

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-000602-T
(2007-CA-001684)

FILED
MAY - 5 2008
CLERK
SUPREME COURT

COMAIR, INC.
AND COMAIR SERVICES, INC.

APPELLANTS

v.

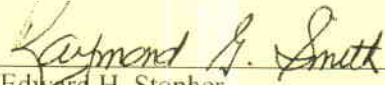
APPELLANTS' REPLY BRIEF

LEXINGTON-FAYETTE URBAN COUNTY
AIRPORT BOARD, LEXINGTON-FAYETTE
URBAN COUNTY AIRPORT CORPORATION,
AND MEMBERS, OFFICERS AND DIRECTORS
OF THE CORPORATION AND THE BOARD, IN
THEIR OFFICIAL CAPACITY

APPELLEES

APPEAL FROM FAYETTE CIRCUIT COURT
NO. 06-CI-03749
JAMES D. ISHMAEL, JR., JUDGE

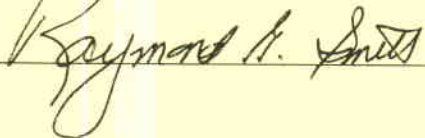
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy was mailed this 5TH day of May, 2008, to: J. Arthur Mozley, Mozley, Finlayson & Loggins, LLP, One Premier Plaza, Ste. 900, 5605 Glenridge Dr., Atlanta, GA 30342; Phillip M. Moloney, Sturgill, Turner, Barker & Moloney, PLLC, 333 W. Vine St., Ste. 1400, Lexington, KY 40507; Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; and Hon. James D. Ishmael, Jr., Fayette Circuit Court, 120 N. Limestone St., Lexington, KY 40507.



I. INTRODUCTION

The Lexington-Fayette Urban County Airport Board (“Board”) and Lexington-Fayette Urban County Airport Corporation’s (singly referred to as “Board” and “Corporation” and collectively referred to as “Airport Defendants”) brief acknowledges two facts that conclusively negate their claim to sovereign immunity: (1) the Board is engaged in a proprietary business activity, and (2) neither the Board nor the Corporation can satisfy the Berns’ two-prong immunity test. These admissions eliminate any doubt that the Board and Corporation do not qualify for sovereign immunity. As a matter of law this Court should direct that Comair is entitled to summary judgment on the Board and Corporation’s claim of sovereign immunity.¹

Instead, the Airport Defendants argue that they qualify for sovereign immunity because any board, authority or corporation created by a county pursuant to state statute ipso facto shares a county’s immunity. This Court has soundly rejected such a simplistic view of sovereign immunity.² There simply is no logical reason that a statutorily authorized county entity should be exempt from the tests that a state agency must satisfy for sovereign immunity to exist.

¹ Comair’s Reply Brief does not address the Appellees’ liability for the crash of Flight 5191 because it was adequately discussed in Comair’s original brief. While the parties obviously disagree on this matter, the issue in this case is sovereign immunity and not whether Appellees were in fact negligent. Nevertheless, Comair’s claims are based on common law negligence, and violations of FARs and Appellees’ own policies and regulations.

² *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703 (Ky. 2000); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003).

II. ARGUMENT

A. Because The Board Is Engaged In The Proprietary, Commercial Business Of Transportation, It Is Not Entitled To Sovereign Immunity

In its brief in chief, Comair described in detail the commercial, proprietary nature of the Board's business and the long-standing rule of law that neither state agencies nor municipal corporations engaged in a proprietary activity are shielded from their torts by sovereign immunity.³ Based on these undisputed matters, Comair argued that neither the Board nor the Corporation qualify for sovereign immunity.

The Airport Defendants' brief concedes that the Board is engaged in a proprietary activity. This Court will not find one word, one case or one legal argument in the Airport Defendants' brief that even addresses this issue, much less denies that the Board's proprietary activities do not disqualify it from claiming sovereign immunity. Their failure to address this issue "is tantamount to a confession" that the Airport Defendants are engaged in proprietary business activity that is not immune from suit.⁴

The Board's silence concerning its proprietary activities is understandable because the facts concerning its proprietary and commercial activities are undisputed. The Board is controlled by ten directors who may only be removed upon "a showing...of misconduct as board member or upon conviction of a felony."⁵ The Board "may sue and be sued, contract and be contracted with, and do all things reasonable or necessary to effectively carry out" its duties.⁶ The Board is solely responsible for setting rates,

³ See, Appellant's Brief, pp. 10-17; 36-47; *Gross v. Kentucky Bd. of Managers of Columbia Exposition*, 49 S.W.2d 458 (Ky. 1899); *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 330-331 (Ky. 1991); *Yanero v. Davis*, 65 S.W.3d 510, 519-521 (Ky. 2002).

⁴ *Trammell v. State of Mississippi*, 622 So.2d 1257, 1261 (Miss. 1993); *Copley v. Craft*, 341 S.W.2d 70 (Ky. 1960).

⁵ KRS 183.132(18).

⁶ KRS 183.132(3).

charges and fees for common carriers and other businesses that advertise, engage in commercial activities and otherwise use its facilities.⁷ The Board serves over 1,000,000 passengers a year, as well as the multitude of people who utilize the commercial facilities within the airport terminal.⁸

Blue Grass Airport (“BGA”) offers nonstop service to major U.S. cities, including New York, Dallas, Houston, Newark, Detroit, Memphis, Chicago and Atlanta.⁹ It is the fifth fastest growing airport in the nation and the seventh fastest growing airport in North America.¹⁰ As reflected in its 2006/2005 Financial Statement, not only is the Board “autonomous” as the “landlord” of BGA, the Board “rents space and assesses fees and charges to the airlines and businesses providing goods and services to the traveling public and to the civilian, business, governmental and military users of the airport.”¹¹

In 2006 alone, the Board earned more than \$11,000,000 from its commercial activities. The Board’s sources of revenue include \$3,540,588 in parking revenue and \$552,833 in concession fees and rental sales paid by rental car companies,¹² and fees derived from operating “The Club at Blue Grass,” a lounge that serves “beverages,” snacks and other “personalized services.”¹³ The income the Board generated in 2006 from its commercial, proprietary activities permitted it to pay \$393,955 in premiums for, *inter alia*, a \$150,000,000 general liability insurance policy.¹⁴

⁷ KRS 183.133(2).

⁸ www.bluegrassairport.com

⁹ *Id.*

¹⁰ John Rhodes (“Rhodes”) Deposition (“Depo.”), 6/29/2007, Exhibit (“Ex.”) 73, pp. 3, 6.

¹¹ Rhodes Depo., Ex. 74, p. 2.

¹² Rhodes Depo., Ex. 74, p. 44.

¹³ Rhodes Depo., pp. 21, 76-77, 79, 82-83 and Ex. 77 to Depo..

¹⁴ Rhodes Depo., Ex. 74, p. 33 and Ex. 80 to Depo.

Since at least 1899, this Court and its predecessor have consistently recognized that government-created entities are not entitled to sovereign immunity when they engage in proprietary activities.¹⁵ Indeed, in *Berns* and *Yanero*, this Court reaffirmed that shielding municipal corporations that engage in proprietary activities from their torts is inconsistent with the purpose of sovereign immunity:

We recognize the difficulty of classifying entities for purposes of constitutionally protected sovereign immunity. But certainly not every business can be immunized simply because it is established by act the General Assembly, and this corporation performs substantially the same functions as any private business engaged in the entertainment business....If we were to follow such reasoning, there would be no limitation on the scope of sovereign immunity. Every time the state gets involved in an enterprise formerly private the area of sovereign immunity would expand accordingly.¹⁶

The Board admits and the facts bear out that BGA is a commercial venture, no different from any other private business engaged in the transportation business other than that its municipal corporation heritage. Sovereign immunity was never intended to protect a proprietary business such as BGA from liability for its own negligent conduct. Summary judgment should have been entered in favor of Comair, not the Airport Defendants.

B. This Court's Decision In *Kea-Ham* Is Dispositive That The Board's Torts Are Not Shielded From Liability By Sovereign Immunity

The Airport Defendants devote a considerable portion of their brief discussing why sovereign immunity extends to Lexington-Fayette Urban County Government ("LFUCG"). The issue in this case, however, has never been whether LFUCG is entitled to sovereign immunity, but rather whether the Board and Corporation are clothed with

¹⁵ *Gross*, 49 S.W.2d at 459; *Berns*, 801 S.W.3d at 330-31; *Yanero*, 65 S.W.3d at 519-20.

¹⁶ *Berns*, 801 S.W.2d 330-331; *Yanero*, 65 S.W.3d at 520.

sovereign immunity. These are entirely different issues that require an entirely different analysis.

The Board and Corporation admit *sub silentio* that they do not qualify for sovereign immunity under the *Berns* test. They flippantly dismiss *Kea-Ham*, a case factually and legally indistinguishable from the present matter, claiming that “the operation of Blue Grass Airport by the Airport Board is a far more obvious example of “public and governmental function” than was the public purpose served by the Floyd County Development Authority.¹⁷ Instead, according to the Airport Defendants, the decisions in “*Inco* and *Smolcic* are dispositive” of their entitlement to sovereign immunity.¹⁸ The Airport Defendants are dead wrong.

Because the Airport Defendants admit that they cannot satisfy the *Berns* test, they contend that *Berns* and *Kea-Ham* are simply irrelevant to the Board’s sovereign immunity. Instead, they assert that the Board and Corporation should be considered a part of LFUCG and share its sovereign immunity. In essence, their position is that any board, authority or corporation created by a county pursuant to statute automatically partakes of the county’s immunity.

This Court has soundly rejected the Airport Defendants’ theory. At least since the decision in *Berns*, this Court has consistently held that a state agency or municipal corporation, including a county-created Authority, does not qualify for sovereign immunity unless it operates under the “direction and control of the central State

¹⁷ Appellees Brief, p. 29.

¹⁸ *Id.*

government” and is substantially “supported by monies which are disbursed by the authority of the Commissioner of Finance out of the State treasury.”¹⁹

The line between what is a state agency and what is a municipal corporation is not divided by whether the entity created by state statute is or is not a city, but whether, viewed as a whole, the entity is carrying out a function integral to state government...’sovereign immunity should extend only to “departments, boards, or agencies that are such integral parts of state government as to come within regular patterns of administrative organization and structure.”²⁰

The decision in *Kea-Ham*, virtually ignored by the Airport Defendants, laid to rest any doubt that a statutorily authorized, county created entity such as the Board does not automatically qualify for a county’s sovereign immunity. Indeed, this Court’s decision in *Kea-Ham* is not only on all fours with the present case, it also disposes of the Airport Defendants’ contention that the decision in *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*²¹ controls the outcome of this case. In *Kea-Ham*, the Floyd County Development Authority (“Authority”) was a statutorily authorized, county created entity whose purpose was to “promote economic progress in the county by acquiring and developing land for industrial and commercial uses.”²² Just like the enabling legislation for the Board, the enabling legislation for the Authority directed that its purpose was a “public and governmental function, exercised for public purpose, and a matter of public necessity” and that the lands it acquired “are hereby declared to be acquired and used for public and governmental purposes as a matter of public necessity.”²³

¹⁹ Berns, 801 S.W.2d at 331.

²⁰ *Id.* at 332.

²¹ 705 S.W.2d 933 (Ky. App. 1986).

²² *Kea-Ham*, 37 S.W.3d at 705.

²³ KRS 154.50-346.

The suit in *Kea-Ham* resulted from the Authority contracting with Kea-Ham to perform excavation work. The Authority represented to Kea-Ham that it had secured funding for that purpose and could pay Kea-Ham's bills as they became due. Kea-Ham sued the Authority when it failed to pay. The Authority claimed that it was entitled to sovereign immunity because it was an agency of Floyd County. The circuit court agreed and granted the Authority summary judgment. The Court of Appeals affirmed, based on the rationale of *Inco* that the Authority was an "agency of Floyd County" and that an entity created by a county is automatically entitled to the county's sovereign immunity.²⁴

This Court reversed the Court of Appeals, and in doing so clearly rejected the rationale of *Inco*. Instead, this Court applied the *Berns* two-part test to the Authority. The Authority was a non-profit entity created by Floyd County pursuant to KRS 155.50-316. It was governed by a board appointed by the County Judge-Executive and its "sources of funding include grants from state agencies."²⁵ Nevertheless, this Court had no difficulty in determining that the Authority was neither under the control of the central State government, nor substantially supported by funds from the State treasury:

Application of the two-part Berns test to the Authority indicates that it is a municipal corporation unprotected from suit by the shield of sovereign immunity. With regard to the control test, although the Authority's board members are appointed by the County Judge-Executive, they serve for a term of four years and have independent responsibility for making decisions for the Authority.

The funding part of the Berns test also indicates that the Authority is an independent municipal corporation, as it has several alternative means of funding. The Authority's funding is not limited to appropriations from the central

²⁴ *Kea-Ham*, 37 S.W.3d at 706. In *Inco*, Judge Wilhoit concurred in the result only, finding that the Board "is plainly not a unit of the urban county government, but an independent entity...." *Inco*, 705 S.W.2d at 935.

²⁵ *Kea-Ham*, 37 S.W.3d at 705.

government, as it can receive grants from other agencies, borrow money on its own credit, and issue bonds.²⁶

It is unmistakable that *Inco* did not survive this Court's decision in *Kea-Ham* because (i) this Court would have simply affirmed the Court of Appeals rather than apply the *Berns* test, and (ii) by necessity the Authority would have been entitled to sovereign immunity, which this Court held it was not.

While the Airport Defendants choose to ignore *Kea-Ham*, it is virtually indistinguishable from the facts in this case. Indeed, the Airport Defendants do not and cannot contend that the Board and Corporation are anything other than separate, independent entities. The Board consists of ten directors who may only be removed from their position for misconduct or conviction of a felony.²⁷ By statute and in practice, the Board operates autonomously from LFUCG. LFUCG is not responsible for the Board's obligations, any losses incurred by the Board are not imputed to LFUCG, the Airport Board statutorily may sue in its own name, and LFUCG does not exercise control over the Board or Corporation's fiscal matters. Based on these facts, the Airport Defendants do not argue, and thus concede, that they do not and cannot meet the *Berns* test.

Nevertheless, the Airport Defendants contend that the decision in *Smolcic* is somehow "dispositive" of their entitlement to sovereign immunity.²⁸ The decision in *Smolcic* is irrelevant to this case. Regardless of what may have been argued in the brief submitted to this Court in *Smolcic*, the only issue in *Smolcic* tangentially related to the present matter was whether LFUCG was itself entitled to sovereign immunity. Clearly, it is. As a result, there was no reason for this Court to discuss the two-pronged test of

²⁶ *Id.* at 706, 707.

²⁷ KRS 183.132(18).

²⁸ Appellees Brief, p. 29.

Berns or the decision in *Kea-Ham* in *Smolcic* because *Smolcic* did not involve a municipal corporation - a statutory entity created by LFUCG. The Airport Defendants' reliance upon *Smolcic* is simply misplaced. Neither the Board nor the Corporation qualifies for immunity under the *Berns* test.

C. **The Corporation Is Not Entitled To Sovereign Immunity Because It Is Either An Independent Entity Or An Agent Of The Non-Immune Board**

The Corporation, but not the Board, contends that it qualifies for sovereign immunity based on this Court's recent decision in *Autry v. Western Ky. Univ.*²⁹ The Corporation's theory is that it holds title to BGA's land as the agent or alter ego of the Board and LFUCG, and therefore can seek shelter in their sovereign immunity. In essence, according to the Corporation, if the Board is entitled to sovereign immunity then so too is the Corporation.

There are several fallacies with the Corporation's position. Among them is that the Corporation is itself a separate corporate entity with its own independent board, albeit the same board as that of the Board. It may sue or be sued in its own name as well as contract in its own name.³⁰ It may borrow monies and pledge BGA's real or personal property, but its indebtedness is not a debt of LFUCG or the Board.³¹ While the circuit court only permitted Comair to take one deposition concerning its claims against the Board and the Corporation, clearly the Corporation has a separate existence and purpose from that of the Board, unlike the Student Life Foundation in *Autry* that had "no truly independent existence from WKU".³²

²⁹ 219 S.W.3d 713 (Ky. 2007).

³⁰ KRS 183.132(3).

³¹ Rhodes Depo., Ex. 75.

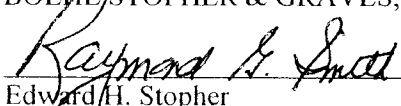
³² *Autry*, 219 S.W.3d at 719

Equally, if not more important, the Corporation cannot piggyback on the Board for its immunity because the Board does not have sovereign immunity for the reasons discussed *supra*. Even if the Corporation is considered an “agent” or the “alter ego” it is of the Board because only board members of the Board may be board members of the Corporation. Indeed, the Airport Defendants themselves describe the Corporation as having “no truly independent existence” from the Board.³³ The Corporation does not qualify for sovereign immunity.

III. CONCLUSION

For the foregoing reasons, Appellants, Comair, Inc. and Comair Services, Inc., respectfully request the Court set aside the summary judgment entered by the trial court, and direct that either summary judgment be entered in favor of Comair that neither the Board nor the Corporation are entitled to sovereign immunity or that the matter be remanded to the trial court for further discovery.

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³³ Appellees Brief, p. 31.