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# A “Preposterous Anomaly”: Sovereign Immunity in Kentucky Following the Crash of Comair Flight 5191

*Nathaniel R. Kissel<sup>1</sup>*

## INTRODUCTION

AT 6:05 a.m. on August 27, 2006, the calm of a quiet Sunday morning in Lexington, Kentucky, was quickly brought to a halt. Shortly after takeoff, Comair flight 5191, en route to Atlanta, crashed to the earth as it ran out of runway.<sup>2</sup> It left in its wake 50,000 pounds of debris and jet fuel, and forty-nine of the fifty people on board were killed.<sup>3</sup> The crash of Comair flight 5191 was the worst commercial air disaster in Lexington’s history and ended one of the longest sustained periods of safety in U.S. aviation history.<sup>4</sup>

Listed among the victims were many friends and familiar faces to the residents of Lexington. They included teachers, business owners, pastors, horse trainers and students.<sup>5</sup> As the realization of the tragedy began to set in, the investigation into the cause of the accident came into focus. When the National Transportation Safety Board (NTSB) finally released its conclusions on the crash in July of 2007, the blame primarily landed on the shoulders of the pilots.<sup>6</sup> In the final report issued by the NTSB on July 27, the probable cause of the accident was attributed to “the flight crewmembers’ failure to use available cues and aids to identify the airplane’s location on the airport surface during taxi and their failure to cross-check and verify that the airplane was on the correct runway before

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<sup>2</sup> See Amy Wilson, *Crash Kills 49*, LEXINGTON HERALD-LEADER (Ky.), Aug. 28, 2006, at A1, available at <http://www.kentucky.com/604/story/10626.html>. All online information was retrieved from the *Lexington Herald-Leader’s* “The Crash of Comair Flight 5191” database, available at <http://www.kentucky.com/604> (last visited Mar. 5, 2010).

<sup>3</sup> Wilson, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> See *Profiles of All on Board*, LEXINGTON HERALD-LEADER (Ky.), June 14, 2007, <http://www.kentucky.com/638/story/97581.html>.

<sup>6</sup> NTSB, NTSB/AAR-07/05, AIRCRAFT ACCIDENT REPORT: ATTEMPTED TAKEOFF FROM WRONG RUNWAY, COMAIR FLIGHT 5191, BOMBARDIER CL-600-2B19, N431CA, LEXINGTON, KY., AUG. 27, 2006 x (2007), available at <http://www.nts.gov/publicctn/2007/AAR0705.pdf>.

takeoff.”<sup>7</sup>

Blue Grass Airport was “largely cleared” by the report.<sup>8</sup> In discussing a paving project at the airport as a probable factor in the confusion of the pilots prior to takeoff, the report concluded that the failure of the controller to alert the pilots to the configuration “was likely not a factor in the crew’s inability to navigate to the correct runway.”<sup>9</sup> Though the report noted that notice about the construction was not in the flight release paperwork, the report did not find that the construction was a probable cause of the accident.<sup>10</sup>

The NTSB report would not be the only assignment of blame, as the surviving families of victims filed a number of lawsuits following the crash, including a suit filed September 1, 2006, by the family of Rebecca Adams against Comair, Inc. (“Comair”).<sup>11</sup> In this suit, the family of Adams alleged wrongful death and common carrier negligence.<sup>12</sup> In May 2007, Comair named Blue Grass Airport as a third-party defendant in the action, alleging that the airport had contributed to the accident with negligence in lighting, markers and signage, construction work, and inaccurate navigational charts and notices.<sup>13</sup> A federal suit naming the Blue Grass Airport as a defendant had been dismissed for lack of federal jurisdiction.<sup>14</sup> Blue Grass Airport’s role in the Comair litigation would, however, take a notable turn in August of 2007, when Fayette Circuit Judge James Ishmael dismissed the airport from the litigation, ruling that as an instrumentality of the Lexington-Fayette Urban County Government (LFUCG), the Blue Grass Airport and the Airport Board shared in the merged government’s sovereign immunity from suit.<sup>15</sup>

From its ancient roots, the doctrine of sovereign immunity has come to serve a strange role in modern society and has had an awkward and often contradictory history in the state of Kentucky. Judge Ishmael’s decision set the stage for another chapter in Kentucky’s long and difficult history with the doctrine. As evidence of the case’s importance, the Supreme Court of Kentucky ultimately took the case from the Court of Appeals and heard

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<sup>7</sup> *Id.*

<sup>8</sup> Janet Patton & Brandon Ortiz, *NTSB Report Praised with Some Exceptions*, LEXINGTON HERALD-LEADER (Ky.), July 27, 2007, at A12.

<sup>9</sup> NTSB, *supra* note 6, at 101.

<sup>10</sup> *Id.*

<sup>11</sup> Complaint, *Adams v. Comair, Inc.*, No. 06-CI-3749, 2007 WL 4858922 (Fayette Cir. Ct. Sept. 1, 2006).

<sup>12</sup> *Id.*

<sup>13</sup> Defendants/Third-Party Plaintiffs’ Third-Party Complaint, *Adams v. Comair, Inc.*, No. 06-CI-3749, 2007 WL 4320786 (Fayette Cir. Ct. May 25, 2007).

<sup>14</sup> Brandon Ortiz, *Comair Tags Airport as Defendant in Lawsuit*, LEXINGTON HERALD-LEADER (Ky.), May 23, 2007, at B3.

<sup>15</sup> *Adams v. Comair, Inc.*, No. 06-CI-3749, 2007 WL 4858922 (Fayette Cir. Ct. Aug. 10, 2007) (order dismissing “Airport Defendants” from third party complaint).

oral arguments in August of 2008.<sup>16</sup> When the court made its decision more than a year later, the court unanimously affirmed Judge Ishmael’s decision, protecting Blue Grass Airport from suit, and classifying it as an instrumentality of the LFUCG performing a governmental function, and thus cloaked in the immunity of its creator.<sup>17</sup>

This Note will trace just some of the confusing and often contradictory history of governmental immunity in Kentucky, a path that will lead through the concepts of municipal and county immunity, as well as the establishment of the LFUCG itself and its effect on the concept of governmental immunity. Part I discusses the development of immunity in Kentucky, weaving through issues of state, county and municipal liability, as well as the status of Blue Grass Airport. These concepts all contributed to the confusion surrounding the state of governmental immunity in Kentucky prior to Justice Mary Noble’s opinion in the *Comair* case, and perhaps necessitated the court’s efforts to “lay the cards on the table,” in explaining the role of precedent in immunity determinations.<sup>18</sup> Part II analyzes the recent *Comair* decision, which has seen the Supreme Court take a step towards revitalization of the doctrine.

Ultimately, in Part III, this Note argues that the Kentucky Supreme Court missed an opportunity to truly reexamine the doctrine of governmental immunity as seen through the particularly troublesome lens of its application to the Blue Grass Airport and the LFUCG. In its affirmation of Judge Ishmael’s decision, the court gutted the heavily relied upon precedent it had provided Kentucky courts in *Kentucky Center for the Arts Corp. v. Berns*,<sup>19</sup> and took a step backwards in what had once been a deliberate march towards the limitation of the ancient and antiquated doctrine of sovereign immunity.

#### I. A GLANCE AT THE DEVELOPMENT OF SOVEREIGN IMMUNITY IN KENTUCKY

The concept of sovereign immunity in Kentucky has a long and labyrinthine history, and several commentators have made efforts to trace through this maze of cases.<sup>20</sup> As noted by Angela S. Fetcher in her note, *Outdated, Confusing, and Unfair: A Glimpse at Sovereign Immunity in Kentucky*,

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<sup>16</sup> *Comair Inc. v. Lexington–Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 99.

<sup>19</sup> *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990).

<sup>20</sup> See Angela S. Fetcher, Note, *Outdated, Confusing, and Unfair: A Glimpse at Sovereign Immunity in Kentucky*, 41 BRANDEIS L.J. 959 (2003); see also Earl F. Hamm, Jr., Note, *The Reemergence of the Sovereign Immunity Doctrine in Kentucky*, 87 Ky. L.J. 439 (1999); Christopher J. Arlinghaus, Note, *Board of Education of Rockcastle County v. Kirby: A Significant Retreat from Sovereign Immunity for School Districts in Kentucky*, 24 N. KY. L. REV. 319 (1997).

“[a]lthough sovereign immunity is a deep-rooted doctrine in American jurisprudence that began just after the signing of the United States Constitution, it is an anomaly that is difficult to trace in Kentucky and even more difficult to comprehend and apply.”<sup>21</sup>

The Kentucky Supreme Court has acknowledged that the concept of sovereign immunity for municipal, county, or local district communities grew from a 1788 English decision, *Russell v. Men of Devon*.<sup>22</sup> In *Russell*, the plaintiff was injured by a wagon as a result of a bridge in disrepair.<sup>23</sup> The court in *Russell* faced two competing fundamental principles of law, yet found that sovereign immunity outweighed other interests stating,

[I]t has been said that there is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principal of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience . . . .<sup>24</sup>

Thus, despite any interest in redressing a wrong, immunity prevented the plaintiff's recovery.

#### A. Municipal Liability

The history and development of municipal liability in Kentucky is described in detail in *Haney v. City of Lexington*.<sup>25</sup> The concept was first described by Kentucky courts in *Prather v. City of Lexington*, where it was apparently rejected.<sup>26</sup> In *Prather*, the plaintiff alleged that a mob defaced her boarding house, rendering it uninhabitable, and that the city of Lexington and police failed to protect her property.<sup>27</sup> The action was brought against the city in its corporate capacity, and not against the particular officers who had failed to respond.<sup>28</sup> The court held that “[w]here a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action

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<sup>21</sup> Fetcher, *supra* note 20, at 959.

<sup>22</sup> See *Haney v. City of Lexington*, 386 S.W.2d 738, 739 (Ky. 1964).

<sup>23</sup> *Russell v. Men of Devon*, 100 Eng.Rep. 359, 360-61 (K.B. 1788).

<sup>24</sup> *Id.* at 363.

<sup>25</sup> *Haney*, 386 S.W.2d at 739.

<sup>26</sup> *Prather v. City of Lexington*, 13 Ky. (1 B. Mon.) 559 (Ky. 1852).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2.

against an individual.”<sup>29</sup> The court also noted that liability had previously been imposed on municipal corporations for negligence in the construction of public works and in the failure to keep streets and sewers in proper repair.<sup>30</sup> Ultimately, liability for the plaintiff’s injury was denied in *Prather* only because it was determined that there was no duty for a municipality to protect residents against mob violence.<sup>31</sup>

Whatever confusion may have existed about municipal liability was put to rest with the case of *Haney v. City of Lexington*.<sup>32</sup> The case involved the drowning of a seven-year-old girl in the public swimming pool at Woodland Park in Lexington.<sup>33</sup> While giving a thorough review of what it called a “legal anachronism,”<sup>34</sup> the court recognized governmental immunity’s many failings.<sup>35</sup> “There is probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine.”<sup>36</sup> Criticisms of the doctrine were “wide-ranging and highly varied,” but included the unfairness of imposing the burden of damage caused by the municipality on individuals instead of on the community, where it should have rightfully rested.<sup>37</sup> The doctrine deprived citizens of “life, liberty, and property without due process of law,” and ran “counter to a basic concept underlying the law of torts, . . . that liability follows negligence.”<sup>38</sup> The court stated that, in the past, it “accepted the theory with reluctance” and “seized upon almost any excuse, however flimsy, to grant relief to any person harmed by negligence of a municipal corporation.”<sup>39</sup> The court recognized that the doctrine had already been chipped away at, as distinctions had been drawn between governmental or public functions and proprietary or private functions, with liability being imposed in the proprietary settings.<sup>40</sup> The court stated that courts use these “contrived devices” to prevent unjust application of sovereign immunity with “a few escape hatches.”<sup>41</sup>

*Haney* was indeed a landmark decision, as Kentucky’s highest court chose to reject the concept of governmental immunity for municipalities,

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Haney v. City of Lexington*, 386 S.W.2d 738, 739 (Ky. 1964).

<sup>33</sup> *Id.* at 738.

<sup>34</sup> *Id.* at 739.

<sup>35</sup> *Id.* at 739-42.

<sup>36</sup> *Id.* at 739 (citation omitted).

<sup>37</sup> *Haney*, 386 S.W.2d at 739 (quoting James M. Talley, Jr., *Torts—Judicial Abrogation of the Doctrine of Municipal Immunity to Tort Liability*, 41 N.C. L. REV. 290, 291 (1963)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (citing *V.T.C. Lines, Inc. v. Harlan*, 313 S.W.2d 573 (Ky. 1958)).

<sup>40</sup> *Id.* at 740-41.

<sup>41</sup> *Id.* at 740.

noting that “when established things are no longer secure in a fast changing world, the courts should re-examine the precedents and determine if they provide a proper standing under present conditions.”<sup>42</sup> This pragmatic approach to the changing landscape of tort law found the court examining its prior decisions alongside the Supreme Court of Florida, where school district tort immunity had been eliminated in 1957.<sup>43</sup> To make their intentions entirely clear, the court concluded its discussion in *Haney* with the following passage:

Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, *the rule is liability – the exception is immunity*. In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental. Our decision does not broaden the government’s obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision.<sup>44</sup>

It is important to note that the court limited the effect of its decision in *Haney* through its final words. In conclusion, the court stated, “It is not our intention at this time to consider the liability of any governmental unit other than that of a municipal corporation and its agents.”<sup>45</sup>

The “clarity” wished for by the court in *Haney*<sup>46</sup> would not last long. While the court’s words in *Haney* appear clear, the Kentucky Supreme Court would later note that the Kentucky Court of Appeals continued to find ways to apply the doctrine around these limitations.<sup>47</sup> In *Gas Service Co. v. City of London*, Justice Leibson noted that “since *Haney*[,] we find Court of Appeals cases, including the present one, now classifying negligence in maintenance and repair of sewers as immune from liability, on new grounds presumably deriving from our post *Haney* opinions.”<sup>48</sup> Such negligence previously fell under the label of a proprietary action which was not protected by sovereign immunity.<sup>49</sup> Justice Leibson noted that “subsequent decisions have so circumscribed [*Haney*’s] language that we have regressed beyond its starting point.”<sup>50</sup> To Justice Leibson, sovereign

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42 *Id.* at 740-41.

43 *Id.* (citing *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957)).

44 *Id.* at 742 (emphasis added) (quoting *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 625 (Wis. 1962)).

45 *Id.*

46 *Id.*

47 *See Gas Serv. Co. v. City of London*, 687 S.W.2d 144 (Ky. 1985).

48 *Id.* at 146.

49 *Id.*

50 *Id.* at 147.

immunity was a “judicially created monstrosity which should be judicially destroyed.”<sup>51</sup> The court described how the waters were muddied since the clarity of *Haney* by outlining a line of cases providing exceptions to the basic premise that sovereign immunity does not apply to municipalities.<sup>52</sup> Much of this hesitance to apply the clear rule of *Haney* appeared to be based on concerns over the financial impact to municipalities, but Justice Leibson noted that “problems with payment [have] never been a defense to an otherwise valid claim.”<sup>53</sup>

The Court in *Gas Service* overruled the cases that carved out exceptions to the abolition of municipal immunity.<sup>54</sup> The Supreme Court of Kentucky reaffirmed its decision in *Haney*, holding that the only exception to *Haney*'s rule is for torts committed in “the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions.”<sup>55</sup> These limited exceptions are also now codified in KRS 65.2003(3).<sup>56</sup>

### *B. State and County Immunity: Further Complications*

Unlike municipal immunity, the concept of state and county immunity is arguably protected by statute. The Commonwealth of Kentucky's immunity from suit, while perhaps not specifically established by its text, is controlled by the Kentucky Constitution. Section 231 of the Kentucky Constitution states, “The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.”<sup>57</sup> Further legislation set up a Board of Claims that hears actions and decides the amount of compensation.<sup>58</sup> The Supreme Court of Kentucky has continued to hold that county governments are cloaked in

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 148-49.

<sup>54</sup> *Id.* at 150.

<sup>55</sup> *Id.* at 149 (quoting *Haney v. City of Lexington*, 384 S.W.2d 739, 742 (Ky. 1964)).

<sup>56</sup> KY. REV. STAT. ANN. § 65.2003(3) (LexisNexis 2004); see also 13 David J. Leibson, KY. PRACTICE: TORT LAW § 10:48 (2d ed. 2008). Leibson notes that at first, the section seems to codify the *Haney* exceptions, but goes further, also excepting some acts of judgment or discretion, perhaps making relevant some of the terms that the *Haney* court sought to eliminate. *Id.*

<sup>57</sup> KY. CONST. § 231.

<sup>58</sup> KY. REV. STAT. ANN. § 44.070(1) (LexisNexis 2007 & Supp. 2009). *But see* Yanero v. Davis, 65 S.W.3d 510, 523-24 (Ky. 2001) (“[T]he words ‘sovereign immunity’ are not found in the Constitution of Kentucky. Rather, sovereign immunity is a common law concept recognized as an inherent attribute of the state. . . . Thus, contrary to assertions sometimes found in our case law, Sections 230 and 231 of our Constitution are not the source of sovereign immunity in Kentucky, but are provisions that permit the General Assembly to waive the Commonwealth’s inherent immunity either by direct appropriation of money from the state treasury (Section 230) and/or by specifying where and in what manner the Commonwealth may be sued (Section 231).”).



the state's sovereign immunity.<sup>59</sup>

Though it is firmly rooted, the continuation of the doctrine of sovereign immunity for state and county agencies has not been without its detractors. In *Cullinan v. Jefferson County*, the predecessor to the Kentucky Supreme Court held that sovereign immunity barred recovery from the Jefferson County Board of Education.<sup>60</sup> Justice Palmore, however, wrote a powerful dissent, calling the doctrine of sovereign immunity both “shocking” and “inexcusable,” as it has been extended beyond suits against the Commonwealth as defined in Section 231 of the Kentucky Constitution that would constitute a claim upon the state treasury.<sup>61</sup> Justice Palmore believed that sovereign immunity should be limited, because “in a civilized society it is morally indefensible.”<sup>62</sup>

In his argument against sovereign immunity, Justice Palmore described a situation in which an average citizen is run down in the street by a reckless motorist.<sup>63</sup> If that motorist is a private citizen, the victim has recourse, but not where that motorist is employed by “one of the myriad governmental agencies which today engage in so many activities formerly considered to lie within the exclusive domain of private enterprise.”<sup>64</sup> Justice Palmore labeled such a situation as “offensive on its face,” and opined that “[t]he average man in the street never heard of sovereign immunity and would scarcely believe it if he did.”<sup>65</sup> Justice Palmore regarded sovereign immunity as a “preposterous anomaly,” and closed his dissent by quoting a state of the union address from Abraham Lincoln: “It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.”<sup>66</sup>

Issues surrounding governmental immunity of the Commonwealth and its agencies were perhaps best encapsulated by the Kentucky Supreme Court in *Yanero v. Davis*, decided in 2001.<sup>67</sup> While much of *Yanero* concerned official immunity, which protected government officials in their exercises of discretion, it also contained a discussion of a host of other issues surrounding immunity.<sup>68</sup> Notably, the court in *Yanero* distinguished “sovereign immunity” from “governmental immunity,” noting that the two

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59 *See* *Schwindel v. Meade County*, 113 S.W.3d 159, 163 (Ky. 2003).

60 *Cullinan v. Jefferson County*, 418 S.W.2d 407, 410 (Ky. 1967).

61 *Id.* at 411. (Palmore, J., dissenting) (quoting E. H. Schopler, *Annotation, Immunity from Liability for Damages in Tort of State or Governmental Unit or Agency in Operating Hospital*, 25 A.L.R. 203 (1952)).

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001).

68 *Id.*

have often been confused and used interchangeably by courts in Kentucky.<sup>69</sup> The Supreme Court of Kentucky succinctly defined governmental immunity as “the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency.”<sup>70</sup>

Importantly, the court in *Yanero* noted that while the proprietary/governmental distinction had been abandoned for municipalities in *Haney*, “it has been employed by this Court in two subsequent opinions to determine whether an agency created by the state was entitled to immunity.”<sup>71</sup> The court acknowledged the problem of inconsistent results using the proprietary/governmental distinction when determining the liability of a governmental entity noted by the court in *Haney*, but deemed its use reasonable in the context of a state agency, noting:

[T]hat analysis has the attribute of relative simplicity in application and affords a reasonable compromise between allowing state agencies to perform their governmental functions without having to answer for their decisions in the context of tort litigation, and allowing private enterprises to pursue their legitimate business interests without unfair competition from government agencies performing purely proprietary functions without the same costs and risks inherent in commercial enterprise.<sup>72</sup>

Because of its relative usefulness, the proprietary/governmental distinction survives in Kentucky’s jurisprudence.

Perhaps the most important piece of the sovereign immunity puzzle was added by the Kentucky Supreme Court in *Kentucky Center for the Arts Corp. v. Berns*.<sup>73</sup> *Berns* concerned a slip-and-fall action filed against the Kentucky Center for the Arts, and a central issue was whether the organization, a state entity, was entitled to the Commonwealth’s sovereign immunity.<sup>74</sup> The court recognized that “certainly not every business can be immunized simply because it is established by act of the General Assembly,” and the Kentucky Center for the Arts acts very much the same as any other business in the entertainment industry.<sup>75</sup> In its analysis, the court could not determine how a patron at the facility (which had previously been privately owned) could be deprived of a right to an action simply based on this change in ownership, recognizing that to follow this reasoning would

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69 *Id.* at 517-19.

70 *Id.* at 519 (quoting 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 10 (2009)).

71 *Id.* at 520.

72 *Id.* at 521.

73 *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990).

74 *Id.* at 328.

75 *Id.* at 331.

provide “no limitation on the scope of sovereign immunity.”<sup>76</sup> “Every time the state gets involved [sic] in an enterprise formerly private the area of sovereign immunity would expand accordingly.”<sup>77</sup>

The court then established what became known as the “*Berns* test”—a two-prong analysis to determine whether a state-created entity is entitled to sovereign immunity.<sup>78</sup> While outlined clearly in *Berns*, the court recognized that the test borrowed the “fundamental premise”<sup>79</sup> of court precedent stated in the earlier case of *Gnau v. Louisville & Jefferson County Metropolitan Sewer Dist.*,<sup>80</sup> that sovereign immunity should be granted “only to those agencies which are under the direction and control of the central State government and are supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.”<sup>81</sup> Accordingly, the test consists of an analysis of (1) “the direction and control of the central State government” on the corporation and (2) support by “monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.”<sup>82</sup> Ultimately, the Kentucky Center for the Arts failed the *Berns* test.<sup>83</sup>

*Berns* recognized a dichotomy between unprotected “municipal corporation[s]” and immune state agencies, noting that the sweep of the court’s decision in *Haney* was wider than merely removing the protection previously enjoyed by cities.<sup>84</sup> A “municipal corporation’ means nothing more than a local government entity created by the state to carry out ‘designated’ functions.”<sup>85</sup> The *Berns* court noted that in *Stephenson v. Louisville & Jefferson County Board. of Health*,<sup>86</sup> a local board of health was determined to be a “municipal corporation” and therefore unprotected through *Haney*.<sup>87</sup> The court further elaborated on this distinction, noting that “[t]he 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, when viewed as a whole, the entity is

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76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Gnau v. Louisville & Jefferson County Metro. Sewer Dist.*, 346 S.W.2d 754 (Ky. 1961).

81 *Berns*, 801 S.W.2d at 331 (quoting *Gnau*, 346 S.W.2d at 755).

82 *Id.* at 331 (quoting *Gnau*, 346 S.W.2d at 755).

83 *Id.*

84 *Id.* at 332.

85 *Id.* (quoting *Rash v. Louisville & Jefferson County Metro. Sewer Dist.*, 217 S.W.2d 232, 236 (Ky. 1949)).

86 *Stephenson v. Louisville & Jefferson County Bd. of Health*, 389 S.W.2d 637, 638 (Ky. 1965).

87 *Berns*, 801 S.W.2d at 332.

carrying out a function integral to state government.”<sup>88</sup> Further, the court states “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.’”<sup>89</sup>

When viewed as a whole, the test outlined in *Berns*, which looks to control and funding, is similar in its analysis and application to the proprietary/governmental distinction that the court in *Yanero* deemed still appropriate for state agencies. This view is supported by *Withers v. University of Kentucky*, a case that is primarily known for its holding that the purchase of insurance does not constitute a waiver of sovereign immunity.<sup>90</sup> In *Withers*, the Kentucky Supreme Court analyzed the immunity of the University of Kentucky Medical Center in a medical malpractice claim.<sup>91</sup> The court upheld the University of Kentucky’s right to sovereign immunity, noting that the university itself passes both the funding and control elements of the *Berns* test.<sup>92</sup> In response to a challenge that the University of Kentucky Medical Center was performing the same sort of proprietary duties as one of the many private hospitals in the world, the analysis slipped back into the governmental/proprietary distinction. “The answer to this contention is simple. The operation of a hospital is essential to the teaching and research function of the medical school. Medical school accreditation standards require comprehensive education and training and without a hospital, such would be impossible.”<sup>93</sup> The hospital is a necessary part of the University of Kentucky, an immune governmental unit, and is therefore entitled to share in its immunity.<sup>94</sup>

The court in *Withers* noted that there is powerful precedential value in affording sovereign immunity to an agency.<sup>95</sup> Justice Lambert reasoned that “[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.”<sup>96</sup> The importance of the *Berns* analysis was again affirmed as Justice Lambert called its standards “a test . . . to determine whether an entity possesses the immunity of the Commonwealth.”<sup>97</sup>

Leading up to Justice Mary Noble’s opinion in the *Comair* decision, the Kentucky Supreme Court faithfully applied the *Berns* test, notably in

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88 *Id.*

89 *Id.*

90 *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997).

91 *Id.* at 342.

92 *Id.* at 343.

93 *Id.*

94 *Id.*

95 *Id.* at 344.

96 *Id.*

97 *Id.* at 346.

*Kea-Ham Contracting, Inc. v. Floyd County Development Authority*.<sup>98</sup> In *Kea-Ham*, the court held that the Floyd County Development Authority was a municipal corporation that was not entitled to sovereign immunity.<sup>99</sup> Though the corporation received grants from state agencies and its board was appointed by the county judge-executive, the authority received funds from a variety of other sources and had the ability to borrow on its own credit.<sup>100</sup> In regards to the funding element, the court noted that “the source of funding for any individual project is not determinative of sovereign immunity, as this determination is made by analyzing the entity, not the specific project.”<sup>101</sup> In regards to the control issue, Justice Lambert noted that board members, though appointed by the county judge-executive, have a great deal of independence.<sup>102</sup> Justice Lambert stated that “[a]pplication 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.”<sup>103</sup> The Floyd County Development Authority, which appeared to be closely associated with the immune agency that created it, failed both aspects of the *Berns* test, and was held to be an independent, non-immune municipal corporation by the Supreme Court of Kentucky.<sup>104</sup>

### C. Urban County Governments

So where does this tangle of common law leave merged governments like the LFUCG? While the courts have had a great deal to say about immunity of municipalities and counties, very little has been said about the concept of an urban county government such as the LFUCG. Should Lexington (which was the subject of the *Haney* decision) be treated as a municipality and held liable for its torts, or should it be granted the immunity of a county? When Lexington merged with Fayette County in 1974,<sup>105</sup> did it discharge the liability that the *Haney* decision left the city with just ten years earlier?

Reviewing the charter of the LFUCG yields some help in understanding its nature. Under Article 3 “Powers of the Lexington-Fayette Urban County Government,” general powers are listed as not only the “powers and privileges which *cities of the second class* are, or may hereafter be, authorized or required to exercise under the Constitution and general laws

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<sup>98</sup> *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703 (Ky. 2000).

<sup>99</sup> *Id.* at 706.

<sup>100</sup> *Id.* at 706-07.

<sup>101</sup> *Id.* at 707.

<sup>102</sup> *Id.* at 706.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Lexington-Fayette Urban County Gov't: Chief of Police, <http://www.lexingtonky.gov/index.aspx?page=68> (last visited Jan. 20, 2010).

of the Commonwealth of Kentucky,” but also “[s]uch other powers and privileges which *counties* are, or may hereafter be, authorized or required to exercise under the Constitution and general laws of the Commonwealth of Kentucky.”<sup>106</sup> The LFUCG is also granted “powers and privileges as urban county governments may be authorized or required to exercise under the Constitution and general laws of the Commonwealth of Kentucky.”<sup>107</sup> The LFUCG thus appears to have all of the powers of a county yet none of the limitations of a municipality.

Perhaps most telling, the Kentucky Supreme Court has also continued to recognize the existence of Fayette County following the creation of the LFUCG and the sovereign immunity retained by the LFUCG.<sup>108</sup> As the court noted in *Lexington-Fayette Urban County Government v. Smolcic*, previous decisions have made it “clear that the urban county form of government is a new classification of *county government* created by the General Assembly.”<sup>109</sup> Accordingly, the Kentucky Supreme Court has determined that LFUCG continues to share in the Commonwealth’s immunity.<sup>110</sup>

#### D. Blue Grass Airport

Where does this leave the Blue Grass Airport’s claim to sovereign immunity in the Comair crash case? The answer may seem simple at first glance, as courts have also directly addressed the issue of Blue Grass Airport’s sovereign immunity. In *Inco, Ltd. v. Lexington-Fayette Urban County Airport Board*, the Court of Appeals decided that the Bluegrass Airport was entitled to immunity as it is essentially a sub-agency of the LFUCG, making *Inco* perhaps the most central case in the Comair immunity discussions.<sup>111</sup> *Inco* involved nearly \$85,000 in damages sustained by a jet when it plowed into a snow bank while landing.<sup>112</sup> The Court of Appeals stated that while “[m]uch has been written concerning the abolition of *municipal* immunity[,] . . . the judiciary has refrained from tampering with our Constitution (Section 231) and the functions of the General Assembly (Constitution Sections 27, 28, and 29) with respect to sovereign or state

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<sup>106</sup> See LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, KY., CHARTER AND CODE OF ORDINANCES art. 3, §3.01 (1999 & Supp. 2009), available at <http://www.municode.com/resources/gateway.asp?pid=11163&sid=17> (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> See *Lexington-Fayette Urban County Gov’t v. Smolcic*, 142 S.W.3d 128 (Ky. 2004); *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1974).

<sup>109</sup> *Smolcic*, 142 S.W.3d at 131.

<sup>110</sup> *Id.*

<sup>111</sup> *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*, 705 S.W.2d 933, 934-35 (Ky. Ct. App. 1985).

<sup>112</sup> *Id.* at 933.

immunity.”<sup>113</sup> The court then held that the LFUCG retained immunity, as “there can be no argument that the Lexington-Fayette Urban County Governmental Unit is a county and thus entitled to the protection afforded the state.”<sup>114</sup>

The Court of Appeals then attempted to clear up any confusion that might have surrounded the status of the LFUCG: “We point out that one should not be misled into the perception that Fayette County is in reality a municipal (city) corporation for the courts have pointed out on at least three occasions that the City of Lexington ceased to exist on the day that urban county government became effective.”<sup>115</sup> Citing precedent, the court noted that by statute, “urban county government retains the immunities of county government. It is, like a county government, an arm of the state entitled to the protective cloak of *sovereign immunity*. This case should have been dismissed upon that ground.”<sup>116</sup> The court emphasized that in *Hempel v. Lexington-Fayette Urban County Government*, sovereign immunity—as opposed to municipal immunity—was applied, establishing that cases abolishing municipal immunity have no effect on the status of the LFUCG.<sup>117</sup> Further, the court stated that “[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.”<sup>118</sup>

But how much weight is to be given to the *Inco* decision? It is not a Kentucky Supreme Court decision and was decided years before the *Berns* test was even established.<sup>119</sup> Attorneys for the Blue Grass Airport noted, however, that the Kentucky Supreme Court cited *Inco* in the *Smolicic* decision favorably, and argued that the court also denied discretionary review in the *Inco* case while ordering it published.<sup>120</sup> Yet the concurrence in *Inco* made important points about the nature of Blue Grass Airport. Judge Wilhoit noted in his concurrence that by virtue of the text of its enabling statute, KRS § 183.132, the Airport Board was “a body politic and corporate with the usual corporate attributes.”<sup>121</sup> KRS § 183.132, titled “Local air boards,”

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113 *Id.* at 934.

114 *Id.* (citing *Hempel v. Lexington-Fayette Urban County Gov't*, 641 S.W.2d 51 (Ky. Ct. App. 1982)).

115 *Id.* (citing *Jacobs v. Lexington-Fayette Urban County Gov't*, 560 S.W.2d 10 (Ky. 1978); *Holsclaw v. Stephens*, 507 S.W.2d 462 (Ky. 1973); *Hempel*, 641 S.W.2d 51).

116 *Id.* at 934 n.1 (quoting *Hempel*, 641 S.W.2d at 53).

117 *Id.* at 934.

118 *Id.*

119 *Id.* at 933.

120 Supplemental Memorandum in Support of Motion to Dismiss by Defendants Lexington-Fayette Urban County Airport Corp., Lexington-Fayette Urban County Airport Board, & All Known Airport Board Members Who May be Included Among the John Does, 1-20 at 16, *Adams v. Comair*, No. 06-CI-03749 (Fayette Cir. Ct. July 17, 2007) [hereinafter Supplemental Memorandum].

121 *Inco*, 705 S.W.2d at 935 (Wilhoit, J., concurring) (quoting Ky. Rev. Stat. Ann. 183.132(2))

also stated that the board, “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.”<sup>122</sup>

Judge Wilhoit contended that “[a]s a ‘body politic and corporate,’ the board is plainly not a unit of the urban county government, but an independent entity which performs designated governmental functions including limited legislative functions. I believe that under our case law such an entity constitutes a quasi-municipal corporation.”<sup>123</sup> Wilhoit expressed his doubts as to how the Kentucky Supreme Court would handle the liability of such an organization, but noted that in prior case law, such “quasi-municipal corporations” had been treated as state agencies for purposes of liability for negligence.<sup>124</sup> The case cited by Judge Wilhoit, *Fawbush v. Louisville & Jefferson County Metropolitan Sewer District*, described how these organizations are to be treated:

[T]here is a distinction between municipal corporations proper and quasi-municipal corporations concerning liability for torts, and . . . the general rule is that the latter are not liable for torts unless so provided by statute. Although the authorities are by no means uniform, the rule has been applied to a wide variety of governmental and political organizations, including drainage districts, utility districts, improvement districts, townships, and, of course, counties.<sup>125</sup>

The *Fawbush* court explained that the reason for immunity for “quasi-public corporations” is generally due to their “involuntary and public character. They are usually treated as public or state agencies, and their duties are ordinarily wholly *governmental*.”<sup>126</sup> The court further reasoned that such organizations “exercise the greater part of their functions as agencies of the state merely, and are created for purposes of public policy, and hence the general rule that they are not responsible for the neglect of duties enjoined on them, unless the action is given by statute.”<sup>127</sup>

While Judge Wilhoit seemed hesitant to declare the Airport either a sub-agency or a municipal corporation, and instead labeled it a “quasi-municipal corporation,”<sup>128</sup> other entities with similar language in their

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(West 2006)).

<sup>122</sup> KY. REV. STAT. ANN. § 183.132(3) (LexisNexis 2003).

<sup>123</sup> *Inco*, 705 S.W.2d at 935 (Wilhoit, J., concurring).

<sup>124</sup> *Id.* (Wilhoit, J., concurring) (citing *Fawbush v. Louisville & Jefferson County Metro. Sewer Dist.*, 240 S.W.2d 622 (Ky. 1951)).

<sup>125</sup> *Fawbush*, 240 S.W.2d at 624 (citing 18 EUGENE McQUILLIN, MUNICIPAL CORPORATIONS § 53.05 (3d ed. 2003)).

<sup>126</sup> *Id.* (quoting 18 McQUILLIN, *supra* note 125, § 53.05) (emphasis added).

<sup>127</sup> *Id.* (quoting 18 McQUILLIN, *supra* note 125, § 53.05).

<sup>128</sup> *Inco*, 705 S.W.2d at 935 (Wilhoit, J., concurring).



enabling legislation have been clearly classified as municipal corporations. In *Stephenson v. Louisville and Jefferson County Board of Health*, the Kentucky Supreme Court analyzed similar “body politic and corporate” statutory language, along with the power to “sue and be sued,” in the legislation that created the Board of Health.<sup>129</sup> In this case, the court concluded that “[i]t seems clear that the Board of Health is a municipal corporation.”<sup>130</sup> The picture becomes even more confusing when following the citations in *Stephenson* to *Louisville and Jefferson County Airport v. American Airlines*, where the Louisville and Jefferson County Airport is deemed to be an “instrumentality of the Commonwealth of Kentucky,” as well as a “municipality.”<sup>131</sup> The court there cites the enabling legislation of KRS 183.476, which states that the functions of municipalities in aviation are “public, governmental and municipal functions, exercised for a public purpose, and matters of public necessity.”<sup>132</sup> What then is the effect of the landmark decision in *Haney* that eliminated municipal immunity? While it would seem that this legislation undoubtedly defines the airport’s functions as governmental functions, the court in *Stephenson* cited *Haney*’s elimination of municipal immunity, stating that since the Board of Health “is in the same category as . . . the Louisville and Jefferson County Air Board[,] . . . it falls squarely under the decision in *Haney v. City of Lexington* . . . and consequently cannot claim governmental immunity.”<sup>133</sup>

The Kentucky Supreme Court surveyed this puzzle of case law and statutory law in *Calvert Investments, Inc. v. Louisville & Jefferson County Metropolitan Sewer District*, a post-*Berns* decision from 1991.<sup>134</sup> The court attempted to clarify the reach of sovereign immunity, limiting its application to situations where the Commonwealth is directly involved.<sup>135</sup> The court looked to the limiting words of Judge Palmore in *Cullinan*, citing his dissent.<sup>136</sup> The court then called the weakening of the doctrine of immunity from *Haney* to *Berns* the “enlightened path.”<sup>137</sup> The court further quoted *Prosser and Keaton on the Law of Torts*, stating that “[t]he most striking feature of the tort law of governmental entities today is that the immunities, once almost

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<sup>129</sup> *Stephenson v. Louisville & Jefferson County Bd. of Health*, 389 S.W.2d 637, 638 (Ky. 1965) (quoting KY. REV. STAT. ANN. § 212.350 (West 2006)).

<sup>130</sup> *Id.*

<sup>131</sup> *Louisville & Jefferson County Air Bd. v. Am. Airlines, Inc.*, 160 F. Supp. 771, 774 (W.D. Ky. 1958), *rev’d on other grounds*, 269 F.2d 811 (6th Cir. 1959) (quoting Ky. Rev. Stat. Ann. § 183.476 (West 2006)).

<sup>132</sup> *Id.* (quoting KY. REV. STAT. ANN. § 183.476 (West 2006)).

<sup>133</sup> *Stephenson*, 389 S.W.2d at 638 (citations omitted).

<sup>134</sup> *Calvert Investments, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133, 135-38 (Ky. 1991).

<sup>135</sup> *Id.* at 137-38.

<sup>136</sup> *Id.* at 138.

<sup>137</sup> *Id.*

total, have been largely abolished or severely restricted at almost all levels . . . .”<sup>138</sup> Writing for the majority, Justice Leibson noted that Kentucky has “progressed to the point where, as duty requires, we defer to the sovereign immunity of the *central state government* mandated by §§ 230 and 231 of the Constitution, but we reject extending sovereign immunity beyond ‘what the Constitution demands.’”<sup>139</sup> Then, with Judge Palmore’s dissenting words in *Cullinan* as their guide, the court stated that “[t]he concept that the government can do no wrong or that the government cannot afford to compensate those whom it wrongs in circumstances where a private entity would be required to pay is unacceptable in a just society.”<sup>140</sup> The court concluded that the municipal corporations of “MSD and the Board of Health, when performing services similar to a private corporation, should be liable for their torts.”<sup>141</sup>

Given this conflicting case law, what is the nature of the Blue Grass Airport? Several opinions of the Kentucky Attorney General have addressed the proper categorization of the Blue Grass Airport, most notably a 1986 opinion that addressed whether the Lexington-Fayette County Airport Board was subject to prevailing wage law.<sup>142</sup> The Attorney General examined precedent, including *Gray v. Central Bank & Trust Co.*, where the Court of Appeals interpreted the language of KRS 183.133 to determine that the airport board is a legislative body, and thus, its members could not be sued for their legislative statements while acting within the scope of their duties.<sup>143</sup> The Attorney General also examined *Inco*, and determined that

The aforesaid case law is inconsistent in determining what this Board is. . . .

If the airport board is *not* a separate entity and is just a mere subagency of the Lexington-Fayette Urban County Government *and* at the same time is a “legislative body,” then the Lexington-Fayette Urban County Government has two legislative bodies—the urban county government’s council and the airport board.<sup>144</sup>

The Attorney General wrote that to adhere to such an interpretation is to

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<sup>138</sup> *Id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984)).

<sup>139</sup> *Id.* (quoting *Cullinan v. Jefferson County*, 418 S.W.2d 407, 411 (Ky. 1967) (Palmore, J., dissenting)) (emphasis added).

<sup>140</sup> *Calvert Investments*, 805 S.W.2d at 138.

<sup>141</sup> *Id.*

<sup>142</sup> 86 Op. Att’y Gen. 73 (Ky. 1986).

<sup>143</sup> *Id.* (citing *Gray v. Cent. Bank & Trust Co.*, 562 S.W.2d 656, 658 (Ky. Ct. App. 1978)).

<sup>144</sup> *Id.* (emphasis added).

“reach an untenable and ridiculous result.”<sup>145</sup> In deciding that the airport board was not excluded from prevailing wage law, the Attorney General noted that regardless of “[w]hether the Board is a subagency of urban county government or a separate local government entity, it, itself, is not a city, not a county, and not an urban county government.”<sup>146</sup> The Attorney General thus acknowledged the confusion in case law in regards to the nature of the airport board, but was not required to determine the categorization of the airport board in order to answer the wage question posed.

In an earlier opinion, the Attorney General recognized the Lexington-Fayette Urban County Airport Board’s status as “a public or municipal corporation and an instrumentality of the Commonwealth.”<sup>147</sup> According to the Attorney General, “[t]he airport board is thus a public body engaged in public duties and is subject generally to *general law applicable to municipal corporations*.”<sup>148</sup>

These Attorney General opinions demonstrate the persistent confusion about the exact legal nature of the airport board that would eventually give rise to the *Comair* litigation. Given the confusion surrounding both the state of immunity in the Commonwealth and the exact legal nature of the airport, it is understandable that the litigation surrounding the Comair crash brought many legal issues to the forefront. In an attempt to clarify these issues, confusing legal distinctions have been made between state agencies and municipal corporations, as well as between municipalities and counties.

## II. DISMISSAL OF THE AIRPORT BOARD IN THE COMAIR LITIGATION

It is apparent from this snapshot of case law that the state of the law prior to the Comair crash was far from clear with respect to sovereign or governmental immunity in Kentucky. The last few decades have seen a carving away at the idea of sovereign immunity, and case law has given birth to tests for immunity such as in *Berns*. Yet, rules establishing absolute sovereign immunity such as in *Inco* remain good law. This complicated dichotomy between the *Inco* decision and the established *Berns* test set the stage for Judge Ishmael’s decision in August 2007 dismissing the Blue Grass Airport entities from the Comair litigation.

Filed August 10, 2007, the “Order Dismissing ‘Airport Defendants’ from Third Party Complaint” dismissed the airport defendants.<sup>149</sup> On August 2, Judge Ishmael heard arguments from each opposing side, and the discussion

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> 80 Op. Att’y Gen. 333 (Ky. 1980).

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> *Adams v. Comair, Inc.*, No. 06-CI-3749 (Fayette Cir. Ct. Aug. 10, 2007) (order dismissing “Airport Defendants” from third party complaint).

essentially came down to the conflict between the *Inco* case and the *Berns* test.<sup>150</sup> These two cases seem wholly incompatible, as *Inco* provides absolute sovereign immunity for the airport as an arm of the LFUCG, while *Berns* seems to contemplate an evaluation of the circumstances surrounding each individual case, and would thus not necessarily provide immunity to the airport.<sup>151</sup>

#### A. Decision of the Fayette County Circuit Court

The airport’s central contention was that the decision in *Inco* is still clearly the law.<sup>152</sup> Attorney Kevin Henry said Comair attempted to argue that *Inco* was overruled because of later cases like *Berns* and *Kea-Ham* that dealt with municipal corporations, but the same kind of arguments were made in the *Smolic* decision, he said, where the urban county government was dismissed.<sup>153</sup> The supreme court had the opportunity to limit the sovereign immunity doctrine, but it instead chose to leave *Inco* intact.<sup>154</sup>

The airport presented several cases to support the position that *Inco* controlled. *Estate of Clark v. Daviess County* was a wrongful death case.<sup>155</sup> In *Estate of Clark*, the decedent was killed when her car drove off a county road.<sup>156</sup> The court held that the decision of where to place guard rails and warning signs was a discretionary act and, therefore, the county officials and employees were immune from suit.<sup>157</sup> In its oral arguments, the airport board characterized the runways and taxiways like “public roads for airplanes,” built by an immune agency.<sup>158</sup> All signage and lighting regulations are controlled by federal law, and Henry noted that the airport had been cleared of any violations following a federal investigation.<sup>159</sup>

*Schwindel v. Meade County*, a case that dealt with an injury in a public park and recreational softball complex, was also noted by the airport.<sup>160</sup> In its Supplemental Memorandum, the airport stated that the case “continue[s] to demonstrate unequivocally that counties enjoy sovereign immunity, and

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<sup>150</sup> Videotape: *Adams v. Comair, Inc.*, No. 06-CI-3749, Certified Portion Tape 22/3/7/ VCR/60, 13:02-4:56 (Fayette Cir. Ct. 2007) [hereinafter Videotape] (on file with author).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; see also *Estate of Clark v. Daviess County*, 105 S.W.3d 841, 843 (Ky. Ct. App. 2003).

<sup>156</sup> *Estate of Clark*, 105 S.W.3d at 843.

<sup>157</sup> *Id.* at 846.

<sup>158</sup> Videotape, *supra* note 150.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (citing *Schwindel v. Meade County*, 113 S.W.3d 159, 165-66 (Ky. 2003)).

county agencies and county officials share that sovereign immunity.”<sup>161</sup> *Berns* was not applied in *Schwindel* because counties have absolute sovereign immunity.<sup>162</sup> The airport is an arm of the LFUCG, it undergoes an annual audit of financial statements, reports to the LFUCG, and there is evidence that the airport corporation really does own the facilities, which are financed through bonds, Henry said.<sup>163</sup> Thus, there is no question that it is controlled by the government.

The airport also noted the recent case of *Autry v. Western Kentucky University*, involving a dormitory fire at Western Kentucky University in which a student died.<sup>164</sup> The Supreme Court of Kentucky held that the University was entitled to governmental immunity for nonproprietary functions.<sup>165</sup> The school’s student life foundation was also found to share immunity.<sup>166</sup> The airport was compared to the student life foundation in *Autry*—both are controlled by an immune government entity.<sup>167</sup> Henry also noted the charter of the airport corporation, describing how the airport board and the county government are to have supervisory control of the airport corporation.<sup>168</sup> “There can be no debate, your honor, that the airport corporation is controlled by not one, but two immune county governments or county government entities,” Henry said.<sup>169</sup>

Attorney Edward Stopher spoke for Comair at the August 2 hearing.<sup>170</sup> Comair set out the essential conflict between the parties—the airport board believed that *Berns* was totally inapplicable and that *Inco* was undeniably the law, while Comair believed that *Berns* was the appropriate test.<sup>171</sup> Stopher said that the state of the law in Kentucky was not in a “static fixed inoperable state,” but rather it was “an evolutionary dynamic body of common law.”<sup>172</sup> *Inco* was decided by a divided court of appeals in 1985, and there was no discretionary review as there was in *Berns*.<sup>173</sup> In *Berns*, Justice Leibson propounded the idea that decisions regarding sovereign

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161 Supplemental Memorandum, *supra* note 120, at 17.

162 Videotape, *supra* note 150.

163 *Id.*

164 *Autry v. W. Ky. Univ.*, 219 S.W.3d 713, 716 (Ky. 2007).

165 *Id.* at 717.

166 *Id.* at 719.

167 Videotape, *supra* note 150.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* (citing *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*, 705 S.W.2d 933, 934-35 (Ky. Ct. App. 1985); *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky. 1990)).

immunity were to be made on a case by case basis.<sup>174</sup> The appropriate line for immunity was not one that could be drawn by the General Assembly.<sup>175</sup> Comair contended that six years after *Inco*, the supreme court decided to establish a specific factual test that was to be applied in every case for a determination of sovereign immunity.<sup>176</sup> Stopher said the airport insisted that *Berns* did not apply because the airport was determined to be immune in *Inco*, but “there has never been, from that day to this, an analysis of the *Berns* test applied to the airport board.”<sup>177</sup>

So would the airport pass the *Berns* test? There is no control by the central state government over the airport board, Stopher said.<sup>178</sup> The board members could only be removed for misconduct and conviction of a felony.<sup>179</sup> They operated independently of Frankfort, he said, and “[t]here [was] no evidence that the state control[led] the operations of the day to day activities of the airport board.”<sup>180</sup> Comair also maintained that the airport’s funding did not come from the state treasury.<sup>181</sup> The financial support that came out of the state treasury was miniscule, Stopher said—he recalled that there was evidence of only one grant for \$200,000 for box hangar construction, and the state leased some weather equipment for fifty dollars a month to the airport.<sup>182</sup> Stopher said that the airport had a budget in the tens of millions of dollars, concluding that it was not an agency controlled or funded by the state government.<sup>183</sup>

Utilizing the *Berns* analysis, Stopher said he had heard no support for the idea that the airport board was supported by the state.<sup>184</sup> It was supported almost entirely by non-state entities, he said.<sup>185</sup> A favorable ruling came down for the airport regarding its status of immunity in 1985, but the law had evolved and changed since then.<sup>186</sup> Put simply, the *Berns* test was now the law, Stopher said.<sup>187</sup> Though *Inco* was never explicitly overruled, Stopher said the Supreme Court of Kentucky had the option to use *Inco* in the *Autry* case, but instead used the *Berns* test.<sup>188</sup>

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174 *Id.* (citing *Berns*, 801 S.W.2d at 329).

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*; *Autry v. W. Ky. Univ.*, 219 S.W.3d 713, 716 (Ky. 2007).

In issuing the trial court's ruling, Judge Ishmael said, "I understand that my ruling today will have an impact. And all I can tell the different families and the different corporate entities is that I've taken my best shot."<sup>189</sup> First, Judge Ishmael turned to Section 231 of the Kentucky Constitution, reiterating that it was clear that counties enjoy sovereign immunity.<sup>190</sup> He also said it was clear that the LFUCG was immune from suit.<sup>191</sup> The question, however, remained whether the entities they had created and the members of the airport board were immune.<sup>192</sup>

Beginning with the *Inco* case, Judge Ishmael noted that the airport was entitled to sovereign immunity and that *Inco* had not been expressly overruled or modified.<sup>193</sup> Comair persuasively argued that though *Inco* was not overruled, it was subject to scrutiny.<sup>194</sup> Yet, Judge Ishmael said he saw a distinction between the creation of the airport board and the airport corporation, and the creation of the Kentucky Center for the Arts in *Berns*.<sup>195</sup> The reason the airport board was created was to provide financing and to issue revenue bonds for the airport, he said, while the Kentucky Center for the Arts was created directly by statute.<sup>196</sup> The airport board and airport corporation are more like direct arms or agencies of the LFUCG, he stated.<sup>197</sup> "The urban county government gave birth to them," Judge Ishmael said, "they've got to be considered part and parcel of the urban county government . . . [and] the urban county government is immune[,] and as a creation of the government, the board and the corporation . . . [are] also entitled to the immunity of its creator."<sup>198</sup> Addressing the *Inco* decision and its continuing status as good law, he said, "If there was intention to overrule or modify *Inco*, surely to goodness someone would have addressed that. . . . I just can't fathom that *Inco* is not the law of the land unless some court says that's what we're supposed to do."<sup>199</sup>

In his final analysis, Judge Ishmael noted his position as a trial court judge, maintaining that he did not believe he could disregard or ignore a clear appellate principle.<sup>200</sup> The appellate court had spoken in *Inco*, and said that the airport board was entitled to sovereign immunity, which Judge Ishmael believed was shared by the airport corporation as well. "I

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189 Videotape, *supra* note 150.

190 *Id.*; KY. CONST. § 231.

191 Videotape, *supra* note 150.

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

don't think I have the authority or the jurisdiction to overrule *Inco*,” Judge Ishmael said.<sup>201</sup> “I think *Inco* is still the law, and if they want to change it, at somebody's request or suggestion, then I'll certainly follow that precedent.”<sup>202</sup>

*B. Opinion of the Supreme Court of Kentucky*

“Given the importance of the issues, . . . [the Supreme Court of Kentucky] transferred the [*Comair* litigation] from the Court of Appeals' docket to its own.”<sup>203</sup> The court heard oral arguments on August 17, 2008, but the court's decision was not finally released until October 1, 2009.<sup>204</sup> In a unanimous decision, the Supreme Court of Kentucky affirmed Judge Ishmael's decision, and cemented the airport's immune status.<sup>205</sup>

Kentucky Supreme Court Justice Mary Noble wrote the *Comair* decision.<sup>206</sup> Noble noted in the outset of her opinion that “[d]espite the frequency of opinions on the subject from this Court, the law of sovereign immunity, and the related doctrines of governmental immunity, official immunity, and qualified official immunity, is still difficult to apply, no doubt in part because of the large number of decisions on the subject.”<sup>207</sup> In addition to these conflicting decisions, Justice Noble noted the effect of changes in the “[a]ttitudes about the propriety of immunity . . . over time and personnel changes on the Court.”<sup>208</sup>

Noble noted that sovereign immunity's reach has become complicated when dealing with entities that are below the level of the state.<sup>209</sup> Noble reaffirmed the immune status of counties and the liability of municipalities, but noted that “[n]umerous other entities . . . fall outside this taxonomy of city versus state and county, and it is not immediately clear whether they are agencies of the state, and therefore possibly entitled to immunity, or more akin to municipal corporations, and are therefore liable in tort.”<sup>210</sup> Noble then discussed airport boards themselves, noting “confusion surrounding [their] exact legal nature,” and recognizing that they have been described in numerous decisions as “municipal corporation[s].”<sup>211</sup> While such a label

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009).

<sup>204</sup> *Id.* at 91.

<sup>205</sup> *Id.* at 93.

<sup>206</sup> *Id.* at 92.

<sup>207</sup> *Id.* at 94.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 95.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* (citing *Bowling Green-Warren County Airport Bd. v. Bridges Aircraft Sales &*



would make them liable for suit under *Haney*, Noble stated that these cases did not have anything to do with immunity, and “may have used the term ‘municipal corporation’ more as a way to identify an entity.”<sup>212</sup> The only case to specifically deal with the issue is *Inco*, Noble said, and in that case, the court granted the airport board immunity.<sup>213</sup>

Much of Noble’s decision appropriately focused on the *Berns* test, and perhaps the most striking element of the decision is her evisceration of an objective test that had been relied upon by courts across the Commonwealth for decades. Noble stated that in *Berns*, the court tried to solve the problem that “plague[d] the courts”—the difference between an immune state agency and a municipal agency.<sup>214</sup> The court noted that *Berns* created a test, but that “the Court did not appear to have a single coherent rule.”<sup>215</sup> Noble described how the court first determined that the entity in *Berns* was not performing a governmental function, which “alone would have been sufficient to find that the Center for the Arts lacked immunity.”<sup>216</sup> The court went further and looked to the *Gnau* case’s “‘direction and control’” two-part test.<sup>217</sup> While the *Berns* court ultimately returned to a discussion of the sort of function (governmental or proprietary) that the entity is carrying out, “it is the narrower, ‘two-pronged test’ that is frequently cited as *the* test for sovereign immunity.”<sup>218</sup>

Noble highlighted what she perceived to be a recent change in the way *Berns* had been applied, noting “a shift in focus to the nature of the entity,” recalling recent cases that focused on whether “*the entity is carrying out a function integral to state government.*”<sup>219</sup> Noble believed the earlier focus on the two-part test in *Berns* was misplaced, and instead sought to limit its use.<sup>220</sup> The *Berns* test was “overly simple, failing to allow for subtlety, and too limiting.”<sup>221</sup> The two-pronged test is still helpful, she stated, but “[t]he more important aspect of *Berns* is the focus on whether the entity exercises

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Serv., Inc., 460 S.W.2d 18, 19 (Ky. 1970); *Sawyer v. Jefferson County Fiscal Court*, 438 S.W.2d 531, 534 (Ky. 1969); *Stephenson v. Louisville & Jefferson County Bd. of Health*, 389 S.W.2d 637, 638 (Ky. 1965)).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 95-96 (citing *Inco, Ltd. v. Lexington-Fayette Urban County Airport Bd.*, 705 S.W.2d 933, 934 (Ky. Ct. App. 1985)).

<sup>214</sup> *Comair*, 295 S.W.3d at 97.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (quoting *Gnau v. Louisville & Jefferson County Metro. Sewer Dist.*, 346 S.W.2d 754 (Ky. 1961)).

<sup>218</sup> *Id.* at 98 (citing *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703, 706 (Ky. 2000); *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 342 (Ky. 1997); *Calvert Invs., Inc. v. Louisville & Jefferson County Bd. of Health*, 805 S.W.2d 133, 137 (Ky. 1991)).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 99.

<sup>221</sup> *Id.*

a governmental function, which that decision explains means a ‘function integral to state government.’”<sup>222</sup>

This search for an integral state function is what finally clothed the airport board in immunity. In addition to significant control by an immune county government, Noble stated, “The Airport Board also carries out a function integral to state government in that it exists solely to provide and maintain part of the Commonwealth’s air transportation infrastructure (i.e., the airport).”<sup>223</sup> Like state highways and county roads, the airport was engaged in important transportation services, and retained similar immunity.<sup>224</sup>

Ultimately, Noble’s decision centered around a return to the more subjective governmental/proprietary distinction, and an abandonment of the objective, fact-driven, *Berns* test. While previous courts lamented the unpredictability of using a governmental/proprietary distinction, the *Comair* court seems to have felt too limited by the inflexibility of the more defined and objective rule.

### III. MOVING FORWARD WITH *COMAIR*

Justice Noble’s opinion is well-written and easy to understand, and indeed “lay[s] the cards on the table”<sup>225</sup> in regards to sovereign immunity. It seems, however, that the court has taken a step backwards towards reliance on what the *Haney* court recognized as the misapplied, inconsistent and subjective proprietary/governmental distinction. *Berns* added a layer of simple, straightforward analysis, in which financial figures and by-laws could be examined for funding and control. These elements could give a clear determination of sovereign immunity, only giving the privilege to those entities that are so closely aligned with their creators as to deserve immunity. This objective test seemed to be a step in the right direction. To a certain extent, after the *Comair* case, it appears we are back to the same confusing mess that frustrated the court in *Haney*.

*A. The Supreme Court Missed an Opportunity to Reexamine the Doctrine of Absolute Sovereign Immunity, Especially in Regards to the Lexington-Fayette Urban County Government, a Community Where the Weaknesses of the Doctrine Were First Noted in Haney.*

Lexington perhaps demonstrates most clearly the unfairness of sovereign immunity. Sovereign immunity truly is a “legal anachronism,”<sup>226</sup>

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<sup>222</sup> *Id.* (quoting *Ky. Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 332 (Ky. 1990)).

<sup>223</sup> *Id.* at 101.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 99.

<sup>226</sup> *Haney v. City of Lexington*, 386 S.W.2d 738, 739 (Ky. 1964).

that runs counter to the essential idea that those who commit torts should be held liable for them.<sup>227</sup> Precedent is important, but as the court in *Haney* notes, when a theory loses its basis in logic, it should be disregarded.<sup>228</sup> Though the court propounded these ideas more than forty years ago, the concept that those wronged by actions of the City of Lexington should have some sort of recourse has not lost its appeal. Just as the family that lost Alene Faye Haney in the pool at Woodland Park deserved to at least see the City of Lexington in court, Comair deserved the right to see the LFUCG argue its liability in court.<sup>229</sup>

Sovereign immunity is unfair, and runs counter to the basic ideas behind liability and negligence. This unfairness is evident in the case of the Comair crash. The charter for the LFUCG is quite clear that the entity created when the two governments merged gained the powers and privileges of both cities and counties.<sup>230</sup> Yet, it seems unfair that the LFUCG gained the “powers and privileges” of a city and a county but the limitations of neither of them. While cities have liabilities for their torts, counties have no such limitations.<sup>231</sup> This liability for torts disappeared the day that the LFUCG was created, and it subsequently gained the privilege of immunity. The jettisoning of the limitation of liability seems to be a huge incentive for choosing the merged government form. It also appears to be wholly unfair to those who choose to live in a merged government over those who live in a regular municipality. Those who live in a city have clear recourse against the city they live in for the torts committed by it, while those who live in Lexington are not able to sue their “city.”

This obstacle to Lexington citizens recovering against the city exists despite the fact that the citizens are probably unaware of any distinction between the two types of entities, which appear on the surface to be very similar, but are legally very different. This argument harkens back to Justice Palmore’s now-famous dissent in *Cullinan*, a touchstone along Kentucky’s road from *Haney* to *Berns*, towards the limitation of the application of sovereign immunity.<sup>232</sup> With its decision in the *Comair* case, however, the Supreme Court of Kentucky appears to have again strayed from this path.

Though the court was quite clear in its analysis in *Haney*, its declaration that “the rule is liability—the exception is immunity” seems to have been

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> See LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, KY., CHARTER AND CODE OF ORDINANCES art. 3, §3.01 (1999 & Supp. 2009), available at <http://www.municode.com/resources/gateway.aspx?pid=11163&sid=17>.

<sup>231</sup> See *supra* Part I.A-B.

<sup>232</sup> *Calvert Invs., Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133, 138 (Ky. 1991) (quoting *Cullinan v. Jefferson County*, 418 S.W.2d 407, 411 (Ky. 1967) (Palmore, J., dissenting)).

largely ignored.<sup>233</sup> While the court did stop short of making its decision apply to counties and noted that county immunity remained a strong concept, the *Haney* decision predated the establishment of the merged county and city governments.<sup>234</sup> With commentators and justices noting both the decline in the application of the concept of sovereign immunity, as well as increasing hostility towards its application, why should Kentucky allow the mere adoption of a new governmental form to lead to avoidance of the liability that the courts had so forcefully placed on the city of Lexington a mere decade before the community entered into the urban county form of government?

*B. The Berns Test Was an Important Objective Tool in Determining Immunity, and the Subjectivity of the Governmental/Proprietary Distinction Will Bring Back Confusion.*

As Justice Noble recognized, the exact nature of the airport entities is unclear.<sup>235</sup> To simply call them an arm of the government itself ignores authorities that have recognized that the airport board is a “municipal corporation,”<sup>236</sup> robbed by *Haney* of its immunity, as well as the Attorney General’s opinions that state that Blue Grass Airport is a municipal corporation the exact nature of which remains unclear due to a confusing tangle of case law and statutory interpretation.<sup>237</sup> While the court’s opinion in *Comair* would appear to confine this labeling of the airport as a “municipal corporation” to simply a label and nothing more, such a decision seems dangerous. The term “municipal corporation” is more than a mere label, as it carries a great deal of meaning with it. Making the decision as to whether an entity retains immunity seems to be a close decision at times, and at such times, what sort of entity an agency was created as or how it has held itself out to be can be very important. If indeed the airport is a municipal corporation, then its immunity is clearly extinguished by *Haney*. If there remains any confusion about its status, the *Berns* test was created precisely to clear up that confusion by examining just how closely the airport is connected to the organization that created it. To simply state that the labeling of an entity as a “municipal corporation” carries with it none of the baggage associated with such entities overlooks the important

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<sup>233</sup> See *Haney*, 386 S.W.2d at 742 (quoting *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 625 (Wis. 1962)).

<sup>234</sup> LFUCG was established in 1974. See Chief of Police, *supra* note 105. *Haney*, however, was decided in 1964. *Haney*, 386 S.W.2d 738.

<sup>235</sup> See *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009).

<sup>236</sup> See *Stephenson v. Louisville & Jefferson County Bd. of Health*, 389 S.W.2d 637, 638 (Ky. 1965).

<sup>237</sup> See 86 Op. Att’y Gen. 73 (Ky. 1986); 80 Op. Att’y Gen. 333 (Ky. 1980).

differences between municipal corporations and immune governmental entities.

Immunity is not a clear-cut decision. The Kentucky Supreme Court has made it abundantly clear that an evaluation of the proprietary/ministerial distinction remains important in the context of state-created agencies and their immunity.<sup>238</sup> But focusing on these ideas and ignoring the importance of other, more objective tests, could lead to the expansion of the sovereign immunity doctrine. In *Berns*, the court clearly worried about the expansion of immunity to any state-created agency.<sup>239</sup> The sort of wild expansion envisioned by the *Berns* court appears to be inspired by the type of analysis that was applied by the Kentucky Court of Appeals in *Inco*—an immune creator means an immune agency. *Berns* was decided to avoid the sorts of quick judgments that the court in *Inco* ultimately arrived at in their decision. Until the court's decision in *Comair*, *Berns* reflected limits to the application of sovereign immunity in Kentucky, and it has been cited in subsequent decisions since it was decided in 1990.<sup>240</sup> Notably, the *Kea-Ham* decision found that an agency specifically created by a county lacked the control and funding to share in the county's immunity.<sup>241</sup> The Supreme Court of Kentucky itself makes perhaps the best case for the importance of the *Berns* test in *Withers*. When referring to *Berns*, the court stated that “[t]he time has come to put an end to the uncertainty which has existed in this area of the law. As stated hereinabove, a test has been developed to determine whether an entity possesses the immunity of the Commonwealth.”<sup>242</sup>

If Kentucky is going to maintain a system of governmental sovereign immunity, tests need to be maintained and consistently used to determine when it is appropriate for an agency that really functions as an alter-ego or arm of the state to share in its creator's sovereign immunity. *Berns* appeared to be the most sensible and easily applicable case, as its two prongs of control and funding accurately assess what it means to be a necessary and protected arm of the state.<sup>243</sup> This establishment of an objective, fact-based system for analysis provided for easy application. As the court made clear in *Yanero*, the proprietary/governmental distinction has never left us when analyzing state agencies.<sup>244</sup> To avoid uncertainty, the court faithfully applied *Berns* in the past, yet rejected it in *Comair*.<sup>245</sup> While the *Comair*

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238 See *Comair*, 295 S.W.3d at 99.

239 See Ky. Ctr. for the Arts Corp. v. *Berns*, 801 S.W.2d 327, 331 (Ky. 1990).

240 *Id.*; see also *Withers v. Univ. of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997).

241 *Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth.*, 37 S.W.3d 703, 706 (Ky. 2000).

242 *Withers*, 939 S.W.2d at 346.

243 *Berns*, 801 S.W.2d at 332.

244 *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001).

245 *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 99 (Ky. 2009).

court decried its inflexibility, in gutting the *Berns* test, the court may have brought back the same uncertainty and inconsistency that plagued the Commonwealth’s law concerning municipalities prior to *Haney*.

#### CONCLUSION: A MISSED OPPORTUNITY

Following Justice Noble’s decision and the apparent removal of the *Berns* test from Kentucky’s jurisprudence, there seems little standing in the way of an expansion of the doctrine of sovereign immunity. Without an objective test that is easily applied, and with a return to the subjective use of the proprietary/governmental distinction, we will likely continue to see inconsistent decisions across the Commonwealth. The arbitrary and unpredictable distinctions for municipalities noted by the court in *Haney* will return in cases concerning state agencies. The doctrine itself remains confusing and unfair, and any decision further entrenching the doctrine in Kentucky will only lead to more unfairness.

If we must keep the doctrine of sovereign immunity, Kentucky must be diligent in limiting it to situations where its application is truly appropriate. In 1985, when an airplane slammed into a snow bank at Blue Grass Airport, it may have been acceptable and easy to simply determine that the airport was an immune arm of the government. But when Comair Flight 5191 crashed into a pasture that Sunday morning in August, taking forty-nine lives with it, the gravity of the situation should serve as a reminder of the repercussions that such a decision regarding immunity can have.

