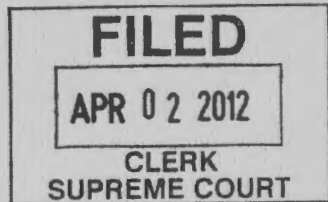


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2011-SC-0332-D



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

VERA FURTULA and
ANTHONY MILLER

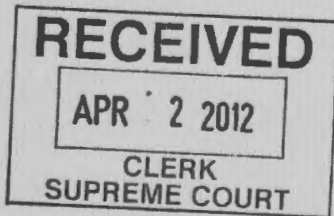
APPELLANTS

v.

REPLY BRIEF ON BEHALF OF APPELLANTS

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' Reply Brief has been served on March 30, 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 Salsburey, Sturgill, Turner, Barker, & Maloney, 333 W. Vine Street, Ste. 1400, Lexington, KY 40507.

M. AUSTIN MEHR

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF POINTS AND AUTHORITIES..... ii

ARGUMENT 1

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ARGUMENT

I. **The University's Counter-Statement of the Case misleads the Court and makes unfounded conclusions not supported by the facts.**

Despite the Appellants having provided the Court with written contracts between the parties regarding the LTD Program,¹ the Appellees attempt to persuade this Court that there are no written contracts but instead merely personnel policies. Such a position is not supported by the language of the contracts and asks the Court to dispense with common sense regarding an obvious written contract between the parties.

The Appellees allege that the LTD Program's governing documents contain numerous provisions and disclaimers making it impossible to be interpreted as a written contract; however, none of the citations listed by Appellees establish that there is not a written contract between the parties. Appellees take provisions out of context, and ask the Court to ignore other provisions establishing a contract, to come to an illogical conclusion. The four provisions cited by Appellees are addressed below.

Appellees first cite to Section 8.01 of the LTD Trust agreement. But the University *conveniently* left off for the Court's review the last bolded provision.

1. Section 8.01 General Disclaimer. Except as may be specifically provided for by law, neither the establishment of the Trust hereby created, nor any modification thereof, nor the creation of any fund or account, nor the payment of any benefits shall be construed as giving to any Participant or other person any legal or equitable right against the Employer, or any officer or employees thereof, or the Trustee, **except as herein provided.**

First, the Trust Agreement enumerates many provisions that establish rights of the Participants (i.e. Appellants), including the right to sue to recover damages under the written contract. For example, under Section 8.05 Legal Actions, it states in part, "any

¹ The University of Kentucky Initial Salary Continuation Long-Term Disability Plan (hereinafter "Salary Continuation Plan") and University of Kentucky Long-Term Disability Plan (hereinafter "LTD Plan").

final judgment ...shall be binding and conclusive on the parties hereto and **all persons** having or claiming to have any interest in the Trust.” The Trust accounts for Participants who would seek legal redress for non-payment of disability benefits. Also, Section 4.01 Trust Assets, states, “Funds periodically deposited with the Trustee under the terms hereof and any increment thereof in income therefrom shall be held by the Trustee in trust for the exclusive benefit of such Employees who qualify for benefits under the Plan. No part of the principle or income of the trust shall be used for purposes other than the exclusive benefit of the Participants.” Next, Section 4.02 Trust Benefits states, “The Trust is established and proposed to be continued in order to provide benefits for the Employees who are Participants in the Plan according to the provisions of the Plan.”

These provisions, along with others, support that the Appellants have a contractual right to disability benefits. Appellees provide no legal reasoning why said aforementioned provision should negate that a written contract exists, as provided in the Salary Continuation Plan and LTD Plan. Section 8.01 does not provide, nor do the Appellees cite to any language, any explicit disclaimer that the Salary Continuation Plan and LTD Plan are not to be considered a written contract between the parties. In fact, the LTD Trust gives further support that disabled Participants are entitled to benefits under the Plan.

Appellees next cite to Section 7.01 of the LTD Plan. The fact that the LTD Plan contains a provision that payment of benefits should be paid by the Trust also does not negate that written contract exists. If the Appellants are found to be “totally disabled” by a court of law, then they would seek disability payments which would be issued from the Trust under the LTD Plan. There is no disclaimer that a contract does not exist. This

provision of the contract simply informs Participants where payments arise for disability benefits under the Plan. As noted in Section 7.01, “Each Participant or such other person having or claiming to have any right or interest in or under the Plan shall look solely to the assets of the Trust for any payment or benefits under the Plan...”

Next, the Appellees argue that because Section 7.01 of the LTD Trust asserts there is no guarantee of payment of benefits that there is no written contract. This is simply a risk undertaken by Participants and not a disclaimer that there is no contract for disability benefits. In fact, the Salary Continuation Plan, under Section 3.01 Eligibility for Salary Continuation Benefits, in part, states, “[a]ny Participant who becomes Totally Disabled as a result of accidental bodily injury or sickness...shall be entitled to be paid during the period specified in Section 3.02...” and Section 7.02 Termination states, “upon the termination of this Salary Continuation Plan, the Employer shall continue to pay any Salary Continuation benefits to which a Participant may be entitled with respect to claims submitted prior to the termination of the Salary Continuation Plan.”

The documents also make clear that the Trust proceeds are for eligible Participants, a fact which dispels that there is just an expectancy to apply for benefits. Section 8.01 Amendment of the LTD Plan provides that the Trust shall be used for “the exclusive benefit of the Participants pursuant to the Plan,” and no portion of the Trust shall “revert to or become the property of the Employer.” And if the Plan is terminated, then after funding of benefits and expenses, the Trustee shall “distribute said excess equally among the Employees who are Participants in the Plan...” Section 8.04 Disbursement of Excess Trust Funds. This evinces a contractual obligation.

Notably, the Appellees cite no case law, nor provide any legal reasoning to support, that a provision regarding guarantee of payment results in a finding, as a matter of law, that a written contract does not exist. Strangely, Appellees cite from the contracts themselves to support the illogical conclusion that there is no written contract.

Finally, Appellees again attempt to mislead the Court by citing to irrelevant citations to provisions that “the LTD program is not to be construed as a **contract of employment** or a guarantee of continued employment.”² (emphasis added) This is not an employment case. Appellants have never asserted that the contract guaranteed continued employment. Rather there is a contract for disability benefits, and the Appellees have failed to cite any language in any of the governing contracts that the LTD program is not be construed as a contract for disability benefits. There is not such a statement. This is because such a statement would be in stark contrast to the very documents themselves.

Instead of dealing with the glaring facts that there is a written contract, the Appellees assert that other program participants will be hurt by the denial of the University’s immunity. But Appellees fail to recognize that the program participants are being victimized by the Appellees’ position that there is no written contract. Upholding any decision that informs eligible Participants that they have no legal redress, and may not seek the opportunity for legal review of a wrongful denial, eliminates any remedy for those Participants who are now, or in the future, in dire need of benefits that were promised by their employer. Appellants only request the opportunity in a court of law to determine whether they are disabled, and, therefore entitled to disability benefits.

Appellees have repeatedly referred to the LTD program documentation as personnel policies. This is an incorrect characterization of the Salary Continuation Plan,

² Appellee’s Brief at pg. 7.

LTD Trust, and LTD Plan. Although the Staff Handbook may be considered a personnel policy, the Appellees' inclusion of the other documents is an attempt to improperly align the facts of this case with case law dealing with different issues. As discussed below, case law cited by Appellees regarding personnel policies deals with employee manuals and handbooks.

II. The elements for a written contract are established and provide a waiver of immunity under KRS 45A.245.

Appellees must recognize that KRS 45A.245 provides a waiver of immunity for persons that hold a written contract with the University. Appellees have not provided this Court with any provisions in the LTD Program's governing documents disclaiming that there is a written contract for LTD benefits between the parties. To the contrary, the documents before the Court explicitly and implicitly demonstrate that there was intent to create a contract for LTD benefits, and it was expressed in a written form.

Appellants will first address why the Appellees' citations are distinguishable from the facts of this case. Appellees' citation to *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005) and analogy is not on point. In *Parts Depot*, the Court reviewed whether a personnel policy in a company handbook could create a contractual right. In this case *sub judice*, Appellants rely on more than a handbook (Staff Handbook) for the position that they have written contracts for disability benefits. The Salary Continuation Plan and LTD Plan are different from the Staff Handbook, which simply references the LTD Program. Appellants are not arguing that the Staff Handbook is the written contract providing disability benefits. Instead, it supports an intent by Appellees to create a contract between the parties. Hence, Appellees' argument regarding disclaimers in personnel policy handbooks is not applicable to this case, as the Court is not restricted in

this case to referencing a staff handbook when deciding whether there are written contracts. Moreover, the staff handbook does not assert that there is no contract for disability benefit coverage.

Second, in *Parts Depot*, the Court took notice that a disclaimer “precluded the employees’ claims that the *handbook* or manual constituted an agreement not to terminate the employment at will.” *Id.* at 363. This is not an employment case, and the analogy presented by Appellees is flawed, as Appellants have provided the Court with more than personnel policies. The Court has been presented with written contracts.

Despite Appellees recognizing that *Oaks v. 3M Co.*, 453 F.3d 781 (6th Cir. 2006) dealt with personnel policies, i.e. an employee manual, Appellees incorrectly attempt to lead the Court into overstepping that holding and applying it to actual written contracts between the parties -- the LTD Plan, the LTD Trust and the Salary Continuation Plan. Neither *Parts Depot* nor *Oaks* ever held that a LTD Plan between an employee and employer does not create a written contract. Instead these cases dealt with personnel policies, which may be more analogous to the Staff Handbook. However, Appellants do not rely on the Staff Handbook to demonstrate that written contracts exist given the actual contracts have been tendered to the Court. Moreover, Appellees cite no case law that supports that a LTD Plan between an employer and employee should not be construed as a written contract for disability benefits.

Given Appellees flawed analysis, it might further contend that employees have no written contracts with their employers whether for health insurance, dental, or vision. This cannot be the intent of Court rulings cited to by Appellees. Other provisions in the

governing documents also are indicative that this is a contract and similar to other insurance contracts:

- Salary Continuation Plan, Section 2.01 Eligibility for Participation, in part, states, “[a] new employee who has been covered by a reasonably comparable long term disability plan by the individual’s immediate preceding employer within the last six months may be covered...”³
- LTD Plan, Section 5.01, in part, states, “The Employer may also purchase an insurance policy or policies issued by an insurance company duly qualified to issue insurance in the Commonwealth of Kentucky to fund or partially fund the benefits payable under this Plan.”

Despite documentation showing a clear intent to create a contract, whether through the University’s website or Staff Handbook, the Appellees cite no language in any documents that the University did not intend to be contractually bound regarding disability benefits.

Moreover, the fact that a contract may have provisions regarding payment or who are necessary parties to a suit does not make it something less than a written contract. Many written contract have distinct terms that bind the parties. And although there may be the ability to make amendments, the LTD Plan is clear that the Trust shall be for exclusive benefit of the Participants and the Employer shall continue to pay any Salary Continuation Benefits to Participants.⁴ Parties to a written contact have the right to bind themselves to terms as they deem fit.

Appellants’ brief set forth that the other elements – acceptance and consideration – for a written contract were satisfied, which was recognized by Appellees. Oddly though, Appellees state the most the Appellants were entitled to “was the opportunity to apply for LTD benefits.” Appellees cite absolutely no language or provisions in support of this contention, which is in contrast to the terms of the contracts. Appellees fail to

³ See also Section 2.01 of the LTD Plan.

⁴ See LTD Plan at Section 8.01, and Salary Continuation Plan at Section 7.02.

explain why there would be the need for Legal Actions, if the Appellants were only entitled to apply for benefits. Or why the documents provide that the Trust shall be used for “the exclusive benefit of the Participants pursuant to the Plan” and no portion of the Trust shall “revert to or become the property of the Employer.”⁵

Appellants, and other Participants, have foregone seeking other disability coverage because of their disability coverage with Appellees. Appellees’ arguments are disingenuous that this offering does not induce employees to accept employment. Appellees provide potential employees, along with Furtula and Miller, information instructing them that as an employee certain benefits will be provided to them. This is an enticement to work for the University. The University now seeks to breach and negate the very contracts in which they induced individuals to accept employment.

III. Appellees misconstrue other provisions.

Appelles incorrectly inform the Court that Sections 9.07 of the Salary Continuation Plan and LTD Plan do not create a cause of action.⁶ Appellees fail to give any importance to the last sentence of these sections that states, “any final judgment which is not appealed or appealable that may be entered in any such action or proceeding shall be binding and conclusive on all parties having or claiming to have an interest in” the Salary Continuation Plan, the Plan, or the Trust. Said language necessarily contemplates the Participants who would be bringing a claim for benefits. The aforementioned documents describe when Participants are eligible for benefits, when they are to be paid disability benefits, and who are necessary parties to actions filed for recovery of benefits. The fact that other participants, which may include thousands of

⁵ See Section 8.01 Amendment of the LTD Plan.

⁶ See page 19 of Appellees’ Brief.

other UK employees, do not need notice of this suit does not preclude a finding that there is not a written contract.

Appellees also ask this Court to ignore the University's website, and in doing so misconstrue what is contained on the website. The plain language on the website states, "1) 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." HRP&P 95.0 is entitled Long Term Total Disability Program, and HRP&P 90.0's explicit reference to "contracts" embodies the LTD Plan, Salary Continuation Plan, and the Trust.⁷ These are not "personnel policies," as argued by the Appellees but written contracts between the parties.

Appellees also request the Court to ignore further evidence that there was a contract between the parties, as noted in the University's answer to Furtula's Complaint. It was only the University's new counsel that proffered this new argument that there was no written contract after the *Miller* action was filed and after the University's counsel in *Furtula* had rationally agreed in its answer that the University supplied and issued a policy of disability insurance to *Furtula*. Moreover, instead of allowing further discovery in support of the waiver of immunity, Appellees instead ask the Court to dismiss without knowing whether there are other documents supportive of the Appellants' position.

Finally, the Appellees assert that the doctrine of estoppel was not previously raised on appeal. But it was not until the Court of Appeals ruling that the Appellants' suits were ordered to be dismissed. The detriment to the Appellants was not realized until the Court of Appeals' ruling. Because the Appellants relied upon the actions of the Appellees and said conduct resulted in their detriment upon the ruling by the Court of

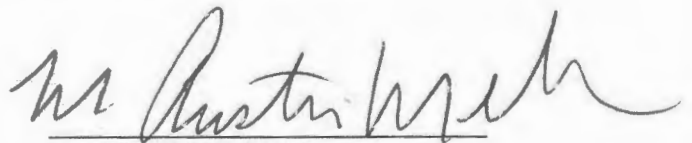
⁷ See Appellees' Brief at Appendix B.

Appeals, the Appellants request the Appellees to be estopped from arguing that there is no written contract. Moreover, contrary to Appellees' argument, estoppel has been recognized against state agencies as noted in the very case cited by Appellees. "It is well established that equitable estoppel can be applied against a state agency."⁸

IV. PNC did not file any brief with the Court of Appeals, nor did it raise any argument on appeal, and its arguments are not preserved.

Appellee PNC Bank did not file a notice of appeal regarding any ruling of the Franklin Circuit Court, nor did PNC file any brief with Court of Appeals. But it now argues for relief from this Court. Because the written contracts dictate what the duties of PNC are as a Trustee, the Appellants request that PNC abide by the terms of the written contracts, which are at issue before the courts. PNC recognizes that it has a contractual relationship with the University under the Trust Agreement, and that dictates payment for disabled Participants. As such, PNC should abide by the terms of the contracts regarding its duties as a Trustee.

Respectfully Submitted:



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⁸ *Bd. of Trs. v. Grant*, 257 S.W.3d 591, 594 (Ky. Ct. App. 2008) (Citing *Laughead v. Commonwealth of Kentucky, Dept. of Transp., Bureau of Highways, et al.*, 657 S.W.2d 228, 230 (Ky. 1983)).

