which Freeman contends by three issues that the trial court erred by (1) dismissing her suit against AMK9 and HCDC pursuant to the plea to the jurisdiction, (2) doing so without giving her the opportunity to replead, and (3) granting AMK9's motion to designate responsible third parties.

II. Subject Matter Jurisdiction

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id.*; *see Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Natural Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852

S.W.2d 440, 446 (Tex. 1993); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 220 (Tex. App.—Fort Worth 2003, pet. denied). We construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *See Miranda*, 133 S.W.3d at 226, 228. If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the plaintiff should be afforded the opportunity to amend its pleadings. *Id.* at 226–27.

Where the plea to the jurisdiction challenges the existence of jurisdictional facts, as here, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, even when the evidence implicates the merits of the cause of action. *Id.* at 227; *Blue*, 34 S.W.3d at 555; *see City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). A review of a plea to the jurisdiction challenging the existence of jurisdictional facts mirrors that of a traditional motion for summary judgment. *Miranda*, 133 S.W.3d at 228. The defendant is required to meet the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction. *Id.* Once the defendant meets its burden, the plaintiff is then required to show that there is a disputed material fact regarding the jurisdictional issue. *Id.* If the evidence creates a fact question regarding jurisdiction, the trial court must deny the plea to the jurisdiction and leave its resolution to the fact finder. *Id.* at 227–28. But, if the evidence is undisputed or fails to raise a fact question on

the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228. In considering this evidence, we "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.*

Because the trial court did not specify the grounds upon which it granted the plea, we will sustain the judgment if it is correct on any theory of law applicable to the case and supported by the record. *Tarkington Indep. Sch. Dist. v. Aiken*, 67 S.W.3d 319, 327 (Tex.App.—Beaumont 2002, no pet.).

B. Evidence

In support of its plea, AMK9 filed several affidavits, including that of Willard Chipman, who stated that he served as AMK9's Assistant Program Manager of Operations in Afghanistan prior to October 2012. Chipman further stated:

> 5. From my work with AMK9, I am knowledgeable about the nature of the services provided by AMK9 under our contract with the U.S. Department of the Army providing Contract Working Dog ("CWD") Team services in Afghanistan in November 2011 (Contract) and the interplay with the U.S. Department of the Army.
>
> 6. It is my understanding the Department of Defense has assigned AMK9's Contract a priority rating of "DO-C9." . . .

7. AMK9 personnel on the Contract are subject to the command of the U.S. Army personnel at Camp Mike Spann in the performance of their duties. Under AMK9's Contract with assigned priority rating "DO-C9" and covering Camp Mike Spann, the Army was specifically required to provide kennel facilities for use by AMK9's CWDs[.] Designation of the contract kennels was the sole responsibility of the site Military Working Dog Program Manager. AMK9 did not provide the kennels Kallie allegedly escaped from which were in place at Camp Mike Spann, did not design them, and did not construct them. As per the Contract, they were provided by the U.S. Army based upon their own design and construction techniques for use by AMK9's CWDs located at Camp Spann; it is my understanding AMK9 was not consulted in the building of the kennels, including the decision to not take the center divider to the ceiling. AMK9 personnel were instructed to use them by the military authorities as a part of their CWD duties on the base. AMK9 personnel were following the commands of the U.S. Army when placing the CWD in the kennel from which Kallie allegedly escaped prior to the alleged incident involving Latasha Freeman.

In response, Freeman produced, among other evidence, her affidavit describing the events at issue as follows:

> Around noon on November 9, 2011, I was with a coworker waiting outside by the entry control point 1, a gate at Camp Mike Spann, for vehicles to arrive through a security checkpoint, so that I could escort the vehicles back to [the] area where they were to be parked. I was standing about 45-50 feet away from an animal shelter. I had been standing waiting for the vehicles for about 10 minutes when I noticed a leash hanging on the latch of the shelter door. I could see the legs of a dog through the shelter door that was partially open. I then saw the dog push the [sic] open and walk through the door. I didn't see any AMK9 handlers around the kennel area.
>
> When I saw the dog outside the shelter it started looking around the area where I was standing. The dog started running towards me and jumped at the back of my left shoulder. While the dog was attacking me, she bit my left back shoulder and tried to bite the left side of my face. When she jumped up again I threw my left arm up to protect myself and she clamped down on my left forearm and shook my left arm violently back and forth. The dog then jumped down and bit me on the outside of my left thigh. Then she bit my right buttocks and pulled my pants down with her teeth exposing my buttocks. Then a local civilian contractor pulled the dog off of me by the collar and took the dog away.

> I never saw the AMK9 handler for the dog that attacked me until after the attack. At that time, I saw the AMK9 handler with the dog that attacked me on a leash standing outside the building. I then observed the AMK9 handler put the dog into the shelter and shut the door without himself going inside the shelter. I also saw another AMK9 handler who had been inspecting vehicles with his dog also put his dog into this shelter shortly after and also shut the door.

Freeman also produced an email she received from R. Keith Dorough, an AMK9 project manager. The email states in part:

> I would like to personally apologize for the incident involving "Callie." The Army guys had built new kennels inside the building at the ECP, Callie jumped over the divider into the opened kennel and exited the building through the opened door. Tops have been put on the kennels and the handler was reprimanded.
>
> Callie is a very playful dog and the soldiers play with her and the other dogs on a daily basis, I can assure you she was just trying to play with you, the soldiers play tug a [sic] war and the dogs will mouth them as well as jumping around, I understand this does not make you feel any better and you were not interested in playing with the dog, this was an unfortunate and inexcusable incident, I just wanted you to understand that you were not "attacked" as some are trying to portray the

> incident, when these dogs are given the command attack, there are serious injuries to follow, I have personally worn the bite suit during training for Callie and when she bites, it is serious. I in no way want to under play the incident as I have stated it was inexcusable, at the same time I want to make sure it[']s not over played as well.

Freeman additionally produced a "Mission/Incident/Accident Report" form promulgated by AMK9 relating to the incident at issue. The report described the incident as follows:

> K9 Kallie was in her place of holding at ECP 1, with her handler Frans standing outside of the shelter. The Other handler was busy with a sweep on a vehicle. K9 Kallie managed to jump over the divider between the two holding spaces and come out the door on the other side, which was open at the time. K9 Kallie ran out the door and immediately made her way to Frans when she saw another person (Latasha Freeman) standing outside.
>
> In her playful yet rough manner she ran over to her, at this time Frans had noticed this and was in process of getting her under control. She briefly jumped up against above mentioned to play and seek attention but in doing so snapped her jaw and punctured the left front sleeve of Latasha Freeman's jacket. There was no injury to her as person [sic].

Under "Analysis," the report stated: "This was an unexpected incident that has not occurred as yet.

Handlers will have to ensure that both doors of the shelter are closed at all times."

C. Jurisdiction Over Claims Against AMK9

As noted, AMK9 asserted in its plea that the trial court lacked subject matter jurisdiction under: (1) the political question doctrine; (2) the combatant activities exception to the waiver of immunity provided in the Federal Tort Claims Act ("FTCA"), (3) the doctrine of derivative immunity, and (4) the Defense Production Act of 1950.

1. Political Question Doctrine

Under the political question doctrine, a case presents a non-justiciable political question when one of the following characteristics is "inextricable" from the case: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 465 (3d

Cir. 2013) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *Lane v. Halliburton*, 529 F.3d 548, 558 (5th Cir. 2008); *see Goldberg v. Comm'n for Lawyer Discipline*, 265 S.W.3d 568, 576 (Tex. App.—Houston [1st Dist.] 2008, pet. denied) (noting that a trial court lacks jurisdiction over a non-justiciable controversy).

In *Harris*, an Army staff sergeant died by electrocution while taking a shower in his barracks in Iraq. 724 F.3d at 463. His estate sued KBR, the military contractor that was allegedly responsible for maintaining the barracks, alleging that KBR negligently installed and maintained a water pump at the barracks. *Id.* KBR asserted, and the trial court agreed, that the suit raised a non-justiciable political question and was pre-empted by the policy embodied in the combatant-activities exception to the waiver of governmental immunity in the FTCA.[2] *Id.* In reviewing the ruling, the Third Circuit Court of Appeals remarked:

> Defense contractors do not have independent constitutional authority and are not coordinate branches of government to which we owe deference. Consequently, complaints against them for conduct that occurs while they are providing services to the military in a theater of war rarely, if ever, directly implicate a political question. Nonetheless, these suits may present nonjusticiable issues because military decisions that are textually committed to

[2] We address the issue of whether the FTCA's combatant-activities exception operates to preempt Freeman's claims *infra* section II.C.2.

> the executive sometimes lie just beneath the surface of the case. For example, a contractor's apparently wrongful conduct may be a direct result of an order from the military, or a plaintiff's contributory negligence may be directly tied to the wisdom of an earlier military decision. In these situations, the political question appears not from the plaintiff's claims but from the broader context made relevant by a contractor's defenses. As such, to avoid infringing on other branches' prerogatives in wartime defense-contractor cases, courts must apply a particularly discriminating inquiry into the facts and legal theories making up the plaintiff's claims as well as the defendant's defenses.

Id. at 465–66 (citations omitted). The Court continued: "Because defense contractors are not coordinate branches of government, a determination must first be made whether the case actually requires evaluation of military decisions. If so, those military decisions must be of the type that are unreviewable because they are textually committed to the executive." *Id.* at 466. There, KBR argued that the claims against it "would require judicial review of the military's decisions about where to house soldiers on a battlefield—decisions that are unreviewable because they involve strategic calculi about how best to defend against threats." *Id.*

The *Harris* court noted that "[m]ilitary control over a contractor's actions is one common way that evaluation of strategic military decisions becomes necessary." *Id.* (noting that "[m]ilitary control requires

evaluation of military decisions because if the contractor is simply doing what the military ordered it to do, then review of the contractor's actions necessarily includes review of the military order directing the action"). In that case, due to the "lack of detailed instructions in the work orders and the lack of military involvement in completing authorized work orders," military control did not introduce an unreviewable military decision into the case. *Id.* at 467. Nevertheless, the court held that the plaintiff's claims "might still present unreviewable military decisions if proving those claims or KBR's defenses necessarily requires evaluating such decisions." *Id.*

After thoroughly reviewing the claims and defenses raised by the pleadings and evidence, the court held that, depending on which state's law was applied by the trial court, KBR's "contributory negligence and proximate cause defenses may present nonjusticiable issues." *Id.* at 469. In *Harris*, the trial court had not yet determined whether Pennsylvania, Tennessee, or Texas law applied. As to KBR's proximate-cause defense (in which it argued that the military's actions were a proximate cause of the soldier's death), the appeals court noted:

> If a jurisdiction uses a proportional-liability system which assigns liability by the degree of fault, then a proximate-cause defense introduces a nonjusticiable issue. In such a system, there is simply no way to determine damages without evaluating military decisions. The fact finder cannot decide the respective degrees of

> fault as between a military contractor . . . and the military without evaluating the decisions made by each—particularly, the military's decisions to house troops in unsafe barracks that would not be repaired.

Id. at 474. Tennessee and Texas use proportional-liability systems. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (West, Westlaw through 2015 R.S.)). Accordingly, if the law of either of those two states applied, "then damages cannot be estimated without evaluating unreviewable military decisions." *Id.* On the other hand, if Pennsylvania law applied, then "calculation of damages does not require evaluating strategic military decisions because the plaintiffs are free to obtain the entirety of their relief from [the contractor]." *Id.* The court further held that the question of whether KBR's contributory-negligence defense presented a non-justiciable issue also turned on the applicable state law. *Id.* at 475 (stating that "[t]o determine whether [the soldier's] alleged negligence caused more than 50 percent of the harm, the degree of causation that can be assigned as between the military's alleged negligence and KBR's alleged negligence must also be determined. . . . This assignment of fault to the military inevitably would require evaluating the wisdom of the strategic military decisions that caused the death"); *see id.* at 477 (observing that, although the military was not a party in the case, Tennessee and Texas law "permit fault to be assigned to nonparties for the purposes of contributory negligence"). The court remanded for a determination of which state's law to apply. *Id.*

AMK9, relying in large part on *Harris*, contended in a brief supporting its plea to the jurisdiction that Freeman's claims against it are non-justiciable because:

> AMK9 had no involvement in the design of the kennel, and was not asked to and had no involvement in the building of the kennel. The entire matter was in the hands of the Army. . . . The Army designed and built the kennel in such a way that the divider between the two dog pens did not reach the roof. . . . While AMK9 had no notice that the CWD in question would be able to scale the divider and slip out through the adjoining pen, the question of whether the Army properly designed and built the kennel is an integral part of AMK9's defense in this case. Therefore, as part of the case, this Court (and/or the jury) is going to have to "analyze the military's judgment" in the design and building of the kennel.

We disagree. AMK9 is asserting a "proximate cause defense" such as that raised by KBR in *Harris*. That is, it is alleging that the negligence of the Army proximately caused Freeman's injuries, at least in part. But when analyzing whether a proposed defense implicates a non-justiciable issue, "courts must first decide whether the defendant has 'present[ed] sufficient evidence to permit a jury to conclude that he established the [elements of the] defense by a preponderance of the evidence.'" *Id.* at 469 (quoting *United States v. Stewart*, 185 F.3d 112, 125 (3d Cir. 1999)). On the other hand, "if

there is insufficient evidence to support the defense, or if the defense does not present a nonjusticiable issue, then the case goes forward." *Id.*

Proximate causation is comprised of both cause-in-fact and foreseeable harm. *See, e.g.*, *Transcont'l Ins. Co. v. Crump*, 330 S.W.3d 211, 222 (Tex. 2010). Here, AMK9 has arguably established through Chipman's affidavit that the Army's design and construction of the kennel at issue—in particular, the fact that the dividers separating the various pens within the kennel did not extend to the ceiling—was a cause-in-fact of Freeman's injuries. That is because, had the Army designed and built the kennel differently such that the dividers between pens extended to the ceiling, the dog would not have been able to "scale the divider and slip out" to "attack" Freeman, notwithstanding the fact that AMK9's handler left the kennel's outer door open. *See id.* at 222–23 ("Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred."). But AMK9 has not presented any evidence establishing that the Army was actually negligent in designing the kennel. *See, e.g.*, *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) ("To establish negligence, a party must establish a duty, a breach of that duty, and damages proximately caused by the breach."). Nor has AMK9 produced evidence that the Army, in failing to design and build the kennel such that the pen dividers extended to the ceiling, could have reasonably foreseen that such failure would result in injuries to a person outside the kennel. *See, e.g.*,

D. Houston, Inc. v. Love, 92 S.W.3d 450, 454 (Tex. 2002) ("Foreseeability exists when the actor as a person of ordinary intelligence should have anticipated the dangers his negligent act creates for others."). *Harris* is distinguishable on these grounds. *See Harris*, 724 F.3d at 471–72 (noting that "from KBR's perspective, the military foresaw the exact harm suffered by [the soldier]" and concluding that KBR "presented sufficient evidence to invoke its proximate-cause defense under Texas law").

We further observe that Freeman's claims against AMK9 were not exclusively based on the dog's escape from the kennel on November 9, 2011. Rather, Freeman additionally claimed in her live pleading that AMK9 "failed to properly train [its] animal handler and [its] CWD to not attack without a command and/or without cause." In our jurisdictional analysis, we must accept as true the factual allegations made in Freeman's pleadings unless AMK9 is able to produce evidence controverting jurisdictional facts. *See Miranda*, 133 S.W.3d at 226, 228. AMK9 has not produced evidence showing either that: (1) contrary to Freeman's pleadings, it properly trained the handler and the CWD; or (2) that judicial determination of whether it properly trained the handler and CWD would "necessarily require" the evaluation of "military decisions" so as to make the claim unreviewable. *See Harris*, 724 F.3d at 467. AMK9 also did not establish that the Army retained any sort of control over AMK9's training methods—in fact, AMK9 concedes that, under

its contract, it was "given discretion" in how to train the dogs.

For the foregoing reasons, we find that the political question doctrine does not bar Freeman's claims.

2. Derivative Sovereign Immunity

The doctrine of sovereign immunity provides 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) (citing *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847)). The FTCA waives sovereign immunity for certain tort claims against the federal government. *See* 28 U.S.C.A. § 2674 (West, Westlaw through P.L. 114-49). However, the FTCA does not waive immunity for claims "arising out of the combatant activities of the military . . . during time of war." 28 U.S.C.A. § 2680(j) (West, Westlaw through P.L. 114-49). Although the issue is disputed by the parties, we will assume for purposes of this opinion that Freeman's suit arises out of "combatant activities . . . during time of war" such that the sovereign immunity of the federal government itself would not be waived by the FTCA. We therefore must next determine whether that immunity extends to AMK9 under the facts of this case.

Contractors and common law agents acting within the scope of their employment for the government generally have derivative sovereign immunity. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 20-21

(1940) (noting that "there is no liability on the part of the contractor for executing [the] will [of Congress]"). However, the 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]." *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994). In other words, "private parties exercising independent discretion are not entitled to sovereign immunity." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015) (citing *K.D.F.*, 878 S.W.2d at 597).

The Texas Supreme Court, in *Brown & Gay*, recently considered the scope of derivative immunity for government contractors. *See id.* There, the plaintiff claimed that Brown & Gay, a government contractor, negligently designed and constructed a roadway, thereby causing a fatal accident. *Id.* at 121. Brown & Gay argued that it was entitled to derivative immunity as an "employee" of the Fort Bend County Toll Road Authority (the "Authority"), the governmental entity that issued the contract. *Id.* at 120 (citing *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")). The trial court agreed with Brown & Gay and dismissed the case, but the Fourteenth Court of Appeals reversed, holding that Brown & Gay was not entitled to immunity because it

was an independent contractor, rather than an employee, of the Authority. *Id.*

The Texas Supreme Court affirmed the court of appeals' decision. *Id.* The Court first reviewed federal case law establishing that derivate immunity is extended to private contractors "only in limited circumstances":

> [I]n *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 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 (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. 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 (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).

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.

Id. at 124–26 (footnote omitted). The Court noted that, in each of the cited 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. In *Brown & Gay*, on the other hand, 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." *Id.* 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.[3]

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[3] The *Brown & Gay* Court also noted that the policy rationales underlying the doctrine of sovereign immunity would not be advanced by affording immunity to private contractors. The Court explained that sovereign immunity is "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

The United States Supreme Court has also weighed in on the limited application of derivative sovereign immunity in the context of military contractors. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988). In *Boyle*, a United States Marine drowned after a helicopter crash and his estate sued the helicopter's designer, a military contractor, claiming that the helicopter's emergency escape hatch was defectively designed. *Id.* at 502. The Court held that

> [l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512. *Boyle* involved a separate exemption to the waiver of immunity provided in the FTCA for discretionary governmental functions. *See id.* at 511 (citing 28 U.S.C.A. § 2680(a)). In *Saleh v. Titan Corp.*, 580 F.3d

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purposes," but "[i]mmunizing a private contractor in no way furthers this rationale." *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 123 (Tex. 2015). The Court explained:

> [e]ven 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.

Id.

1 (D.C. Cir. 2009), the District of Columbia Court of Appeals applied *Boyle* in the context of the combatant-activities exception. It held that, under the combatant-activities exception, state tort claims are preempted "where a private service contractor is integrated into combatant activities over which the military retains command authority." *Id.* at 10; *see Harris*, 724 F.3d at 480.

Here, the evidence established that the services and "equipment" provided by AMK9—i.e., the CWD and its handler—did not conform to specifications provided by the military. In particular, Freeman alleged that AMK9's handler was negligent in failing to close the outer doors of the kennel, and in support of these allegations, she produced a copy of a "Performance Work Statement" applicable to AMK9's contract with the United States Government. The Performance Work Statement stated in part that AMK9 was required to close doors to facilities "[a]t the close of each work period."[4] Freeman also alleged that AMK9's handler was negligent in failing to train the dog to not attack without provocation and in failing to restrain the dog at the time of the incident, and the Performance Work Statement provided that the training and supervision of the dogs at the forward operating base was

[4] Specifically, the document provides: "The Contractor is responsible for safeguarding all Government property . . . At the close of each work period, Government facilities, equipment, and materials shall be secured, lights and water turned off, hear [sic] or air conditioning set to minimum acceptable temperatures, and all doors and windows secured."

solely the responsibility of AMK9's employees.[5] The military did thus not "retain[] command authority" over AMK9's activities with regard to training and supervision of the CWDs at the base. *See Saleh*, 580 F.3d at 10; *Harris*, 724 F.3d at 481 (holding that the military did not retain command authority over KBR's installation and maintenance of the defective water pump because "the relevant contracts and work orders did not prescribe how KBR was to perform the work required of it"). The evidence showed that AMK9 was working

[5] The Performance Work Statement provides in part:

> The contractor shall provide sufficient CWD Trainer/Supervisor(s) to oversee all CWD training under this contract.
>
> . . . .
>
> The Kennel Master is in charge of the Contractor's CWD program at the designated FOBs in Afghanistan [and is r]esponsible for overall management of contract dogs, health, morale and welfare, team utilization, training, and coordination of services to support the program.
>
> . . . .
>
> Each handler is personally responsible for his or her assigned dog. The handler trains, employs, feeds, cares for, cleans, and otherwise maintains his or her assigned dog in every way. The dog depends directly on the handler and, in keeping with the principle of one dog—one handler, the dog should never have to depend on anyone other than the assigned handler. The handler is responsible for the cleaning and maintenance of the dog's kennel. The handler is directly responsible to the Kennel Master for the operation, maintenance, and cleaning of the kennels, kennel support building, training area, exercise area, obedience course, and any other areas or equipment that are included in the kennel facility.

under a "performance-based" contract—that is, a contract which "describe[s] the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided." *Saleh*, 580 F.3d at 10. Under *Saleh*, tort suits against contractors working under performance-based contracts are not preempted on the basis of the FTCA's combatant-activities exception. *Id.*

The Performance Work Statement additionally incorporated "Contract Working Dog Certification Standards" which provided in part that CWDs must be trained so as to attack only when commanded.[6] Freeman alleged

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[6] The Performance Work Statement provides in part:

1.2. Controlled aggression

1.2.1. False run (critical). When commanded to STAY, the CWD must remain in the heel, sit, or down position, on-leash, and not attack when a person approaches the CWD team.

1.2.2. False run into a bite (critical). When commanded to STAY, the CWD must remain in the heel, sit, or down position, on-leash, and attack only on the command of GET HIM at which time the dog is taken off leash. The CWD must complete the attack, bite, and hold the decoy, hold with a full mouth bite for at least 10 seconds, and release on the command OUT. Only 1 verbal correction is authorized and the CWD must release the bite on the second command of OUT. The CWD must return to its handler when commanded to HEEL.

1.2.3. Search and attack (critical). When commanded to STAY, the CWD must remain in the heel, down, or sit position while the

that AMK9 failed to conform to these specifications and the evidence did not controvert these allegations; accordingly, under *Boyle*, AMK9 is not entitled to derivative immunity. *See Boyle*, 487 U.S. at 512. This is not a suit, like the one in *Ackerson*, complaining generally about congressional or military policy; nor is it a suit, like the one in *Glade*, seeking to impose liability for a contractor's performance of work in accordance with the contract. *See Brown & Gay*, 461 S.W.3d at

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handler searches a decoy off-leash. The search will consist of patting down both arms, both legs, and the torso of the decoy. During the search, the CWD must attack the decoy without command if the decoy tries to escape or attacks the handler. The CWD must complete the attack, bite and hold the decoy, and release on the command OUT. Only 1 verbal correction is authorized and the CWD must release the bite on the second command of OUT. The CWD must return to its handler when commanded to HEEL.

1.2.4. Standoff (critical). When commanded to STAY, the CWD must remain in the heel, down, or sit position, while off-leash. Only 1 command of GET HIM will be given. The correct response for this task is the dog will cease pursuit of a decoy on the command OUT, and then on command of HEEL, the dog will return to the heel position. For a standoff only 1 verbal correction is authorized and the CWD must stop pursuit on the second command of OUT. The CWD must respond to the command without biting the decoy. The dog is not allowed to nip and bite at the agitator after being commanded to out.

124–26 (citing *Ackerson*, 589 F.3d at 207; *Glade*, 295 S.W.2d at 644). Instead, it alleges "independent act[s] of negligence" on the part of AMK9, in violation of its contract with the military and in violation of the previously-formulated military policy. *See id.*

We conclude that, under applicable law, AMK9 is not entitled to derivative sovereign immunity as to Freeman's claims.

3. Defense Production Act of 1950

The Defense Production Act of 1950 authorizes the Department of Defense to issue so-called "rated order" contracts which, because they are "necessary or appropriate to promote the national defense, shall take priority over performance of any other contract or order. . . ." 50 U.S.C.A. app. § 2071(a) (West, Westlaw through P.L. 114-49); *see Martin v. Halliburton*, 618 F.3d 476, 480 (5th Cir. 2010). The willful failure to perform a rated order contract carries a criminal penalty. *See id.* §§ 2071(a), 2073; *Martin*, 618 F.3d at 480. The statute provides, however, that "[n]o person shall be held liable for damages . . . for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act. . . ." *Id.* § 2157 (West, Westlaw through P.L. 114-49); *see Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996) (noting that section 2157 "plainly provides immunity" and "expressly provid[es] a defense to liability . . . ").

AMK9 has produced evidence indicating that its contract with the military was a "rated order" under this statute. However, Freeman disputes that AMK9 "compli[ed] with the . . . order" such that the section 2157 defense would apply. *See* 50 U.S.C.A. app. § 2157. In any event, AMK9's plea to the jurisdiction did not cite any authority, and we have found none, indicating that the section 2157 defense, even if established, deprives the trial court of subject matter jurisdiction.[7] We therefore conclude that the trial court erred if it granted AMK9's plea on this basis.

4. *Westfall* Immunity

Finally, AMK9 contends on appeal that it is entitled to absolute governmental immunity under *Westfall v. Erwin*, 484 U.S. 292 (1988).[8] In that case, the United States Supreme Court held that federal

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[7] The "immunity" referred to by the United States Supreme Court in *Hercules* is immunity from *liability*—which, unlike immunity from *suit*, does not implicate subject matter jurisdiction. *See Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996); *see also Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015) ("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.").

[8] Although AMK9 did not assert in its plea that it was entitled to *Westfall* immunity, we are required to consider "all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015); *Dallas Metrocare Servs. v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013).

officials are entitled to absolute immunity from state tort liability for acts that are: (a) discretionary in nature and (b) fall within the scope of the officials' duties. *Id.* at 295–98. This test, as it applies to federal employees, was superseded by the passage of the Federal Employees Liability Reform and Tort Compensation Act. *Murray v. Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 174 (2d Cir. 2006). But "the *Westfall* test remains the framework for determining when nongovernmental persons or entities are entitled to the same immunity." *Id.* (citing *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998)).

The *Westfall* Court noted that the purpose of official immunity "is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." *Id.* at 583. But Freeman's suit does not seek to challenge the "decisionmaking process" of either the military or AMK9; instead, as we have explained above, it seeks to hold AMK9 liable for its failure to comply with decisions that were already made regarding training and supervision of the CWD. In other words, the acts which Freeman claims caused her to suffer injury did not "fall within the scope of [AMK9's] duties." *See Westfall*, 484 U.S. at 295–98. Accordingly, AMK9 is not entitled to immunity under *Westfall* and its progeny.

5. Summary

Because none of the theories raised by AMK9 operate to deprive the trial court of subject matter

jurisdiction, the trial court erred in granting the plea to the jurisdiction. We sustain Freeman's first issue as it relates to her claims against AMK9.[9]

C. [sic] **Jurisdiction Over Claims Against HCDC**

We next address whether dismissal of the claims against HCDC was proper. Freeman contends that the trial court erred in dismissing those claims because HCDC did not file a plea to the jurisdiction. HCDC responds on appeal by arguing that the trial court properly found, *sua sponte*, that it lacked jurisdiction over Freeman's suit against it. In particular, HCDC appears to argue that the trial court lacked jurisdiction because (1) "[a]s a matter of law, liability related to domestic animals runs only to the owner or keeper of the animal at the time of the incident" and (2) Freeman judicially admitted that only AMK9 owned or kept the dog at issue at the time of the incident.

We find that the trial court's *sua sponte* dismissal of the claims against HCDC was erroneous. HCDC did not put forth any authority establishing that it was immune to Freeman's suit, either under any of the theories advanced by AMK9 or under any other theory. Further, even assuming that HCDC is correct that "liability related to domestic animals" may only be imposed on "the owner or keeper of the animal at the time

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[9] In light of this conclusion, we need not address Freeman's second issue, by which she contends that the trial court erred in failing to give her an opportunity to replead. *See* TEX. R. APP. P. 47.1.

of the incident" and not on a third party, HCDC has not directed us to any authority, and we find none, establishing that a trial court lacks subject matter jurisdiction over such claims against a third party.[10] We sustain Freeman's first issue as it relates to her claims against HCDC.

III. Motion to Designate Responsible Third Parties

Freeman contends by her third issue that the trial court erred in granting AMK9's motion for leave to designate the Army and/or DOD as responsible third parties.[11] A "responsible third party" is defined as

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[10] We note that HCDC had filed a motion to dismiss Freeman's claim against it pursuant to Texas Rule of Civil Procedure 91a. *See* Tex. R. Civ. P. 91a (allowing for expedited dismissal of "baseless" causes of action). However, Freeman and HCDC later entered into a Rule 11 agreement stating in part as follows:

> HCDC agrees to withdraw its New Rule 91a Motion to Dismiss that is set for October 30, 2013, and [Freeman and HCDC] agree to reset the motion and hearing to occur at a later date and time that is convenient to both parties. The agreement between the parties shall not prejudice or prohibit Defendant, HCDC from having its Rule 91a Motion to Dismiss heard and ruled upon by the court outside the statutory deadline.

The parties dispute whether HCDC "withdrew" the Rule 91a motion by this agreement or merely consented to have it heard at a later date. In any event, it is undisputed that the trial court never ruled upon any Rule 91a motion. Therefore, the issue of whether the claims against HCDC should have been dismissed under the rule as "baseless" is not before us on appeal.

[11] The order purportedly granting the motion states that "Defendants' Motion for Extension of Time to Designate Responsible

> any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.

TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(6) (West, Westlaw through 2015 R.S.). A defendant may move to designate a responsible third party, and the trial court must grant the motion unless another party files a timely objection and establishes:

> (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and
>
> (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

Id. § 33.004(a), (g) (West, Westlaw through 2015 R.S.). We review a trial court's ruling on such a motion for abuse of discretion. *MCI Sales & Serv. v. Hinton*, 272 S.W.3d 17, 36 (Tex. App.—Waco 2008), *aff'd*, 329 S.W.3d

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Third-Parties is in all things GRANTED." The parties do not dispute that the trial court actually intended to grant AMK9's motion rather than merely to grant an extension of time.

475 (Tex. 2010); *see In re Arthur Andersen LLP*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (noting that "a trial court ordinarily has great discretion regarding joinder of third parties"); *see also Helm v. Kingston*, No. 13-10-00224-CV, 2011 WL 6746064, at *9 (Tex. App.—Corpus Christi Dec. 21, 2011, pet. denied) (mem. op.). A trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

Freeman filed an objection to AMK9's motion to designate responsible third parties in which she contended that AMK9 "did not plead sufficient facts about the alleged responsibility of [the Army or DOD] to satisfy the pleading requirements of the Texas Rules of Civil Procedure." *See id.* § 33.004(g)(1).

In its motion, AMK9 pleaded the following facts regarding the alleged liability of the Army and/or DOD:

> [T]his suit involves a claim for personal injuries arising out of an alleged "attack" by an AMK9 contract working dog (CWD) while the plaintiff was on Forward Operating Base (FOB) Mike Spann in Afghanistan working as a civilian contractor. Although the "attack" admittedly did not even break the skin, Plaintiff has alleged that Defendant AMK9 failed to properly control the CWD under Texas strict liability and negligence law. Even assuming Texas law should apply to torts which occurred, if at all, in a combat zone in Afghanistan on a U.S.

> military base, AMK9 asserts that at all relevant time periods: (1) the areas involved in the incident were under the control of the United States Army and/or the United States Department of Defense; (2) that those parties had a contractual duty to design, construct, and provide the kennels from which the CWD "escaped," and (3) that AMK9 was commanded by U.S. military authorities to use those kennels, which AMK9 had no part in designing, constructing, or providing, with designation of the contract kennels being the sole responsibility of the site Military Working Dog Program Manager (U.S. Army personnel). The kennels were designed and built by the U.S. Army in such a fashion that the CWD was able to escape from her kennel even though the door to her specific kennel enclosure was closed and locked by AMK9 personnel, due to the responsible third parties' decision not to construct the center divider to the ceiling of the kennels.

"The elements of a negligence cause of action are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338 (Tex. 2015). AMK9 has pleaded facts alleging that the Army had a "duty to design, construct, and provide the kennels," but it has not alleged, either implicitly or explicitly, that the Army *breached* this duty by designing and constructing the kennels such that, if the outer door to the kennel were open, a CWD would be able to escape. AMK9 has not pleaded any facts establishing

that the Army or DOD committed any other "negligent act or omission" or engaged in any "other conduct or activity that violates an applicable legal standard." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(6). Accordingly, we agree with Freeman that AMK9 failed to plead sufficient facts concerning the alleged liability of the Army and/or DOD. We conclude that the trial court abused its discretion in granting AMK9's motion for leave to designate the Army and/or DOD as responsible third parties.[12] Freeman's third issue is sustained.

IV. CONCLUSION

We reverse the trial court's judgments (1) dismissing Freeman's claims against both AMK9 and HCDC for lack of subject matter jurisdiction and (2) granting AMK9's motion to designate responsible third parties. The cause is remanded for further proceedings consistent with this opinion.

DORI CONTRERAS GARZA,
Justice

Delivered and filed the
29th day of October, 2015.

[12] On remand, the trial court is directed to afford AMK9 the opportunity to replead. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(g)(2) (West, Westlaw through 2015 R.S.).

[SEAL]

THE THIRTEENTH COURT OF APPEALS

13-14-00726-CV

Latasha Freeman

v.

American K-9 Detection Services, L.L.C. and
Hill Country Dog Center, L.L.C.

On appeal from the 198th Judicial
District Court of Bandera County, Texas
Trial Cause No. CV-13-246

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes the judgment of the trial court should be reversed and the cause remanded to the trial court. The Court orders the judgment of the trial court REVERSED and REMANDED for further proceedings consistent with its opinion. Costs of the appeal are adjudged against appellee.

We further order this decision certified below for observance.

October 22, 2015

CAUSE NO. CV-13-246

LATASHA FREEMAN	§	**IN THE DISTRICT**
VS.	§	**COURT**
AMERICAN K-9 DETECTION SERVICES, L.L.C. and HILL COUNTRY DOG CENTER, L.L.C.	§ § § § §	**198TH JUDICIAL DISTRICT** **BANDERA COUNTY, TEXAS**

ORDER GRANTING PLEA TO THE JURISDICTION

(Filed Jul. 29, 2014)

On the **2nd** day of **July, 2014**, the Court considered DEFENDANT, AMERICAN K-9 DETECTION SERVICES, LLC'S PLEA TO THE JURISDICTION, and after reviewing the materials filed with the Court and hearing the arguments, the Court finds that the Plea to the Jurisdiction should be **GRANTED**.

IT IS THEREFORE ORDERED that Defendant, American K-9 Detection Services, LLC's Plea to the Jurisdiction is hereby **GRANTED IN ALL THINGS**, and American K-9 Detection Services, L.L.C. **and** Hill Country Dog Center, L.L.C. are both hereby dismissed as parties to this case.

SIGNED on 28 day of July, 2014.

/s/ [Illegible]
PRESIDING JUDGE

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ATTORNEYS FOR AMERICAN K-9 DETECTION SERVICES, LLC

[AMOS BARTON 257-7580]

[SEAL]

THE SUPREME COURT OF TEXAS

Orders Pronounced October 19, 2018

ORDERS ON CAUSES

THE MOTIONS FOR REHEARING OF
THE FOLLOWING CAUSES ARE DENIED:

15-0932 AMERICAN K-9 DETECTION SERVICES, LLC AND HILL COUNTRY DOG CENTER, LLC v. LATASHA FREEMAN; from Bandera County; 13th Court of Appeals District (13-14-00726-CV, 494 SW3d 393, 10-29-15)

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