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COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2023-SC-0142-DG / 2023-SC-0383-D
(2021-CA-0788)

FILED

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CLERK
SUPREME COURT

BOARD OF EDUCATION OF PARIS,
KENTUCKY

APPELLANT/
CROSS-APPELLEE

v.

FRANKLIN CIRCUIT COURT
ACTION NO. 21-CI-00493

JASON EARLYWINE

APPELLEE/
CROSS-APPELLANT

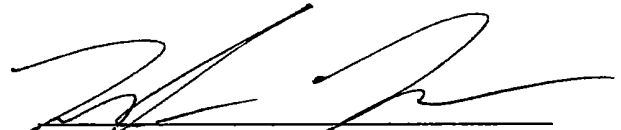
BRIEF ON BEHALF OF APPELLEE/CROSS-APPELLANT
JASON EARLYWINE

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Certificate Required by RAP31(C)(1)(b) and RAP 30(B)

I hereby certify that true and accurate copies of this **BRIEF FOR APPELLEE/CROSS-APPELLANT** Jason Earlywine have been mailed, first class, postage prepaid, to the Clerk of the Kentucky Court of Appeals, 669 Chamberlin Ave., Suite B, Frankfort, Kentucky 40601; to Hon. Phillip Shepherd, Judge, and the Clerk of the Franklin Circuit Court, 222 St. Clair St., Frankfort, Kentucky 40601; and to Johnathan C. Shaw, Esq., and Grant R. Chenoweth, Esq., PORTER, BANKS, BALDWIN & SHAW, PLLC, 327 Main Street ~ P.O. Drawer 1767, Paintsville, Kentucky 41240, on this 8th day of May, 2024.:



Tyler Z. Korus, Esq.

Counsel for Appellee, Jason Earlywine

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Tyler Z. Korus, Esq.
Counsel for Appellee, Jason Earlywine

INTRODUCTION

This is a review of the lower courts' rulings that KRS 45A.245 waives sovereign immunity as to employment contracts with local school boards. It is a further review of the factual issues present regarding exhaustion of remedies in the trial court.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee/Cross-Appellant is not requesting Oral Argument. The plain language of KRS 45A.245 and this Court's binding precedent in *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644 (Ky. 2017) were correctly applied by the lower courts. Further, factual issues regarding exhaustion of remedies require reversal and remand to the trial court.

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COUNTERSTATEMENT OF THE CASE

The Appellant/Cross-Appellee Board of Education of Paris, Kentucky (“Paris”), employed Appellee/Cross-Appellant Jason Earlywine (“Mr. Earlywine”) as a teacher from August 2007 until June 2019.¹ At all times relevant to this civil action, Mr. Earlywine was employed pursuant to a continuing employment contract² that remained in effect until June 2019.³

In 2011, Mr. Earlywine was accused of inappropriate contact with a student, something that Mr. Earlywine vehemently denied and continues to deny.⁴ He was subsequently charged with one count of Sexual Abuse in the first degree, pursuant to KRS 510.110.⁵ After several years of proclaiming his innocence and attempting to clear his name, Mr. Earlywine’s criminal case went to trial in January 2015.⁶

On January 27, 2015, Bourbon Circuit Court Judge Rob Johnson fully and finally dismissed the sole charge against Mr. Earlywine, with prejudice, by granting Mr. Earlywine’s motion for a directed verdict.⁷ As of January 27, 2015, there were no longer any criminal charges pending against Mr. Earlywine.⁸

Shortly after the full dismissal of the sole criminal charge against him, Mr. Earlywine moved the Circuit Court for expungement of the dismissed charge and all related

¹ Complaint ¶ 1; TR 80.

² This civil suit was filed on January 27, 2020, within one year after the termination of Mr. Earlywine’s continuing employment contract. While not at issue in this Appeal, to the extent that the one year statute of limitation contained in KRS 45A.260(2) applies, this suit was timely filed “within one (1) year from the date of completion specified in the contract.”

³ See, KRS 161.730.

⁴ Complaint ¶ 5; TR 81.

⁵ Complaint ¶ 5; TR 81.

⁶ Complaint ¶ 6; TR 81.

⁷ Complaint ¶ 7; TR 81.

⁸ Complaint ¶ 7; TR 81.

proceedings. On April 10, 2015, the dismissed criminal charge and related proceedings against Mr. Earlywine were permanently expunged.⁹ Pursuant to KRS 431.076, the legal effect of the expungement order was that the dismissed charge and related proceedings against Mr. Earlywine were legally deemed to have never occurred: “The above-named offense(s) is/are expunged from the court records. On entry of this order, the proceedings shall be deemed never to have occurred; the court shall reply to any inquiry that no record exists; and the Defendant shall not have to disclose the fact of the record or any matter relating to it on an application for employment, credit, or other purpose.”¹⁰

During the pendency of the now-expunged criminal proceedings, Gary Wiseman, the then-Superintendent of the Paris Independent School District, purported to suspend Mr. Earlywine without pay.¹¹ Per a June 12, 2012, letter to Mr. Earlywine from Mr. Wiseman, the sole alleged basis for suspending Mr. Earlywine without pay was “the seriousness of the charges brought against you.”¹² The only charge brought against Mr. Earlywine was the count of Sexual Abuse in the first degree that was expunged on April 10, 2015.

Mr. Wiseman’s June 12, 2012, letter to Mr. Earlywine failed to specify the detailed factual basis for the suspension without pay, as required by KRS 161.790.¹³ Mr. Wiseman also failed to notify the school board of the suspension, which is further required by KRS 161.790.

Mr. Earlywine subsequently filed suit for breach of his employment contract to recover the wages that were unlawfully withheld from him during his unpaid suspension.

⁹ Complaint ¶ 9; TR 81.

¹⁰ Complaint ¶ 9; TR 81.

¹¹ Complaint ¶ 11; TR 82.

¹² Complaint ¶ 11; TR 82.

¹³ Complaint ¶ 12; TR 82.

Paris responded to Mr. Earlywine's Complaint with a motion to dismiss, which was denied by the Bourbon Circuit Court and the case was transferred to Franklin Circuit Court.¹⁴ The trial court held that KRS 45A.245 waived Paris' sovereign immunity, and this interlocutory appeal followed. The sole issue on appeal was whether KRS 45A.245 applied to local school boards. The Court of Appeals affirmed the trial court's reliance on this Court's opinion in *University of Louisville v. Rothstein*, 532 S.W.3d 644 (Ky. 2017), holding that Paris' sovereign immunity had been waived by KRS 45A.245.¹⁵ The Court of Appeals further held that Mr. Earlywine failed to exhaust his administrative remedies pursuant to KRS 161.790, despite being outside the scope of the appeal and without an evidentiary record.¹⁶

For the reasons stated herein, it is respectfully requested that this Court affirm the lower courts' holding that KRS 45A.245 is an unqualified waiver of immunity on all contracts with the Commonwealth, including Paris, which is undisputedly a state agency. It is further requested that this Court reverse and remand the Court of Appeals' holding that Mr. Earlywine failed to exhaust administrative remedies pursuant to KRS 161.790 because the strict due process requirements of the statute were not followed by Paris and therefore the statute was never properly invoked.

¹⁴ TR 9.

¹⁵ *Bd. of Educ. of Paris v. Earlywine*, No. 2021-CA-0788-MR, 2023 WL 2192965, *2 (Ky. Ct. App. Feb. 24, 2023).

¹⁶ *Id.* at *3.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of the lower courts' decisions is de novo. *Osborne v. Commonwealth*, 185 S.W.3d 645, 648 (Ky. 2006); *Morgan v Botts*, 348 S.W.3d 599, 601 (Ky. 2011). For purposes of this appeal, the factual allegations contained in Earlywine's Complaint must be accepted as true. *See James v. Wilson*, 95 S.W.3d 875, 889 (Ky. App. 2002).

II. PRESERVATION OF ISSUES

The application of KRS 45A.245 as a waiver of Paris' sovereign immunity and failure of Paris' exhaustion of administrative remedies arguments were raised in Earlywine's response to Paris' motion to dismiss.¹⁷

III. THE LOWER COURTS PROPERLY FOLLOWED THIS COURT'S BINDING PRECEDENT IN *ROTHSTEIN*

The lower courts held that Paris' governmental immunity is derived from its status as an arm of the Commonwealth.¹⁸ Paris does not dispute that it is a "State agency."¹⁹

The Trial Court further held that KRS 45A.245's waiver of sovereign immunity applied to Paris, explaining that the statute "undeniably and expressly waives immunity on behalf of the Commonwealth."²⁰ The Court of Appeals of Kentucky agreed.²¹ The pertinent portion of KRS 45A.245 is as follows:

¹⁷ TR 43.

¹⁸ TR 7.

¹⁹ Appellant/Cross-Appellee's Brief at 7.

²⁰ TR 7.

²¹ *Earlywine*, 2023 WL 2192965 at *2 (holding that "Pursuant to *Rothstein*, the Board as a state agency does not have governmental immunity for Earlywine's breach of contract claims.")

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.

As additional support for their holdings, the lower courts cited to this Court's decision in *University of Louisville v. Rothstein*, 532 S.W.3d 644 (Ky. 2017). In *Rothstein*, a professor sued the University of Louisville for breach of his written employment contract. *Id.* at 646. This Court held that "KRS 45A.245 is an ***unqualified waiver of immunity*** in all cases based on a written contract with the Commonwealth, including but not limited to employment contracts." *Id.* at 647 (emphasis added).²²

Based upon the plain language of KRS 45A.245 and this Court's binding precedent in *Rothstein*, the lower courts concluded that KRS 45A.245 applied. Their holdings and rationales on this point are sound and should be affirmed.

- i. ***Paris' governmental immunity and the waiver of same in KRS 45A.245 are derived from its status as an arm of the "Commonwealth"***

Paris argues that while it is undisputedly an arm of the "Commonwealth" for purposes of receiving the benefits of governmental immunity, it is, at the same time, somehow not an arm of the "Commonwealth" for purposes of the explicit waiver contained in KRS 45A.245. In other words, Paris is attempting to substantially qualify the waiver of immunity that this Court in *Rothstein* held to be "unqualified." 532 S.W.3d at 647. While creative, Paris' arguments are legally and logically deficient and must be rejected.

²² This Court recently reaffirmed KRS 45A.245's unqualified waiver of immunity in *University of Kentucky v. Regard*, 670 S.W.3d 903, 919 (Ky. 2023) ("The General Assembly's waiver of sovereign immunity for all written contracts then is properly understood as a waiver for all contracts with the Commonwealth that can be proved by writing.")

ii. *Paris is part of the “Commonwealth” as that term is used in KRS 45A.245*

As stated, *supra*, KRS 45A.245 waives immunity in all cases based on a written contract with the Commonwealth. *See also, Rothstein*, 532 S.W.3d at 647. KRS 45A.240(1) provides the only definition of the term “Commonwealth” that applies to KRS 45A.245 as follows: “the Commonwealth of Kentucky and any of its departments or *agencies*.” (emphasis added) Again, this is the *only* definition of the term “Commonwealth” that applies to KRS 45A.245. Paris does not dispute that it is a “State agency,” and therefore unambiguously falls within the plain meaning of this broad definition.

Additionally, KRS 45A.245’s definition of “Commonwealth” is substantively identical to the language in the Kentucky Civil Rights Act that was held to be a waiver of governmental immunity as to the Commonwealth, including local school boards. KRS 344.010(1) (defining a “person” to include “the state, any of its political or civil subdivisions or *agencies*”) (emphasis added); *see also, Department of Corrections v. Furr*, 23 S.W.3d 615, 617 (Ky. 2000) (recognizing that the definition of “person” in KRS 344.010(1), *supra*, represented an express waiver of governmental immunity); *see also, Ammerman v. Bd. of Educ., Nicholas County*, 30 S.W.3d 793, 797 (Ky. 2000) (applying KRS 344.010(1)’s waiver of governmental immunity to local boards of education based on their status as *agencies* of state government). Therefore, this Court’s interpretation of the waiver of sovereign immunity in the Kentucky Civil Rights Act is consistent with the lower courts’ findings that KRS 45A.245 applies to local school boards because they are state agencies.

Paris counters that the definition of the term “local public agency,” found elsewhere in

the Kentucky Model Procurement Code (“KMPC”) somehow impacts the definition of “Commonwealth” as used in KRS 45A.245.²³ Paris claims that because school boards are included in this inapplicable definition of a “local public agency,” they cannot be included in KRS 45A.240(1)’s definition of “Commonwealth.”

The fatal flaw with Paris’ argument is that the definition of “local public agency” is inapplicable to KRS 45A.245, the statute at issue in this appeal. The definition of “local public agency” is found in KRS 45A.345 and specifies that it only applies to KRS 45A.343 through 45A.460 – an entirely different section of the KMPC than the waiver statute at issue in this case, KRS 45A.245. If the General Assembly intended a different meaning of the term “Commonwealth” than the applicable definition in KRS 45A.240(1), it could have done so. The fact that KRS 45A.245’s definition of “Commonwealth” has included state agencies, such as local school boards, since the KMPC was enacted in 1978 is a strong indication that the General Assembly meant what it said and said what it meant. *See, Revenue Cabinet v. O’Daniel*, 153 S.W.3d 815 (Ky. 2005) (quoting Ronald Benton Brown 8B Sharon Jacobs Brown, *Statutory Interpretation: The Search for Legislative Intent* § 4.2, at 38 (NITA 2002)) (“[t]he plain meaning of the 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.”); *see also, O’Daniel*, 153 S.W.3d at 819 (quoting *Stone v. Pryor*, 103 Ky. 645, 45 S.W. 1136, 1142 (1898) (Waddle, S. J., dissenting) (“we assume that the ‘[Legislature] meant exactly what it said, and said exactly what it meant.’”))

Review of the Legislative intent further supports that KRS 45A.245’s waiver applies

²³ Appellant/Cross-Appellee’s Brief at 8-9.

to local school boards. As recognized in numerous Kentucky cases, including *Rose v. Council for Better Educ., Inc.*, local boards of education glean their governmental immunity from the Constitutional mandate that requires the Legislature to carefully monitor and supervise the state's educational system. 790 S.W.2d 186, 211 (1989), *see also, Thacker v. Pike County Bd. of Ed.*, 193 S.W.2d 409, 409 (Ky. 1946) (recognizing local board of education as a state agency). Thus, local boards of education are considered agencies of the "Commonwealth." The Legislature chose to broadly define "Commonwealth" in KRS 45A.245 to include state "agencies," and that term has been interpreted by Kentucky's Highest Court to include local school boards for nearly 80 years, *Thacker, supra*. If the Legislature intended the term "Commonwealth" to mean something other than its plain language meaning, which includes local boards of education, it could have done so. But it didn't. The fact that KRS 45A.245 has remained unchanged since its passage in 1978, particularly considering the nearly 80-year-old definition of state agency and this Court's 2017 holding in *Rothstein*, further evidence that local boards of education fall within its coverage. *See, Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561, 564 (Ky. 2012), quoting *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) ("[T]he failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted.")

Contrary to Paris' unsupported, restrictive reading of KRS 45A.245, this Court has interpreted the statute to be so broad that it even applies to contracts entered outside of the KMPC. In *Rothstein*, this Court adopted much of the dissent in *Furtula v. University of*

Kentucky, 438 S.W.3d 303, 310-20 (Ky. 2014) *as modified* (June 23, 2014) (Noble, J., dissenting). 532 S.W.3d at 648. In the adopted section, Justice Noble observed that the breadth of KRS 45A.245’s waiver was so broad that it “is not limited to contracts entered into under the [KPMC]; rather, the waiver applies to all lawfully authorized written contracts. This necessarily includes contracts whose authority lies outside the [KPMC].” *Id* at 649, citing *Furtula*, 438 S.W.3d at 319. Paris’ attempt to restrict the application of the waiver in KRS 45A.245 based on an inapplicable definition, cannot be squared with the plain language of the statute, Legislative intent, and with this Court’s extremely broad interpretation of the waiver.

iii. ***KRS 45A.245’s waiver is not limited to contracts managed by the Finance and Administration Cabinet***

Paris attempts to further distract from the plain language of KRS 45A.245 by inviting this Court to read into the statute a significant limitation that does not exist – that KRS 45A.245’s waiver only applies to contracts managed by the Finance and Administration Cabinet.²⁴ Paris’ argument of selective waiver as to only certain types of contracts was explicitly rejected by this Court in *Rothstein*: “The language of this statute is clear. We deem no necessity to begin parsing out the types of contracts the legislature envisioned when creating [KRS 45A.245].” *Rothstein*, 532 S.W.3d at 651.

This Court then reviewed the plain language of the statute and concluded there were absolutely no limitations on the types of contracts that KRS 45A.245’s waiver applied to: “The legislature chose to utilize this language, without restriction or limitation. There is no reason for us, therefore, to impose a constraint unintended or unexpressed by the General

²⁴ Appellant/Cross-Appellee’s Brief at 9.

Assembly. Clearly, the legislature has waived governmental immunity on *all* claims brought by *all* persons on *all* lawfully authorized written contracts with the Commonwealth.” *Id.* (emphasis in original)

Rothstein's plain language reading of KRS 45A.245 nullifies Paris' arguments that the statute only waives immunity as to certain types of contracts, i.e., contracts managed by the Finance and Administration Cabinet, or with “central State agencies.” Once again, if the Legislature intended a different definition of state agency than the one that has included local boards of education for nearly 80 years, it could have so specified, but chose not to. This Court is urged to follow its prior holding regarding KRS 45A.245's waiver of written contracts with an admitted state agency in this matter.

Similarly, Paris's contention that other provisions of the KPMC somehow limit the plain language of KRS 45A.245's waiver is incorrect.²⁵ In support of its argument, Paris cites to various provisions of the KPMC, including KRS 45A.230, 45A.235, 45A.270 and 45A.275, which it claims are not “readily applied” to a local board of education, such as Paris.²⁶ Paris claims that if certain provisions of the KPMC are not applicable to local boards of education, then the waiver contained in KRS 45A.245 must not be applicable to local boards of education, either. Identical arguments have been previously rejected by this Court and should also be rejected now.

For example, in the aforementioned *Furtula* dissent, which was subsequently adopted by this Court in its *Rothstein* opinion, Justice Noble addressed the “perceived conflict between KRS 45A.050, which states that all authority under the [KPMC] is vested in the

²⁵ Appellant/Cross-Appellee's Brief at 9.

²⁶ *Id.*

Finance and Administration Cabinet, and the statutes giving the board of trustees of the University of Kentucky exclusive control over hiring employees.” *Furtula*, 438 S.W.3d at 318. The same argument made by the University then is the same argument being made by Paris now; if some part of the KMPC does not apply to the University/Paris, then the Legislature must not have intended for the waiver of immunity in KRS 45A.245 to apply to the University/Paris, either. Such an argument was squarely rejected by Justice Noble in her dissent, which dissent was formally adopted by this Court in *Rothstein*.

As cited in *Rothstein*, “[t]he waiver [in KRS 45A.245(1)] is not limited to contracts entered into under the [KPMC]; rather, the waiver applies to all lawfully authorized written contracts. This necessarily includes contracts whose authority lies outside the [KPMC].” 532 S.W.3d at 649, citing *Furtula*, 438 S.W.3d at 319. Applying this holding to Paris’ arguments renders them invalid. KRS 45A.245 applies to *all* contracts with the Commonwealth, without exception. Just because certain provisions of the KPMC are not “readily applied to a local board of education,” this does nothing to limit the broad scope of the waiver contained in KRS 45A.245, as held in *Rothstein* KRS 45A.245 applies to *all* contracts with *all* state agencies, including Paris.

iv. ***Paris’ position would leave Kentucky teachers without a remedy for unpaid wages***

Paris’ argument against a plain language reading of KRS 45A.245 continues with a gloom and doom approach, speculating that “financial harm and harassment” will result if written contracts with local school boards are enforceable when they are breached.²⁷ Paris’ position would likely come as a shock to the hard working Kentuckian teachers who would

²⁷ Appellant/Cross-Appellee’s Brief at 10-14.

be left without a remedy if they are stiffed out of a paycheck – a truly absurd result that should be avoided.²⁸ Moreover, Paris’ projections are speculative and without legal or factual support.

Ignoring this appalling impact on the Commonwealth’s teachers, Paris bemoans having to litigate breach of contract claims in Franklin Circuit Court, as all state agencies are statutorily required to do. Notwithstanding the Court of Appeals’ ruling that this case must be litigated in Bourbon County, Paris’ concerns are severely overstated. In addition to being centrally located geographically, the Franklin Circuit Court, by virtue of regularly handling legal issues related to the Commonwealth, is well-suited to decide issues related to state agencies, including claims of governmental immunity. Furthermore, the alleged hardships identified by Paris’ citation to a case from 1936 are outdated.²⁹ Since 1936, the advent of e-filing, cell phones, internet, email, zoom, freeways, and efficient cars either significantly diminishes or altogether eliminates the purported “financial harm and harassment” of litigating cases in Frankfort.

The Commonwealth is having a difficult enough time retaining teaching talent as it is.³⁰ The problem only gets worse if the teacher’s “contracts” aren’t worth the paper they are printed on because they are wholly unenforceable.

²⁸ Such a reading also conflicts with the primary function of the Model Procurement Code, which is to benefit the citizens of the Commonwealth. *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759 (Ky. Ct. App. 1984).

²⁹ Appellant/Cross-Appellee Brief at 10, citing *Pendleton County Board of Education v. Simpson*, 91 S.W.2d 557, 559-60 (Ky. 1936).

³⁰ Teacher shortages in Kentucky are at or near crisis levels. According to a recent governmental report, unfilled teacher positions in Kentucky have increased by 260 percent since 2019. *Kentucky Public School Employee Staffing Shortages*, page 6, Research Report No. 486 October 2023, Legislative Research Commission Office of Education Accountability; accessible as of 4/30/2024 at <https://legislature.ky.gov/LRC/Publications/Research%20Reports/RR486.pdf>.

v. *Paris' reliance on pre-Rothstein and unpublished cases*

Despite *Rothstein's* holding, Paris cites to a smattering of cases in support of its argument that KRS 45A.245 does not apply to local school boards. They include *Clevinger v. Board of Education*, 789 S.W.2d 5 (Ky. 1990) and *Ammerman v. Bd. of Educ., Nicholas County*, 30 S.W.3d 793 (Ky. 2000). Importantly, neither of these cases address KRS 45A.245, the statute at issue here, and are therefore not on point.³¹ Moreover, both predate this Court's decision in *Rothstein*, wherein it held that governmental immunity had been waived as to *all* contracts with the Commonwealth pursuant to KRS 45A.245. To the extent their holdings are in conflict, it is respectfully submitted that *Rothstein* should control.

Paris also cites to the unpublished case of *Hammond v. Little*, 2016-CA-000707-MR, 2018 WL 1037740 (Ky. App. Feb. 23, 2018), review denied (Sept. 19, 2018). Like *Clevinger* and *Ammerman*, the unpublished *Hammond* case contains no reference to KRS 45A.245. It is difficult to see how an unpublished case that makes no reference to the sole statute at issue in the case at bar fits into the exception contained in Kentucky Rule of Civil Procedure 76.28(4)(c). In any event, because *Rothstein* explicitly held that the waiver of governmental immunity in KRS 45A.245 applied to the Commonwealth, of which the Paris is admittedly a part, *Hammond* should not be given any precedential weight.

Finally, Paris cites to two unpublished Court of Appeals opinions that are of no precedential weight. The first, *Bd. of Educ. v. D.W. Wilburn, Inc.*, is a strange case for Paris

³¹ Paris similarly cites to *Bd. of Educ. v. Logan Aluminum, Inc.*, 764 S.W.2d 75 (Ky. 1986). (Appellant/Cross-Appellee's Brief at 9). In *Logan*, the sole issue was a question of administrative procedure – whether a tax issue was to be litigated with the Kentucky Board of Tax Appeals or in a Circuit Court. There were no issues relating to governmental immunity, KRS 45A.245, or the KMPC. Moreover, the case predated *Rothstein* by over three decades. In sum, the case has no bearing on the interpretation of KRS 45A.245.

to cite, since it involved the Court of Appeals affirming a trial court's judgment awarding damages against a local board of education for *breach of contract*.³² Governmental immunity was not at issue, rendering the case not applicable to the immunity issue at bar. Furthermore, *D.W. Wilburn, Inc* predated this Court's holding in *Rothstein*, which should further remove it from consideration by this Court.

The other case cited by Paris is *Greenup Co. Bd. of Educ., et al. v Grizzle*, another unpublished opinion from the Court of Appeals.³³ For the reasons stated herein, it is submitted that the *Grizzle* Court's unpublished holding that KRS 45A.245 did not apply to local school boards was incorrect, is obviously not binding upon this Court, and conflicts with this Court's holding in *Rothstein*.

IV. EXHAUSTION OF REMEDIES

The Court of Appeals ruled that Mr. Earlywine failed to exhaust his administrative remedies under KRS 161.790³⁴ without a factual record from the Trial Court, and even though the interlocutory Appeal was expressly limited to the application of KRS 45A.245 to local school boards and therefore the Parties did not brief the issue. Because fact issues remain, the Court of Appeals' ruling should be reversed and remanded to the Trial Court for the development of a factual record, or, in the alternative, an evidentiary hearing.

KRS 161.790, titled "Termination of contract by board; administrative hearing tribunal; sanctions," protects Kentucky teachers by providing them with due process rights before final action is taken against their contracts.

³² 2010 WL 2010760, *7 (Ky. Ct. App., May 21, 2010)

³³ 2020-CA-1112 (Ky. Ct. App. Jan. 7, 2022).

³⁴ KRS 161.790 was amended as of 2019. However, the version of the statute in effect at the time of the conduct at issue is the same for all purposes relevant to this Appeal.

Final action in the form of terminating a teacher's contract or suspending a teacher without pay may only be taken under specific circumstances.³⁵ KRS 161.790(1) states that "[t]he contract of a teacher **shall remain in force** during good behavior and efficient and competent service by the teacher and **shall not be terminated except for any of the following causes:**

- (a) Insubordination, including but not limited to violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education, the Education Professional Standards Board, or lawful rules and regulations established by the local board of education for the operation of schools, or refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties;
- (b) Immoral character or conduct unbecoming a teacher;
- (c) Physical or mental disability; or
- (d) Inefficiency, incompetency, or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved." (emphasis added)

Before a school board may attempt to take such final action, KRS 161.790 contains strict requirements a school board must comply with to notify the teacher of the charges levied. These requirements include furnishing the teacher with a "**written statement specifying in detail the charge against the teacher,**" followed by the superintendent providing notification of the charge to the school board. KRS 161.790(3) (emphasis added). Neither of these statutory requirements were complied with in this case.

For a charge to comply with KRS 161.790(3), at an absolute minimum it must contain "specific details by way of names, dates and places upon which such an allegation is based..." *Blackburn v. Board of Ed Of Breckinridge County*, 546 S.W.2d 35, 36-37 (Ky.

³⁵ While KRS 161.790(1) only references the termination of a teacher's contract, KRS 161.790(10) requires identical due process standards to be followed if a teacher is suspended without pay or publicly reprimanded.

Ct. App. 1978), citing *Knox County Board of Education v. Willis*, 405 S.W.2d 952 (Ky. 1966); *Osborne v. Bullitt County Board of Education*, 415 S.W.2d 607 (Ky. 1967); and *Parks v Ashland Independent School District*, 549 S.W.2d 323 (Ky. Ct. App. 1977). A charge that does not contain sufficient detail as required by KRS 161-790(3) amounts to a denial of due process. *Blackburn*, 546 S.W.2d at 36. Additionally, charges based on KRS 161.790(1)(a) or (d) require an additional written record in support.

In the case of Mr. Earlywine, there are factual issues present regarding Paris' attempted invocation of KRS 161.790 that require this Court to reverse the Court of Appeals' ruling on jurisdiction. Namely, Paris failed to comply with the notice requirements in KRS 161.790(3). The attempted unpaid suspension of Mr. Earlywine was premised solely on the alleged basis of "the seriousness of the charges brought against you."³⁶ This purported "notice" is not compliant with the detailed notice requirements of KRS 161.790(3). *See also, Blackburn, supra*. It failed to specify names, dates, places, or any other information regarding the allegations. There is also nothing in the record evidencing that the superintendent notified the school board, as also required by KRS 161.790(3) prior to taking final action. Based on these deficiencies, the administrative remedies contained within KRS 161.790 were not properly invoked, and obviated any strict compliance by Mr. Earlywine.

Furthermore, the charge at issue failed to specify which, if any, of the four enumerated categories contained in KRS 161.790(1)(a)-(d) was being relied upon. In fact, the only "charges" pending against Mr. Earlywine at the time was a singular criminal charge that was subsequently dismissed, as a matter of law.

³⁶ Complaint at ¶ 11, TR 82.

Without proper notice, KRS 161.790 was not implicated, and the Court of Appeals' reliance on same to hold there was a lack of jurisdiction was improper.

Pursuant to *Blackburn, supra*, the effect of a charge that fails to comply with KRS 161.790(3) is reversible error because it is a denial of due process. Further supporting the improper denial of Mr. Earlywine's due process in this case is the fact that when he inquired about his due process rights within days after receiving the charge at issue, the superintendent declined, stating he had a right to suspend Mr. Earlywine without pay if he wanted to.³⁷ In order to effectively protect the contractual rights of teachers, the due process notice requirements in KRS 161.790 must be strictly complied with.

Prior to suspending a teacher without pay, the superintendent is also required to provide notice to the school board. KRS 161.790(3) There is no such notice in the record in this case. Since the attempt to suspend Mr. Earlywine without pay was legally defective, the suspension was of no effect and following Mr. Earlywine's reinstatement, he was to be "paid his full salary for the period of suspension." KRS 161.790(8).

CONCLUSION

Paris admittedly derives its governmental immunity from its status as a State Agency of the Commonwealth of Kentucky. As detailed in the foregoing, KRS 45A.245, without restriction or limitation, "waived governmental immunity on *all* claims brought by *all* persons on *all* lawfully written contracts with the Commonwealth." *Rothstein*, 532 S.W.3d at 651. Because Paris is admittedly part of the Commonwealth, as that term is defined in KRS 45A.240(1), the waiver in KRS 45A.245 unambiguously applies to its

³⁷ Complaint at ¶ 13, TR 82.

lawfully written contract with Mr. Earlywine. It is respectfully submitted that the lower courts' application of KRS 45A.245 to this case should be affirmed.

Furthermore, because the notice requirements contained in KRS 161.790 were not complied with, the statute was not properly invoked, and any purported final action taken against Mr. Earlywine by Paris was legally deficient. At minimum, it is respectfully requested that this matter be remanded to the Trial Court for development of a factual record to address factual issues regarding Paris' attempted invocation of KRS 161.790.

Respectfully submitted,

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