

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002144-MR

KEA-HAM CONTRACTING, INC.

APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 97-CI-000172

FLOYD COUNTY DEVELOPMENT  
AUTHORITY and  
BURL WELLS SPURLOCK

APPELLEES

**AND:**

Cross-Appeal No. 1997-CA-002478-MR

FLOYD COUNTY  
DEVELOPMENT AUTHORITY

CROSS-APPELLANT

v.

CROSS-APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE JOHN DAVID CAUDILL, JUDGE  
ACTION NO. 97-CI-000172

KEA-HAM CONTRACTING, INC.

CROSS-APPELLEE

### **OPINION**

#### **AFFIRMING ON APPEAL, REVERSING ON CROSS-APPEAL**

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BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and MILLER, Judges.

MILLER, JUDGE. Kea-Ham Contracting, Inc. (Kea-Ham), brings this appeal from an August 21, 1997 summary judgment of the Floyd

Circuit Court. The Floyd County Development Authority (Authority) brings a cross-appeal from the same judgment. We affirm on appeal and reverse on cross-appeal.

The facts are these: It appears that the Authority entered into a construction contract with Kea-Ham for the development of certain land. Co-appellee Burl Wells Spurlock (Spurlock) was chairman of the Authority. Soon after beginning work on the project, Kea-Ham terminated its efforts and brought an action in the Floyd Circuit Court alleging breach of contract and fraud against the Authority and Spurlock, individually. Ultimately, the circuit court entered summary judgment. Ky. R. Civ. Proc. 56. It determined that Spurlock was entitled to the protection of "official immunity" and thus was immune from liability. The court also concluded that the Authority was entitled to the defense of "sovereign immunity" but had waived same to the extent of available insurance coverage. The appeal and cross-appeal followed.

Summary judgment is proper when there exists no material issue of fact and the movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

On appeal, Kea-Ham contends that the circuit court erred as a matter of law by concluding that the Authority was cloaked with sovereign immunity. We disagree. The record reveals that the Authority was created by Floyd County pursuant to Ky. Rev. Stat. (KRS) 154.50-316 and that the members of the Authority are appointed by the county judge executive. We

believe the Authority to be an agency of Floyd County and, as such, endowed with sovereign immunity. See Inco, Ltd. v. Lexington-Fayette Urban County Airport Board, Ky. App., 705 S.W.2d 933 (1985). We thus cannot say that the circuit court erred by concluding that the Authority was enveloped by sovereign immunity.

Next, Kea-Ham asserts that even if the Authority is entitled to sovereign immunity, such does not preclude an action based upon contract. We disagree. We are of the opinion that the doctrine of sovereign immunity shields the Authority from liability arising from contractual claims. See Foley Construction Company v. Ward, Ky., 375 S.W.2d 392 (1963), and Powell v. Board of Education of Harrodsburg, Ky. App., 829 S.W.2d 940 (1991). As such, we perceive no error.

Last, Kea-Ham maintains that Spurlock, as chairman of the Authority, was not entitled to the protection of official immunity. The claim against Spurlock arose from representations he made in a letter to Kea-Ham's insurance agent assuring that funding for the project was in place at a local bank. Kea-Ham alleges intentional and negligent misrepresentation. We agree with the circuit court that official immunity shields Spurlock from liability in the instant action. We believe his decision to respond to Kea-Ham's insurance agent's request and his composition of the letter providing such information were clearly discretionary acts. Public officials are entitled to immunity from liability when exercising a discretionary act so long as such act is not illegal or outside the scope of their authority.

See Franklin County, Kentucky v. Malone, Ky., 957 S.W.2d 195 (1997). It is clear that Spurlock was acting within the scope of his authority when writing the letter, and there is no allegation by Kea-Ham that Spurlock's actions were "illegal." Hence, we are of the opinion that the claims against Spurlock were properly dismissed based upon the doctrine of official immunity.

We now turn to the cross-appeal. The Authority contends that the circuit court erred as a matter of law by concluding that its purchase of liability insurance constituted an implied waiver of sovereign immunity. We are of the opinion that the purchase of liability insurance can no longer be viewed as a partial waiver of sovereign immunity to the extent of applicable insurance coverage. See id., and Withers v. University of Kentucky, Ky., 939 S.W.2d 340 (1997). In light thereof, we think the court erred by concluding that the Authority had partially waived sovereign immunity. We do not believe Kea-Ham is entitled to recover from the Authority the extent of its liability insurance coverage.

For the foregoing reasons, the judgment of the circuit court is affirmed on appeal and reversed on cross-appeal.

GUDGEL, CHIEF JUDGE, CONCURS.

GARDNER, JUDGE, CONCURS IN RESULT.

BRIEFS FOR APPELLANT/  
CROSS-APPELLEE KEA-HAM:

Erich E. Blackburn  
Pikeville, KY

Pierre Michael de Bourbon

BRIEF FOR APPELLEES:

Bradford L. Cowgill  
Richard E. Fitzpatrick  
William Craig Robertson III  
Lexington, KY

-and-

Michael J. Schmitt  
Paintsville, KY

BRIEF FOR APPELLEE/  
CROSS-APPELLANT AUTHORITY:

Michael J. Schmitt  
Paintsville, KY