COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2016-SC-220

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2014-CA-000997-MR
FRANKLIN CIRCUIT COURT NO. 13-CI-00202

UNIVERSITY OF LOUISVILLE — APPELLANT

v.

MARK ROTHSTEIN — APPELLEE

BRIEF OF APPELLANT UNIVERSITY OF LOUISVILLE

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served this 10th day of April, 2017 via hand delivery upon Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601; and via U.S. mail, postage-prepaid, upon Robert W. "Joe" Bishop, Esq., John S. Friend, Esq., and Tyler Korus, Esq., Bishop Korus Friend, P.S.C., 6520 Glenridge Park Place, Suite 6, Louisville, Kentucky, 40222; Hon. Thomas D. Wingate, Franklin Circuit Court Judge, Division 2, Franklin County Courthouse, 222 St. Clair Street, Post Office Box 678, Frankfort, Kentucky 40601; and, Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

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INTRODUCTION

This is an employment case in which the University appeals from a judgment of the Franklin Circuit Court and an affirming opinion by the Kentucky Court of Appeals denying sovereign immunity for the University on the employee's claim for breach of an employment contract. The judgment and opinion fail to recognize important components of Kentucky's Model Procurement Code and statutes governing the University, which make clear that sovereign immunity has not been waived with respect to the employee's breach of contract claim.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to CR 76.12(4)(c)(ii), Appellant requests oral argument. This matter concerns an increasingly common type of claim filed against state institutions of higher education under Kentucky's Model Procurement Code (breach of a contract for employment pursuant to KRS 45A.245), and has broad ramifications for all state employers. Accordingly, this Court may wish to clarify the parties' written submissions with direct questions to counsel, so that its decision may be as instructive to the trial bar and bench of the Commonwealth as possible.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This appeal involves a judgment erroneously entered against Appellant University of Louisville (the "University") in favor of Appellee Mark Rothstein ("Rothstein"), as to the University's sovereign immunity. The Franklin Circuit Court erred by denying that part of the University's CR 56 Cross-Motion for Partial Summary Judgment addressing Rothstein's claim for breach of an employment contract purportedly pursuant to KRS 45A.245.

A. Initial Proceedings in the Jefferson Circuit Court

The University is a state institution of higher education recognized by the Kentucky General Assembly to promote and provide associate, baccalaureate, masters, doctoral, and professional degree programs to students from around the world. (Vol. 2, R. 179). Rothstein is a tenured professor of the University and currently serves as the Herbert F. Boehl Chair of Law and Medicine. (Vol. 1, R. 88).

The University awarded Rothstein a Distinguished University Scholar ("DUS") designation in 2001. (Vol. 1, R. 88-89). It is the goal of the University's DUS program that the DUS award will be renewed throughout the academic career of a potential candidate. However, renewal is in no way guaranteed and is dependent upon whether the candidate meets the standards of the assignment, among other things. (Vol. 2, R. 226). Rothstein's DUS award was renewed in 2004. (Vol. 2, R. 234-35). Subsequently, the University determined that Rothstein fell short of the criteria for renewal of the DUS award, outlined in his existing contract, and consequently opted not to renew Rothstein's DUS award in 2011. (Vol. 2, R. 260).

Rothstein filed a Complaint against the University and individual defendants in Jefferson Circuit Court on May 10, 2012, alleging breach of contract and due process violations under 42 U.S.C. § 1983 and the Kentucky Constitution. (Vol. 1, R. 96-100). Rothstein's breach of contract claim against the University, which purportedly arises out of Kentucky's Model Procurement Code, KRS 45A (hereinafter "KMPC"), alleges that the University breached its employment agreement with him. (Vol. 1, R. 96).

Rothstein's case was transferred to the Franklin Circuit Court on February 1, 2013 pursuant to the Franklin Circuit Court's jurisdiction under the KMPC. (Vol. 1, R. 5-8).

B. Subsequent Proceedings in the Franklin Circuit Court

The University filed its Answer to Rothstein's Complaint on June 12, 2013. (Vol. 1, R. 84-100). On July 8, 2013, Rothstein filed a CR 56 Motion for Partial Summary Judgment, alleging that no dispute existed as to any material fact and that, as a matter of law, he was entitled to damages arising from his claim for breach of contract under KRS 45A.245. (Vol. 1, R. 112-25).

On August 26, 2013, the University and the individual defendants responded to Rothstein's Motion for Summary Judgment and simultaneously filed a CR 56 Cross-Motion for Partial Summary Judgment. (Vol. 2, R. 173-211). As its principal argument in its Cross-Motion, the University stated that the general rule of immunity articulated by the Kentucky Court of Appeals in *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978), applied to this case, (Vol. 2, R. 188), and that the Franklin Circuit Court should dismiss Rothstein's breach of contract claim because the waiver of immunity articulated in the KMPC does not apply to employment agreements. (Vol. 2,

R. 188-92). Rothstein filed his response to the Cross-Motion on October 1, 2013, and the University replied.

On May 21, 2014, the Franklin Circuit Court issued its Opinion and Order on the parties' respective motions. (Vol. 3, R. 341-53). In the Opinion, the Franklin Circuit Court denied Rothstein's Motion for Summary Judgment outright, and properly granted the University's and individual defendants' Cross-Motion as to Rothstein's claim for breach of an implied contract. In addition, the Franklin Circuit Court granted the Cross-Motion in favor of the individual defendants named in Rothstein's claim for breach of contract. The Franklin Circuit Court denied, however, the University's motion for summary judgment on Rothstein's breach of contract claim against the University, rejecting the University's sovereign immunity defense. (Vol. 3, R. 346-47).

In its analysis of the University's immunity, the Franklin Circuit Court emphasized that that the KMPC "is to be 'liberally construed and applied to promote its underlying purposes and policies.'" (Vol. 3, R. 346 (citing KRS 45A.010(1))). The Franklin Circuit Court went on to cite to the next section of the KMPC, which, the Court wrote, "provides that '[the MPC] shall apply to every expenditure of public funds by this Commonwealth under any contract or like business agreement [. . .].'" (Vol. 3, R. 346 (citing KRS 45A.020(1))) (alterations by the Franklin Circuit Court). Despite prior Kentucky Supreme Court decisions which expressed doubt regarding the applicability of the KMPC to employment contracts, the Franklin Circuit Court concluded that "because the plain meaning of KRS Chapter 45A is not unclear or ambiguous, the Court need not resort to secondary sources in concluding that Chapter 45A applies to state university

employment contracts like the one *sub judice*," (Vol. 3, R. 347). This ruling was critically flawed, as discussed below.

On June 19, 2014, the University timely filed its Notice to appeal from that part of the Franklin Circuit Court's Order denying the University's Cross-Motion on sovereign immunity grounds. (Vol. 3, R. 354-55). The appeal was perfected and briefing ensued.

C. Subsequent Proceedings in the Kentucky Court of Appeals

On appeal, the Court of Appeals affirmed the Franklin Circuit Court's Opinion and Order. Rather than relying on *Martin*, the Court of Appeals chose to extend its holding in *Commonwealth v. Samaritan Alliance, LLC*, 439 S.W.3d 757 (Ky. App. 2014), in which an incomplete reading of the KMPC led the Court to mistakenly conclude that the KMPC's waiver of immunity applied to *all* written contracts. *University of Louisville v. Rothstein*, 2016 Ky. App. LEXIS 42, 7 (Ky. App. 2016). Thus, the Court of Appeals held that "the Legislature's enactment of KRS 45A.245 plainly constitutes an unqualified waiver of sovereign immunity on all written contracts with the Commonwealth – including employment contracts." *Id.*

ARGUMENT

I. THE UNIVERSITY IS ENTITLED TO IMMEDIATE REVIEW OF THE FRANKLIN CIRCUIT COURT'S DENIAL OF SOVEREIGN IMMUNITY

As a threshold matter, it is incumbent upon the University to explain why it is before this Court at this stage of the litigation. As a general rule, appellate courts "have jurisdiction only over 'final' judgments and orders[,] and orders denying motions to dismiss . . . are not final and thus generally do not give rise to appellate jurisdiction." *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 885 (Ky. 2009). That said, the Kentucky Supreme Court recently held that "an order denying a substantial

claim of absolute immunity is immediately appealable even in the absence of a final judgment." *Id.* at 887. Given this guidance, the Franklin Circuit Court's denial of the University's claim of sovereign immunity as to Rothstein's breach of contract claim warranted immediate review by the Kentucky Court of Appeals and this Court.

II. THE UNIVERSITY IS ENTITLED TO SOVEREIGN IMMUNITY FOR CLAIMS OSTENSIBLY ARISING UNDER THE KENTUCKY MODEL PROCUREMENT CODE FOR BREACH OF AN EMPLOYMENT CONTRACT

The Court of Appeals' decision affirming the Franklin Circuit Court's order denying immunity to the University for Rothstein's breach of contract claim was erroneous because the waiver of immunity articulated in KRS 45A.245 does not contemplate or encompass contracts for employment with the University. A review of immunity law in the Commonwealth, and a scrupulous examination of both the statutory definitions set forth in the KMPC as well as the overall purpose and applicability of the KMPC supports this conclusion.

A. Sovereign Immunity and Its Application to the University Generally

In Kentucky, sovereign immunity is not a release from the burdens of liability; it is a release "from the burdens of defending the action." *Rowan County v. Sloas*, 201 S.W.3d 469, 474 (Ky. 2006) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Indeed, sovereign immunity "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." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001) (citing Restatement (Second) of Torts § 895B(1) (1979)). This principle has been recognized as applicable to the Commonwealth for nearly 200 years. *Divine v. Harvie*, 23 Ky. 439 (7 T.B. Mon. 439) at 441 (Ky. 1828).

For more than thirty (30) years, Kentucky courts have recognized the applicability of sovereign immunity to the University. *See Stewart v. University of Louisville,* 65 S.W.3d 536 (Ky. App. 2001); *University of Louisville v. Martin*, 574 S.W.2d 676, 677 (Ky. App. 1978) ("[T]he university became a state institution of higher education in mid-1970 with all the attendant powers and protections, including immunity from suit except where the Kentucky General Assembly specifically waives it."). This doctrine extends to immunity from "actions in tort and contract." *Martin*, 574 S.W.2d at 677. Sovereign immunity also applies to the Commonwealth's other research university, the University of Kentucky. *See, e.g., Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 n.1 (Ky. 2014); *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997).

B. Waiver of Immunity in Kentucky

While sovereign immunity is an important protection for the Commonwealth, it is not absolute. At the heart of it, the Commonwealth's governing charter provides that "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." Ky. Const. § 231. Kentucky courts will find such waiver, however, "'only where stated "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."'" *Withers*, 939 S.W.2d at 346 (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). Statutes in derogation of the Commonwealth's sovereign immunity must be "strictly construed *in favor of the state* unless the intention of the legislature to do otherwise is clearly expressed in the statute." *Jones v. Cross*, 260 S.W.3d 343, 345 (Ky. 2008) (citing *Lexington-Fayette Urban County Board of Health v. Board of Trustees of the University of Kentucky*, 879 S.W.2d 485, 486 (Ky. 1994)) (emphasis added).

Whether the General Assembly expressly waived the University's sovereign immunity for claims of an alleged breach of an employment contract is the subject of the instant appeal. Despite the Court's clear instructions in *Withers* and *Jones*, the Court of Appeals in this case did not strictly construe KRS 45A.245(1) in addressing this issue.

C. The Unambiguous Language of the Kentucky Model Procurement Code Does Not Waive Immunity for Claims of Alleged Breach of an Employment Contract

When construing statutes, the goal "is to give effect to the intent of the General Assembly." *Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012). The courts "presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Id.* (citing *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky. 2008)). The courts "also presume that the General Assembly did not intend an absurd statute or an unconstitutional one." *Id.* (citing *Layne v. Newberg*, 841 S.W.2d 181 (Ky. 1992)).

In addition, as a primary canon of statutory construction, statutes are to be read according to their plain meaning. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005). "In fact, [t]he plain meaning of statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Id.* (internal quotations omitted).

Rothstein asserts that the authorization for his breach of contract claim stems from the KMPC; however, the statute expressly applies to claims on "written contracts," and the definition for the term "contract" in this statute is contained in KRS 45A.030:

> "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; public-private partnership agreements; and insurance contracts except as provided in KRS 45A.022. It includes supplemental agreements with respect to any of the foregoing.

KRS 45A.030(8) (emphasis added). Thus, by definition, the 45A.245 is not for any and all written contracts, but only for "state agreements . . . *for the purchase or disposal of supplies, services, construction, or any other item.*" KRS 45A.030(8) (emphasis added).

The lower courts held that KRS 45A.245 waives the University's sovereign immunity for Rothstein's breach of contract claim, but the express exclusion of employment agreements from its coverage reveals itself through a complete examination of the applicable statutory definitions, and thus cannot constitute a waiver of sovereign immunity by the legislature.

This issue was one of first impression for the Court of Appeals, which had previously been asked to look past the overall design of the KMPC and, instead, to focus on common-law contract-formation principles. *See, e.g., Western Kentucky University v. Esters*, 2014 Ky. App. Unpub. LEXIS 1037 (Ky. App. Apr. 11, 2014); *Weickgenannt v. Board of Regents of Northern Kentucky University*, 2012 Ky. App. Unpub. LEXIS 980 (Ky. App. Dec. 21, 2012); *Newton v. University of Louisville*, 2010 Ky. App. Unpub. LEXIS 867 (Ky. App. Nov. 5, 2010); *University of Kentucky v. Furtula*, 2010 Ky. App. Unpub. LEXIS 1006 (Ky. App. Oct. 8, 2010). In its review of this case, the University asks this Court to put things back in order and place the *horse* before the *cart*.

The Court of Appeals failed to look further than the first clause of the KMPC's definition of a "contract," simply concluding that the waiver applied to "all types of state agreements." Tab A, at 6. The Court failed to apply the definition's appropriate qualifying language "for the purchase or disposal of supplies, services, construction, or

any other item." This omission eviscerates the maxim that "every word in a statute is to be given force and effect[.]" *See Golightly v. Bailey*, 292 S.W. 320, 321 (Ky. 1927).

When the definition of contract is read in its entirety, as it should be, it is clear that an employment contract does not fall within the scope of the KMPC's waiver of immunity. As an initial point, given the strict requirement of finding clear intent of the legislature for a waiver of immunity, *Jones*, 260 S.W.3d at 345, it is unreasonable to hold that an alleged employment contract with the University could be considered a state agreement for a "purchase." The statute also defines the terms "supplies," "services," and "construction," which further denotes the General Assembly's intent to leave no doubt as to their meanings. *See* KRS 45.030. Under these statutory definitions, Rothstein's employment contract could not be deemed a "purchase" of "supplies" or "construction." *See* KRS 45A.030(29),(4). Indeed, the terms have no logical link to the general concept of employment.

The only category of purchase contracts arguably applicable would be one for "services." This term is also expressly defined in the KMPC:

> "Services" means the rendering *by a contractor* of its time and effort rather than the furnishing of a specific end product, other than reports that are merely incidental to the required performance of services.

KRS 45A.030(27) (emphasis added). But, by definition, Rothstein would have to be deemed a "contractor" for the immunity waiver in KRS 45A.245 to be applicable. The term "contractor" is also delineated under the KMPC to mean "any person having a contract with a governmental body." KRS 45A.030(10) (emphasis supplied).

Rothstein cannot be considered a "contractor" for purposes of the KMPC. The KMPC separately defines the term "employee" as "an individual drawing a salary from a

governmental body, whether elected or not, and any nonsalaried individual performing personal services for any governmental body." KRS 45A.030(15). As well, other sections of the KMPC further exemplify the General Assembly's intent to allocate distinct rights and responsibilities between "contractors" and "employees." *Compare, e.g.*, KRS 45A.080(2), 45A.115, 45A.120, 45A.145, 45A.150, 45A.165(1)(a), 45A.285 (mentioning "contractors" in the context of pricing for goods and services, bidding processes, and inspecting a contractor's external place of business), *with* KRS 45A.190(1), 45A.330, 45A.340 (mentioning "employees" in the context of internally overseeing the procurement and purchasing process). Had the General Assembly intended to collapse the definition of "employee" into the definition of "contractor," or vice versa, it could have specifically done so. A contract for "services," therefore, is not analogous to a contract for "employment" under the KMPC.

That the legislature intended to exclude employment agreements with the University from the KMPC's waiver becomes even more apparent when viewing the statutory definitions in the context of the underlying purposes and policies of the KMPC:

> (a) To simplify, clarify and modernize the law governing purchasing by the Commonwealth;
> (b) To permit the continued development of purchasing policies and practices;
> (c) To make as consistent as possible the purchasing laws among the various states;
> (d) To provide for increased public confidence in the procedures followed in public procurement;
> (e) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth;
> (f) To provide increased economy in state procurement activities by fostering effective competition; and
> (g) To provide safeguards for the maintenance of a procurement system of quality and integrity.

KRS 45A.010(2). More succinctly, the purpose and policy of the KMPC is to streamline, make fair, and maintain the integrity of the Commonwealth's role in acquiring or obtaining possession of *supplies*, *services*, or *construction*. Indeed, it was in furtherance of the underlying purposes and policies of the KMPC that the legislature appended the waiver language. *See* 1978 Ky. Acts, Ch. 110, §§ 48-54. Notably absent from KRS 45A.010(2) is any reference or allusion to employment with a state institution such as the University.

Rothstein's effort to read into the statute what is altogether absent – that the limited waiver in KRS 45A.245 applies to contracts for employment with the University – runs afoul of the overriding charge that waiver must be stated "by the *most express language*" or be narrowly construed to where the "*overwhelming implications* from the text . . . leave *no room* for any other reasonable construction." *Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997) (emphasis added); *see also Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000) ("We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used."). It was error for the Court of Appeals to cast aside this mandate and overlook the actual language of the KMPC. There is no express waiver of immunity.

D. The Methods for Awarding Contracts Under the Kentucky Model Procurement Code Are Inappropriate For Employment Contracts with the University

In addition to the plain language and definitions contained in the KMPC, which make it clear that KRS 45A.245 does not apply to employment contracts with the University, the method and process for awarding contracts under the KMPC also reflect

the legislature's intent to exclude employment contracts with the University from the sovereign immunity waiver in KRS 45A.245.

Under the KMPC, "all state contracts" shall be awarded by:

(1) Competitive sealed bidding, pursuant to KRS 45A.080; or
(2) Competitive negotiation, pursuant to KRS 45A.085 and 45A.090 or 45A.180; or
(3) Noncompetitive negotiation, pursuant to KRS 45A.095; or
(4) Small purchase procedures, pursuant to KRS 45A.100.

KRS 45A.075. Again, the term "contract" is expressly defined in the KMPC. Thus, if Rothstein's alleged employment contract with the University is encompassed by KRS 45A.245, then the awarding of that contract (and all other University employment contracts) must comply with KRS 45A.075 by being awarded by one of the methods set forth in that statute.

The KMPC's procedures for competitive sealed bidding and competitive negotiation include provisions for "reverse auction," "invitation for bids," submission of multiple bids, and public disclosure of bid information. *See* KRS 45A.080, KRS 45A.085, and KRS 45A.090. If an employment contract with the University was deemed a "contract" under the KMPC, these methods of awarding such contracts would clearly be inappropriate. Similarly, the small purchase procedures set forth in KRS 45A.100 are, by the statute's terms, limited to those construction projects or other purchases up to $10,000, $1,000, or $40,000, depending on the purchasing entity. KRS 45A.100(1). Thus, an employment contract for a full-time professor with the University could not be awarded through these procedures.

Of the methods set forth in KRS 45A.075, only a sole-source contract awarded by "noncompetitive negotiation" pursuant to KRS 45A.095 could conceivably apply to the award of an employment contract. KRS 45A.095 provides:

> A contract may be made by noncompetitive negotiation only for sole source purchases, or when competition is not feasible, as determined by the purchasing officer in writing prior to award, under administrative regulations promulgated by the secretary of the Finance and Administration Cabinet or the governing boards of universities operating under KRS Chapter 164A, or when emergency conditions exist. Sole source is a situation in which there is only one (1) known capable supplier of a commodity or service, occasioned by the unique nature of the requirement, the supplier, or market conditions. Insofar as it is practical, no less than three (3) suppliers shall be solicited to submit written or oral quotations whenever it is determined that competitive sealed bidding is not feasible. Award shall be made to the supplier offering the best value. The names of the suppliers submitting quotations and the date and amount of each quotation shall be placed in the procurement file and maintained as a public record. Competitive bids may not be required:
>
> . . . .
>
> (f) For visiting speakers, professors, expert witnesses, and performing artists

Id.

The statute provides that competitive bids *may* not be required "[f]or visiting speakers, professors, expert witnesses, and performing artists." By definition, "sole source" purchases arise through "a situation in which there is only one (1) known capable supplier of a commodity or service." KRS 45A.095(1). An employment contract with a professor does not fit this definition, as there are numerous qualified candidates for professorial positions with Kentucky's universities.

Applying the KMPC to employment contracts between Kentucky's universities and its professors would require *all* state university employees who have a contract but who are not "visiting speakers, professors, expert witnesses, and performing artists," KRS 45A.095(1)(f), to be hired through bids or requests for proposal under KRS 45A.080 or KRS 45A.085. Imagine a higher education system wherein administrators, deans, instructors, postdoctoral scholars, directors, and support staff respond to requests for proposals or sealed bids and where the *price* of providing the services outlined in those job descriptions steer hiring decisions. This is not the General Assembly's intent, nor should it be the decided view of the statute. The inclusion of "visiting speakers, professors, expert witnesses, and performing artists" as specific, referenced categories of persons with whom the state can enter into a non-competitive sole-source contract under the KMPC is very telling. The legislature intentionally separated a "visiting professor" from an employed professor under the KMPC. Waiver of immunity would specifically apply to a visiting professor. That person is a contractor or vendor to the University—not an employee, and certainly not a tenured faculty member of the University as Rothstein is in this case.

Indeed, closer examination of the statute governing noncompetitive negotiation contracts in conjunction with its implementing regulations supports only one conclusion: the noncompetitive negotiation process does not fit the present scenario. The Secretary of the Finance and Administration Cabinet has promulgated administrative regulations to implement noncompetitive negotiations, as required by KRS 45A.095. These regulations, set forth in 200 KAR 5:309, state that contracts may be awarded on the basis of noncompetitive negotiation only for a defined set of circumstances. 200 KAR 5:309(1).

The regulation then proceeds to set forth fifteen different categories of contracts which may be awarded by noncompetitive negotiation. *Id.* Notably absent from this list, however, are employment contracts for full-time professors.

Pursuant to KRS 45A.095, the University has also implemented its own internal regulations and policies with respect to contracts made by noncompetitive negotiation. *See* Official University Administrative Policy Number PUR-5.00 ("Non-competitive Negotiation");[1] Official University Administrative Policy Number PUR 11.00 ("Personal Service Contract").[2] The University's policy for Non-competitive Negotiation quotes the statutory language of KRS 45A.095, and sets forth the appropriate procedures for single source contracts awarded for a commodity or non-professional service. The policy requires the requesting department to complete a Single/Sole Source Justification request, which "explains the nature of the commodity/non-professional service, describing uniqueness of situation and why this is the only item/firm suited for their purpose." Thus, the policy contemplates the award of non-negotiation contracts for certain unique goods, commodities, or non-professional services in which there is only one known supplier.

Similarly, the University's Personal Service Contract policy separately sets forth the procedures for personal services contracts that may be awarded by non-competitive

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[1] A copy of this policy is attached at Tab G and can be accessed at the following website:

https://sharepoint.louisville.edu/sites/policies/library/SitePages/Business%20Services/Non-competitive%20Negotiation.aspx

[2] A copy of this policy is attached at Tab H and can be accessed at the following website:

https://sharepoint.louisville.edu/sites/policies/library/SitePages/Business%20Services/Personal%20Service%20Contract.aspx

negotiation. The policy mirrors the language of KRS 45A.095, and notes that personal service contracts may be established by noncompetitive negotiation only for sole source purchases or when competition is not feasible as determined by the Department of Purchasing in writing prior to award, or when emergency conditions exist. *Id.* In other words, the policy contemplates the award of noncompetitive negotiation contracts for short-term specific projects where a particular expertise is required. The policy provides:

> It is the policy of the University of Louisville to establish personal service contracts for professional services in accordance with the provisions of KRS 45A.690-45A.695. Examples of services that must be provided through a personal service contract include but are not limited to consultants, doctors, employee search firms, nurses, lawyers, engineers and architects.

Surely if this policy were meant to apply to employment contracts with professors, that would have been included here.

The regulations promulgated by the Secretary of the Finance and Administration Cabinet and the University's policies both support the same conclusion: the procedures for contracts awarded by noncompetitive negotiation do not apply to the University's employment contracts with its professors. Indeed, none of the processes for awarding contracts under the KMPC, whether by sole-source or sealed bids, or their other various permutations are relevant to or reasonable for the traditional employee hiring practices of placing a job posting, receiving applications, interviewing qualified candidates, submitting an offer of employment to a preferred applicant, and that applicant's acceptance of the offer. To adopt Rothstein's position and affirm the Court of Appeal's opinion that KRS 45A.245 extends to employment contracts with a university, thus waiving sovereign immunity, creates the absurdity that all of the state's universities must either engage in one of these statutory processes each time they wish to contract with any

full-time employee or be in violation of the KMPC. This Court should not presume or condone what is clearly an unreasonable outcome. *See Maynes v. Commonwealth*, 361 S.W.3d 922, 924 (Ky. 2012).

E. Other Panels of The Kentucky Court of Appeals Have Expressed Doubt About the Application of the Kentucky Model Procurement Code to Employment Agreements

The position that KRS 45A.245 does not apply to employment contracts is not novel to the instant matter; at least three panels of the Court of Appeals have previously expressed doubt about the statute's application to such agreements. *See, e.g.*, *Furtula v. University of Kentucky*, 438 S.W.3d 303, 306 n.3 (Ky. 2014) ("The Court of Appeals has previously expressed doubt about the applicability of KRS 45A.245 and the Kentucky Model Procurement Code in the context of employment contracts."); *Ashley v. University of Louisville*, 723 S.W.2d 866, 867 (Ky. App. 1986) ("[W]e consider the language of KRS 45A.010 to limit the chapter's application to the procurement of items of hardware and services subject to bidding procedures . . . ."); *Newton v. University of Louisville*, 2010 Ky. App. Unpub. LEXIS 867, *14-15 (Ky. App. Nov. 5, 2010) (citing same); *Haeberle v. University of Louisville*, 2004 Ky. App. Unpub. LEXIS 132, *8 (Ky. App. Mar. 26, 2004) (quoting same). In each of these cases cited above, the appellants were university employees and, in each case, this Court identified the inherent conflict with applying the KMPC to state employees.

In its April 4, 2016 Opinion Affirming, the Court of Appeals recognized that such decisions exist. However, the Court of Appeals instead opted to rely solely on its own prior decision that in no way addresses the application of the KMPC's immunity provision to employment contracts. Rather, the Court of Appeals in *Commonwealth v.*

Samaritan Alliance, LLC, 439 S.W.3d 757, 762 (Ky. App. 2014), held generally that the statute waives sovereign immunity "in all contract actions against the Commonwealth and not only those subject to the Model Procurement Code." From this, the Court of Appeals concluded in the case at bar that "our holding in *Samaritan Alliance* would clearly extend to employment contracts." *University of Louisville v. Rothstein*, 2016 Ky. App. LEXIS 42, 7 (Ky. App. 2016). As established above, the KMPC provides express definitions for terms used in KRS 45A.245 that make clear that not *all* written contracts are encompassed by the KMPC's waiver. Accordingly, the Court of Appeals' reliance on *Samaritan Alliance* is misplaced, and its Opinion Affirming the Franklin Circuit Court's Order and Opinion is severely flawed.

CONCLUSION

For all these reasons, the University respectfully asks the Court to reverse the Kentucky Court of Appeals and the Franklin Circuit Court and remand this case with instructions to dismiss Rothstein's breach of contract claim against the University on the grounds that the University enjoys sovereign immunity from such actions.

Respectfully submitted,

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