

appeal is based on the denial of a motion to dismiss, orders denying claims of immunity are appealable by interlocutory appeal. *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). “[A]n appellate court reviewing an interlocutory appeal of a trial court’s determination of a defendant’s immunity from suit is limited to the specific issue of whether immunity was properly denied, nothing more.” *Baker v. Fields*, 543 S.W.3d 575, 578 (Ky. 2018). After careful review, we affirm in part, reverse in part, and remand for dismissal of Bohm’s claim for breach of covenant of good faith and fair dealing.

FACTUAL AND PROCEDURAL HISTORY

In 2010, Bohm was recruited by the J.B. Speed School of Engineering (“Speed School”) at U of L. On March 30, 2010, Mickey R. Wilhelm, dean of the Speed School sent two signed letters to Bohm. The first reads, in relevant part, as follows:

Upon the recommendation of Dr. Glen Prater, Chair of the Mechanical Engineering Department, it is my pleasure to inform you that this office is prepared to recommend to the Administration and the Board of Trustees that you be appointed as a faculty member at the J.B. Speed School of Engineering, University of Louisville, beginning July 1, 2010. I will recommend an appointment as an Assistant Professor of Mechanical Engineering. The beginning salary will be \$85,000 for a B-11 appointment.

In accordance with The Redbook covering the articles of governance and administration of the University of Louisville, the term of initial probationary appointment will be through June 30, 2012. You will be eligible for

permanent tenure of academic appointment on July 1, 2017 should it be mutually agreeable to continue your faculty appointment until that date.

Your responsibilities will include the development of a funded research program, with emphasis on federal funding, in the area of advanced design and product development; graduate and undergraduate teaching as assigned by your chair; supervision of student research projects; publication in refereed journals, professional presentations and participation at the national level; university service on committees, and special assignments as requested by your chair or upon election by the faculty. . . .¹

In closing, I encourage your acceptance of this position in the J.B. Speed School of Engineering and look forward to your important contributions to our Mechanical Engineering Department.

After Dean Wilhelm's signature at the close of the letter was the following statement:

I am prepared to accept the terms as outlined in the foregoing letter relative to an appointment as an Assistant Professor of Mechanical Engineering in the J.B. Speed School of Engineering, University of Louisville.

Bohm signed the letter directly below the above statement, dated April 2, 2010.

¹ Remaining portions of the letter, not directly quoted in this opinion, addressed moving expenses, the requirement of a state and national criminal background check and the requirement of an official transcript of the highest degree attained.

The second letter provided specific details related to funding and support. It addressed research salary release, funds for research equipment,² office and laboratory space, and travel support. The portions relevant to this appeal read as follows:

You have received our formal offer of employment and my letter indicating that I will recommend you for a University position. The purpose of this letter is to indicate our intention to provide start-up funding for your research program at U of L. . . .

Student Support Dr. Prater has indicated his intention to allocate a Grosscurth or University Fellow-supported Ph.D. student to you. You may recommend doctoral students to the Mechanical Engineering department for nomination to University Fellowships and/or a Grosscurth Fellowships, provided the students meet the standards of the departmental and School-wide selection committees and are awarded fellowships. Each fellowship (tuition, stipend and health insurance) is for two years, and following that period you will be expected to replace the students' support from extramural funded research projects for an additional two years. . . .

While my office and the Mechanical Engineering Department fully intend to provide this support and have the means to do so at this time, this support cannot be guaranteed. This support is contingent upon the continued availability of institutional resources over the time cited in the offer. However, faculty support offers have a high priority, and we have been able to cover all such commitments to date. Please contact me if you have questions. We look forward to having you join the faculty.

² \$50,000 was allocated to Bohm for the purpose of purchasing equipment over the first two years of his employment.

This letter, signed by Dean Wilhelm, does not contain a signature line for Bohm.

Bohm began his faculty appointment at U of L on July 1, 2010. He was not given the support of a Ph.D. student upon his appointment. In fact, the Speed School did not allocate a Ph.D. student to him until 2014. On July 19, 2012, Bohm received a letter signed by the Executive Vice President and University Provost, Shirley C. Willihnganz. The letter reads, in relevant part:

This is to inform you of the continuation of your appointment as Assistant Professor of Mechanical Engineering effective July 1, 2012 through June 30, 2014. The terms and conditions of employment in the University of Louisville herein specified include all rules and regulations promulgated on the authority of the University of Louisville Board of Trustees and the governance document known as The Redbook.

The appointment as Assistant Professor of Mechanical Engineering is subject to the tenure policy of the University of Louisville. Under the policy of The Redbook, tenure in this position would be awarded by July 1, 2017 should it be mutually agreeable to make renewals of this appointment beyond this date. . . .

An annual statement of work assignment and compensation will be provided to you by the dean (or designee) of your unit and will set out your assignment for each school year.

Please sign and return the original copy of this letter to the Center for Faculty Personnel, Grawemeyer Hall, Room 201. The second copy is for your file.

Although there is a signature line, the copy of the letter contained in the record before this Court is not signed by Bohm. However, Bohm asserts that he did sign the letter. This is not refuted by U of L.

Bohm received the same letter, also signed by Shirley C. Willihnganz, on June 13, 2014, for the period effective July 1, 2014 through June 30, 2016. Again, the letter in the record before us is not signed by Bohm, but U of L does not contest that it was signed.

Bohm was not granted tenure. The record contains a memorandum from the jurisdiction panel at U of L dated May 9, 2016. Bohm filed a grievance regarding the termination of his appointment, arguing that the Speed School had failed to follow U of L's policies related to pre-tenure review as contained in The Redbook. The memorandum states that Bohm's grievance should be forwarded to the grievance hearing panel. It is unknown from the record before us if a hearing was held or what the outcome was. This lawsuit followed.

U of L moved to dismiss the action pursuant to CR³ 12.02(f) claiming that Bohm failed to state a claim upon which relief could be granted. U of L claimed that, because the university is an extension of the state, it is entitled to

³ Kentucky Rules of Civil Procedure.

sovereign immunity.⁴ Bohm contended that U of L waived sovereign immunity under the Kentucky Model Procurement Code (“KMPC”), KRS⁵ 45A.245, because it had entered into a written employment contract with him. After a hearing, the circuit court denied U of L’s motion to dismiss Bohm’s claims for breach of contract and breach of the covenant of good faith and fair dealing. The circuit court granted U of L’s motion to dismiss Bohm’s claims for fraudulent misrepresentation and equitable estoppel. This appeal followed.⁶ Further facts will be developed as necessary.

STANDARD OF REVIEW

“[W]hether a particular defendant is protected by [governmental] immunity is a question of law which we review *de novo*.” *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006), *as corrected* (Sept. 26, 2006) (internal citations omitted).

⁴ Although both parties refer to any alleged immunity of U of L in this action as “sovereign immunity,” we note that, because U of L is an agency of the state, rather than the state itself, it is actually entitled to governmental immunity in certain circumstances. “[G]overnmental immunity is the public policy, derived from the traditional doctrine of sovereign immunity, that limits imposition of tort liability on a government agency.” *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001) (internal quotation marks and citation omitted).

⁵ Kentucky Revised Statutes.

⁶ We note that Bohm filed a cross-appeal that was ultimately dismissed by this Court.

Despite arguments made by both parties regarding the merits of Bohm's claims and the language contained within the letters from U of L regarding promises allegedly made to Bohm, those issues are not presently before us.

ANALYSIS⁷

The specific issues raised by U of L in this appeal are whether (1) Bohm entered into a written employment contract with U of L, thereby waiving the university's governmental immunity; (2) U of L's The Redbook constitutes an express written agreement between the parties, thereby waiving U of L's governmental immunity; and (3) U of L's immunity was waived for Bohm's claim of breach of the covenant of good faith and fair dealing.

The state universities in the Commonwealth are state agencies that enjoy the benefits and protection of governmental immunity. *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014). Suit cannot be brought against an agency of the Commonwealth on a claim unless governmental immunity has been specifically waived, as it has been on a lawfully authorized written contract. *Commonwealth v. Whitworth*, 74 S.W.3d 695, 700 (Ky. 2002). Pursuant to KRS 45A.245, any person having a lawfully authorized written contract with the

⁷ At the outset, we note that the record indicates that a hearing was held on U of L's motion to dismiss on April 19, 2017. Neither a recording or transcript of this hearing is contained in the record for our review. The reason is unknown to this Court. However, we note that neither party filed a Designation of Record pursuant to CR 75.01. It is the duty of practitioners before this Court to ensure that a well-developed record is available for review to the extent possible.

Commonwealth may bring an action against the Commonwealth on the contract.

Id. KRS 45A.245 also waives the defense of governmental immunity in a lawfully authorized written employment contract. *University of Louisville v. Rothstein*, 532 S.W.3d 644, 650 (Ky. 2017).

KRS 45A.245(1) states:

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.

U of L's primary argument rests upon its assertion that "no express written contract exists between the University and Dr. Bohm." U of L argues that the letters sent to Bohm on March 30, 2010, and the subsequent follow-up letters sent to him at the beginning of each new two-year term, prior to denial of tenure, did not constitute a written contract. U of L contends that the letters contained indefinite and incomplete terms, arguing that they speak only to recommendations rather than definitive promises of performance. U of L also argues that the subsequent appointment letters in 2012 and 2014 do not reference any consideration from Bohm; and do not incorporate The Redbook by reference. We disagree.

The essential elements of a contract are “offer and acceptance, full and complete terms, and consideration.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky. App. 2002). Bohm contends that the letters sent to him by U of L are written employment contracts. We agree. The letter dated March 30, 2010, that is not signed by Bohm refers to the letter of the same date that bears Bohm’s signature as U of L’s “formal offer of employment.” Bohm signed the formal offer of employment, thereby accepting U of L’s offer. The offer contains definite terms, stating that Bohm’s initial probationary period would be July 1, 2010, through June 30, 2012, and that he would be eligible for tenure “on July 1, 2017 should it be mutually agreeable to continue your faculty appointment until that date.” Indeed, Bohm’s signature appears just below a statement indicating that he was “prepared to *accept the terms* as outlined in the foregoing letter” (Emphasis added.) Consideration was part of the written agreements. U of L was to pay Bohm a salary of \$85,000. In addition to salary, U of L’s consideration included moving expenses for Bohm; money for equipment; office and laboratory space; student support; and travel expenses. For his part, Bohm was expected to develop a funded research program with emphasis on federal funding; he was to teach both undergraduate and graduate courses; supervise student research projects; publish in refereed journals; make professional presentations at the national level; and serve on various committees. We agree

with the circuit court that whether U of L's promise of support (apart from salary) depended on availability of resources or whether it was guaranteed was not the issue in U of L's motion to dismiss; nor is it the issue before us on appeal.

The letter from U of L to Bohm dated July 19, 2012, opens with “[t]his is to inform you of the *continuation of your appointment* as Assistant Professor of Mechanical Engineering” (Emphasis added.) The letter to Bohm dated June 13, 2014, opens with the same sentence. It is clear that the parties intended to continue the terms of the original written employment contract dated March 30, 2010, in each instance. The letters are signed by the Executive Vice President and University Provost. There is a signature line for Bohm and, although the copies of the letters in the record are unsigned, Bohm asserts that he did sign and submit the agreement of continuation. U of L does not contest that Bohm signed these letters.

Based on the facts of this case, we hold that a written employment contract existed between Bohm and U of L.

Next, U of L argues that the terms of U of L's book of policies and procedures, The Redbook, do not constitute an express written contract between Bohm and U of L and, therefore, governmental immunity has not been waived. Bohm contends that he is not arguing that The Redbook alone constitutes an express written contract between the parties. Rather, he contends that The

Redbook was incorporated by reference into his employment contract with U of L.

We agree with Bohm.

As pointed out by the circuit court, the preface to The Redbook states

The Redbook is the official statement of the organizational structure, the rules of governance and procedures, and the University-wide policies of the University of Louisville. It is the final, published authority under the Board of Trustees, and its policies and procedures and those contained in the resolutions of the Board govern all actions of the University and all relations with the University, including administrative and faculty contracts.

U of L points to *Furtula*.⁸ The instant action is distinguishable. In *Furtula*, the Kentucky Supreme Court held that the employee handbook and personnel policies of the University of Kentucky created only an implied contract and, therefore, governmental immunity had not been waived. The plaintiff in *Furtula* claimed that the University of Kentucky's employee handbook constituted a written contract. No other employment contract was alleged. Further, the handbook at issue, published by the University of Kentucky, contained a

⁸ We note that U of L also points to unpublished cases in support of its argument, including *Newton v. University of Louisville*, 2009-CA-002197-MR, 2010 WL 4366360 (Ky. App. Nov. 5, 2010). Pursuant to CR 76.28(4)(c), citation may not be made to unpublished cases unless there are no other published cases on point and are at best persuasive authority only. Regardless, the instant action is distinguishable from *Newton*. In that case, the plaintiff did not allege the existence of a separate employment contract as Bohm does; nor did the plaintiff allege that The Redbook had been incorporated by reference into a written contract. We likewise find *Weickgenannt v. Board of Regents of Northern Kentucky University*, 2011-CA-001975-MR, 2012 WL 6651887 (Ky. App. Dec. 21, 2012), relied upon by U of L, also distinguishable upon the facts.

disclaimer at the beginning that specifically stated that the handbook was not a contract and that all employees at the University of Kentucky are considered “at will.” *Id.* at 309. This is distinguishable from the preface of The Redbook, which states, in part, that it is the final, published, authoritative statement of the Board of Trustees and governs all administrative and faculty contracts at U of L.

For a contract to incorporate other terms, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. In addition, there must be clear language expressing the incorporation of other terms and conditions. *Dixon v. Daymar Colleges Grp., LLC*, 483 S.W.3d 332, 344 (Ky. 2015). Further, “a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified.” *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277, 36 S. Ct. 300, 306, 60 L. Ed. 636 (1916).

We hold that The Redbook was incorporated by reference into Bohm’s employment contract with U of L. Its terms are referenced in all employment letters contained in the record.⁹ The preface of The Redbook states that it governs all faculty contracts. The letters dated July 19, 2012, and June 13, 2014, state that, “[t]he terms and conditions of employment in the University of Louisville herein specified *include all rules and regulations promulgated on the*

⁹ The Redbook is referenced in the letter signed by Bohm on March 30, 2010, but is not referenced in the unsigned letter of the same date.

authority of the University of Louisville Board of Trustees and the governance document known as The Redbook.” (Emphasis added.) Both letters also state “[t]he appointment as Assistant Professor of Mechanical Engineering is *subject to the tenure policy* of the University of Louisville. Under the policy of The Redbook, tenure in this position would be awarded July 1, 2017” (Emphasis added.) The plain and unambiguous meaning of these statements, taken together, is that all the rules and regulations (including the tenure policy) contained in The Redbook are incorporated into Bohm’s employment contract with U of L. “Where a contract makes reference to another agreement between the same parties in such fashion as to clearly import incorporation by reference, the contract and the pre-existing document should be read together and considered as one binding agreement or contract.” *Am. Fed’n of Labor v. W. U. Tel. Co.*, 179 F.2d 535, 538 (6th Cir. 1950). Accordingly, based on the facts of this case, The Redbook and Bohm’s written employment contract should be considered as one binding agreement between the parties. Consequently, U of L is not entitled to governmental immunity for the alleged breach of contract claim.

Finally, U of L argues that governmental immunity bars Bohm’s claim for breach of the covenant of good faith and fair dealing. U of L first argues that Bohm cannot pursue the claim because it is necessarily predicated upon the existence of a valid contract, which U of L argues does not exist. As

previously stated in this opinion, we disagree and hold that a valid, written employment contract exists between Bohm and U of L.

Alternatively, U of L argues that Bohm’s claim for breach of the covenant of good faith and fair dealing is a tort-like claim that arises from common law rather than the terms of the contract. U of L asserts that, because it is a tort claim, it is barred due to governmental immunity. We agree that Bohm cannot bring the claim. “The sovereign state cannot be held liable in a court of law for either intentional or unintentional torts[.]” *Calvert Investments, Inc. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 805 S.W.2d 133, 139 (Ky. 1991).

Bad faith is generally described as an intentional tort which results from a breach of the implied contractual duty of good faith and fair dealing. The tort itself arises from a violation of a duty to act in good faith that is imposed by the common law, not by the terms of the contract. However, it is well-settled that independent tort claims for breaches of duty of good faith and fair dealing are only permitted where a special relationship exists between the parties. Kentucky courts have only recognized the existence of such a relationship in the context of insurance contracts.

James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC, 941 F. Supp. 2d 807, 815-16 (E.D. Ky. 2013) (internal quotation marks and citations omitted).

The United States Court of Appeals for the Sixth Circuit has defined a “special relationship” between the parties as one “where distinct elements are

present, such as: unequal bargaining power, vulnerability, and trust among the parties; nonprofit motivations for contracting (e.g., peace of mind, security); and inadequacy of standard contract damages.” *State Auto Property and Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 196 (6th Cir. 2015) (internal quotation marks and citations omitted). The contract at issue is an employment contract, not an insurance contract. The hallmarks of a “special relationship” between the parties are not present.

In his brief to this Court, Bohm acknowledges that his claim for breach of the covenant of good faith and fair dealing “technically” arises from tort law. However, he cites *RAM Engineering & Construction, Inc. v. Univ. of Louisville*, 127 S.W.3d 579 (Ky. 2003), for his argument that the KMPC holds the Commonwealth to the same standard of good faith and fair dealing as private parties. *Id.* at 585. *RAM Engineering* is distinguishable from the instant action. Briefly, the Kentucky Supreme Court held that termination for convenience clauses are subject to the good faith and fair dealing requirement of the KMPC as set forth in KRS 45A.015. Termination for convenience clauses must be present in any construction contract in excess of \$50,000 entered into by the Commonwealth.¹⁰ Bohm’s contract is an employment contract, not a construction contract. Moreover, the Kentucky Supreme Court has specifically declined to apply any

¹⁰ KRS 45A.200.

provisions of the KMPC (aside from KRS 45A.245) to contracts with university professors. “We now hold that KRS 45A.245 is an unqualified waiver of immunity in all cases based on a written contract with the Commonwealth, including but not limited to employment contracts. We hold that this immunity is *not* limited to contracts entered into pursuant to the KMPC and thus, therefore, decline to dictate whether the hiring of university professors must comply with the remaining provisions of the KMPC.” *Rothstein*, 532 S.W.3d at 647 (emphasis in original). We find Bohm’s reliance on the KMPC for support of his claim of breach of the covenant of good faith and fair dealing in an employment contract unpersuasive.

Accordingly, Bohm cannot pursue a separate claim for breach of the implied covenant of good faith and fair dealing. We reverse and remand to the circuit court for dismissal of Bohm’s separate claim for breach of the covenant of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, the judgment of the Franklin County Circuit Court is affirmed in part, reversed in part, and remanded for dismissal of Bohm’s claim for breach of covenant of good faith and fair dealing.

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