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Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001317-MR

UNIVERSITY OF LOUISVILLE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 12-CI-01062

DR. JAMES WELDON LILLARD, JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: D. LAMBERT, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The University of Louisville appeals from an opinion and order of the Franklin Circuit Court denying its motion to dismiss Dr. James Weldon Lillard Jr.'s claim for breach of a written employment contract based on governmental immunity. The question presented is whether Kentucky Revised

Statutes (KRS) 45A.245's waiver of immunity for actions brought on written contracts applies to employment contracts. We conclude it does, and affirm.

Lillard was employed as an associate professor at the University's School of Medicine Brown Cancer Center from 2006 to 2009. In September 2011, the University filed a complaint against Lillard in the Jefferson Circuit Court claiming that during his written employment, Lillard wrongfully used a University credit card to purchase two laptop computers for his own benefit.

Lillard filed an answer and asserted various counterclaims. The University's appeal concerns only one of those counterclaims, specifically, Lillard's claim for breach of his employment contract with the University.¹

The University filed a Kentucky Rules of Civil Procedure (CR) 12.02 motion to dismiss each of Lillard's counterclaims. Regarding Lillard's breach of employment contract claim, the University argued that even if Lillard could establish a written contract with the University, as a state agency, it was immune from suit for breach of contract and that immunity was not waived by the legislature's enactment of KRS 45A.245.

The Franklin Circuit Court denied the University's motion to dismiss the breach of contract claim on the basis of immunity concluding that written employment contracts are included within the purview of KRS 45A.245. The University appealed.

¹ Lillard also filed an action in the federal district court alleging various state and federal claims. Those claims are not pertinent to this appeal.

As a threshold matter, we reiterate what is now well established. A denial of immunity “cannot be vindicated following a final judgment for by then the party claiming immunity has already borne the costs and burdens of defending the action.” *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). Consequently, a denial of governmental immunity is subject to immediate appeal. *Id.*

For purposes of a motion to dismiss pursuant to CR 12.02, the facts as pleaded in the complaint are admitted. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky.App. 2002). A court should not grant a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to the rule “unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). For purposes of review of the trial court’s denial of the University’s CR 12.02 motion, we must accept those facts alleged as true, including the existence of a written contract, without regard to the merits of those allegations.

The University is a state institution of higher education “with all the attendant powers and protections, including immunity from suit except where the Kentucky General Assembly specifically waives it.” *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky.App. 1978).² The immunity afforded extends to

² We recognize there is a distinction between sovereign immunity, which affords absolute immunity to the Commonwealth and governmental immunity applicable to state agencies which affords immunity to the extent the agency was performing a governmental function. As a state agency, the University is entitled to governmental immunity. *Autry v. Western Kentucky*

tort actions as well as contracts actions. *Id.* Therefore, the University cannot be sued for damages caused by its breach of a written contract unless immunity has been expressly waived by the legislature. *Id.*

KRS 45A.245(1) was enacted as part of the Model Procurement Code.

Subsection 1 of the statute contains a waiver of immunity for actions brought on written contracts. It provides:

Any person, firm or corporation, having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both. Any such action shall be brought in the Franklin Circuit Court and shall be tried by the court sitting without a jury. All defenses in law or equity, except the defense of governmental immunity, shall be preserved to the Commonwealth.

The statutory language clearly states immunity is waived only for actions brought on written contracts. *Id.* See also, *Furtula v. University of Kentucky*, 438 S.W.3d 303, 306 (Ky. 2014) (the waiver of immunity is not applicable to implied contracts) and *Commonwealth v. Whitworth*, 74 S.W.3d 695 (Ky. 2002) (rejecting the argument that the waiver of immunity for written contracts in KRS 45A.245(1) includes a waiver of immunity for suing on an oral contract)). Therefore, Lillard's contract claims are precluded to the extent he alleges an implied or oral contract.

University, 219 S.W.3d 713, 717 (Ky. 2007). In this case, such distinction is not relevant and may be used interchangeably in this opinion.

However, his allegations that a written employment contract exists are not so readily dismissed.

As recognized by our Supreme Court, various panels of this Court have “expressed doubt about the applicability of KRS 45A.245 and the Kentucky Model Procurement Code in the context of employment contracts.” *Furtula*, 438 S.W.3d at 306 n. 3 (quoting *Ashley v. University of Louisville*, 723 S.W.2d 866, 867 (Ky.App. 1986), where it was stated KRS Chapter 45A. is “limited in application to the procurement of items of hardware and services subject to bidding procedures”).

Despite the wording in *Ashley*, our Supreme Court has used broad language when interpreting the statute stating “KRS 45A.245(1) waives sovereign immunity for a lawfully authorized written contract.” *Whitworth*, 74 S.W.3d at 699. Most persuasive, the Court has directly applied the statute when discussing immunity in the context of a contract outside the Model Procurement Code.

In *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013), our Supreme Court expressly recognized the application of KRS 45A.245 when considering a declaratory judgment action by county employees arising under a written retirement contract with the Commonwealth. The Court agreed that the Kentucky Employees’ Retirement System, a statutorily created agency which performs an integral function of state government, is entitled to the protection of immunity. *Id.* at 837. Although decided in part based on the Declaratory Judgment Act, the Court also noted the express language of KRS

45A.245 and held that there was an implication of an “overwhelming” intent by the legislature to waive immunity and the agency was not immune. *Id.* at 837-38.

Following our Supreme Court’s decision, in *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757 (Ky.App. 2014), this Court directly considered the scope of KRS 45A.245, when presented with the Commonwealth’s alleged breach of Medicaid Provider Agreements. Relying on the *Kentucky Retirement Systems* case, this Court held that such agreements were governed by KRS 45A.245 and immunity was waived. *Id.* at 761-62. However, this Court did not limit its holding to the specific facts before it but pronounced that the statute waived “sovereign immunity in all (written) contract actions against the Commonwealth and not only those subject to the Model Procurement Code.” *Id.* at 762.

The University argues our decision in *Good Samaritan* was ill reasoned. It argues that under KRS 45A.030(8), employment contracts are not included in the definition of contracts as defined in the Code. We disagree.

KRS 45A.030(8) defines “contract” as follows:

“Contract” means all types of state agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other item. It includes awards; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; purchase orders; and insurance contracts except as provided in KRS 45A.022.

“*All* types of state agreements” necessarily includes employment contracts. *Id.*

(emphasis added).

The University correctly argues that traditional employee hiring practices do not comport with the Model Procurement Code's requirements for bidding and negotiation of contracts. *See* KRS 45A.080-45A.100. However, the question here is whether the legislature intended to waive immunity for all written contracts entered into between the Commonwealth and private citizens, and not whether a contract must have been executed in conformity with the Model Procurement Code.

We conclude the waiver of immunity for all actions based on written contracts brought against the Commonwealth or its agencies is consistent with the purpose of the Model Procurement Code to hold “the government to the same standard of good faith and fair dealing as private parties.” *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 585 (Ky. 2003). Although in *Foley Const. Co. v. Ward*, 375 S.W.2d 392, 395 (Ky. 1963), it was stated that “mutuality of obligations does not require that there shall be mutuality of remedies,” there is an inherent unfairness in applying immunity to the Commonwealth's written contracts. A private citizen who contracts with the Commonwealth or its agencies should be entitled to the same remedies for the breach of that contract as he or she would have against another private citizen. As a part of the legislature's effort to bring fairness to the contractual relationships between the Commonwealth and its citizens, the legislature enacted KRS 45A.245.

In his concurring opinion in *Caneyville Volunteer Fire Depart. v. Green's Motorcycle Salvage, Inc.* 286 S.W.3d 790, 813 (Ky. 2009), Chief Justice Minton

described the doctrine of sovereign and governmental immunity as a “judge-made swamp” and called upon the legislature to drain the swamp putting an end to the seemingly never ending debate regarding the application and scope of immunity. KRS 45A.245, by its express terms, resolves any dispute concerning the application and scope of immunity to written contracts. The Commonwealth and its agencies no longer enjoy immunity for the breach of a written contract entered into with a private citizen.

Based on the foregoing, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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