

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

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SUPREME COURT

COMAIR, INC.
AND COMAIR SERVICES, INC.,

APPELLANTS,

BRIEF FOR APPELLEES

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
HON. JAMES D. ISHMAEL, JR., JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was mailed, postage prepaid, this 18 day of April, 2008 to: Edward H. Stopher and Raymond G. Smith, Boehl, Stopher & Graves, LLP, AEGON Center, Suite 2300, 400 West Market Street, Louisville, Kentucky 40202; Chad Wadlington, Wombles & Wadlington, 200 West Vine Street, Suite 620, PNC Bank Plaza, Lexington, Kentucky 40507; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Hon. James D. Ishmael, Jr., Fayette Circuit Court, 120 N. Limestone St., Lexington, KY 40507. I further certify that the record on appeal was not withdrawn from the Clerk's office.

Kevin D. Henry
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MAY IT PLEASE THE COURT:

I. INTRODUCTION

The trial court correctly dismissed Appellants' (hereinafter "Comair") third party complaint against Appellees (collectively, the "Airport Defendants"), based on the holding of sovereign immunity for the Lexington-Fayette Urban County Airport Board (the "Airport Board") in Inco, Ltd. v. Lexington-Fayette Urban County Airport Board¹ which this Court ordered published in 1986. The Airport Board is not a "municipal corporation," but rather is a county board or arm and instrumentality of the Urban County Government, performing public and governmental functions under the control of the Urban County Council pursuant to its Charter, Ordinances, and appointments (and power of removal) of Airport Board Members. In addition to FAA regulations, Blue Grass Airport is governed by rules and regulations adopted by both its Airport Board and Urban County Council Ordinances. The other Airport Defendants derive immunity from the LFUCG, a sovereign-immune county government, and its Airport Board. Therefore, this appeal does not present any questions of first impression, and there is ample precedent to support the judgment of the trial court.

Since Comair has chosen to inject unsupported allegations of Airport negligence into what should be a strictly legal discussion, let it be noted that the National Transportation Safety Board ("NTSB") conducted a complete, professional and impartial investigation, along with the Federal Aviation Administration ("FAA"), commencing immediately after the crash of Comair flight 5191 and continuing for several months. The NTSB findings of fact released in December 2006 contained no criticisms or

¹ 705 S.W.2d 933 (Ky. App. 1985, discretionary review denied and Court of Appeals opinion ordered to be published).

allegations of any violation of FAA standards by the Airport Defendants. Subsequently, in late July 2007, it was well publicized in all Kentucky and national news media that the NTSB conducted a public hearing and issued its final report and recommendations, which again exonerated the Airport Defendants and found that the cause of the crash was Comair pilot error and inattention. Therefore, the Appellees object to Comair's suggestion that its appeal has any factual merit, even if alleged "liability facts" were relevant to a legal determination of sovereign immunity, which they are not. (The trial court was asked to take judicial notice of the NTSB Accident Report, a public record that may be found at www.nts.gov/publicn/2007/AAR0M05.pdf; Report No. NTSB/AAR-07-05, PB2007-910406; Attempted Takeoff From Wrong Runway, Comair Flight 5191, Lexington, Kentucky, August 27, 2006). KRE 201 and 1005. The factual portions of NTSB Accident Reports are admissible in evidence. Curry v. Chevron².

Equally as important, Comair is not the real party in interest in this action. The insurer for Comair, United States Aviation Underwriters, Inc. ("USAU"), carries a public liability insurance policy in excess of one billion dollars for Comair covering the crash of Flight 5191, and USAU has intervened in a companion Federal Court action styled Comair, Inc. and United States Aviation Underwriters, Inc. v. Lexington-Fayette Urban County Airport Board, et al., filed in the Eastern District of Kentucky, Central Division at Lexington, Civil Action No. 5:07-CV-58-KSF. USAU has acknowledged that it has already paid claims to settle a dozen or more of the passenger estate lawsuits along with property damage claims. A true copy of USAU's Intervening Complaint is attached as Appendix A. Thus, while Comair asserts that this appeal "presents a significant issue of sovereign immunity to well over 1,000,000 persons [passengers] each year," (Appellants'

² 779 F.2d 272, 274 (5th Cir. 1985).

Brief, p. ii), the appeal really is for the benefit of its insurance company. Both Comair and USAU are improperly attempting to claim contribution when none is allowed against sovereign-immune entities or individuals; indemnity, when no legal basis exists therefor, given the active and primary negligence of the Comair flight crew; or apportionment, which does not lie against the immune Airport Defendants as arms or instrumentalities of the Lexington-Fayette Urban County Government.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellees/Airport Defendants are ready and willing to participate in an oral argument, if necessary.

III. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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IV. COUNTERSTATEMENT OF THE CASE

A. The Airport Taxiways, Runways, Signage, Markings and Lighting Complied with FAA Requirements.

In its Brief, Comair resorts to non-admissible hearsay, news articles, speculation and rank gossip in an effort to portray that the Airport runways, taxiways, markings, signage and lighting somehow did not comply with FAA 14 CFR Part 139 requirements, and somehow played some role in causing the crash of Comair Flight 5191 on takeoff from the wrong runway 26 (also called 8-26, a shorter, daylight only strip), after being cleared by the tower for takeoff on runway 22 (also called 4-22), the longer commercial runway always used by Comair flights. Nothing could be farther from the truth, as established by the NTSB's independent and professional investigation.

Regarding lighting and signage, the NTSB Accident Report at page 62 stated (page 62 attached as Appendix B):

“Because both pilots were experienced, they should have been knowledgeable about basic airport geographic features and signage and surface marking standards (the Safety Board did not note any signage or surface markings at LEX that were not in compliance with FAA regulations), and they should have been skilled at interpreting airport charts. In addition to their knowledge about the specific route (taxiway A to runway 22), multiple external cues and features were available to the pilots to support their navigation to runway 22, and no evidence indicated that their view from the windscreen was obstructed. Observations from a CRJ-100 airplane after the accident demonstrated that, during nighttime conditions, taxiway location signs were visible along the full length of the taxi route, a runway 26 holding position sign adjacent to the runway 26 hold short line was visible, and the runway 26 numbers were visible. Also, evidence indicated that, at the time of the accident, the signs identifying the critical features along the taxi route (that is, the runway 26 holding position sign, the taxiway A extension across runway 26, and the runway 22 holding position sign) were illuminated and would have been visible to both pilots.” (Emphasis added.)

Further, the December 17, 2006 NTSB Operational Factors Group Chairman's Factual Report (of which Group, Comair had two members), at page 3-4 states:

"Floodlights at the terminal building illuminated the ramp area and taxiway lights were illuminated on taxiway A. The runway lights on runway 22 were illuminated and on step 3. Runway 26 lights were not illuminated and the runway was NOTAM'd closed except during daytime operations." (Emphasis added.) (Footnote omitted.)

See also the NTSB statement of American Eagle employee and eyewitness Kerry Ray Williams, marked as Exhibit 6 at his deposition (and attached hereto as Appendix C):

"...he noted that the runway lights for runway 22 were illuminated, as were the taxiway lights."

Further, the NTSB found as a fact that "Runway 4/22 conformed with the FAA airport certification requirements specified in 14 CFR 139." (NTSB Accident Report, p. 16, attached hereto as Appendix D.) On December 12, 2006, the NTSB made this factual finding: "At the time of the accident, both runways [26 and 22] had appropriate runway holding position and taxiway location signs at the taxiway entrance to each runway." (NTSB Safety Recommendation A-06-83 and 84, December 12, 2006, pages 2-3, attached hereto as Appendix E.) Further, the FAA itself found that Blue Grass Airport was in compliance with 14 CFR Part 139 certification requirements:

"In conjunction with the ongoing NTSB investigation, the FAA has reviewed the airport signs and markings and found they are in compliance with FAA standards. In addition, an Airport Certification/Safety Inspector performed an annual 14 CFR Part 139 airport inspection at LEX on November 20 and 21, 2006. The inspector found the Taxiway A7 construction area is currently in compliance with FAA sign and marking standards." (FAA e-mail dated November 22, 2006, FAA official Kathleen Berger Deposition Exhibit 285, attached hereto as Appendix F.)

See also FAA e-mail dated September 20, 2006 from the FAA Airport Safety and Certification Division, Southern Region (Berger Deposition Exhibit 284, attached hereto as Appendix G):

“Just for everyone’s info – We have our own standards and they aren’t always the same as ICAO. There was a sign at the intersection of A and 8-26. It was correct and did meet our standards. There were also 3 lead in lines extending from the hold marking position that directed you across 8-26 to the intersection of A4 and 4-22. Also, the signs for 4-22 were bright and visible from the 8-26 hold position. Our standards recommend naming taxiways just as they were named. Alpha being the parallel taxiway and A-1, A-2, A-3, A-4, etc., being the stub taxiways to the runway. These articles are making me nuts and why are they using someone from the United Kingdom to do this report for them?”

These independent findings of Airport compliance are confirmed in the NTSB Accident Report, particularly pp. 73-75:

“As previously stated, numerous cues were available to the flight crew to indicate that the airplane was not at the position on the airport surface that it was supposed to be. For example, when the airplane stopped at the runway 26 hold short line instead of the runway 22 hold short line, the flight crew would have been able to see the runway 26 holding position sign and painted runway numbers, the continuation of taxiway A across runway 26, and the runway 22 holding position sign. Also, when the airplane was in position at runway 26 instead of runway 22, the crew would have been able to see the holding position sign for runway 22 and the 75-foot width of the runway (versus the 150-foot width of runway 22).”

(Pages 73-75 of NTSB Accident Report attached hereto as Appendix H.) Contrary to Comair’s contentions in its Brief, “Lighted X’s” were not required on Runway 26 at night, as verified by the FAA:

“It is the opinion of the [FAA] certification inspectors that lighted X’s are NOT required for a runway that is a daylight, VFR only runway. In this case, Runway 8-26 is published as a day/VFR only, non-part 139 runway in the applicable charts and publications and in the LEX ACM.

“The X would only be required when the runway is closed by NOTAM for construction or other conditions. The placing of X’s on a daily basis for 8-

26 at sunset is not required or recommended." (Emphasis added.) (FAA official Jim Price Deposition Exhibit 430, attached hereto as Appendix I.)

Last, Comair's unfounded assertions concerning the alleged inadequacy of the NOTAM that taxiway Alpha was closed north of Runway 26 are not only untrue but are totally irrelevant, as it is undisputed that (1) Comair itself determined that the NOTAM did not affect safety of flight, and (2) in any event the 5191 flight crew did not receive the NOTAM, and thus could not have been misled or confused by it:

"The local NOTAM that indicated that taxiway A north of runway 8/26 was closed was not included in the Comair flight planning system or the flight release paperwork for the accident flight because the company determined that the information in the local NOTAM did not affect safety of flight. The Safety Board was not able to determine what effect, if any, this information would have had on the circumstances of this accident. However, this possible cue would not have had the same salience as the primary cues -- the airport markings and signage -- that were accurate and available to the flight crew. In addition, the Board's analysis of the accident determined that the taxi to runway 22 was relatively simple and could have been successfully conducted by using the cues and aids available to the flight crew. Thus, the Safety Board concludes that, because the information in the local NOTAM about the altered taxiway A configuration was not needed for the pilots' wayfinding task, the absence of the local NOTAM from the flight release paperwork was not a factor in this accident." (NTSB Accident Report, p. 101.)

B. Comair's Pilot Negligence Was the Cause of the Crash.

Contrary to Comair's efforts to imply that its own negligence was not the sole cause of the accident, Comair's own line check pilots³ have already given sworn testimony that the Flight 5191 pilots committed numerous violations on the morning in question:

Q: Now, when you reviewed the CVR [cockpit voice recorder] transcript, you saw that there were a number of violations committed by this crew in connection with their conduct on the day of the crash; is that correct?

A: Correct.

³ Line check pilots are Comair supervisory pilots responsible for conducting operational checks of other Comair pilots to ensure they operate safely and in compliance with FAA and Comair procedure.

Q: Sterile cockpit violations, right?
A: Yes.
Q: Briefing violations?
A: Yes.
Q: Taxi violations?
A: I'm not sure.
Q: Okay. And as a – you're a line check airman, are you not?
A: Correct.
Q: And we'll get into that, and had you been sitting on the jump seat on the day of the – on the morning of the crash of Comair Flight 5191, you would have failed that crew if this was an IOE; is that correct?
A: At a certain point, yes.
Q: You never would have let them take off, would you have?
A: Not on the incorrect runway.
Q: That's right. You would have NQ'd both pilots, correct?
A: Yes.
Q: NQ'd means nonqualified both pilots, correct?
A: Correct.
Q: So neither one could act as the pilot in command; is that right?
A: Correct."

(Comair Line Check Pilot and Captain Thomas Scharold deposition, pp. 13-14.) See also pages 239-259 of Captain Scharold's deposition, where he outlined in detail the many errors and violations of the flight crew causing the accident.

In a further attempt to excuse its pilots' errors by arguing that the Jeppesen charts taxiways and runways (not published by the Airport) were somehow deficient, Comair again neglected to advise the Court that every Comair pilot who has testified in this case has given sworn testimony that it was crystal clear from the airport charts and diagrams that in order to get to Runway 22 from the gate area it is necessary to first cross Runway 26, and that one does not attempt to take off from the first runway (26) that one comes to:

Q: And you emphasized that both pilots should have out the airport diagram and both pilots, the Captain and First Officer, should both understand the taxi route to be followed to get to the takeoff runway?
A: Yes.
Q: And you said that you, as a line check airman, wanted to see that – when you were performing your line check duties, you wanted to see that the

first officers generally wrote down the taxi clearance that was given to them, correct?

A: Yes.

Q: Now, the taxi clearance that was given to this flight crew was basically a clearance to Runway 22; is that correct?

A: That's correct.

Q: They were not told to use any particular taxiway to get there, were they?

A: That's correct.

Q: So this flight crew, on the day in question or the morning in question, had absolute discretion to get to Runway 22 by using any taxiway they desired to use, so long as it was an open taxiway?

A: Yes.

Q: Nonetheless, you know from the airport diagram that these two pilots both should have had out and been looking at, you know from that airport diagram that in order to get to Runway 22 from the ramp area, it is necessary to cross 26.

A: Correct.

Q: And regardless of what the taxiways are called, whether they're called A1 through A10000, regardless of how they're designated, by looking at that airport diagram, it's clear as crystal that in order to get to Runway 22, you have to cross first Runway 26?

A: Correct.

Q: And it's also clear as crystal that no matter what the taxiways are designated as number-wise, the flight crew should not have taken the first runway they came to and utilized it as a takeoff runway?

A: Correct.

Q: And that's just obvious from the airport diagram?

A: Yes.

(Comair Line Check Pilot and Captain Scharold deposition, pp, 401-403.)

Q: All right, sir. Was there anything to your knowledge, on the early morning in question, that prevented the flight crew from inquiring of the air traffic controller as to why the runway they had turned onto had no lights?

A: There was nothing to prohibit them from inquiring.

Q: In your best view as a line check airman, should they have done so?

A: Yes.

(Scharold deposition, p. 406.) See also the similar deposition testimony of Comair Proficiency Check Airman and Captain Richard Easterly, including pp. 343-356. And as to the fact that the runways and taxiways and signage and pavement markings at the

airport were not confusing to pilots, see the sworn deposition testimony of Comair Captain, Line Check Pilot and Crew Resource Management Instructor Timothy David Patrick (pages 269-273):

- Q: It says, quote, "Captain Patrick flew into LEX quite often and recently," end quote. What's your best estimate as to the number of times you have flown into and out of the Lexington Blue Grass Airport?
- A: I don't know.
- Q: Certainly more than 10 or 15?
- A: I don't know.
- Q: Okay. You went on to say that Lexington was a, quote, "staple city," end quote, for pilots at Comair. Do you see that statement?
- A: Yes, I see that.
- Q: What did you mean by saying that Lexington was a, quote, "staple city," end quote, for pilots at Comair?
- A: I believe I was referring to the fact that Lexington has been a Comair station for a long time, so most pilots had had an opportunity to fly in there.
- Q: Many Comair pilots have flown into and out of Lexington in the past, correct?
- A: Yes.
- Q: Both day and night?
- A: That's correct.
- Q: And to your best knowledge, this accident is the only instance in which any Comair pilot has ever tried to take off on Runway 26; is that correct?
- A: I don't know the answer to that.
- Q: All right. Are you aware of any other instances in which Comair pilots tried to take off on Runway 26?
- A: No, I'm not.
- Q: I see. Did you also tell the National Transportation Safety Board that you had never had a situational awareness problem during any of your ground operations at the Lexington Airport?
- A: Can you refer me to that sentence?
- Q: Yes, sir, the middle of the – middle of the second full paragraph, where the sentence says, quote, "He," referring to you, "had never had a situational awareness problem during ground operations at LEX," end quote.
- A: Yes, I see that.
- Q: That's a correct statement, is it not, sir?
- A: Yes.
- Q: And you go on to state – state that most pilots have flown into Lexington frequently, and then you say that you, quote, "had never been confused or had problems distinguishing Runway 22 from Runway 26 on the ground," end quote. And that's a true statement, it is not, sir?

A: That's what I said.
Q: And that's an accurate statement of your experiences at the Lexington Airport, is it not, sir?
A: Yes, it is.
Q: And you also stated that you, quote, "had not heard other pilots ever mentioning that they had almost made the same mistake as the accident flight crew in distinguishing Runway 22 from Runway 26." Is that a -- correct?
A: That's correct.
Q: And that's a true statement, is it not, sir?
A: To the best of my knowledge.
Q: All right, sir. Excuse me. And you know, sir, from looking at the airport diagram that regardless of whether we call it Taxiway Alpha, Bravo, Charlie, Delta, Echo, Foxtrot or whatever, you know from looking at the airport diagram that there are two and only two paved runways there, correct?
A: (No audible response.)
Q: 8-26 is one; 4-22 is the other, correct?
A: Yes.
Q: And you also know from looking at the airport diagram that if you are cleared from the ramp to take off on Runway 22, then you have the discretion and the authority to get to 22 by using any taxiway you wish, correct?
A: Yes.
Q: And you also know as an absolute fact that in order to get to runway 22, you must first cross Runway 26?
A: That's true.
Q: And you also know as an absolute fact that regardless of what these taxiways are called, whether they're called A5, A7, A1, C1, D1, F1 or whatever, it is an absolute fact that in order to get to Runway 22 from the ramp, you should not turn onto the first runway you come to and take off from it; is that correct?
A: Would you restate your question?
Q: Certainly, sir. If you're on the ramp, and you know where the Comair ramp area is at -- at the Lexington Airport, correct?
A: Yes.
Q: If you're on the ramp and you're cleared to take off from Runway 22, then you know by looking at the airport diagram that, regardless of what these taxiways are called, Alpha, Bravo, Charlie, Delta, Echo, Foxtrot, A1, A2, A3, A4, A5, A6, A7, regardless of what those taxiways are called, you should not turn onto and attempt to take off from the first runway you come to; isn't that a fact?
A: Yes.

For similar testimony and evidence, see pages 76-78 of the deposition of American Eagle employee and eyewitness Kerry Williams, and the deposition of eyewitness and Comair Customer Service Agent Gregory Cotton:

Q: What is your best recollection as to the number of daily flights that Comair operated out of the airport at the time in question?

A: It would be approximately 16 departures a day.

Q: So in the seven-day period prior to this accident, somewhere around 16 Comair flights daily departed from Blue Grass Airport?

A: To the best of my knowledge.

Q: And they all, to the best of your knowledge, would have taxied out to Runway 22 and taken off?

A: 22 or 4.

Q: All right, sir. And do I understand, sir, that in your 20-plus years of working there at the airport, you never heard any crew members speak about or discuss any confusion about the taxiways or lining up on the wrong runway or anything like that?

A: I have never heard any talk of that, no.

(Cotton deposition, p. 83.)

Further, that same morning, Skywest and American Eagle flights taxied to and departed from Runway 22 without any problems, just minutes before Comair 5191 was cleared by FAA air traffic control to taxi to Runway 22. NTSB Accident Report p. 63.

So we see that the Comair/USAU arguments concerning supposed negligence on the part of the Airport – based on unheard-of and unverified foreign “plaintiffs’ experts,” hearsay newspaper articles and the like – are simply just that – arguments, totally refuted by the undisputed NTSB findings and evidence in this case.

V. ARGUMENT

Preface

In this appeal, Comair (for the benefit of its insurer, United States Aviation Underwriters Group) asks this Court to overrule Inco, Ltd. v. Lexington-Fayette County Airport Board and thereby abrogate the sovereign immunity which for the past 22 years has been expressly recognized for the Lexington-Fayette Urban County Airport Board as an arm or instrumentality of the sovereign immune Lexington-Fayette Urban County Government. In doing so, Comair seeks to change the principle that “counties and municipalities are accorded different degrees of immunity from tort liability.”⁴ There has been no action by the Kentucky legislature to warrant a change in the sovereign immune status of the Airport Board or the LFUCG. In fact, this Court would have to overrule or ignore its decision in Autry v. Western Kentucky University⁵, rendered just last year, in order to reach the result urged by Comair and its insurer.

The same arguments about the “evolution” of the law of sovereign immunity presented by Comair and its insurer were unsuccessfully attempted in Lexington-Fayette Urban County Government v. Smolcic.⁶ There, the appellees/cross appellants argued that Kea-Ham Contracting v. Floyd County Development Authority⁷, compelled application of the “Berns test” for sovereign immunity to the Urban County Government, which factors the Urban County Government (or any county government) could never satisfy (i.e., control by the central State government, and funded out of the central State treasury). Finally, the Smolcic appellees/cross appellants also argued legislative waiver

⁴ Schwindel v. Meade County, 113 S.W.3d 159, 164 (Ky. 2003).

⁵ 219 S.W.3d 713 (Ky. 2007).

⁶ 142 S.W.3d 128 (Ky. 2004). See Appendix J, excerpts from the Brief for Appellees/Cross Appellants, filed in this Court in Smolcic, case nos. 2002-SC-958-D and 2002-SC-972-D dated January 8, 2004.

⁷ 37 S.W.3d 703 (Ky. 2001).

of sovereign immunity from a provision of the Board of Claims statute relating to the maintenance by a municipality of state-owned traffic control devices pursuant to contract with the Commonwealth, and by statutes or ordinances permitting the LFUCG to maintain an indemnity fund or purchase liability insurance. This Court heard and rejected all such challenges, and in passing cited Inco on the sovereign immunity of the LFUCG as a county government.

Nothing has changed since Smolicic except the unfortunate occurrence of the crash of Comair flight 5191 – exposing Comair and its insurer to substantial damages – and the advent of a new majority of Justices on this honorable Court. Throughout amendments of the Board of Claims Act as well as the enactment and amendment of the Claims Against Local of Governments Act, KRS 65.200, et seq. after Inco was published, the legislature has left intact the sovereign immunity of county governments, the LFUCG and the Lexington-Fayette Urban County Airport Board.⁸ This Court has said, “[O]nce it has been determined that an entity is entitled to sovereign immunity, this Court has no right to merely refuse to apply it or abrogate the legal doctrine.” Withers v. University of Kentucky⁹. In this case, the Court should reject Comair’s effort to eliminate the Appellees’ sovereign immunity when there has been no new legislation to interpret or to reconcile with existing statutes the Court has previously addressed.

A. The Airport Board and its Members have sovereign immunity from Comair’s unfounded claims.

Since Inco was published almost 23 years ago, it may be useful to the current Court to briefly review some of the background of the City of Lexington-Fayette County

⁸ Schwindel, supra at 163 held that enactment of this statute did not waive any immunity enjoyed by counties and their immune agencies.

⁹ 939 S.W.2d 340, 344 (Ky. 1997).

merger through which the former Lexington-Fayette County Airport Board was brought under the control of the Urban County Government, and the City of Lexington ceased to exist.

Pursuant to enabling legislation in KRS Chapter 67A, the voters of the old City of Lexington and Fayette County approved merger of the two governments and specifically the Lexington-Fayette Urban County Government Charter (the “Charter”), which in turn was adopted by the new Urban County Council, effective January 1, 1974. The City of Lexington ceased to exist. This Court need not determine whether the old Lexington-Fayette County Airport Board was a “municipal corporation” before 1974. As a matter of law, the current Lexington-Fayette Urban County Airport Board since then has been an arm and instrumentality of the LFUCG by express language of the Charter, and controlled by Urban County Council Ordinances and Board appointments.

Key Urban –County Charter Provisions (reprinted in Appendix K):

Section 1.01 unmistakably merged the City of Lexington with the: “governmental and corporate functions of the County of Fayette, operating under the Constitution and Laws of the Commonwealth of Kentucky.”

Section 1.02 provided: “the Lexington-Fayette Urban County Government shall have power and jurisdiction throughout the total area embraced by the official boundaries of the County of Fayette...”

Among the powers granted to the Lexington-Fayette Urban County Government in Section 3.02 were:

(8) To provide for the creation and maintenance, building or purchase, and operation of water works, transportation facilities, public airports...(Emphasis supplied.)

(24) To create, alter or abolish departments, boards, commissions, offices and agencies, and to confer upon same necessary and appropriate authority for carrying out all powers and duties assigned thereto.

Section 7.02 provided in pertinent part:

Except as otherwise provided by this Charter or appropriate state law, all members of boards, agencies and commissions covered by the provisions of this Article shall be appointed by the Mayor subject to confirmation by majority of the Council members...all vacancies on any board, agency or commission shall be filled for the unexpired term in the manner prescribed for original appointment by this Charter or by applicable state law. Any member of a board, agency or commission may be removed from office in accordance with applicable state law, or in the absence of such law, by a majority of the Council of the Merged Government...all official meetings of boards, agencies and commissions of the Merged Government shall be public and any citizen shall have access to the minutes and official records thereof on request.

Section 7.18 provided:

The Lexington-Fayette County Airport Board shall continue after the effective date of this Charter as the Lexington-Fayette Urban County Airport Board. Said Board shall retain all of the powers, duties and functions under law as may be now or hereafter assigned to city, county or joint city-county airport boards. The Lexington-Fayette Urban County Airport Board shall retain all powers pertaining to the appointment of an Airport Manager and staff as prescribed by law. All vacancies on said Board occurring after the effective date of this Charter shall be appointed by the Mayor, subject to the provisions of Section 7.02 of this Charter.

It is also highly significant that Section 2A2 of the Code of Ordinances of the Lexington-Fayette Urban County Government, in effect for many years before August 27, 2006, stated that:

“The rules and regulations adopted by the Lexington-Fayette Urban County Airport Board, a copy of which is on file in the council clerk’s office, are hereby adopted as a part hereof and ratified by the Urban County Government. The penalties prescribed in Section 100.31 of such rules and regulations are specifically adopted in order to enforce the rules and regulations and shall be the penalties for violation of the rules and regulations...”

Therefore, any claim of alleged breach of duties arising from Airport Board rules and regulations is actually alleging a breach of LFUCG rules and regulations, with specific penalties enacted by the Urban County Council for instances of breach. This makes it clear that the Urban County Council has exercised control over the Airport Board and its employees, not just by appointing Airport Board members.

1. The Inco Decision.

Inco, Ltd. sued the Airport Board for property damage to its aircraft when, after landing, it ran into a snow embankment at the end of an airport runway created by plowing the runway – an incident which also suggested pilot error as the primary, active cause, but without the tragic loss of life like the crash of flight 5191.

In Inco, supra, Judge Lester first reiterated that the LFUCG was not a municipality because prior decisions of this Court (Holsclaw, Jacobs and Hempel, citations omitted) had consistently held that “the City of Lexington ceased to exist on the day that urban county government became effective.” 705 S.W.2d at 934. Then, the Inco opinion stated that it made no difference whether the old City of Lexington or Fayette County “took the initial steps to provide Blue Grass Field,” because “[w]ith the demise of the city, then every function it sponsored became a county agency prior to the time of the tort involved in this appeal.” Id. Finally, the Court of Appeals concluded that University of Louisville v. Martin¹⁰ disposed of the aircraft owner’s contention that the “authority to sue and be sued” language in the enabling statute for airport boards, KRS 183.132, was a waiver of sovereign immunity as a county agency. Id. at 935.

2. Undisputed facts supporting the sovereign-immune status of the Appellees

¹⁰ 574 S.W.2d 676 (Ky. App. 1978).

The following set of facts about the present Airport Defendants is undisputed in this record, after Comair was given document discovery and took the deposition of the Airport Director of Finance and Administration, related to the defense of sovereign immunity:

1. The Lexington-Fayette Urban County Airport Corporation (Airport Corporation) has no employees. All employees work for the Airport Board. (John Rhodes deposition, pp. 22, 29)

2. The Airport Corporation is the legal titleholder of all land, runways, buildings and improvements at Blue Grass Airport. In a series of bond financing transactions facilitated by actions of the Urban County Council, the Airport Board has leased the entire airport premises to the Lexington-Fayette Urban County Government (LFUCG) and the Airport Board as co-lessees. (Deposition of John Rhodes, Airport director of Administration and Finance, p. 33, 34)

3. The Airport Board operates Blue Grass Airport. Airport management answers to the members of the Airport Board, who set policy, hire and fire. In turn, Airport Board members serve at the pleasure of the Mayor and the Urban County Council. [Charter section 7.02, Appendix L and KRS 183.132(8)]

4. The Airport Board's annual financial statements are included in the LFUCG's annual financial statements reported to the public. (Appendix M, 2005-2006 Comprehensive Annual Financial Report of the Airport Board, Rhodes deposition exhibit, pp. 74).

5. Comair has not alleged with particularity in this record (nor has discovery in any related Comair passenger cases since revealed) a single violation of any FAA

standard at Blue Grass Airport as of the morning of August 27, 2006 that could relate to why Flight 5191 attempted takeoff from the wrong Runway 26 after having been cleared for takeoff on the main commercial Runway 22 by the federal air traffic controller in the tower. Significantly, Comair first sued the Airport Defendants and the FAA in U.S. District Court, E.D.Ky, Central Division at Lexington, Civil Action No. 5:06-CV-00346-KSF on October 1, 2006, claiming federal question jurisdiction because FAA regulation of aviation and airports was pervasive and preempted the field of aviation. (Appendix N). That action was dismissed for lack of subject-matter jurisdiction on April 18, 2007. Yet, Comair in its Third-Party Complaint and lengthy memoranda filed months later could not identify a single FAA standard allegedly violated by the Airport, much less connect such a violation to be a substantial factor in causing the Comair pilots to takeoff from the wrong runway.

6. KRS 183.123 provides that the “establishment, construction, enlargement, improvement, maintenance, equipping and operation of airports...whether by the state separately or jointly with any governmental unit thereof or air board...are hereby declared to be public and governmental functions exercised for a public purpose, and matters of public necessity...”

7. Included in the exhibits Comair introduced in evidence at the deposition of Airport Director of Finance John Rhodes were the following, which clearly describe the relationship of each entity to the Urban county Government and each other:

Exhibit 74 – 2005-06 Audited Annual Financial Report

The LFUCAB is owned by Lexington-Fayette Urban County Airport Corporation, a public corporation created under the laws of the Commonwealth of Kentucky. The Corporation acts as an agency and instrumentality of Lexington-Fayette Urban County Airport Board and

Lexington-Fayette Urban County Government (LFUCG). The LFUCAB is a component unit of LFUCG and its financial statements are included as a discretely presented component unit in LFUCG's general-purpose financial statements.

The LFUCAB is responsible for the efficient planning, development, administration, operation, and financial condition of the Airport, and as landlord, 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. In addition, the LFUCAB is responsible for assuring residents of Fayette County and the immediate surrounding areas of minimal environmental impact from air navigation and transportation.

The LFUCAB is composed of ten members appointed by the Mayor, including a designated officer of the LFUCG, in accordance with terms set forth in Kentucky Revised Statute 183.132(7).

Based on the Mayor's responsibility for the appointment of the LFUCAB members, their approval of any capital improvements programs and the issuance of certain debt, the LFUCAB is considered a component unit of the Lexington-Fayette Urban County Government under the criteria set forth by the Governmental Accounting Standards Board (GASB). The LFUCAB does not have any component units and is not involved in any joint ventures. (Page 2.)

Exhibit 75 -- \$29,050,000 Bond Issue

Blue Grass Airport ("Airport") is owned by the Corporation and operated by the Board. Pursuant to a Contract, Lease and Option of 1994 (the "1994 Lease"), the Corporation has leased certain designated portions of the Airport (including various capital improvements financed with the 1994 Bonds (the "1994 Projects")) to the Urban County Government and the Board, as joint lessees (sometimes here and after referred to collectively as the "Lessees"). The required rental payments under the 1994 Lease include annual amounts sufficient to pay principal and interest on the Corporation's outstanding 1994 Bonds. To secure payment of the 1994 Bonds, the Corporation has granted a nonforeclosable mortgage lien to J.P. Morgan Trust Company (f/k/a Bank One, Kentucky, N.A.), as trustee (the "1994 Trustee") on the Airport, including the 1994 Projects, pursuant to a Mortgage Deed of Trust of 1994 (the "1994 Indenture"). At the direction of the Corporation, the 1994 Trustee has delivered a notice of redemption calling all of the outstanding 1994A Bonds for redemption on December 1, 2003. (Page 2.)

The Corporation was created in 1976 as the agency, instrumentality and constituted authority of the Board and the Urban County Government, organized and existing by virtue of the provisions of Section 58.180 and Chapter 273 of the Kentucky Revised Statutes. The Corporation was formed by the Board and the Urban County Government to act as the agency and instrumentality of the Board and the Urban County Government in the financing of public improvements and projects of a capital nature for the Board and the Urban County Government relating to airports. The Corporation is a legal corporate entity in its own right, separate and apart from the Urban County Government and from the Urban County Council, but nevertheless constitutes an agency, instrumentality and constituted authority for the Board and the Urban County Government.

The Lexington-Fayette Urban County Airport Board is a political subdivision of the Commonwealth of Kentucky created in 1946 pursuant to Kentucky Revised Statutes, Chapter 183 and the prior existence of the Board was specifically recognized in the Charter of the Lexington-Fayette Urban County Government Sec. 7.18 which provides that the merger of the City of Lexington and Fayette County would not change the Airport Board's statutory enabling acts and operation of the Board. The Board continues its autonomous status as intended under the statutes. The Board consists of ten members who are appointed by the Mayor of the Urban County Government. Each director of the Corporation is also a member of the Board and is identified above under "Lexington-Fayette Urban County Corporation." (Page 3.)

Exhibit 76 – Airport Lease

This CONTRACT, LEASE AND OPTION OF 2003 (the "2003 Lease Agreement", the "Lease", or the "2003 Lease"), made and entered into as of the first day of November, 2003, by and between LEXINGTON-FAYETTE URBAN COUNTY AIRPORT BOARD of Lexington, Fayette County, Kentucky, an agency of the Lexington-Fayette Urban County Government, created pursuant to Sections 183.132-500 of the Kentucky Revised Statutes, with full corporate powers to sue and be sued and to exercise the power of eminent domain, party of the first part (the "Board"), the LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT of Lexington, Fayette County, Kentucky, party of the second part (the "Urban County Government"), the Board and the Urban County Government being hereinafter jointly referred to as the "Lessees", and the LEXINGTON-FAYETTE URBAN COUNTY AIRPORT CORPORATION, a non-profit, no stock public corporation, organized and existing for governmental purposes under the laws of the Commonwealth of Kentucky, for the purposes of servicing as an agency and instrumentality of the Urban County Government and the Board in the

financing of public, governmental airport projects (the “Corporation” or the “Issuer”). (Page 1.)

3. The Airport Board and the Airport Corporation were and are true “county” (LFUCG) agencies under the Urban County Charter and LFUCG ordinances and enabling statutes.

The Kentucky Constitution provides that the common law doctrine of sovereign immunity of the Commonwealth and its counties can only be waived by the General Assembly. KY. CONST. § 231. Carr v. Jefferson County¹¹. Kentucky counties, including urban counties, enjoy the same immunity from tort liability as the Commonwealth. Hempel v. Lexington-Fayette Urban County Gov’t¹². Specifically, this Court has held that the merged form of government known as the Lexington-Fayette Urban County Government retained the attributes of Fayette County and therefore is entitled to sovereign immunity from tort claims as a political subdivision of the Commonwealth. Holsclaw v. Stephens¹³.

Urban counties are authorized to establish airport boards, consisting of up to ten (10) members. K.R.S. 183.132(1). The statute further provides that:

The board shall be a body politic and corporate with the usual corporate attributes, and in its corporate name may sue and be sued, contract and be contracted with, and do all things reasonable or necessary to effectively carry out the duties prescribed by statute. The board shall constitute a legislative body for the purposes of *KRS 183.630 to 183.740*.

K.R.S. 183.132(3). The operations of an airport by an airport board or by an airport corporation created by the airport board, including construction, improvement and maintenance of the airport, are considered to be “public and governmental functions exercised for a public purpose . . .” K.R.S. 183.123 (emphasis added). This is further

¹¹ 122 S.W.2d 482, 484 (Ky. 1938).

¹² 641 S.W.2d 51, 53 (Ky. App. 1982); K.R.S. 67A.060 (2006).

¹³ 507 S.W.2d 462 (Ky. 1974).

confirmed by the LFUCG Charter, sections 3.02(8) and 7.18 (Appendix K). Thus, the runways and taxiways at Blue Grass Airport are akin to “county roads for airplanes,” and clearly a public and governmental function.

4. **There has been no express waiver of sovereign immunity by statute as to the LFUCG, this Airport Board or airport boards generally, since Inco.**

The sovereign immunity of the Commonwealth and its counties may only be waived by the Kentucky General Assembly. “It is the province of the General Assembly to waive immunity, if at all, and only to the extent it sees fit.” Boarman v. Commonwealth¹⁴. Absent such an express waiver, the immunity of the Airport Defendants is absolute. Withers v. University of Kentucky¹⁵. No statute has waived the sovereign immunity of counties, airport boards and their officials and Comair has not alleged waiver in its Third-Party Complaint.

The Board of Claims Act, originally enacted in 1946 and now KRS 44.070, et seq., has been amended a number of times, most recently in 2000. Over the years, the legislature has added to the list of government entities for whom a limited waiver of sovereign immunity is made so as to confer jurisdiction upon the Board of Claims for limited compensation in tort, including school district boards of education (added in 2000) and state institutions of higher education (1986). In addition, in 1990 the legislature added KRS 44.071(2) to bring claims for personal injury against any municipality or its employees “arising out of negligence in the maintenance of state-owned traffic control devices pursuant to a contract with the Commonwealth” within the exclusive purview of the Board of Claims, constituting a limited waiver for such

¹⁴ 37 S.W.3d 759, 763 (Ky. 2001) (citations omitted).

¹⁵ 939 S.W.2d 340, 344 (Ky. 1997).

municipalities (which led to the appeal in LFUCG v. Smolic). Nevertheless, the following section, KRS 44.072, enacted in 1986, continued to state a clear reservation:

The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, agents or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by Statute.

Several Court of Appeals decisions have subsequently held that the Board of Claims Act did not expressly waive sovereign immunity with respect to county governments and did not vest jurisdiction over counties in the Board of Claims. E.g., Board of Claims v. Banks¹⁶.

In the 1986 session, the General Assembly also enacted KRS 44.073, which again in subsections (11) and (12) made it clear that sovereign immunity was generally preserved except where expressly waived by Statute, and in subsection (13), elaborated that the preservation of sovereign immunity included, but was not limited to: (a) discretionary acts or decisions; (b) executive decisions; (c) ministerial acts; (d) actions in the performance of obligations running to the public as a whole; (e) governmental performance of a self-imposed protective function to the public or citizens; and (f) administrative acts.

Accordingly, during the 22 years after this Court ordered the *Inco* opinion of the Court of Appeals to be published, the General Assembly has passed up every opportunity to make an express waiver of sovereign immunity for this particular Airport Board, or

¹⁶ 31 S.W.3d 436 (Ky. App. 2000).

county governments (be they fiscal courts or urban-county governments), or airport boards generally. Likewise, no decision from this Court has diminished the sovereign immunity of any county government, despite several invitations to do so in Schwindel v. Meade County and LFUCG v. Smolcic in 2003 and 2004.

In addition, another opportunity for the General Assembly to speak presented itself when the Claims Against Local Governments Act, KRS 65.200, et seq. (“CALGA”) was passed in the 1988 session and became effective July 15, 1988. While including county governments and fiscal courts within the definition of “local government” in KRS 65.200(3), the legislature proceeded in KRS 65.2001(2) to make it clear and unequivocal that it was not waiving sovereign immunity for county governments:

. . . no provision of KRS 65.2002 to 65.2006 shall in any way be construed to expand the existing common law concerning municipal tort liability as of July 15, 1988, nor eliminate or abrogate the defensive governmental immunity for county governments.

Subsequently, this Court held that CALGA, while referring to “governmental immunity for county governments” instead of “sovereign immunity” did not intend to waive any immunity enjoyed by any local government, but only to specify what damages could be obtained against such local governments or their employees for acts or omissions of a ministerial nature. Schwindel, supra at 163. In essence, what CALGA did was establish a clear delineation of a number of categories of claims for which a local government shall not be liable for injuries or losses, then require the application of apportionment of fault before any judgment may be recoverable, provide for a periodic payment of such a judgment over a time not to exceed ten years, if the judgment is not totally covered by insurance, and provide for a defense and indemnity of ministerially

negligent employees (so long as he/she was acting within the scope of employment, no fraud, malice or corruption was involved, and the employee cooperates with the local government in the defense or settlement of the action). KRS 65.2005, dealing with the defense and indemnity of employees by the local government, was added in the 1994 legislative session, three years after Kentucky Center for the Arts Corp. v. Berns¹⁷, but yet again the legislature declined the opportunity to make an express waiver of sovereign immunity for county governments and fiscal courts, leaving the case law of sovereign immunity, including Inco, intact.

In fact, CALGA clearly preserves sovereign immunity as to those “claims disallowed” against local governments, including counties. K.R.S. 65.2003(3). This statute is almost verbatim a codification of the former exclusions from municipal liability set forth in Gas Service Co. v. City of London¹⁸, for “legislative or judicial or quasi-legislative or quasi-judicial functions.” The General Assembly even gave examples of the types of claims which would be subject to governmental immunity. K.R.S. 65.2003(3) expressly protects a local government from:

Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not limited to: . . . (d) the exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or (e) failure to make an inspection.

These are the kinds of allegations loosely made against the Airport Board and its Board Members by Comair. Clearly, no act of the General Assembly has waived the Airport Defendants’ sovereign immunity. Therefore, this third-party action against them was properly dismissed.

¹⁷ 801 S.W.2d 327 (Ky. 1991).

¹⁸ 687 S.W.2d 144, 149 (Ky. 1985).

In numerous cases before and after Kea-Ham, this Court has consistently upheld the rule that counties are entitled to absolute sovereign immunity, usually citing Cullinan v. Jefferson Co.¹⁹. Creative attacks have attempted to pierce the sovereign immunity of county governments in the past, without success. For example, Commonwealth, Board of Claims v. Harris²⁰ was a Board of Claims action filed by the personal representative of a prisoner who hanged himself in the McCracken County Jail, suing the county jailer and his deputies in both their official and individual capacities. The plaintiff estate in that case attempted to argue that counties' sovereign immunity was waived by the Board of Claims Act, KRS 44.070, et seq. In response, this Court observed that "language pertaining to counties, its officers, agents and employees is conspicuous in its absence from the listing contained in KRS 44.070(1)." The Court then proceeded to quote from Withers v. University of Kentucky²¹: "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." Therefore, this Court reaffirmed its prior holdings that the Board of Claims Act did not grant the Board of Claims jurisdiction over claims against counties, county agencies, officers or employees. Harris, supra at 900-901.

The truth of the matter is that counties do remain in a category by themselves, because the legislature has chosen not to include counties by express terms in any legislative act waiving county sovereign immunity. Whether perceived to be fair or unfair, it is nonetheless the sole province of the General Assembly to determine whether to make an express waiver of sovereign immunity for counties, by clear statutory

¹⁹ 418 S.W.2d 407, 408 (Ky. 1967).

²⁰ 59 S.W.2d 896 (Ky. 2001).

²¹ 939 S.W.2d 340, 346 (Ky. 1997).

enactment. Ky. Const. sec. 231. When the legislature enacted the Claims against Local Governments Act in 1988, that would have been a logical time to expressly waive sovereign immunity for counties and county agencies. However, the legislature chose to omit any waiver for counties, a conspicuous omission of which this Court took note in Schwindel, *supra*.

Although airport boards can sue and be sued in their own name, Inco determined that did not diminish the sovereign immunity of the Airport Board.²²

5. **There has been no new statute authorizing suits in tort against the LFUCG, this Airport Board, or airport boards generally, for the limited purpose of fixing the liability of insurance policies such entities may have purchased for the protection of their officials and employees.**

Contrary to Comair's argument, the purchase of liability insurance by an airport board does not operate as a waiver of sovereign immunity, unless such immunity is waived by an act of the Kentucky General Assembly. Franklin County v. Malone²³. In Malone, the court held that a county or county agency's purchase of insurance does not waive liability up to the amount of insurance, unless provided by statute. The plaintiffs argued that K.R.S. 65.150 was an implied waiver of immunity as to Kentucky's counties. The Court disagreed, finding that the authorization for a county to purchase insurance was not an express waiver of immunity and that the statute "only permits a county to purchase insurance covering the liability of employees and officials and it does not

²² Although the statute contains a provision which allows the entity to "sue and be sued", this kind of provision has been rejected as any waiver of immunity. See Wallace v. Laurel County Board of Education, 153 S.W.2d 915, 916-917 (Ky. 1941) (holding that a state creating Boards of Education and allowing them "sue and be sued" does not constitute a waiver of sovereign immunity for tort liability). The Inco decision relied upon University of Louisville v. Martin, *supra* at 678-679 (holding the governmental immunity afforded by Section 231 of the Kentucky Constitution is not waived by language allowing the entity to "sue and be sued").

²³ 957 S.W.2d 195 (Ky. 1997). Malone was overruled in part by Harris, *supra* at 901, to the extent that Malone suggested that the Board of Claims Act was applicable to counties.

provide for the purchase of insurance covering liability of the county itself.” Malone, 957 S.W.2d at 203.

Before the merger of the City of Lexington and the Fayette County governments, this Court had ruled in Moore v. Fayette County²⁴ that the purchase of liability insurance by Fayette County had “no effect upon its immunity from tort liability.” Subsequently, KRS 65.150 was enacted, which in pertinent part provides, but does require:

(1) a county or city or urban-county government and any board, commission, agency or authority of a county, city or urban-county government may expend funds necessary to insure any of its employees, officials and property against any liability or property damage arising out of an act or omission committed in the scope and course of performing legal duties.

It is noteworthy that this statute is not phrased so as to expressly authorize suit against the county, urban-county or its board (the Airport Board) for purposes of fixing liability under such an insurance policy, it only speaks of insuring employees and officials. This is consistent with Withers v. University of Kentucky²⁵, and other decisions of this Court, and is not an express waiver of sovereign immunity for the LFUCG or its Airport Board.

Contrast, Monroe Co. v. Rouss²⁶, which addressed former statute KRS 67.180. That statute authorized county fiscal courts, in their discretion, “to purchase policies of insurance...suits instituted on such policies may be maintained against a county only for the purpose of obtaining a judgment which when final shall measure the liability of the insurance carrier to the insured party for whose benefit the insurance policy was issued, but not to be enforced or collectible against the county or fiscal court or the members thereof.” In that case, a county road department employee was negligent in operating a

²⁴ 418 S.W.2d 412, 413 (Ky. 1967).

²⁵ 939 S.W.2d 340 (Ky. 1997), KRS 44.073(14).

²⁶ 274 S.W.2d 477 (Ky. 1954).

road grader and backed the rear wheel over a volunteer worker. This Court held that the authorization of suits against counties was not a complete waiver of sovereign immunity, but “was obviously designed to make available to the county officials a way to ameliorate the severity of the common law doctrine of governmental immunity.” Id. at 479. Here, KRS 65.150 does not authorize suit to be brought against the LFUCG or counties at all, not even to fix the liability of any insurance carrier.

6. This Court and the Court of Appeals have consistently upheld sovereign immunity for counties and fiscal court members after Berns and Kea-Ham.

In Schwindel, supra, the Meade County Fiscal Court members and the county were held to be protected by sovereign immunity as to the county operation of a public softball field where the plaintiff was injured on allegedly defectively-maintained bleachers. This Court did not discuss or apply the so-called Berns test, for the obvious reason that it does not apply to county governments, which do not derive their funding from the central State Treasury, and are not controlled by the central State government (the Executive Branch).

Similarly, Estate of Clark v. Daviess County²⁷, dismissed the Daviess County Fiscal Court members and the county as immune from a wrongful death case that arose from a crash on a county highway at a curve where it was alleged the warning sign had come down and should have been replaced before the accident. Only two county road department employees were held to be proper defendants, if it could be proven they knew the missing sign needed to be replaced (citing Yanero v. Davis, supra). 105 S.W.3d at 846.

²⁷ 105 S.W.3d 841, 844 (Ky. App. 2003).

Then in 2006, this Court dismissed a suit against Rowan County and the County Jailer in Rowan County v. Sloas²⁸, again determining sovereign immunity as a matter of law, without resorting to the “Berns test.” Id. at 473. The Court applied Yanero as to the qualified official immunity of the Jailer and deputy jailer, and determined they acted within the scope of their discretionary authority, and not in “bad faith,” so as not to be liable for injury to a prisoner from a falling tree while out on a work crew assisting the county road department.

7. **In LFUCG v. Smolcic, this Court rejected all of the arguments Comair reiterates concerning the “Berns test” and the “proprietary functions test” of Withers.**

Appellants’ Brief has not presented any new arguments that were not raised in Smolcic, and cites only one new case of importance – Autry v. Western Ky. University²⁹ which actually favors the Airport Corporation’s immunity. See Appendix J for a listing of all the arguments made in Smolcic against sovereign immunity for the LFUCG, and the cases those plaintiffs cited in 2004.

The possible application of Kea-Ham Contracting, Inc. v. Floyd County Development Authority³⁰ to the LFUCG was argued at length in the Smolcic appeal, at pages 5, 14-15 and 21-22 of the Brief for the Appellees/Cross-Appellants, to no avail. (Appendix J)

This Court held in Smolcic:

Under Kentucky law, counties are treated markedly different from other local government units, e.g., municipal corporations, due to a county’s unique status under the Kentucky Constitution. Calvert Investments, Inc. v.

²⁸ 201 S.W.3d 469 (Ky. 2006).

²⁹ 219 S.W.3d 713 (Ky. 2007).

³⁰ 37 S.W.3d 703 (Ky. 2001).

Louisville & Jefferson County Metropolitan Sewer District,
Ky., 805 S.W.2d 133, 138 (1991).

142 S.W.3d at 133.

In light of the virtually identical arguments made and rejected in Smolcic, it is easy to see why Comair completely omitted mention of this Court's decision in Smolcic in Appellants' Brief. But Smolcic cannot be ignored, and Comair has made no effort to demonstrate any reason why it was not a correct decision. Moreover, the operation of Blue Grass Airport by the Airport Board is a far more obvious example of "public and governmental function" than was the Floyd County Development Authority which simply bought land, installed utilities and streets, and resold lots to industrial buyers.

The Third-Party Complaint against the Airport Defendants deals with the crash of Comair 5191 immediately after takeoff from the wrong runway at Blue Grass Airport. Under no set of alleged or possible facts could this tragic accident involve anything other than governmental functions of the Airport Defendants. Inco and Smolcic are dispositive, and the dismissal of the Airport Board and its Members by Judge Ishmael should be affirmed.

8. The Airport Corporation shares the same sovereign immunity of the LFUCG and the Airport Board.

The Court may take judicial notice from public records presented to the trial court that the Airport Corporation was established in 1976 pursuant to resolutions of both the Airport Board and the Lexington-Fayette Urban County Council. Its stated purpose is "to act as a 'public agency' of the State of Kentucky as well as an agency for financing purposes for the benefit of the Airport Board and the Urban County Government, it being formed as authorized by KRS 273.167 for 'governmental' purposes" (Emphasis

supplied). *See Motion to Dismiss, Exhibit C*, Articles of Incorporation of the Lexington Fayette Urban County Airport Corporation, Article 3, T.R., pp. 429-430 and *Motion to Dismiss, Exhibit D*, Articles of Amendment to Articles of Incorporation, Article 3(a), T.R., pp. 439. Thus, the trial court properly took judicial notice that the Airport Corporation is a non-profit, non-stock corporation organized by and functioning as an arm of the Airport Board and the LFUCG. KRE 201 and 1005.

Because the Airport Corporation's ownership and financing of Blue Grass Airport is a governmental function, it is entitled to share the same absolute immunity as the Airport Board and the LFUCG it serves. See, *Autry v. Western Ky. University*, supra. The Student Life Foundation ("SLF") at Western Kentucky University ("WKU") owns residence halls (dormitories) which are operated by the University in order to lease rooms to students, just like the Airport Corporation owns the land and improvements which are leased to and operated by the Airport Board as a public airport in conformity with the Urban County Charter and rules and regulations of the LFUCG, Code of Ordinance Section 2A.2.

In *Autry*, Justice Noble stated that "while SLF is an incorporated entity, it exists only to serve WKU, and derives its immunity status through WKU." 219 S.W.3d at 719. Alternatively, the majority opinion held that SLF's delegation of all management of the dormitories to WKU, including security, was "the product of a good faith judgment call that the action would best serve the general functions for which SLF was formed, and was therefore discretionary in nature. As such, SLF was entitled to qualified official immunity." Id.

Applying Autry's guidance to the Airport Corporation, with the undisputed facts that the Airport Corporation: (a) was formed by joint action of the Airport Board and the Urban County Council, (b) has as its officers and directors the same Members of the Airport Board, and (c) has leased all of the Airport property it owns to the Airport Board and the LFUCG as co-lessees, for the Airport Board to manage and operate under rules and regulations enacted as part of the LFUCG Code of Ordinances, one must conclude that the Airport Corporation is an agent or alter ego of the Airport Board and the LFUCG for purposes of governmental or qualified official immunity from suits in tort. Like the SLF's relationship with Western Kentucky University, the Airport Corporation has "no truly independent existence" from the Airport Board. Autry, supra at 719.

Furthermore, the Airport Corporation was a "non-operative, non-negligent entity who was a landlord out of possession." Kenton County Public Parks Corp. v. Modlin³¹. As such and having no employees, the Airport Corporation could not be liable for the crash of Comair flight 5191 under any legal theory.

Because the Airport Corporation serves the sovereign immune Airport Board and LFUCG and performs no management itself, the Airport Corporation and those Airport Board Members serving as its officers and directors were properly dismissed from this third-party action.

9. **Dismissal of the members of the Airport Board was proper, not only on the grounds of sovereign immunity and legislative immunity, but under the rule that public officers are only responsible for their own misfeasance and negligence, not the negligence of those they have employed, if they have employed persons of suitable skill, and Comair has made no factual allegations to the contrary.**

³¹ 901 S.W.2d 876, 880 (Ky. App. 1995) [citing Milby v. Mears, Ky. App., 580 S.W.2d 724, 728 (1979)].

Under the United States Constitution, the Kentucky Constitution, and Kentucky case law, members of a legislative body are absolutely immune from suit. As members of a legislative body, any Airport Board members included in the unidentified John Docs are absolutely immune from suit. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency³²; Wiggins v. Stuart³³; and Jacobs v. Underwood³⁴.

Section 43 of the Kentucky Constitution contains a speech and debate clause for member of Kentucky's General Assembly, which clause has also been held as a grant of immunity for legislative actions. Wiggins, supra. The same immunity extends by statute to local legislators. See K.R.S. 83A.060(15) (formerly numbered K.R.S. 84.050); Jacobs, supra.

When county officials, employees, and agents are sued in their official capacity, they are protected by sovereign immunity. Schwindel v. Meade County, supra. Because the Airport Board is a legislative body, "its members are granted absolute immunity . . ." for both their speech and actions. Gray v. Central Bank & Trust Co.³⁵ (Immunity of Airport Board member upheld against defamation claim as well as tortious interference with contract claim). See also Wiggins, supra at 264 ("[t]he immunity not only applies to speech and debate, but to voting, reporting, and every act in the execution of their legislative duties . . .") (citing Tenney v. Breedlove, 341 U.S. 367).

The Third party complaint by Comair against the Members of the Airport Board appears to sue them only in their official capacity, which has been deemed by courts to be the same as suing the Airport Board itself, thereby bringing sovereign immunity into play

³² 440 U.S. 31 (1979).

³³ 671 S.W.2d 262 (Ky. App. 1984).

³⁴ 484 S.W.2d 855 (Ky. App. 1972).

³⁵ 562 S.W.3d 656, 658 (Ky. App. 1978).

as an absolute bar. Alternatively, the Airport Board members pleaded, and the trial court agreed, that they possess legislative immunity for such decisions as the discretionary selection of a design consultant (Tetratex) or general contractors who performed the repaving and other construction work of the Runway Safety Area Improvement project (whom Comair's surviving First Officer/co-pilot has sued as Third-Party Defendants in the Federal Court cases). There was no allegation by Comair that the Board Members were negligent in selecting those agents, thus the Third party complaint by Comair failed to state a claim, and was properly dismissed, similar to the case of Moore v. Fayette County³⁶, a companion case to Cullinan v. Jefferson County³⁷.

In Moore, a woman sued the members of the Fayette County Fiscal Court, as well as the County, the County Judge and its insurance company for a slip and fall on an accumulation of snow and ice on the sidewalk adjacent to the Fayette County Courthouse. Her complaint did not allege that the members of the Fiscal Court were negligent in selecting the subordinate persons to shovel snow and otherwise maintain the property adjacent to the Courthouse. The only theory advanced by Moore was that KRS 67.140 placed the "care and custody of the Courthouse . . . and the public grounds adjacent thereto" in the hands of the Fiscal Court, and gave the Fiscal Court the "authority and jurisdiction to levy and collect property taxes necessary for the purpose of keeping and maintaining the Courthouse and grounds in proper condition and repair, to prevent injury thereto, to keep them in a proper state of cleanliness and sanitation . . ." In her mind, the plaintiff/appellant believed this created the statutory duty upon members of the Fiscal Court to prevent injury to third persons on or about the Courthouse premises.

³⁶ 418 S.W.2d 412 (Ky. 1967).

³⁷ 418 S.W.2d 407 (Ky. 1967).

This Court rejected such a claim, because an allegation that the members of the Fiscal Court “should have known” of the danger arising from adverse weather conditions did not require the Fiscal Court members to assume that an employee would not perform his duty to use reasonable efforts to clear the steps and sidewalk of snow and ice within a reasonable time.

In Comair’s Third party complaint, there were no allegations that Airport Board members were negligent in hiring independent contractors, airport managers and other employees, or that they knew or should have known of the existence of any uncorrected danger or hazard on or about the airport runways and/or taxiway on August 27, 2006. Neither did the impartial investigation by the NTSB reveal any such failures by management of the Airport Board. Accordingly, dismissal of the Third party complaint against the Airport Board members was the correct result.

B. Comair’s reliance on foreign authorities is misplaced.

Comair’s reliance on authorities from other states is misplaced, as the issues involved in this case are governed solely by Kentucky law and the treatment that Kentucky affords to counties and county instrumentalities performing governmental functions.

Further, Kentucky is not alone in holding that airports owned and operated by county entities (as opposed to city airports) are entitled to the sovereign immunity of the county³⁸.

Other states also hold that ownership and operation of an airport, whether by a city or a county, are governmental activities³⁹.

³⁸ See, e.g., Miree v. United States, 249 S.E.2d 573 (Ga. 1978); Overlin v. Boyd, 431 F.2d 409 (5th Cir. 1979).

Thus, contrary to Comair's arguments, there is nothing inappropriate about the grant of sovereign immunity to a county-owned and controlled airport. Under Kentucky law, these Airport Defendants may not be sued by Comair.

VI. CONCLUSION

In response to Comair's argument that a million passengers land and/or take off at the Blue Grass Airport annually, Appellees respectfully note that all such passengers did so safely, except for those who were unfortunately aboard Comair flight 5191 with a wholly inattentive cockpit crew on August 27, 2006. The Appellees were properly held to have sovereign immunity from Comair's Third-Party Complaint, and did not cause or contribute to the tragic crash. Inco should be deemed dispositive of this appeal, along with Autry.

It is also noteworthy that Senior Judge Karl S. Forester of the U.S. District Court for the Eastern District of Kentucky, in a comprehensive 17 page opinion, has held the Airport Defendants are protected by sovereign immunity from Comair and its insurer's direct suit and third-party complaints in the Federal Court, as urban county-controlled agencies and servants performing governmental functions. A true copy of his Opinion and Order is attached as Appendix O.

For all of the above reasons, the Airport Defendants respectfully urge this Court to affirm the decision of the Fayette Circuit Court, Third Division.

³⁹ City of Hearne, Texas v. Williams, 715 S.W.2d 375 (Tex. App. 1986); Davis v. Lambert-St. Louis International Airport, 193 S.W.3d 760 (Mo. 2006) ("Governmental entities, such as the airport, are protected by sovereign immunity"); Gaines v. Huntsville-Madison County Airport Authority, 581 So. 2d 444 (Ala. 1991) ("Airport authorities... are immune from negligence actions brought against them or their directors").

Respectfully submitted,

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