IN THE COURT OF APPEALS OF TENNESSEE

DAVID BROCK, ANGEL BURRAGE, TRESA COOPER, SHARON CRAWFORD, KAREN CLARK HICKMAN, CAROLYN HINES, LAJUANA JONES, W. RUTH OBEN, MARY OLDAKER, AND MARTHA SMITH,	)	C/A NO. 03A01-9509-CV-00297
	)	HAMILTON COUNTY CIRCUIT COURT
Plaintiffs-Appellants,	)	
v.	)	HONORABLE WILLIAM L. BROWN, JUDGE
PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, PATTY CROCKER, NAOMI SMITHERMAN, AND DONNA WILCOX,	)	
Defendants-Appellees.	)	AFFIRMED AND REMANDED

LYNN PERRY, Cleveland, for Appellants

CHRISTOPHER H. STEGER and KAREN M. SMITH of MILLER & MARTIN, Chattanooga, for Appellees

OPINION

_____ Susano, J.

In the joint complaint filed in this action, each of the ten plaintiffs asserted an individual cause of action against their former employer, Provident Life and Accident Insurance Company (Provident), and three of the company's supervisors. Each of the plaintiffs relied upon similar facts in charging that Provident had breached an employment contract, had breached its implied covenant of good faith and fair dealing, and had been guilty of the tort of negligent misrepresentation. The individual defendants were sued for actions on their part that formed a part of the basis for the suit against Provident. The trial court granted Provident's motion for summary judgment as to each claim. The plaintiffs appeal, raising the following questions as taken from their joint brief:

> 1. Did the trial court err in holding that there was no genuine issue of material fact regarding whether there was a written employment contract for a definite term?
>
> 2. Did the trial court err in holding that the contract was not a writing as contemplated by the Statute of Frauds, T.C.A. § 29-2-101(5)?
>
> 3. Did the trial court err in holding that there was no cause of action for negligent misrepresentation under the facts of this case and the law of Tennessee?
>
> 4. Did the trial court err in holding that there is no cause of action for breach of an implied covenant of good faith and fair dealing under the facts of this case and the law of Tennessee?

We affirm.

I

In the latter part of 1992, Provident assigned the plaintiffs to work in various positions in what was referred to as the company's Medicare Litigation Unit (Unit). Provident established the Unit to perform tasks directly related to Medicare litigation between Provident and the federal government.

Each of the plaintiffs was an employee of Provident prior to the creation of the Unit. In 1991, the plaintiffs, save one, signed a document entitled "Corporate Ethics Policy" that provided, in part, as follows:

> My dated signature below means that I have received and read Provident's Corporate Ethics Policy Manual, and that I understand I am required to comply with both the letter and the spirit of the policies in the manual as it is presented and as it may be amended from time to time . . . I acknowledge that neither my signature below nor my compliance with these policies creates or implies an employment contract. I understand that employment relationships with Provident remain on an at will basis.

The plaintiff Karen Clark Hickman did not sign this document; but, along with four of the other plaintiffs, she did sign a Provident employment application containing the following language:

> Provident makes no representation that employment with the Company is for any specified term of years. While Provident's past record can be illustrated by a long-standing tradition of job security and loyalty to satisfactory employees, Provident reserves the right to terminate employees for the Company's best interest, for unsatisfactory job performance, for unsatisfactory attendance, for violation of Company rules and policies, because an individual's services become excess to the Company's staffing needs, or at the sole discretion of Provident.

Provident claims that it attempted to staff the Unit with employees who were considered to be "at risk" or "excess," meaning that they "were on notice that their jobs were being eliminated or for whom there was a significant risk of termination." The plaintiffs dispute the company's contention, claiming that they were not advised they were "at risk" with respect to continued employment with Provident. Whether they were or not is not material to a resolution of the issues in this case.

The plaintiffs each filed an affidavit stating as follows:

> During my interview for employment with the Medicare Litigation Unit, I was told the job would last between 2 ½ to 3 years. I was never told "or as long as the Medicare Litigation lasted", nor was there any reference in my job confirmation as to my employment lasting only as long as the Medicare Litigation lasts.
>
> It was never stated to me in any interview

> that the position for which I was to be hired was "temporary" in nature. I was clearly told the job would last between 2 ½ to 3 years.

As each plaintiff was hired to work in the Unit, that person received a memorandum labeled "job offer confirmation." These were identical in all respects except for name, date and position. Each provided as follows:

> We are excited about your decision to accept the [title] position in the Medicare Litigation Claims Office. Since you will be coming on board with us effective [date], there are several items of important information that I would like to reiterate:
>
> (1) This project assignment period is between 2 ½ to 3 years.
>
> (2) Due to the sensitivity of the assignment for Medicare Litigations Unit, you will not be eligible for job posting for 1 ½ years.
>
> (3) Consistent with all of our Company job offers, this is not a contractual agreement for guaranteeing future employment.
>
> (4) The office will be located in Chattanooga and will be considered a field office.
>
> We trust that this job offer information for the Medicare Litigation Claims office, clarifies or confirms what has been previously discussed with you at some point during the selection process. If you have additional questions, please feel free to contact me or Sahira Sorrells at extension 8959.

> Again, we're excited about your decision and look forward to you joining the Medicare Litigation Claims team!

The Medicare litigation apparently was concluded sooner than anticipated. A settlement was reached with the federal government approximately one year after the Unit was created. After the litigation was settled, the Unit was disbanded and the plaintiffs were discharged. The duration of their employment ranged from 7 months, 25 days to 10 months, 11 days.

The plaintiffs claim they were contractually guaranteed employment for a period of 2 ½ to 3 years, and that Provident made a negligent misrepresentation when it told each of them that their jobs with the Unit would last that long. Provident denies making a contractual guarantee of employment for a specific term, and contends that it expressly informed each of the plaintiffs that "the job would last between two and one-half to three years, or as long as the Medicare Litigation lasted."

The trial court found that the plaintiffs' employment status remained "at-will" throughout the course of their employment with Provident, and that the undisputed material facts did not make out a claim for breach of a covenant of good faith and fair dealing or for negligent misrepresentation, as a matter of law. The trial court further found that "[a]ny contract of employment or agreement that existed between the plaintiffs and

Provident was an oral contract," and consequently that it "is unenforceable under the Statute of Frauds."

II

Our standard of review in a summary judgment case is well-defined. In deciding whether a grant of summary judgment is appropriate, we must determine "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.03. We take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences from that evidence in its favor, and discard all countervailing evidence. *See* ***Byrd v. Hall***, 847 S.W.2d 208, 210-11 (Tenn. 1993). If, after applying this standard, we find that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law, we must affirm the grant of summary judgment.

III

Tennessee recognizes and follows the "at-will" employment doctrine, meaning that in the absence of a clear contractual agreement to the contrary, either party has the concomitant right to terminate the employment relationship at any

time, with or without cause. ***Bennett v. Steiner-Liff Iron & Metal Co.,*** 826 S.W.2d 119, 121 (Tenn. 1992). Prior to the creation of the Unit, plaintiffs were clearly employees-at-will, and, as evidenced by the documents they signed in 1991, they were well aware of their at-will status. This observation does not end our inquiry, however, because Provident and the plaintiffs could have later modified their agreement during the course of negotiations regarding employment with the Unit, so as to provide for a definite and guaranteed term of employment. *See* ***Davis v. Connecticut Gen. Life Ins. Co.,*** 743 F. Supp. 1273, 1278 (M.D. Tenn. 1990) ("the non-existence of a definite term of employment at the outset of employment does not preclude the modification of the employment contract to provide for a definite term. . ."); ***Shelby v. Delta Air Lines, Inc,*** 842 F. Supp. 999, 1006 (M.D. Tenn. 1993).

Plaintiffs contend that such a modification occurred in this case. The plaintiffs make two arguments in support of their contention. First, they argue that the memorandum entitled "job offer confirmation" that Provident sent each of them constituted a written contract for a definite term of employment for 2½ to 3 years. Alternatively, they argue if the memorandum is deemed insufficient to create an express written contract, that they and Provident orally contracted for such a guaranteed term. In that instance, they contend the memorandum is sufficient to satisfy the "writing" requirement of the Statute of Frauds, which provides that no action shall be brought upon a contract not to be performed within one year, "unless the [contract], upon which

such action shall be brought, or some memorandum or note thereof, shall be in writing. . .” T.C.A. § 29-2-101(5).

Regarding the claim of a written contract, this court recently considered a similar contention in the case of ***Loeffler v. Kjellgren,*** 884 S.W.2d 463 (Tenn.App. 1994), wherein the following is found:

> . . . there is a presumption in Tennessee that employment is terminable at will. ***Bates v. Jim Rule Chevrolet, Inc.,*** No. 16, 1990 WL 51295, at *10 n.4 (Tenn.App. 26 April 1990) (citing ***Combs v. Standard Oil Co.,*** 166 Tenn. 88, 59 S.W.2d 525 (1933)). One Tennessee federal district court has espoused that in order to overcome this presumption, *the employer must use specific language which guarantees employment for a definite time.* ***Davis v. Connecticut Gen. Life Ins. Co.,*** 743 F.Supp. 1273, 1280 (M.D.Tenn. 1990).

Id. at 468. (Emphasis added). Also relevant to the present analysis are the general principles of contract law set forth in the case of ***Jamestowne on Signal, Inc. v. First Federal Sav. & Loan Ass’n.,*** 807 S.W.2d 559, 564 (Tenn.App. 1990):

> It is well established in this jurisdiction that a contract can be expressed, implied, written, or oral, but an enforceable contract must, among other elements, result from a meeting of the minds and must be sufficiently definite to be enforced. . .The contemplated mutual assent and meeting of the minds cannot be accomplished by the unilateral action of one party, nor can it be accomplished by an ambiguous course of dealing between the two parties from which differing inferences

> regarding continuation or modification of the original contract might reasonably be drawn.

Id. at 564 (citations omitted).

The plaintiffs' contention that the "job offer confirmation" memorandum constituted an express written contract for a specific duration must be rejected for at least three reasons. First, there is no "specific language which guarantees employment" as required by the court in ***Loeffler*** to remove an employment relationship from an at-will status. The memorandum states only that "[t]his *project assignment* period is between 2 ½ to 3 years." (emphasis added). We do not think this statement can be "bootstrapped" into an enforceable promise that the plaintiffs' *employment* is guaranteed for that long. Second, the memorandum expressly states the following: "[c]onsistent with all of our Company job offers, *this is not a contractual agreement for guaranteeing future employment*." (Emphasis added). It would be incongruous to find a contract between the parties guaranteeing employment in the face of such an unequivocal assertion to the contrary in the document itself. Finally, the document did not state a definite term. The job was for a period "*between* 2 ½ to 3 years." (Emphasis added). The memorandum is insufficient as a matter of law to create an express contract of the nature urged by the plaintiffs.

The argument that the parties orally contracted for a specific term of 2½ to 3 years must fail for similar reasons. We examine the affidavits of the plaintiffs in order to determine whether their statements, accepted by us as true, are sufficient to establish the existence of an oral contract of employment for a specific term. The two paragraphs in each of the affidavits that are relevant to this inquiry read as follows:

> During my interview for employment with the Medicare Litigation Unit, I was told *the job would last* between 2 ½ to 3 years. I was never told "or as long as the Medicare Litigation lasted", nor was there any reference in my job confirmation as to my employment lasting only as long as the Medicare Litigation lasts.
>
> It was never stated to me in any interview that the position for which I was to be hired was "temporary" in nature. I was clearly told *the job would last* between 2 ½ to 3 years.

(Emphasis added). Even accepting these statements as true, as we must under our summary judgment standard of review, we find they are insufficient as a matter of law to demonstrate an enforceable oral contract for a specific term of employment. This proof shows only that Provident gave the plaintiffs an estimate of how long it anticipated the Medicare litigation would last. The plaintiffs have presented no evidence suggesting that Provident guaranteed *their employment* would last any definite duration. This is further supported by the indefinite nature of the 2 ½ to 3 year period. Our holding on this matter renders moot the

question of the application of the Statute of Frauds to this case.

IV

We next address the plaintiffs' contention that Provident was guilty of negligent misrepresentation by neglecting to inform them that their positions with the Unit would last only as long as the Medicare litigation lasted. As a general rule,

> a party may be held liable for damages caused by his failure to disclose material facts to the same extent that a party may be liable for damages caused by fraudulent or negligent misrepresentations.

Macon County Livestock Market, Inc. v. Kentucky State Bank, Inc., 724 S.W.2d 343, 349 (Tenn.App. 1986), ***Gray v. Boyle Investment Co.***, 803 S.W.2d 678, 683 (Tenn.App. 1990). Liability for nondisclosure arises only where the person sought to be held responsible has a duty to disclose the material facts at issue. ***Macon County***, 724 S.W.2d at 349.

Accepting all of plaintiffs' proof on this matter as true, we do not think it can be fairly said that Provident in any way concealed the fact that the plaintiffs' positions with the Unit were "temporary" in that they were tied in duration to the Medicare litigation itself. Each plaintiff knew that he or she was being hired for a position in a unit that was directly

related to litigation. The fact that Provident gave the plaintiffs an estimate of the Unit's "life" underscores the fact that its duration was unclear and undeterminable. How long litigation will last is always a matter of conjecture. Furthermore, it is implicit in any position related solely to specific litigation that once the litigation is concluded, the position is concluded with it.

The Court of Appeals has stated that

> [a] party to a contract has a duty to disclose to the other party any material fact affecting the essence of the subject matter of the contract, unless ordinary diligence would have revealed the undisclosed fact.

Lonning v. Jim Walter Homes, Inc., 725 S.W.2d 682, 685 (Tenn.App. 1986), ***Garrett v. Mazda Motors of America,*** 844 S.W.2d 178, 181 (Tenn.App. 1992). We find that in the instant case, ordinary common sense would reveal the "undisclosed" fact. In the final analysis, Provident made it clear that the job was "temporary" by making no promises that the plaintiffs' positions would last for a specific term; its memorandum clearly stated that "this is not a contractual agreement for guaranteeing future employment." It was not necessary to tell the plaintiffs that when the work of the Unit was completed, their jobs were completed. Their jobs had no "life" other than the one necessitated by the litigation. Provident did not have to tell the plaintiffs something that was obvious from the dealings between the parties.

V

Finally, the plaintiffs contend that Provident, by failing to inform them that their positions were "temporary" in the sense that they were tied in duration to the Medicare litigation, breached an implied covenant of good faith and fair dealing between itself and the plaintiffs. We disagree.

It is clear that parties to employment contracts are held to a standard of good faith and fair dealing. ***Williams v. Maremont Corp.,*** 776 S.W.2d 78 (Tenn.App. 1988); ***Hooks v. Gibson,*** 842 S.W.2d 625 (Tenn.App. 1992). In ***Williams,*** the court stated of an employment contract, "[t]his contract, as all contracts, impliedly provides for good faith and fair dealing between the parties." ***Williams,*** 776 S.W.2d at 81. The ***Hooks*** court noted that "all parties to contracts are held to the duty of good faith and fair dealing, which is also applicable to employment contracts." ***Hooks,*** 842 S.W.2d at 628.

In the instant case, Provident did not breach the covenant of good faith and fair dealing. As we have previously indicated, each of the plaintiffs was aware that his or her employment was directly tied to a project with a limited life. Since they knew this, and since each of them acknowledged in writing that their employment was at-will, they cannot now claim that they were treated unfairly when their employment was terminated.

For the aforementioned reasons, the judgment of the trial court is affirmed and this case remanded for collection of costs assessed below pursuant to applicable law. Costs on appeal are taxed and assessed to appellants.

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Charles D. Susano, J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.