RENDERED: JULY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF MARCH 4, 2016, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002044-MR

MARK BLANKENSHIP AND OTHER
INDIVIDUAL APPELLANTS AS
DESIGNATED IN THE NOTICE OF APPEAL — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 05-CI-05024

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This case is before us on a Petition for Rehearing filed by the Appellee, Lexington Fayette Urban County Government ("LFUCG"). LFUCG is requesting that we reconsider our Opinion of March 4, 2016 which reversed and

remanded the decision of the Fayette Circuit Court entered December 20, 2007. The Kentucky Supreme Court has remanded this case to us on two occasions. The second remand resulted in our March 4, 2016 opinion. After reviewing this case again, we grant the Petition for Rehearing.

Procedural History

Mark Blankenship is a firefighter employed by LFUCG and the lead plaintiff in this action. The complaint included other plaintiffs who are current or former employees of LFUCG who served as firefighters, paramedics and EMTs. The complaint was filed on November 21, 2005, in the Fayette Circuit Court. The original complaint has two counts. The first count alleges that LFUCG violated Kentucky Revised Statutes (KRS) 337.285, by failing to pay overtime wages at the rate of time and one-half of the firefighter's regular rates for hours that exceed 40 hours per week. The second count alleges that LFUCG has established ordinances and policies which obligate the county to pay overtime wages at the rate of time and one-half of the firefighter's regular rates of pay for all hours that exceed 40 hours per week which create an implied/and or expressed contract.

LFUCG denied any statutory violations and denied that any contract existed. Blankenship filed his first amended complaint on December 6, 2005, adding a third count which alleged violations of pension obligations. The alleged violations of pension obligations are not before this Court. On January 26, 2007, LFUCG filed a Motion for Judgment on the Pleadings, on Counts I and II of the complaint pursuant to Kentucky Rules of Civil Procedure (CR) 12.03. LFUCG

argued that sovereign immunity barred any claims on actions arising from either the statute or from any alleged contracts. Further it was argued that even if there was a contract, the Fayette Circuit Court lacked jurisdiction to hear the contract claims. However, for purposes of the CR 12.02 motion, LFUCG was required to admit to the truth of the allegations of the complaint, which included admitting to the existence of a contract between the parties.

On December 20, 2007, the Fayette Circuit Court entered an opinion and order which held that KRS 337.285 and other applicable statutes do not waive sovereign immunity for LFUCG. The court dismissed Count I of the complaint. The court then determined that its analysis and discussion regarding the statutory language was equally applicable to the claim found in Count II, Breach of Contract, therefore sovereign immunity applied to those claims as well. The court also stated that even if the contract claims were not governed by sovereign immunity, "the Plaintiffs would have to seek any further relief in Franklin Circuit Court and would probably be barred by the applicable Statute of Limitations in any event." Therefore, both Counts I and II were dismissed by the Fayette Circuit Court.

In our original opinion rendered August 20, 2010, we affirmed the Fayette Circuit Court. We agreed that if there had been written contracts, the action should have been brought in Franklin Circuit Court within one (1) year as set forth in KRS 45A.245 and 45A.260. Chief Judge Taylor concurred in result only and Judge Wine filed a dissenting opinion stating that KRS 337.285 does

waive sovereign immunity for firefighters. The Kentucky Supreme Court granted discretionary review. The Supreme Court then remanded this case to our Court for further consideration in light of their recent decision in *Madison County Fiscal Court v. Kentucky Labor Cabinet*, 352 S.W.3d 572 (Ky. 2011) which addressed whether sovereign immunity applied in actions arising pursuant to KRS 337.285.

Upon remand, we held that *Madison County* required that we reverse the Fayette Circuit Court because the Kentucky Supreme Court had determined that a statute which directed a governmental unit to pay employees in a prescribed manner overwhelmingly implied a waiver of sovereign immunity. We held that sovereign immunity had been waived and the trial court erred in dismissing the action "based upon this defense". LFUCG then requested a petition for modification, extension, and or rehearing because our second opinion only considered the effect of *Madison County* on the statutory claims but not the contract claims. We denied the petition. The Kentucky Supreme Court again granted discretionary review.

The Kentucky Supreme Court again remanded this case to our Court for us to consider the alleged "KRS 337.285 violation in light of this Court's recent decision in *Madison County Fiscal Court v. Kentucky Labor Cabinet* . . . and for further consideration of the alleged breach of contract in light of this Court's recent decision in *Furtula v. University of Kentucky*, 438 S.W.3d 303 (Ky. 2014)." In an opinion rendered March 4, 2016, we revisited our decision regarding the contract claims and the defense of sovereign immunity in light of *Furtula.* In *Furtula,* the

issue was whether the university staff handbook created a contract between the university and its employees. The university handbook contained a disclaimer that the handbook did not create a contract between the employees and the university.

The Kentucky Supreme Court held in *Furtula* that when the maker of a contract states that he does not intend to enter into a contract, a contract will not be implied. Accordingly, in our March 4, 2016 opinion, we stated that LFUCG had stipulated that a contract existed and sovereign immunity was expressly waived. We remanded the case to the Fayette Circuit Court.

In the Petition for Rehearing, LFUCG requests that the case be remanded for resolution of the Plaintiffs' statutory claims pursuant to KRS Chapter 337 and that the trial court's dismissal of the contract-based claims be affirmed. LFUCG argues that our opinion made reference to a "statutory contract" which was not pled and "arguably no such claim exists"; that they did not stipulate that a valid contract existed, but only assumed for the purpose of the motion for judgment on the pleadings that a valid contract existed. Blankenship responded that LFUCG has accepted as true, for the purpose of its motion, that a valid contract exists, and *Furtula* is not applicable in this case because there was no written contract in that case. We believe that further examination is needed, and therefore we grant the Petition for Rehearing.

As a point of clarification, in our March 2016 opinion, the term, "statutory contract" was inappropriately used. Additionally, we agree with the parties, that the claims arising from Count I of the complaint which allege

violations of KRS 337.285 are remanded to the Fayette Circuit Court. Those claims are not discussed in this opinion. We, therefore, limit our review to the contract-based claims alleged in Count II.

Analysis

We acknowledge that LFUCG did not stipulate that there was a valid contract, but were required to assume all allegations in the complaint were true for the purpose of the motion for judgment on the pleadings. The trial court did not make any determination of whether there was a valid contract between the Plaintiffs and LFUCG. Our first consideration therefore is whether there is a valid contract. We first consider the impact of *Furtula* on the case at bar.

In *Furtula*, the employees of the University of Kentucky argued that they had contractual rights pursuant to the university staff handbook concerning their entitlement to benefits to the university's long-term disability program. The Kentucky Supreme Court held that the state universities of Kentucky are state agencies. In this case, the employees did not have a "written contract" with the university and did not establish that the General Assembly in this instance had expressly waived sovereign immunity. The disclaimer in the handbook stated that the handbook did not create an implied contract. *Furtula* held that implied contracts may sometimes be created if the promisor agrees to be bound; but it was not proven in this instance that the General Assembly expressly waived sovereign immunity in claims based upon implied contracts arising from handbooks and policies. Because the Supreme Court determined that there was no written

contract, the Court did not address whether there was a waiver of governmental immunity pursuant to KRS 45A.245.

The dissent by Justice Noble in *Furtula* is helpful in our consideration as to whether writings which express an offer and acceptance constitute a unilateral contract. Justice Noble wrote that the handbook policies amounted to a unilateral contract sufficient to satisfy the requirement of a written contract under KRS 45A.245. Further, university contracts with its employees are subject to the provisions of KRS 45A.245.

Do the ordinances and policies in the case at bar constitute a written contract? Justice Noble cites *City of Houston v. Williams*, 353 S.W.3d 128,131 (Tex. 2011). *Williams* is not binding on this Court, but it is useful in our analysis. In *Williams*, firefighters asserted two claims against the City of Houston. Both claims were based on alleged underpayment of lump sums owed to them when their employment with the City terminated.

The firefighters argued that certain City of Houston Ordinances constituted a written contract for which immunity was waived under the Texas statutes. Texas requires that immunity must be waived clearly and unambiguously. Kentucky and Texas both require an express contract before a waiver is found. The *Williams* court noted that a municipality utilizes ordinances as a means to conduct its business and sometimes a municipality contracts with third parties by way of an ordinance. Ordinances and related documents can be read together as a single agreement, and the *Williams* court noted that "a court may determine, as a

matter of law, that multiple documents comprise a written contract." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 840 (Tex. 2000). *Williams*, 353 S.W.3d at 137.

Further, Restatement (Second) of Contracts § 95(2) (1981) and Restatement (Second) of Contracts § 2(1) (1981) are also useful in our analysis. Restatement (Second) of Contracts § 95(2) states:

> When a statute provides in effect that a written contract or instrument is binding without consideration or that lack of consideration is an affirmative defense to an action on a written contract or instrument, in order to be subject to the statute a promise must either
>
> > (a) be expressed in a document signed or otherwise assented to by the promisor and delivered; or
> >
> > (b) be expressed in a writing or writings to which both promisor and promisee manifest assent.

Restatement (Second) of Contracts § 2(1) reads:

> A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

In *Parts Depot v. Beiswenger*, 170 S.W.3d 354,362 (Ky. 2005), the Kentucky Supreme Court held that:

> An express personnel policy can become a binding contract "once it is accepted by the employee through his continuing to work when he is not required to do so." *Hoffman–La Roche, Inc. v. Campbell,* 512 So.2d 725, 733 (Ala.1987). *See also Dahl v. Brunswick Corp.*, 277 Md. 471, 356 A.2d 221, 224 (1976) ("[T]here is abundant support for the proposition that employer policy directives regarding aspects of the employment relation become contractual obligations when, with knowledge of

> their existence, employees start or continue to work for the employer.")

Here, Blankenship's complaint alleges the LFCUG's "ordinances and policies" created an "implied and/or expressed agreement or contract" that was violated. While it does not appear that a single, written contract existed, *Furtula* and *Beiswenger* allow that these ordinances and policies may constitute as a valid employment contract. As the case before us is only on a motion for judgment on the pleadings, we remand for the trial court to determine whether the ordinances and policies constitute a written contract.

The next consideration is whether Blankenship must proceed under KRS 45A.245 which is part of the Kentucky Model Procurement Code. The code was enacted in 1978. We look to the provisions of the code which are pertinent to our review. KRS 45A.020(1) reads in part:

> This code shall apply to every expenditure of public funds by the Commonwealth under any contract or like business agreement…

KRS 45A.240:

> (1) "Commonwealth" means the Commonwealth of Kentucky and any of its departments or agencies.
> (2) "Contracting agency" means any department or agency of the Commonwealth of Kentucky having entered into a lawfully authorized written contract.

KRS 45A.245:

> (1) 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.

KRS 45A.260(2):

> Any other claim shall be commenced in Franklin Circuit Court within one (1) year from the date of completion specified in the contract.

Blankenship argues that the provisions of KRS 45A. 245 and 45A.260 do not apply in this case. Blankenship points to several cases to support his position, all of which can be distinguished with the exception of *Illinois Central Gulf Railroad Company v. Graves County Fiscal Court*, 676 S.W.2d 470 (Ky. 1984). That appeal arose from an order of the Graves Circuit Court dismissing the appellant's action on the grounds of sovereign immunity. The issue was whether the court erred in applying the doctrine of sovereign immunity to shield the Graves County Fiscal Court from honoring its contract with the appellant.

Graves County, through its county judge, had signed a contract with the Illinois Central Railroad Company for the installation of an automatic flashing light signal and bell at a grade crossing leading to an industrial park maintained by the county. The county agreed to reimburse the railroad in an amount equal to the

cost of the work, which was estimated at $14,990. The county judge's authority to sign the agreement arose from a resolution of the Graves County Fiscal Court. The signal was installed but the Graves County Fiscal Court resolved not to pay the debt.

Pursuant to the agreement, the appellant installed the signal and presented the county with a bill for $15,366.56. On December 15, 1975, after numerous demands for payment by the appellant, the Graves County Fiscal Court resolved to disclaim the debt. The Court held that an action to recover an amount agreed by the parties upon performance of a contract with a county is not barred by sovereign immunity. Blankenship argues that his case is similar to *Graves County* and therefore it was proper to bring his action in Fayette County and not Franklin County. He does not believe that KRS 45A.245 applies.

We first note that a county government is cloaked with sovereign immunity. See *St. Matthews Fire Protection District v. Aubrey*, 304 S.W.3d 56, 59, 60 (Ky. App. 2009). Counties are basic subdivisions of the Commonwealth of Kentucky, nine of which existed before Kentucky attained statehood. *Lexington–Fayette Urban County Government v. Smolcic,* 142 S.W.3d 128, 131, n.1 (Ky. 2004). "A county government is cloaked with sovereign immunity." *Schwindel v. Meade County,* 113 S.W.3d 159, 163 (Ky. 2003), *see Smolcic,* 142 S.W.3d at 132. "A consolidated local government shall be accorded the same sovereign immunity granted counties, their agencies, officers, and employees." KRS 67C.101(2)(e). Among the issues discussed in the *Aubrey* case were contract claims asserted

against the Jefferson County Sheriff's Office. The case was brought in Jefferson County.

The case at bar is also not a case arising out of an action of the Board of Claims such as *Commonwealth v. Harris*, 59 S.W.3d 896 (Ky. 2001). "The Board of Claims argues that, because the Board of Claims Act fails to expressly include language pertaining to counties directly or as a political subdivision of the Commonwealth, the General Assembly purposely excluded counties from the limited waiver of sovereign immunity contained therein. We agree." *Id.* at 900. "No language in *Withers* should be construed as holding that counties are submitting to Board of Claims' jurisdiction by virtue of claiming a defense of sovereign immunity." *Id.* at 901.

Notwithstanding *Illinois Central,* more recent cases have applied the provisions of the Model Procurement Code to a variety of contracts. In *Commonwealth v. Ky. Retirement Sys.*, 396 S.W.3d 833,838 (Ky. 2013), the Kentucky Supreme Court discussed KRS 45A.245 in a declaratory judgment action brought by county employees who filed an action in Franklin Circuit Court. The employees sought a declaration that KRS 61.637(1) was unconstitutional, and requested injunctive relief. The legislation in question was enacted during an extraordinary session in 2008 and significantly revised the public employee retirement plan. The employees are members of the County Retirement System which is a plan administered by the Kentucky Retirement System. The Court wrote, "KRS 45A.245 provides that any person, firm or corporation who has a

written contract with the Commonwealth after 1974 may bring an action *against the Commonwealth* for breach or enforcement. It stands to reason that a declaratory judgment action to determine if any contract rights are affected by the enactment of a statute is appropriate, standing alone or in conjunction with a claim on the contract." (Emphasis in the original).

Our Court in *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757 (Ky. App. 2014) interpreted the *Kentucky Retirement System* case as applying KRS 45A.245 to all contracts involving the Commonwealth. *Samaritan Alliance* held:

> Although the Court's decision was primarily based upon the specific statutory scheme relating to the KERS, the Supreme Court went on to address the general application of these principles to contractual actions against the Commonwealth. The Court pointed out that KRS 45A.245 provides that any person, firm or corporation who has a written contract with the Commonwealth after 1974 may bring an action against the Commonwealth for breach or enforcement. *Id.* The statute specifically waives governmental or sovereign immunity for contract actions against the Commonwealth.

Id. at 761.

Samaritan Alliance further held that:

> While the Supreme Court's discussion was specifically addressed to claims brought against the KERS, we conclude that it is also applicable to the claims brought by Samaritan… the Cabinet has entered into a Medicaid Provider Service Contract with Samaritan. KRS 45A.245 expressly waives sovereign immunity for actions arising under contracts with the Commonwealth. In relying upon KRS 45A.245, the Supreme Court applied the

> statute as a waiver of sovereign immunity in all contract actions against the Commonwealth and not only those subject to the Model Procurement Code.

Id. at 761-62.

By way of further example, in two recent cases, two different panels of our Court held that KRS 45A.245 applied to all contracts involving the Commonwealth. The contracts in *University of Louisville v. Rothstein*, 2016 WL 1267992 (Ky. App. 2016) and *University of Louisville v. Lililard,* 2016 WL 93834 (Ky. App. 2016) involved employment contracts. These cases are to be published but are not yet final. Additionally, Justice Noble wrote in her dissent in *Furtula,* that the unilateral contract was sufficient to satisfy the requirement of a written contract under KRS 45A.245; and that university contracts with its employees are subject to the provisions of KRS 45A.245.

The cases that have applied the Model Procurement Code have involved the Commonwealth, or departments or agencies of the Commonwealth. LFUCG is a merged city and county government entitled to immunity but it is not the Commonwealth of Kentucky or a department or agency of the Commonwealth. The public funds were not from the Commonwealth but from LFUCG. If a contract is found to exist, it was not with the Commonwealth but with Fayette County based upon its ordinances and policies. KRS 45A.245 does not apply in this case and the contract claims were properly pled and filed in Fayette Circuit Court. The trial court is to conduct an analysis of whether a contract existed and whether a defense of sovereign immunity can be asserted.

Therefore we remand the case to the Fayette Circuit Court for consideration of the claims in Claim I of the complaint pursuant to KRS 337.285 and for the determination of whether there was an enforceable contract as alleged in Count II of the complaint.

ALL CONCUR.

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