RENDERED: JUNE 28, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000073-MR

LOUISVILLE METRO HOUSING AUTHORITY
DEVELOPMENT CORPORATION — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 07-CI-006701

COMMONWEALTH SECURITY, INC. — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: MOORE, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Louisville Metro Housing Authority Development Corporation (Housing Authority) appeals from a judgment entered against it in favor of Commonwealth Security, Inc. (CSI) after a jury found it liable for fraud and three counts of intentional interference with existing contacts and awarded

$2,845,880 in compensatory damages. The Housing Authority alleges that: (1) it is entitled to immunity; (2) the trial court erred when it awarded post-judgment interest; (3) the elements of intentional interference with existing contracts were not properly included in the jury instruction and not proven; (4) the finding of fraud was not sustained by the evidence; (5) evidence concerning damages was improperly admitted because CSI failed to make adequate pretrial disclosures; and (6) evidence of CSI's President, Curtis Gordon's, prior felony convictions were improperly excluded.

This action commenced when CSI filed a complaint against the Housing Authority alleging breach of contract. CSI subsequently amended its complaint to assert claims for theft of services, fraud and intentional interference with existing contractual relationships.

The Housing Authority filed a counterclaim against CSI alleging that CSI knowingly and fraudulently billed the Housing Authority, and later filed an amended counterclaim alleging that CSI lost keys to Dosker Manor Apartments and agreed to reimburse the Housing Authority for the cost to replace the locks. The Housing Authority alleged the lock replacement cost $10,221.40, which was not reimbursed by CSI.

The parties' business relationship began in 1998, when CSI and the Housing Authority entered into a contract for CSI to provide security services to various Housing Authority apartment complexes. The contracts were negotiated on behalf of the Housing Authority by John Groves, head of security, and by Curtis

Gordon on CSI's behalf. Under the original contracts, CSI only provided security guards who were not sworn police officers and the Housing Authority agreed to pay CSI $8.50 per hour for each guard provided.

At trial, Gordon testified that in 2004, Groves requested CSI to supply additional security services for the Housing Authority's Dosker Manor Apartments, including sworn police officers to be paid $19 per hour. In that same conversation, Groves allegedly agreed that the hourly fee for guards that were not sworn officers would increase from $8.75 per hour to $9.75 per hour. Groves negotiated the proposed contract without soliciting bids, the submission of bids, and without government approval. Although no written contract was executed, CSI provided security guards and sworn officers to the Housing Authority and continued to be assured by Groves that the Housing Authority would pay the agreed price. However, the Housing Authority continued to pay CSI only $8.75 per hour for unsworn officers but did pay the $19 an hour for sworn officers.

In 2005, after CSI's business increased and other companies were paying it $9.75 per hour for unsworn security guards, CSI notified the Housing Authority that it planned to file a breach of contract action against it for failure to pay $9.75 per hour. The Housing Authority denied that there was a written contract executed with CSI in 2005 and refused to pay the increased amount.

Gordon testified that as a result of his attempt to enforce the 2005 agreement, the Housing Authority publically accused him of falsifying billing records, failing to provide security services billed to the Housing Authority and

failing to provide sworn officers with authority to arrest in Jefferson County. Based on the accusations, Gordon was charged with one count of forgery in the second degree and 43 counts of theft by deception over $300. Gordon was found not guilty of all charges.

CSI presented evidence that after the Housing Authority's disparaging public statements, CSI lost contracts with three customers, Park DuValle Health Centers, Louisville Water Company and City of West Buechel. Representatives from those entities testified that although CSI had provided quality service, the public accusations caused them to terminate their contracts with CSI. Groves admitted that once the allegations were made against Gordon, police departments refused to permit their officers to work off duty for CSI, effectively destroying CSI's business. After the allegations were made public, Gordon sold his security company.

The jury rejected CSI's claim that the Housing Authority executed a written contract providing for $9.75 per hour but returned a verdict against the Housing Authority on the fraud and intentional interference with existing contract counts. The jury also returned a verdict against CSI on the Housing Authority's counterclaim for the cost of replacing the locks at Dosker Manor Apartments.

The Housing Authority asserted its immunity defense in its post-judgment motions filed after seven years of litigation and a lengthy trial. The trial court expressed the dilemma presented by the Housing Authority's plea for immunity and the Housing Authority's misuse of Kentucky Rules of Civil

Procedure (CR) 59.01 to raise the immunity issue. It observed that the rule is intended to provide relief where the jury's verdict was fundamentally unjust "as a consequence of circumstances beyond the control of the aggrieved party or conduct (or misconduct) by the lawyers, the judge or the jury." It found the Housing Authority's "thirteenth hour plea of immunity to be procedurally and equitably disconcerting." The trial court ruled that the Housing Authority was not entitled to claim immunity.

We agree with the trial court that the Housing Authority's belated claim of immunity is disconcerting. Although it now vehemently contends that it cannot be sued for its torts and asserts the shield of immunity, this Court cannot comprehend its reason for waiting until after years of trial preparation and a trial to assert its defense. Its lack of diligence is particularly troublesome in light of the rule in this Commonwealth that a party claiming immunity is entitled to immediately appeal a trial court's denial of immunity. *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009). Instead of attempting to avoid the burdens of litigation, the Housing Authority chose to wait until the burdens were borne and a judgment entered to assert its defense. Given the precarious path chosen by the Housing Authority, as a threshold inquiry, we must determine whether, on the record presented, we can properly review the immunity issue.

Generally, an issue not properly preserved in the trial court cannot be considered by this Court on appellate review. CR 8.03 provides that "[i]n pleading

to a preceding pleading, a party shall set forth affirmatively … any … matter constituting an avoidance or affirmative defense." Our procedural rules do not permit a party to assert a waived defense in a post-judgment motion.

CR 59.01 provides specific grounds for post-judgment relief, none of which are applicable to the Housing Authority's belated claim of immunity. Moreover, a CR 59.05 motion to alter or amend a judgment cannot be invoked "to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). Despite the well established rules of procedure, the Housing Authority asserts that its claim of immunity was not waived by its failure to properly present it to the trial court and cites three cases in support of its position.

In *Commonwealth, Department of Highways v. Davidson*, 383 S.W. 2d 346, 348 (Ky. 1964), the Court held that the Commonwealth's failure to assert sovereign immunity as a defense in its answer did not preclude the Commonwealth from presenting the issue for the first time on appeal. Without deciding whether immunity is an affirmative defense that must be pled under CR 8.03, the Court held that "[t]he immunity is such that it may not be waived, except by legislative action." *Id*. The Court reasoned that the mandate of Section 231 of the Kentucky Constitution, stating that only the legislature can waive sovereign immunity, "would be of small stature if its precepts could be 'waived' by any state officer or agent other than the general assembly." *Id*.

One month later, in another case filed against the Commonwealth, Department of Highways, the Court reaffirmed its holding. Although the defense of sovereign immunity was not specifically pleaded, the Court reiterated that "it is a constitutional protection that can be waived only by the General Assembly and applies regardless of any formal plea." *Wells v. Commonwealth, Department of Highways*, 384 S.W.2d 308 (Ky. 1964).

Relying on the same Constitutional provision, our Supreme Court held that the Commonwealth of Kentucky, Department of Corrections could present the issue of sovereign immunity for the first time on appeal in a Kentucky Civil Rights Act claim. *Department of Corrections v. Furr*, 23 S.W.3d 615, 616 (Ky. 2000).

We add to the cases cited by the Housing Authority a case decided by this Court. In *Louisville Metro/Jefferson County Government v. Abma*, 326 S.W.3d 1, 14 (Ky.App. 2009), we acknowledged that sovereign immunity may be raised at any time.[1]

The cases cited have a crucial common holding: All held that *sovereign immunity* may be raised at any time. In contrast, CSI did not file an action against the Commonwealth or the Louisville/Jefferson County Metro

[1] We note that our Supreme Court has rendered opinions that are arguably inconsistent with the view expressed in these four opinions. In *Board of Trustees of University of Kentucky v. Hayse*, 782 S.W.2d 609, 614 (Ky. 1989) (*overruled on other grounds by Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001)), the Court held that the sovereign immunity defense was precluded by the law of the case doctrine. In *3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government,* 134 S.W.3d 558, 563 (Ky. 2004), our Supreme Court carved out yet another exception to the rule that only the General Assembly can waive immunity. In that case, our Supreme Court held that sovereign immunity had been waived by the failure to present the issue in a cross-motion for discretionary review. *Id*.

Government. It was filed against an incorporated entity, the Housing Authority. Therefore, our discussion turns to the significant differences between sovereign and governmental immunity.

Recognizing that courts and litigants have used the terms sovereign immunity and governmental immunity interchangeably, in *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001), the Court reaffirmed that the two concepts are distinct. Sovereign immunity "arose from the common law of England" and "is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Id*. at 517. Only states and counties enjoy sovereign immunity. *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp*., 295 S.W.3d 91, 94 (Ky. 2009). Because the Housing Authority is not the state or a county, if it has any immunity at all in this case, it must be governmental immunity.

Governmental immunity is applicable to government agencies and limits tort liability on those agencies. *Yanero*, 65 S.W.3d at 519. It is an offshoot of sovereign immunity but derived from a different source. *Id*. Its origin was explained in *Yanero*:

> The principle of governmental immunity from civil liability is partially grounded in the separation of powers doctrine embodied in Sections 27 and 28 of the Constitution of Kentucky. The premise is that courts should not be called upon to pass judgment on policy decisions made by members of coordinate branches of government in the context of tort actions, because such actions furnish an inadequate crucible for testing the merits of social, political or economic policy.

Id.

Unlike sovereign immunity which operates as a complete shield from liability, governmental immunity "shields state agencies from liability for damages only for those acts which constitute governmental functions, *i.e.,* public acts integral in some way to state government," and does not apply "to agency acts which serve merely proprietary ends, *i.e.,* non-integral undertakings of a sort private persons or businesses might engage in for profit." *Prater,* 292 S.W.3d at 887. Thus, an agency of the state government cloaked with governmental immunity can "be sued in a judicial court for damages caused by its tortious performance of a proprietary function, but not its tortious performance of a governmental function, unless the General Assembly has waived its immunity by statute." *Grayson County Board of Education v. Casey,* 157 S.W.3d 201, 203 (Ky. 2005).

Appellate decisions have repeatedly noted the difficulty in making the initial determination of whether an entity is an agency for governmental immunity purposes. *Caneyville Volunteer Fire Department v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 801 (Ky. 2009). In *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990), the Court set forth a test for whether an entity created by an act of the General Assembly is entitled to immunity and *Berns* remained the seminal case on the issue until the Supreme Court rendered its decision in *Comair,* 295 S.W.3d 91. Although not overruling *Berns*, the Court

again attempted to bring consistency to an admittedly haphazard application of *Berns* and was prompted to "lay the cards on the table, so to speak, and explain the status of the various elements of *Berns*." *Id*. at 99.

As background, the Supreme Court reiterated that the state and counties enjoy sovereign immunity but that cities, as municipal corporations, have no immunity for negligent acts committed outside the legislative and judicial realms. *Id.* at 94-95. Where the identity of an entity is transparent, the analysis is simplistic. However, the Supreme Court recognized that other entities exist that are neither a city, state, nor county but are in-between entities. *Id.* at 95. The proper analysis to determine whether immunity is available to an in-between entity has proven problematic.

It is frequently unclear whether these in-between entities are more similar to agencies of the state or of the county and entitled to immunity, or are more similar to municipal corporations and enjoy no immunity. *Id.* In *Comair*, the Supreme Court pronounced a new two-part analysis, requiring that the origin of the entity be considered and then whether the entity carries out an integral state function to ultimately determine the entity's immunity status. *Id.* at 99. Quoting *Autrey v. Western Kentucky University*, 219 S.W.3d 713, 717 (Ky. 2007), the Court reiterated that "[a]n analysis of what an agency actually does is required to determine its immunity status." *Comair*, 295 S.W.3d at 102.

Thus, after a determination is made that an entity is a public agency for governmental immunity purposes, the court must make a subsequent liability

inquiry and apply the government/proprietary test. *Caneyville,* 286 S.W.3d at 804. That test requires the court to determine whether the agency was functioning in a proprietary or governmental function when it committed the tortious act. *Prater*, 292 S.W.3d at 887. While not a perfect test,

> it provides 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.

Caneyville, 286 S.W.3d at 805 (quoting *Yanero*, 65 S.W.3d at 521).

The Housing Authority argues that despite the complex analysis applicable to governmental immunity, as a matter of law, it is entitled to immunity and cites prior case law holding that housing authorities created pursuant to Kentucky Revised Statutes (KRS) Chapter 80 are state agencies. In *Louisville Metro Housing Authority v. Burns*, 198 S.W.3d 147, 151 (Ky.App. 2005), the Court held that the Housing Authority was a public agency and, therefore, punitive damages were precluded by KRS 65.2002 in a personal injury action. In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85 (Ky.App. 2009) (*Brooks III*), this Court again looked to the enabling statutes to determine whether the Lexington-Fayette Urban County Housing Authority was a public entity. The Court held that it was a state agency created pursuant to KRS Chapter 80 and not subject to levy or execution by garnishment. *Id*. at 90.

We are not persuaded that the cases cited addressing the remedies available against the Housing Authority are binding regarding the immunity question. If there is any clarity in this otherwise legal quagmire, it is that "unless created to perform a governmental function, a state agency is not entitled to governmental immunity." *Autry,* 219 S.W.3d at 717. Indeed, there is authority that while a housing authority is a state agency, under the two-part *Comair* test, it may not be entitled to immunity.

Although not written in the context of immunity, the Court's opinion in C*ity of Louisville Municipal Housing Commission v. Public Housing Administration*, 261 S.W.2d 286 (Ky. 1953), is instructive. The Court noted that although the Housing Commission was created pursuant to KRS Chapter 80 and perhaps a state agency, it was organized to participate in the federal housing program and that "[n]one of the revenue of the Housing Commission is derived from local or state funds, and it has no authority to assess, levy or collect taxes in any form." *Id*. at 288. It concluded that the Commission was neither "fish nor fowl," but a "hybrid, conceived for a purpose never contemplated by the framers of our Constitution." *Id*.

In *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777, 779 (Ky.App. 1991), the Court held that the Housing Authority of Paducah was not immune. Organized pursuant to KRS Chapter 80, it was a municipal corporation and pursuant to KRS 80.050, had "the power to contract and be contracted with, to sue

or be sued, and to adopt a seal and alter it at will." *Id*. at 780. The Housing Authority of Paducah was an entity totally separate from the City. *Id*.

If we were to accept the Housing Authority's contention that it is immune because it is a state agency, we would set a precedent contrary to that established in *Yanero* and thoroughly explained in *Comair*. In this Commonwealth, the question of sovereign immunity may be readily resolved where the Commonwealth or a county is a named defendant. However, an in-between agency, such as a housing authority, is entitled to immunity if the two-part *Comair* test is met. Although the immunity question may not be waived by the failure to timely present it to the trial court, this Court cannot make a fact intensive inquiry based on a silent record. Yet, this is precisely what the Housing Authority proposes.

There is no evidence in the record to establish what the Housing Authority actually does, how and from where it receives funding, whether the Commonwealth or the Louisville/Jefferson County Metro Government controls, directs, provides funding to, or will be responsible for the judgment in this case. Furthermore, there is no evidence that the Housing Authority was performing a governmental versus proprietary function when it committed torts against CSI. These are factual determinations incapable of resolution based on the record before this Court. Although we are bound by existing law not to resolve the immunity question solely on the basis of waiver, as an appellate court, we have no factual basis to make a determination whether governmental immunity applies to the Housing Authority. Consequently, we affirm the trial court's denial of immunity.

Although logic dictates that we consider the Housing Authority's argument regarding post-judgment interest only if we affirm the judgment as to liability and damages, clarity dictates otherwise. Notably, in *Burns* and *Brooks III*,[2] the Courts held that although housing authorities were state agencies created under KRS Chapter 80, they were not shielded by governmental immunity from the actions filed against them and damages were recoverable. However, the available remedies were limited by their status as state agencies. We reach the same conclusion in this case.

Regardless of whether it performs a governmental function and the source of its funding, the Housing Authority is a state agency created pursuant to KRS Chapter 80 and, therefore, we conclude that post-judgment interest is precluded. It is an entity created by the General Assembly. The law is that interest otherwise recoverable pursuant to KRS 360.040, the post-judgment interest statute, does not apply to a state or public agency without an explicit declaration by the legislature or by contract. *Powell v. Board of Education of Harrodsburg*, 829 S.W.2d 940, 941 (Ky.App. 1991). Consequently, we reverse the award of post-judgment interest.

The Housing Authority argues that the trial court erroneously instructed the jury regarding CSI's claim for intentional interference with existing

[2] In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004), (referred to in *Brooks III* as *Brooks II*), the Court held that the Lexington-Fayette Urban County Housing Authority's failure to challenge the award of post-judgment interest in the first appeal precluded it from challenging it in the second appeal. In *Brooks III*, the Court indicated that if properly presented, the award would have been precluded because the Court deemed the Housing Authority a state agency. *Brooks III*, 332 S.W.3d at 90.

contracts. Essentially, it argues that the instruction should have specifically included the terms "malice" and "good faith."

Our review of alleged errors regarding jury instructions is a question of law subject to a *de novo* standard of review. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006). A verdict will be reversed as erroneous only where the jury instruction misstated the law. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 230 (Ky. 2005). Kentucky follows the bare bones approach to jury instructions: If counsel believes the instructions need more elaboration, they can be fleshed out by counsel in their closing arguments. *Id.* at 230. Under this rule, we consider the trial court's instructions.

As noted in *Harrodsburg Indus. Warehousing, Inc. v. MIGS, LLC*, 182 S.W.3d 529, 533 (Ky.App. 2005), Kentucky recognizes an action for intentional interference with an existing contract set forth in the Restatement (Second) of Torts § 766 (1979), which provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

In order to prevail, the plaintiff must "show malice or some significantly wrongful conduct." *Id*. at 534. However, if malice or wrongful conduct is established, the wrongdoer "may escape liability by showing that he acted in good faith to assert a legally protected interest of his own." *NCAA v.*

Hornung, 754 S.W.2d 855, 858 (Ky. 1988). Because it is a defense as opposed to an element of the tort, "the party asserting a right to protect his own interest bears the burden of proving his defense." *Id*.

The Housing Authority contends that the jury instructions did not properly instruct the jury regarding the malice element and good faith as a defense to CSI's interference claim. Its proposed instruction required that the jury make a specific finding whether the Housing Authority acted with malice and was motivated by a good faith effort to protect its legitimate business interests.

The Court rejected the proposed instruction. Following the bare bones approach to instructions, it instructed counsel to emphasize in closing argument that to permit recovery by CSI, the jury must find the Housing Authority intentionally caused CSI to lose the contracts. Accordingly, the following instruction was submitted on each claim of intentional interference with CSI's contractual relationships with Park DuValle Health Centers, Louisville Water Company and City of West Buechel:

> If you are satisfied from the evidence that [the Housing Authority], acting by and through its employee(s), intentionally and improperly interfered with CSI's employment contract with the [named company] by inducing or otherwise causing the [named company] not to perform on that contract, then you shall find for CSI. Otherwise, you shall find [for the Housing Authority].

We are not convinced that the jury instruction was required to include the term malice, as the Housing Authority suggests. As noted in *Hornung*, actual malice is not required and the tort may be established by demonstrating "some

significantly wrongful conduct." *Id*. at 859. The trial court's instruction requiring a finding that the Housing Authority "improperly interfered" with CSI's contractual relationships and the opportunity for counsel to elaborate on the instructions in closing satisfied the bare bones approach to jury instructions under Kentucky law.

The Housing Authority's claim that the instruction was required to include a good faith defense is equally unpersuasive. "The rule is well settled that '[e]ach party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it.'" *University Medical Center, Inc. v. Beglin*, 375 S.W.3d 783, 792 (Ky. 2011) (quoting *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.,* 303 S.W.2d 319, 321 (Ky. 1957)). An instruction on a defense is to be rejected if not warranted by the evidence. *Harris v. Commonwealth*, 313 S.W.3d 40, 50 (Ky. 2010).

Because good faith is a defense to a claim for intentional interference with an existing contract, it was incumbent upon the Housing Authority to submit evidence to support that defense to warrant its requested instruction. In its appellate brief, the Housing Authority failed to cite any specific evidence in the record supporting its assertion. CR 76.12(4)(c). This Court is not required to sift through the record to determine whether there is evidence to support the Housing Authority's alleged error in the instruction. *Monumental Life Ins. Co. v. Department of Revenue*, 294 S.W.3d 10, 23 (Ky.App. 2008). In the absence of

sufficient citation to the record demonstrating that a good faith instruction was warranted, we conclude there was no error.

Under the instructions given, the jury returned a unanimous verdict on CSI's interference with existing contract claims. However, the Housing Authority contends that there was insufficient evidence to establish that its actions caused CSI to lose those contracts. We disagree.

There was testimony the Housing Authority made false allegations that while conducting CSI's business, and as its president, Gordon engaged in criminal conduct. Further testimony revealed that Park DuValle Health Centers, Louisville Water Company, and City of West Buechel terminated their contracts with CSI as a result of the criminal charges against Gordon. There was sufficient evidence to support the jury's finding that the Housing Authority caused CSI to lose the contracts.

The Housing Authority contends that the trial court erroneously denied its motion for directed verdict on the basis that there was insufficient evidence to submit the fraud issue to the jury. Our standard of review regarding a ruling on a motion for directed verdict is well settled.

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot

> substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998)(citation omitted).

A party claiming harm resulting from fraud in the inducement must establish six elements of fraud by clear and convincing evidence as follows: "a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." *United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999). The Housing Authority submits that to establish fraud, CSI must have demonstrated that the Housing Authority misrepresented a present or preexisting fact, as opposed to a promise to perform a future act. However, *Schroerlucke v. Hall*, 249 S.W.2d 130 (Ky. 1952), sets forth a contrary rule. The Court explained:

> It has been pointed out in many decisions that promises made without intention of fulfillment in order to induce another to enter into a contract may be as culpable and harmful as misrepresentations of existing facts. It has been held that even though the representations relate to the future, if they are positively stated in order to induce another to do something and the party making the representations has no intention of performance, such statements may be misrepresentation of facts on which fraud may be predicated.

Id. at 131. The same rule was recited and further explained in *PCR Contractors, Inc. v. Danial*, 354 S.W.3d 610, 614 (Ky.App. 2011). Quoting *Hanson v. American Nat. Bank & Trust Co*., 865 S.W.2d 302, 307 (Ky. 1993) (*overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co*., 83 S.W.3d 483 (Ky. 2002)), the Court stated:

> The essential element in an action for fraud is not whether the representation is the consideration for contract for which a separate action may lie. 'Since a promise necessarily carries with it the implied assertion of an intention to perform it follows that a promise made without such intention is fraudulent and actionable in deceit ... This is true whether or not the promise is enforceable as a contract.' Restatement (Second) of Torts § 530 Comment c (1976).

Id. at 614.

Gordon testified Groves promised that as of February 2005, the Housing Authority would pay $9.75 per hour for each security guard provided by CSI. Each time he attempted to obtain a written signed contract from Groves for the increased rate, Gordon was promised that the increased rate would be paid. In reliance on the Housing Authority's repeated promises, CSI provided the security guards. Under the appropriate standard of review, when the evidence is viewed in a light most favorable to CSI, we cannot disturb the trial court's denial of the Housing Authority's motion for a directed verdict.

The next issue presented is whether the trial court erred by permitting testimony regarding economic damages suffered by CSI when Park DuValle Health Centers cancelled its contract with CSI after learning of Gordon's indictment and permitting Gordon to testify from a worksheet not revealed during discovery. Again, we are mindful of our standard of review: Absent an abuse of discretion, a trial court's ruling on evidentiary issues will not be disturbed. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

Although the basis for the Housing Authority's argument is that CSI did not comply with certain discovery requests, we have scoured the appellate record and found that it does not include discovery responses and depositions. We did find that in CSI's itemization of damages submitted to the trial court, there was no reference to Park DuValle Health Centers. However, CSI explained that it mistakenly included Douglas Park in place of Park DuValle Health Centers. Based on the record available to this Court, we are unable to say that the trial court abused its discretion.

Finally, we address the Housing Authority's argument that the trial court erred when it excluded evidence regarding Gordon's federal convictions for unrelated tax crimes and bank fraud. The trial court properly ruled that because Gordon had not been sentenced and his conviction was not final, the evidence was inadmissible. *Commonwealth v. Duvall*, 548 S.W.2d 832 (Ky. 1977), plainly states the rule in this Commonwealth:

> The trial court correctly held that under the principle of *Foure v. Commonwealth*, 214 Ky. 620, 283 S.W. 958, 962 (1926), for impeachment purposes a judgment of conviction that has been appealed is not final until the mandate is issued. The Attorney General urges that the rule be relaxed and brought into line with Rule 609(e) of the Federal Rules of Evidence, under which the pendency of an appeal does not prevent proof of the conviction from which the appeal was taken. This, it is said, is the majority rule in the country. Cf. Annotation, 16 ALR 2d 726. We think, however, that until the litigation is ended and the conviction has survived the appeal it should not be admissible. Until then the defendant's day in court is not over. We decline to overthrow what we consider to be a sound principle.

The rule expressed continues to be applied in this Commonwealth and, therefore, the trial court properly excluded evidence regarding Gordon's convictions. *St. Clair v. Commonwealth,* 140 S.W.3d 510, 564 (Ky. 2004).

Based on the foregoing, the judgment of the Jefferson Circuit Court is affirmed except that the portion of the judgment awarding post-judgment interest against the Housing Authority is reversed and remanded for entry of a judgment consistent with this opinion.

STUMBO, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent regarding the majority's decision that the Housing Authority is entitled to governmental immunity rather than sovereign immunity and its decision that the Housing Authority's failure to develop a factual record impedes the Court's review. In my view, this issue is well settled and is a purely legal issue.

In *Brooks v. Lexington-Fayette Urban County Housing Authority*, 332 S.W.3d 85 (Ky. App. 2009), which I will reference as "*Brooks III*," this Court reviewed specifically whether a sister entity to the Louisville Metro Housing Authority Development Corporation was entitled to immunity. Both entities are formed under KRS Chapter 80, and both are operated in conjunction with a metro form of government.[3] In *Brooks III*, we held that

[3] As I will discuss *infra*, I am not convinced that the fact this is a housing authority operating under a metro form of government makes any difference.

> [o]ur opinion in *Brooks II* held the Housing Authority's failure to challenge the trial court's award of post-judgment interest in the first appeal was the fatal flaw which precipitated its liability and ultimately became the law of the case. Contrary to Brooks' assertion, our holding was not premised upon the trial court's alleged rejection of the Housing Authority's status as a state agency. **In fact, a careful reading of *Brooks II* reveals the panel believed the Housing Authority was, in fact, a state agency.** This is especially evident in our discussion of [*Kentucky Dept. of Corrections v.*] *McCullough* [,123 S.W.3d 130 (Ky. 2003),] which centered on state agency immunity. We have scoured the lengthy record and the earlier published opinions rendered in this matter and are unable to locate a holding by any court that the Housing Authority is not a state agency.
>
> As correctly noted by the Housing Authority, it is organized as a public entity under KRS Chapter 80 to be a municipal or city[4] housing authority. Numerous cases from within and without this jurisdiction have clearly

[4] At oral argument, counsel for CSI argued that the *Brooks III* decision regarding immunity was flawed because in one breath it referenced that the housing authority was a "municipal or city agency" and in the next stated it was a "state agency." Certainly, "cities are incorporated to manage purely local governmental functions, not to be agents of the central state government." *Wilson v. City of Central City*, 372 S.W.3d 863 (Ky. 2012), *reh'g denied* (citing 62 C.J.S. §2 (1999)). Cities accordingly are generally not entitled to sovereign immunity. However, in *Withers v. University of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997), the Supreme Court held that

> the line between what is a state agency and what is a municipal corporation is not divided by whether the entity created by state statute is or is not a city, but whether, when viewed as a whole, the entity is carrying out a function integral to state government. We use by analogy the language in *Kentucky Region Eight v. Commonwealth*, Ky., 507 S.W.2d 489, 491 (1974), holding that 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."

(Note omitted).

This focus on substance over form remains the test for immunity. *See Wilson*, 372 S.W.3d at 869, n. 10.

> held such entities to be state agencies. *See Louisville Metro Housing Authority v. Burns*, 198 S.W.3d 147 (Ky. App. 2005); *City of Louisville Municipal Housing Commission v. Public Housing Administration*, 261 S.W.2d 286 (Ky. 1953); *Salisbury v. Housing Authority of Newport*, 615 F.Supp. 1433, 1436 (E.D. Ky. 1985) (overruled on other grounds by *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988); *Tedder v. Housing Authority of Paducah*, 574 F.Supp. 240 (W.D.Ky. 1983)). **Clearly, in light of these and other precedents, an entity created under KRS Chapter 80 enjoys the status of a state agency.**[5] Therefore, the trial court correctly found the Housing Authority is not subject to levy or execution by garnishment as it is a body politic of the *Commonwealth. Bullitt Circuit Court*, 365 S.W.2d at 108 (Judgments against the Commonwealth "cannot be enforced by the ordinary processes of law" and execution against property cannot be had against public corporations or bodies politic but only against property of private persons).

332 S.W.3d at 90 (emphasis added).

The decision in *Brooks III* should end the inquiry--not just because it is a published case, binding on this Court --but because it is correct. The Housing Authority meets the test created by the Supreme Court to resolve immunity status questions. Recently, the Kentucky Supreme Court in *Wilson v. City of*

Furthermore, the Housing Authority is not strictly one operated solely by a City (although I do not think that would be determinative); rather it is operated by a consolidated form of local government. Pursuant to KRS 67C.101(2)(e), "[a] consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees."

[5] I disagree with the majority opinion's inference that *Brooks III* can be construed as only "a state agency for the purpose of determining its liability for post-judgment interest." As noted above the Court in *Brooks III*, 332 S.W.3d at 90, held that "Clearly, in light of these and other precedents, an entity created under KRS Chapter 80 enjoys the status of a state agency." Only after having decided that KRS Chapter 80 entities are state agencies did the Court thereafter state "Therefore, the trial court correctly found the Housing Authority is not subject to levy or executive by garnishment as it is a body politic of the Commonwealth." *Id.* (citations omitted).

Central City, 372 S.W.3d 863 (Ky. 2012), *reh'g denied*, reaffirmed its holding in *Comair Inc. v. Lexington-Fayette Urban Cnty. Airport Corp*., 295 S.W.3d 91 (Ky. 2009). The Supreme Court has recognized that

> [n]umerous … entities… fall outside [the] 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. These in-between entities have given courts the most trouble in recent years.

Wilson, 372 S.W.3d at 869 (quoting *Comair*, 295 S.W.3d at 95).

Thereafter, the Court in *Wilson* quoted *Comair* on resolving the immunity status of entities falling within the "gray" area.

> [T]here is a gray area between counties, which are political subdivisions of the Commonwealth, and cities, which are not. Whether an entity falling within that gray area is a "political subdivision" … is to be resolved in the same way that we resolve whether an entity is protected from suit by sovereign immunity. In *Comair*, we drew upon, but refocused, the [*Kentucky Center for the Arts v.*] *Berns* [,801 S.W.2d 327 (Ky. 1990)] test for determining immunity status with a test that focuses on "whether the entity exercises a governmental function, which [*Berns*] explains means a 'function integral to state government.[']" 295 S.W.3d at 99 (citing *Berns*, 801 S.W.2d at 332). "The focus," *Comair* directs, "is on *state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities*...." *Id*. (emphasis added); *see also Caneyville* [*Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*,] 286 S.W.3d [709,] 802[(Ky. 2009)] ("although the courts have engaged in somewhat of a hodgepodge of factorial considerations, Kentucky follows the [ ] approach in placing greater weight on the extent to which the entity engages in an essential [state] government function"). In

> *Comair*, we held that the Lexington–Fayette Urban County Airport and its Board were entities that fell within this definition, and were therefore protected by sovereign immunity. 295 S.W.3d at 104.

Wilson, 372 S.W.3d at 869, n. 11.

Accordingly, the Court in *Wilson* reaffirmed the *Comair* test of "a case-by-case analysis focusing, in general, on 'whether the entity exercises a governmental function, which [ ] means a "function integral to state government."'" *Id.* at n.10.

As far back as 1940, the highest Court in Kentucky recognized that housing commissions are public entities, organized to promote public health, safety, morals, and general welfare, *i.e.,* traditional state functions. *See City of Louisville v. German*, 286 Ky. 477, 150 S.W.2d 931 (Ky. App. 1940). In no uncertain terms, Kentucky highest Court held that:

> [t]he municipal housing commission was created under what is known as the Municipal Housing Commission Act, Kentucky Statutes, section 2741x-1 et seq.[6] The purpose of that act was to promote slum clearance by acquiring, establishing, erecting, maintaining, and operating low cost housing projects in municipalities of the first and second class. In *Spahn v. Stewart*, 268 Ky. 97, 103 S.W.2d 651, 659, [Ky. 1937] the act was held valid and constitutional. The purposes of the act are fully set forth in that opinion and among other things it is said: "Two principal features of the act must be considered: One, that the act has as one of its outstanding purposes the procurement of financial aid from the government; second, that the work contemplated is of a public nature, as we think we have sufficiently pointed out. The work done in the consummation of the plan is essentially public work."

[6] The Act was since amended, but its purpose remained essentially the same. *See* KRS Chapter 80.

> As was indicated in the opinion it is a public work serving a public purpose in that it has as its objective the promotion of public health, safety, morals, general welfare, etc., of citizens of the city.[7]

Id. at 933-34.

More importantly, however, is the fact that the General Assembly has in no uncertain terms stated that the housing authorities address a state level concern at the local level, and it has unequivocally declared that this is an essential governmental function. In KRS 80.270, the General Assembly provided that

> [i]t is hereby declared that there exist in Kentucky unsafe and unsanitary housing conditions and a shortage of safe and sanitary dwelling accommodations for persons of low income; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities; and that the public interest requires the remedying of these conditions. It is further declared that the assistance provided in KRS 80.280 to 80.300 for the remedying of such conditions constitutes a public use and purpose and an essential governmental function for which public money may be spent and other aid given; that it is a proper public purpose for any public body to aid any housing authority located or operating within its boundaries or jurisdiction, as the public body derives immediate benefits and advantages from such a housing authority or developments; and that the provisions of KRS 80.280 to 80.300 are necessary in the public interest.

Based on the foregoing, the issue is well settled that the Housing Authority is entitled to sovereign immunity. The fact that the Housing Authority may not have developed a factual record is not fatal herein because the question of

[7] See note two in regard to Court's reference of the housing authority in *German* being organized for the benefit of the citizens of a city.

immunity is purely a legal one. *See Energy & Environment Cabinet, Div. of Forestry, Commonwealth v. Robinson*, 363 S.W.3d 24 (Ky. App. 2012) (citing *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006); *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841, 844 (Ky. App. 2003)). Accordingly, this issue can be resolved by statutory review. Hence, I would reverse the circuit court's decision.

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