

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-0332-D

(2009-CA-0811 & 2009-CA-0852)

VERA FURTULA and
ANTHONY MILLER

APPELLANTS

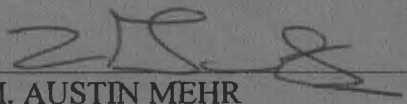
v.

APPELLANTS' BRIEF

UNIVERSITY OF KENTUCKY
and UK BOARD OF TRUSTEES
and NATIONAL CITY CORP. D/B/A NATIONAL CITY BANK

APPELLEES




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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the enclosed Appellants' Brief has been served on January 13, 2012, by sending ten (10) copies via Federal Express overnight delivery to the Clerk, SUPREME COURT OF KENTUCKY, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, Kentucky 40601, and by mailing true copies of the same to the office of Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Barbara Kriz, Baker, Kriz, Jenkins, Prewitt & Jones, 200 W. Vine Street, Ste. 710, Lexington, KY 40507; Dustin Meek and Jon Salomon, Tachau Meeks PLC, 3600 National City Tower, 101 South 5th Street, Louisville, KY 40202; and Stephen Barker and Joshua Salburey, Sturgill, Turner, Barker, & Maloney, 333 W. Vine Street, Ste. 1400, Lexington, KY 40507.


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INTRODUCTION

This is a case in which the Appellants Vera Furtula and Anthony Miller (employees of the University of Kentucky) have written disability insurance contracts but have been denied disability benefits. This appeal stems from the University of Kentucky's erroneous assertion that Furtula and Miller – along with thousands of other UK employees – do not have a written contract for disability benefits with UK, and that based on sovereign immunity Furtula and Miller allegedly do not have the ability to present their cause of action in a court of law despite a waiver under KRS 45A.245.¹

¹ Appendix 1. October 8, 2010, Court of Appeals' Opinion Reversing and Remanding.

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Because the University of Kentucky (hereinafter "UK") has promulgated many irrelevant issues on appeal, Furtula and Miller believe that oral argument may assist the Court, if desired.

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STATEMENT OF THE CASE

The Appellants, Furtula and Miller, were both UK employees for several years.¹ At the time of their employment, UK provided literature to them, and thousands of other prospective employees, that upon hiring the “University provides Long Term Disability (LTD) insurance for regular full-time employees.”² UK’s offer of LTD benefits to UK employees is also orally articulated by UK personnel at orientation for new UK employees. UK notifies employees that the “LTD program is intended to make monetary benefits available to an employee in the event of long term total disability.”³ The LTD program consists of two disability insurance plans:⁴ (1) University of Kentucky Initial Salary Continuation Long-Term Disability Plan (hereinafter “Salary Continuation Plan”),⁵ and (2) University of Kentucky Long-Term Disability Plan (hereinafter “LTD Plan”).⁶

Furtula and Miller became disabled while working for UK, and both applied for disability benefits under the LTD program.⁷ After filing their applications for disability benefits, UK did not assert that Furtula and Miller were not eligible for disability benefits, nor that they did not have LTD coverage, but alleged that Furtula and Miller

¹ Record on Appeal “ROA” at 167-F, 119-M. The appeals of Furtula (2009-CA-811) and Miller (2009-CA-852) were consolidated pursuant to an Order of the Court of Appeals entered February 3, 2010. (See Appendix 2) As Furtula and Miller have separate Records on Appeal, the Appellants have designated the Records on Appeal from the trial courts for Furtula with an “F,” and Records on Appeal from the trial courts for Miller with an “M.”

² ROA at 297-M. UK’s Human Resources Policy and Procedure Number 95.0: Long Term Total Disability Program is attached hereto as Appendix 3.

³ ROA at 297-M. Appendix 3.

⁴ ROA at 27-M.

⁵ Attached hereto as Appendix 4. (ROA at 277-M thru 297-M). The Salary Continuation Plan provides 6-months of benefits equal to the Participant’s Monthly Earnings beginning on the date of the Onset of Disability.

⁶ Attached hereto as Appendix 5. (ROA at 215-M thru 233-M). The LTD Plan provides 60% of the Participant’s Monthly Earnings after a six (6) month Waiting Period.

⁷ ROA at 10-F, 167-F, 4-M thru 5-M.

were not “totally disabled” under the terms of the LTD Plan and denied disability benefits.⁸ Furtula and Miller filed separate complaints seeking due disability benefits, asserting that Appellees were “obligated to pay under the policy,” and seeking “full contractual benefits” for the wrongful denial of “long term disability benefits” owed.⁹ After the trial courts denied UK’s motions for summary judgment, on the basis of sovereign immunity, UK appealed.¹⁰

The parties do not dispute that UK’s sovereign immunity can be waived in certain circumstances. Pursuant to KRS 45A.245, any person having a lawfully authorized written contract with the Commonwealth may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contract or for enforcement of a contract, or for both.¹¹ Under KRS 45A.030(7), a contract includes “all types of state agreements” and “insurance contracts except as provided in KRS 45A.022.” Kentucky courts have also held that UK is considered an agency of the Commonwealth, and that claims regarding a contract with an agency of the Commonwealth are exempt from sovereign immunity if they fall under KRS 45A.245.¹² Because the parties have written contracts, sovereign immunity is waived by UK in this case under KRS 45A.245, and Furtula and Miller have the right to enforce these contracts – the Salary Continuation Plan and LTD Plan.

The issue raised by UK on appeal is whether Furtula and Miller, and by default thousands of other UK employees, have a written contract with UK for LTD benefits.

⁸ ROA at 154-F thru 156-F, 4-M thru 5-M.

⁹ ROA at 4-F, 5-F, 5-M, 6-M, 179-M.

¹⁰ ROA at 199-F, 200-F, 204-F, 205-F, 503-M, 504-M, 528-M, 529-M.

¹¹ KRS 45A.245 is attached hereto as Appendix 6.

¹² See Whittenberg Constr. Co. v. Univ. of Ky., 2007 Ky. App. Unpub. LEXIS 310 (Ky. App. 2007). The Unpublished Opinion is attached hereto as Appendix 7.

The answer to the question is yes: Furtula and Miller have written contracts for disability benefits, and said contracts are titled the Salary Continuation Plan and LTD Plan (hereinafter collectively referred to as "Plans").

UK asserted that Furtula and Miller, and, in essence, thousands of UK employees, do not have written contracts for LTD benefits.¹³ This fiction is being perpetuated by UK to improperly preclude Furtula and Miller, and other UK employees, from being able to maintain a cause of action regarding whether the denial of disability benefits by UK was wrongful. This appeal is not whether Furtula and Miller are "totally disabled," but whether they have a right to bring a cause of action to enforce their disability insurance policies in the first place. UK's contention that there is not a written contract between the parties is in contrast to the very documentation before the Court.¹⁴

Even though there are written contracts for disability insurance coverage, UK created certain red herrings on appeal, which the Court of Appeals relied upon in overturning the trial court's decisions. First, the Court of Appeals opined, "the LTD program is not to be construed as a contract of employment or a guarantee of continued employment."¹⁵ This was an irrelevant issue propagated by UK. The issue on appeal is not whether a contract of *employment* was created; the issue is whether there is a written contract for disability coverage between the parties.

Second, UK informed the appellate court that Furtula and Miller have a "misconception that the LTD program is an insurance policy between the University and

¹³ Appellants' Brief at p. 10-M. Relevant portions of Appellants' Brief is attached hereto as Appendix 8.

¹⁴ See the Salary Continuation Plan and LTD Plan. (Appendix 4 & 5).

¹⁵ Court of Appeals' Opinion Reversing and Remanding at p. 10. (Appendix 1). The Court of Appeals denied Furtula and Miller's Petition for Rehearing. (See Appendix 9).

its employees.”¹⁶ But UK’s Answer to Furtula’s Complaint *admitted* that UK “supplied and issued a policy of disability insurance to Plaintiff by virtue of a group insurance policy through the University of Kentucky Long-Term Disability Employee Benefits Trust.”¹⁷ UK has now taken a contrary position to inappropriately attempt to dismiss Furtula’s and Miller’s complaints.¹⁸

UK also attempted to create confusion regarding the breadth of the Plans. UK asserted, “[t]he only thing the LTD program establishes for University employees is a mere expectancy of the opportunity to apply for LTD benefits – nothing more.”¹⁹ Such an allegation is in stark contrast to the terms of the Plans. The Plans enumerate provisions regarding “Legal Actions,” and that UK shall be bound by any final judgment arising from a party having a claim to benefits under the Plans.²⁰

UK also alleged that Furtula and Miller are merely “third party beneficiaries”²¹ to the disability policies, and the appellate court held UK “made no offer to its employees.”²² But UK repeatedly made offers regarding the LTD insurance coverage to UK employees, including Furtula and Miller, through the UK Staff Handbook,²³ UK’s Human Resources Policy and Procedure Manual,²⁴ UK’s HR department, and UK’s website. UK made its offer regarding LTD benefits to UK employees, including Miller, at his orientation. UK, through its HR department, verbally articulated its offer of LTD

¹⁶ Appellants’ Brief at p. 1-M. (Appendix 8).

¹⁷ ROA at 10-F.

¹⁸ UK failed to file any Answer to Miller’s Complaint.

¹⁹ Appellants’ Brief at p. 4-M. (Appendix 8).

²⁰ Salary Continuation Plan at §8.05 (Appendix 4, ROA at 294-M), and LTD Plan at §9.07 (Appendix 5, ROA at 230-M, 231-M).

²¹ Appellants’ Brief at p. 10-M. (Appendix 8).

²² Court of Appeals Opinion entered October 8, 2010 at p. 11. (Appendix 1).

²³ Appendix 10.

²⁴ Appendix 3. See also <http://www.uky.edu/HR/policies/hrpp090.html>.

benefits to UK employees. And despite UK's legal counsel now asserting for the sake of dismissal that there is no contract, UK's Policy and Procedures describes the Plans as "contracts."²⁵

As discussed more fully below, the elements for a valid contract are met: offer, acceptance, terms, and consideration. Until the recent appellate court decision, UK employees believed they had a right to bring a civil action if their disability benefits were wrongfully denied by UK. Furtula and Miller now respectfully request the Court to overturn the Opinion of the Court of Appeals, which reversed the lower courts orders and remanded the actions back to Franklin Circuit Court to enter orders dismissing both cases.²⁶

The facts do not support, as a matter of law, that there is not a written contract between the parties. To the contrary, the Court is in possession of written contracts for long-term disability benefits. Moreover, no discovery occurred in Miller's case, and a remand to the trial courts would allow the parties to further develop facts regarding the written contracts, and UK's verbal offers to Furtula and Miller regarding LTD benefits. As Furtula and Miller were the non-moving parties, the appellate court's decision to reverse the denial of summary judgment was improper.

²⁵ See <http://www.uky.edu/HR/policies/hrpp090.html>. UK did not provide the lower courts with the entire Human Resources Policy and Procedure Manual. UK conveniently did not provide Human Resource Policy and Procedure Number 90.0, which refers to the Plans as "contracts."

²⁶ See Appendix 1.

ARGUMENT

I. Standard of Review²⁷

“[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial.”²⁸ In First Federal Sav. Bank v. McCubbins,²⁹ this Court noted the standard for reviewing summary judgments:

The proper standard of review on appeal when a trial judge grants a motion for summary judgment is whether the trial judge correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. CR 56.03. It has long been held that a trial judge must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.

Summary judgment should be granted only if it appears "impossible" that the non-moving party will be able to produce evidence at trial warranting a judgment in its favor.³⁰

II. The Plans demonstrate that there are written contracts between the parties.

Furtula and Miller need only to provide “affirmative evidence” that there was a written contract with UK to preclude entry of summary judgment.³¹ A written contract may consist of “various forms such as notes, papers, letters and telegrams, so long as,

²⁷ The Court of Appeals opined that UK’s motion to dismiss, in the Miller case, must be treated as a motion for summary judgment, as UK attached documentation outside of the pleadings in its motion to dismiss. See Court of Appeals Opinion at p. 6, footnote 3. (Appendix 1).

²⁸ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991).

²⁹ 217 S.W.3d 201, 203 (Ky. 2006).

³⁰ Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

³¹ Id.

taken together, they contain on their face, or by reference to other writings, the names of the parties, an identification of the subject matter of the contract, and the terms and conditions of the contract."³² Kentucky law recognizes that it is not always necessary for both parties to sign a contract, and that parties may be bound by the terms of an unsigned contract when both parties thereafter act as if they have a binding contract.³³ In this case *sub judice*, the Plans satisfy the requirements for a written contract, and both parties acted as if they had a binding contract, as evidenced by Furtula and Miller's claims for disability benefits that were reviewed by UK. The Plans identify the parties, and define whom are Participants, Employees, and Employer; the subject matter of the contracts are LTD benefits; and the terms and conditions are expressly noted in the Plans.³⁴ Notably, UK informs employees that these are contracts, as UK asserts the "plans and programs described in the following policies (Human Resources Policy and Procedure (HRP&P) Numbers 91.0 – 96.0) are governed by the applicable **contracts**."³⁵ (emphasis added) UK has explicitly informed UK employees that the Plans are contracts, but then incongruously argues to the contrary to the courts.

Beyond the Plans themselves, UK provided documentation to Furtula and Miller, and other UK employees, that UK is offering LTD insurance coverage with reference to the Plans.³⁶ UK extended offers of disability insurance to Furtula and Miller in multiple

³² Am. Bar Endowment v. Mut. of Omaha Ins. Co., 2002 U.S. Dist. LEXIS 4809 (N.D. Ill. 2002) (citing Am. Coll. of Surgeons v. Lumbermens Mut. Casualty Co., 142 Ill. App. 3d 680, 698-99, 96 Ill. Dec. 719, 491 N.E.2d 1179 (1986)).

³³ Cowden Mfg. Co. v. Sys. Equip. Lessors, Inc., 608 S.W.2d 58, 61 (Ky. App. 1980).

³⁴ ROA 215-M thru 233-M, 277-M thru 295-M. (Appendix 4 & 5).

³⁵ <http://www.uky.edu/HR/policies/hrpp090.html>.

³⁶ The Staff Handbook states, "You are eligible for the long-term disability (LTD) plan effective the first day of the month following twelve (12) consecutive months of regular full time employment," and "This plan provides monthly benefits for as long as you remain totally disabled or until you retire in accordance with University rules." (ROA at 303-M, Appendix 10)

manners: UK's HR Policy and Procedure Manual; UK's Staff Handbook; and UK's website. UK also extended its offer of LTD insurance verbally to its employees at orientation. Discovery regarding these matters should be further developed through discovery depositions of UK staff, including the personnel in UK's HR department that extended these offers to UK employees. UK may also not have provided all necessary documentation to allow the Court to make its decision regarding the written contract, as evidenced by UK not providing all of the HR Policy and Procedure Manual, or Staff Handbook. The more prudent action would be to allow discovery before ruling on a matter that would affect thousands of employees.³⁷

The parties agree they are bound by the terms of the Plans. These Plans should not be construed as anything but written contracts between the parties. UK's legal counsel alleged that UK employees merely have an "expectancy of an opportunity to apply for LTD benefits"³⁸ and that there is not a contract but a "unilateral" offering under the LTD program.³⁹ UK cites to no language in the Plans that this is a "unilateral" offering, nor does said allegation comport with the terms of the Plans in which an aggrieved party may sue when claiming an interest in the Plan.⁴⁰ Moreover, there is no disclaimer in the Plans that state these disability contracts are not to be construed as a contract between the parties. Instead, UK's allegation is an inappropriate guise devised

Further, the HR Policy and Procedures state, "The LTD program is intended to make monetary benefits available to an employee in the event of long term total disability..." (ROA at 297-M, Appendix 3).

³⁷ UK requested the Franklin Circuit Court to hold all further proceedings in abeyance until UK's interlocutory appeal was decided, which was granted by the trial court. (See ROA at 567-M thru 569-M).

³⁸ Appellants' Brief at p. 4-M. (Appendix 8).

³⁹ Appellants' Brief at p. 1-M. (Appendix 8).

⁴⁰ ROA at 231-M, 232-M, 294-M. (Appendix 4 & 5).

by UK's legal counsel to wrongfully preclude the rights given to Furtula and Miller under their contracts.

As further proof, UK has not claimed that Miller and Furtula are not eligible for disability coverage under the Plans, nor has UK denied their disability claims on the basis that there is no insurance coverage under the Plans. Rather there was a dispute regarding whether these individuals were "totally disabled" under the terms of the LTD plan, and only now has UK alleged there is not a written contract.

Furtula and Miller have also not claimed that they have a written contract for *employment*. Instead, Furtula and Miller seek disability benefits under the Plans. UK has attempted to create confusion by citing to provisions in the Salary Continuation Plan and LTD Plan, wherein it states these contracts shall not "be construed as a contract of employment between the Employer and any Employee..."⁴¹ Said language, however, inherently was added to distinguish these contracts for disability insurance from an employment contract. Moreover, UK has cited to no documentation that the Plans are not to be construed as an insurance contract between UK and UK employees. This is logical as such a statement would be inherently in contrast to the contracts themselves.

If UK intended the Plans not to be considered as written contracts between the parties, then UK could have asserted this in the Plans. Instead, the Plans are written much like other contracts for disability insurance coverage provided by other entities, as the Plans provide the terms for eligibility, payments, claims procedures, appeals, and legal action.

⁴¹ ROA at 293-M (Appendix 4), and ROA at 230-M thru 231-M (Appendix 5).

III. The elements for a written contract are established.

The appellate court noted that the essential elements of a written contract include: offer, acceptance, terms, and consideration.⁴² All four elements are established in this case *sub judice*.

A. Offer

Black's Law Dictionary provides multiple definitions of an offer, including: to bring to or before; to present for acceptance or rejection; a proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act; and the offer creates a power of acceptance permitting the offeree by accepting the offer to transform the offeror's promisee into a contractual obligation.⁴³

UK made a contractual offer to UK employees, including Miller and Furtula, to provide LTD insurance. UK's offer was presented to UK employees in multiple forms, including but not limited to: UK's Staff Handbook, UK's Human Resource Policy and Procedure Manual, UK's website, and UK's HR personnel. At UK's orientation for new employees, UK informs UK employees, such as Furtula and Miller, of the offering of LTD benefits. UK sought to dismiss Miller's case before any discovery occurred. But Miller would testify that at his employee orientation UK made its offer regarding LTD benefits known to him and discussed the terms and what would be needed accept this offer.

⁴² Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384 (Ky. App. 2002). See Appendix 1 at p. 9.

⁴³ BLACK'S LAW DICTIONARY 975-976 (5th ed. 1979).

The Plans denote UK's offer that an employee must complete "one year of regular full-time employment."⁴⁴ The Plans also dictate other terms required for disability benefits to be provided. UK has not asserted that Furtula and Miller did not meet these eligibility requirements, or satisfy the terms of UK's offer for LTD coverage.

Although the appellate court took issue that UK did not charge a monetary premium for LTD insurance coverage, it is unjust and prejudicial to Furtula and Miller to now second-guess UK's offer, or to require additional conditions to UK's offer. It is not the function of the judiciary to change the obligations of a contract which the parties have seen fit to make.⁴⁵ UK's offer could have requested a premium. Instead, UK chose not to make monetary payments a requirement for LTD insurance coverage. Rather UK found value in UK employees fulfilling the terms of its offer by working for more than 12 months. To require a monetary payment to form a written contract would improperly void contracts that are entered into daily where services are exchanged for goods.

B. Acceptance

Furtula and Miller accepted UK's offer. Notably, Furtula and Miller were under no obligation to work as regular full-time employees for one year. Their agreement to continuing working as full-time employees, while under no obligation to do so, constituted acceptance of UK's offer and sufficient consideration to make the employer's promise binding and enforceable. Furtula and Miller realized that acceptance of UK's offer would entitle them to LTD coverage. Upon fulfillment of the terms of the offer, the

⁴⁴ The terms of the Plans also delineate who are participants (insureds), when an employee is eligible for insurance coverage, what criteria must be met in order to be entitled to disability benefits, the administrative processes for applying for disability benefits, and in the event of a denial who are necessary parties to any lawsuit. (See Appendix 4 & 5) (ROA at 220-M, 283-M)

⁴⁵ *O. P. Link Handle Co. v. Wright*, 429 S.W.2d 842, 847 (Ky. 1968).

be a loss of productivity and additional costs associated with paperwork in rehiring new employees. Part-time employees would also arguably be less efficient due to overlap in duties performed by multiple employees. Further, employees who have been with an employer for a longer period of time would intuitively be more productive as they would have a better understanding of their work, which has a direct economic benefit to their employer. Hence, there is value to UK in Furtula and Miller accepting UK's offer.

Courts have also ruled that continued employment alone is sufficient consideration to support an agreement between an employer and an employee.⁵³ Until Furtula and Miller fulfilled the terms of UK's offer by continuously working full-time for one year, UK was not obligated to provide insurance coverage, or pay disability benefits.

Miller and Furtula, and thousands of UK employees, rely on this contractual agreement for disability coverage in the unfortunate event they become "totally disabled," and are unable to return to gainful employment. UK's offer of LTD benefits also discourages UK employees from seeking other disability coverage, as UK promises covered employees that the LTD program makes "monetary benefits available to an employee in the event of disability..."⁵⁴ In fact, Miller and Furtula did not obtain other disability insurance coverage believing that if they became disabled, then they would be provided disability benefits, or at least be afforded the opportunity to seek redress in a court of law.

D. Terms

The Plans set forth the terms of the LTD benefits. The Plans discuss requirements for each party – both UK and UK employees. The Plans discuss, among other things:

⁵³ See Dantz v. Am. Apple Group, LLC, 123 Fed. Appx. 702, 709 (6th Cir. 2005).

⁵⁴ ROA at 297-M.

CONCLUSION

As the facts are to be viewed “in the light most favorable to the party that is in opposition to the motion for summary judgment,” UK’s motions should be denied. Thousands of UK employees, who presumably do not have other disability insurance coverage, eagerly await a ruling by this Court that they will have the opportunity to challenge UK when it makes a wrongful decision regarding their entitlement to disability benefits under the Plans. To allow these cases to be dismissed would create manifest injustice, given there is a written contract, or at least “affirmative evidence” from which a finder-of-fact could determine there was a written contract. Upholding UK’s position that there is no written contract would allow UK to have unfettered discretion to deny all future disability claims without recourse for UK’s employees.


Moreover, it was appropriate for the trial courts not to dismiss Furtula and Miller’s causes of actions.⁷⁰ Furtula and Miller, along with thousands of UK employees, now merely seek the opportunity to seek a review of UK’s denial of their disability benefits. Because there is a written contract, UK is not afforded sovereign immunity in this case under KRS 45A.245, and Furtula and Miller should have an opportunity to enforce their rights under the Plans.

A court of law may ultimately determine that Furtula and Miller are not “totally disabled” as defined by the Plans, but Furtula and Miller, and potentially thousands of other UK employees, should be given the opportunity to bring a civil action to enforce the terms of their disability contracts. As KRS 45A.245 allows a waiver of sovereign

⁷⁰ See Appendix 11, 12, 13.

immunity when there is a written contract with UK,⁷¹ Furtula and Miller respectfully request this Court to: (1) deny UK's request to dismiss their cases on the basis of sovereign immunity; (2) find that there is a written contract between the parties; and (3) remand these actions back to the Franklin Circuit Court for further proceedings.

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⁷¹ See Whittenberg Const. Co. v. University of Kentucky, 2007 WL 3037721 at *2 (Ky. App. 2007). (Appendix 7).

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