COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2007-SC-0769-DG

BRAVO! DEVELOPMENT, INC. — APPELLANT

v.

APPEAL FROM COURT OF APPEALS
CASE NO. 2006-CA-002163

SCOT SINGLETON — APPELLEE

BRIEF OF *AMICI CURIAE*, KENTUCKY CHAMBER OF COMMERCE, KENTUCKY ASSOCIATION OF MANUFACTURERS, AND KENTUCKY SHRM (SOCIETY FOR HUMAN RESOURCE MANAGEMENT) COUNCIL, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, via first class U.S. Mail, postage prepaid, this 15 day of July, 2008, on the following: Hon. Fred A. Stine V, Campbell County Circuit Court, 330 York Street, Newport, Kentucky 41071; Clerk Samuel Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; P. Douglas Barr, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; Andrew C. Smith, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43216-1008; Scott A. Carroll and Anthony L. Osterlund, Vorys Sater, Seymour and Pease LLP, 221 East Fourth Street, Cincinnati, Ohio 45202; Sherrill Hondorf, 221 Front St., #4, New Richmond, Ohio 45157; and Margo Grubbs, 327 West Pike Street, Covington, Kentucky 41011. The undersigned further certifies that these *Amici* have not withdrawn the record on appeal.

COUNSEL FOR *AMICI CURIAE*, KENTUCKY CHAMBER OF COMMERCE, KENTUCKY ASSOCIATION OF MANUFACTURERS and KENTUCKY SHRM COUNCIL

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PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

The purpose of this brief is to assist this Court in considering the central question presented by this appeal: may a claimant pursue a wage and hour claim to its conclusion before the Kentucky Department of Labor ("KDOL"),[1] accept a settlement of all unpaid back wages, release his "employer from any further liability," and then file suit in circuit court for substantial additional relief based upon the same wage and hour violation?

An affirmative answer to this question will undermine the dual enforcement mechanism contemplated under the Kentucky Wages and Hours Law, KRS Chapter 337 (the "Statute"), destroying the finality of administrative settlements obtained under the KDOL's auspices. Given the recent proliferation of wage and hour litigation, including class actions, affirming the Court of Appeals' Opinion (the "Opinion") could result in a litigation explosion, shifting most enforcement from the KDOL to our already overburdened courts.

The Kentucky Chamber of Commerce (the "Chamber") is the largest business organization in the Commonwealth, representing more than 13,000 companies and customers that share a strong interest in enhancing and protecting the state's economic future, while employing more than 400,000 Kentucky workers - nearly 25 percent of the state's private workforce. The mission of the chamber is to provide leadership and serve as a consensus-builder and advocate for the advancement of Kentucky.[2]

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[1] It should be noted that the KDOL no longer exists. By Executive Order 2008-472 dated June 2, 2008, the Governor of Kentucky reorganized the Executive Branch of government, establishing the Labor Cabinet and assigning to it all duties, functions, responsibilities, personnel, records, files, equipment, budgets, appropriations, allotments, and cash balances formerly assigned to the Department of Labor within the Environmental and Public Protection Cabinet. For simplicity, we will continue to reference the agency as "KDOL," with such designation referring to the Kentucky Department of Labor before June 2, 2008, and the Kentucky Labor Cabinet after June 2, 2008.

[2] For a description of the chamber's membership and mission, see http://www.kychamber.com.

The Kentucky Association of Manufacturers ("KAM") is the Commonwealth's only trade association focused exclusively on the manufacturing sector, with over 400 member companies, which together employ over 120,000 Kentuckians. The KAM and its member employers are dedicated to enhancing education and worker skills, as well as responsibly achieving environmental and safety initiatives, to the benefit of all Kentuckians.

The Kentucky SHRM (Society for Human Resource Management) Council, Inc. ("Kentucky SHRM") is comprised of representatives from all ten Kentucky SHRM chapters. The Kentucky SHRM chapters are comprised of approximately 600 members who are all human resource professionals. In addition, there are over 1,000 at-large members of Kentucky SHRM within Kentucky. Kentucky SHRM coordinates the efforts of the Kentucky SHRM chapters, as well as the at-large members, with the national Society of Human Resource Management. Kentucky SHRM serves its member human resource professionals through professional development, including a human resource certification process, regional and state continuing education conferences, workplace safety training, and philanthropic activities. Kentucky SHRM prides itself on being an association of professionals concerned with the needs and interests of Kentucky workers and their employers.

Given their respective roles representing Kentucky businesses, manufacturers and human resource professionals, these *amici* believe the Opinion below will create havoc in the administration and resolution of Kentucky wage and hour claims under the Statute.

The Opinion invites piecemeal resolution of wage and hour claims brought under KRS Chapter 337, suggesting as it does that "in most cases . . . recovery of unpaid

wages" will be accomplished through the DOL administrative process "followed by an action pursuant to KRS 337.385." *Opinion*, slip op. at 9-10. This approach stands in stark contrast to this Commonwealth's policies favoring finality, encouraging settlement of claims, enforcing settlement agreements, and against splitting causes of action.

Should the Opinion be affirmed, it is hard to imagine any employer doing what employer Bravo! Development ("Bravo") did here -- paying nearly $400,000 to resolve wage and hour claims[3] with the KDOL's approval, using the KDOL's own release -- knowing that such payment, even accompanied by a release of "any further liability for your claim," would not bar a subsequent court action for that same amount in liquidated damages, plus attorneys' fees. The Opinion thus has the effect of divesting the KDOL of its legislatively granted powers to investigate, and ultimately resolve, wage and hour claims. As a result, employers facing wage and hour claims will simply refuse to enter into KDOL-approved settlements, choosing instead to litigate such disputes. No party will win in that scenario, as more claims will go to our already overburdened trial courts, and the often lengthy and difficult litigation process will ensure that employees' receipt of unpaid wages will be substantially delayed.

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[3] As part of the settlement, Appellee Scot Singleton ("Singleton") received a gross amount of $4,139.08 in back wages.

ARGUMENT

I. THE OPINION CONTRAVENES THE DUAL ENFORCEMENT MECHANISM CONTEMPLATED IN THE STATUTE, INCLUDING THE FINALITY DOCTRINES NECESSARY TO ITS EFFECTIVE ADMINISTRATION.

A. The Opinion Fails To Acknowledge The KDOL's Key Role In The Statute's Interpretation And Enforcement.

The Opinion fails to accord any significance to the KDOL's legislatively mandated role of enforcing and administering the Statute. Instead, the Opinion views the various provisions of the Statute as though they exist in a vacuum, without ascertaining how they can and should be applied together in a rational statutory scheme. The Court of Appeals thus ignored its role to construe statutes *in pari materia*, such that the courts are required to construe together those statutes having a common purpose or subject matter. *Dieruf v. Louisville & Jefferson Co. Bd. of Health*, 304 Ky. 207, 200 S.W.2d 300, 302 (1947); *Hardin Co. Fiscal Ct. v. Hardin Co. Bd. of Health*, 899 S.W.2d 859, 862-63 (Ky. App. 1995). Moreover, the Opinion pays no heed to policies served by the prompt, cost-effective resolution of claims at the administrative level, without the necessity, time and expense of resorting to the courts for relief. *See, e.g., Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky. 2004) (exhaustion of remedies doctrine intended to permit agency to "function efficiently" and to "afford the parties and the courts the benefit of [the agency's] experience and expertise without the threat of litigious interruption.").

B. The Kentucky Civil Rights Act And The Statute Provide For Similar Dual Enforcement Schemes, And The Same Finality Principles Should Apply To Each.

Although this case concerns settlement of wage and hour complaints before the KDOL, and the binding election of remedies arising from such administrative

proceedings, the developed jurisprudence under the Kentucky Civil Rights Act ("KCRA") provides helpful guidance for this Court's analysis of the Statute's analogous dual enforcement scheme.

On March 21, 1974, the legislature approved a new section of the KCRA, KRS 344.450[4]:

> Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.

Just 12 days later, on April 2, 1974, the legislature approved a new section of the Statute, KRS 337.385:[5]

> (1) Any employer who pays any employee less than wages and overtime compensation to which such employee is entitled under or by virtue of KRS 337.020 to 337.285 shall be liable to such employee affected for the full amount of such wages and overtime compensation, less any amount actually paid to such employee by the employer, for an additional equal amount as liquidated damages, and for costs and such reasonable attorney's fees as may be allowed by the court. Provided, that if, in any action commenced to recover such unpaid wages or liquidated damages, the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of KRS 337.020 to 337.285, the court may, in its sound discretion, award no liquidated damages, or award any amount thereof not to exceed the amount specified in this section. Any agreement between such employee and the employer to work for less than the applicable wage rate shall be no defense to such action. Such action may be maintained in any court of competent

[4] Acts 1974, ch. 104, § 8.

[5] Acts 1974, ch. 391, § 9.

> jurisdiction by any one (1) or more employees for and in behalf of himself or themselves.
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> (2) At the written request of any employee paid less than the amount to which he is entitled under the provisions of KRS 337.020 to 337.285, the executive director may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The executive director in case of suit shall have power to join various claimants against the same employer in one (1) action.

These provisions, together with the pre-existing administrative avenues for relief found in the KCRA and the Statute, provide the framework for each statute's dual enforcement scheme. This Court has noted that the KCRA "provides alternative sources of relief, one administrative and one judicial." *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 820 (Ky. 1992). Significantly, these alternative sources of relief are mutually exclusive, and once substantial steps have been taken to pursue a remedy in one forum, such constitutes a binding election of remedies precluding resort to the other forum. *See, Vaezkoroni v. Domino's Pizza, Inc.*, 914 S.W.2d 341, 342-43 (Ky. 1995) ("[o]nce any avenue of relief is chosen, the complainant must follow that avenue through to its final conclusion"). *See, also, Kindred Hospitals Ltd. v. Lutrell*, 190 S.W.3d 916, 921 (Ky. 2006) (citing *Vaezkoroni,* this Court rejected a litigant's ability to have two bites at relief, under different appellate standards).[6]

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[6] Although it is apparent that the mere **filing** of an administration complaint will not bar a subsequent court action under the election of remedies doctrine, it is equally clear that *Vaezkoroni* remains valid precedent for the concept that a claimant taking substantial steps in the administrative forum, so as to effect an election of remedies in that forum, will be barred under that doctrine from seeking further relief in court. *Lutrell*, 190 S.W.3d at 921, citing *Young v. Hammond*, 139 S.W.3d 895, 903 (Ky. 2004) ("deliberate and settled choices and pursuit of one [mode of redress] will preclude [the] later choice and pursuit of the other" mode of redress).

Nor is the election dependent upon the remedies available in each forum. Thus, even though KRS 344.450 permits an individual "an opportunity in circuit court to have the fullest range of remedies available," *Meyers*, 840 S.W.2d at 820, a decision to instead proceed to relief before the Kentucky Commission on Human Rights is a binding election of remedies, barring a subsequent circuit court action for additional or alternative relief under KRS 344.450. *See*, *Founder v. Cabinet for Human Resources, Dept. for Employment Services, Div. of Unemployment Ins. and Dept. of Personnel*, 23 S.W.3d 221, 223 (Ky. App. 1999) (holding that, once a charge was filed with the Kentucky Commission on Human Rights, "a subsequent action in circuit court based on the same civil rights violation(s) is barred.").

In *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354 (Ky. 2005), this Court recognized that KRS 337.385 affords a direct circuit court action for claims under the Statute, just like KRS 344.450 affords for claims under the KCRA. Given the similarity between these provisions, enacted just days apart, and the dual enforcement schemes each provides, it stands to reason that they should be construed in a similar fashion.[7]

Accordingly, this Court should clarify or establish a rule of law that once substantial steps have been taken to pursue an administrative remedy before the KDOL,

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[7] The Opinion improperly characterized the relief available under KRS 337.385 as an independent remedy, somehow unrelated to the underlying statutory violation of KRS 337.065; KRS 337.385 cannot stand alone to permit relief without the assertion of such an underlying violation. KRS 337.385 establishes the relief available in a circuit court action for failure to pay the full amount of wages and overtime required by KRS 337.020 to 337.285. Likewise, KRS 344.450 establishes the relief available in a circuit court action for commission of unlawful employment practices, most of which are set out in KRS 344.040. Structurally, the two statutes work in the same way. Just as a KRS 344.450 action is not cognizable without establishing an unlawful employment practice set forth elsewhere in the KCRA, so too a KRS 337.385 action is not cognizable without establishing a failure to pay wages or overtime as required by KRS 337.020 through 337.285. Thus, in this regard as well, the Statute follows the KCRA's structure, and should be applied in the same way.

such will constitute a binding election of remedies barring subsequent circuit court litigation arising out of the same alleged violation.

C. The Opinion's Rejection Of The Election Of Remedies Doctrine Is Premised Upon An Illogical Conclusion.

The Opinion purports to consider the election of remedies doctrine, which it explains:

> means that when a person has at his disposal two modes of redress, which are contradictory and inconsistent with each other, his deliberate and settled choice and pursuit of one will preclude his later choice and pursuit of the other.

Opinion, slip op. at 10. Among the cases the Opinion cites for this proposition is *Collings v. Scheen*, 415 S.W.2d 589, 591 (Ky. 1967). Given the Opinion's rejection of the election of remedies doctrine, it is ironic that the Court of Appeals would have even cited *Collings*, in which our highest court recognized over 40 years ago that "[t]he doctrine of election of remedies is, of course, thoroughly entrenched in the jurisprudence of this State, and it is also received and almost universally approved." *Id.*

Noting the KDOL's position "that its administrative process does not provide for the recovery of KRS 337.385 [liquidated] damages," the Court of Appeals concluded that:

> it appears that the [K]DOL administrative process is not a "mode of redress." There being only one mode of redress, i.e., a circuit court action, the election of remedies doctrine is not applicable.

Opinion, slip op. at 11.

The Court of Appeals' assertion that the KDOL administrative process is not a "mode of redress" giving rise to the election of remedies doctrine begs the question: if not "redress," what exactly was the nearly $400,000 Bravo paid in back wages? Or, for

that matter, the sums paid by all other Kentucky employers resolving wage and hour claims before the KDOL?

D. The Opinion Violates The Commonwealth's Settled Policy Against Splitting Causes Of Action.

A corollary to the election of remedies doctrine is our "long recognized . . . prohibition against splitting a cause of action." *Kirchner v. Riherd*, 702 S.W.2d 33, 34 (Ky. 1985). *Kirchner* has continuing significance to the matters presented in this case, as the Opinion invites piecemeal resolution of wage and hour claims brought under the Statute:

> It stands to reason that in most cases the unpaid wages will have been recovered through the [K]DOL administrative process. As such the statute contemplates the recovery of unpaid wages outside of the judicial process followed by an action pursuant to KRS 337.385.

Opinion, slip op. at 9-10.

Not only is this approach contrary to the statutory structure analyzed above, this endorsement of a successive circuit court action for additional relief following completion of KDOL administrative proceedings arising out of the same violation of KRS 337.065 is antithetical to the *Kirchner* Court's holding that "the law will not permit a party who has sued for a part of an entire demand to sue for the residue in another action." *Kirchner*, 702 S.W.2d at 34, citing *Pilcher v. Ligon*, 91 Ky. 228, 15 S.W. 513 (1891). In *Kirchner*, an injured driver in an auto accident case (Riherd), filed a suit in small claims court for his property damage and loss of use. He later filed an action in circuit court for his personal injuries. The Court rejected concerns that the small claims court could afford only limited relief, holding:

> The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.

Kirchner, 702 S.W.2d at 35.

The Court explained the policy rationale, rooted in finality principles, for this holding:

> The theory for the prohibition against splitting a cause of action is [based] largely on the ground that fairness to the defendant and sound judicial administration require that at
>
> some point litigation over a particular controversy be brought to a final conclusion.

Id. at 35.[8] But perhaps the best explanation for refusing to permit successive court actions arising out of the same claim was supplied over a century ago by our highest court:

> to allow [plaintiff] to split the entire cause of action into many causes of action, and to harass the defendant with separate action on each, would be a travesty upon legal justice.

Id. at 34, citing *Pilcher*, 15 S.W. at 513.

The Court of Appeals recently reaffirmed the principles announced in *Kirchner,* noting this Court's adoption of *Restatement (Second) Judgments*, § 24 (1982), which provides:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of

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[8] Citing yet another venerable precedent, the Court added that "[t]he reason for such declared rule is that it is the duty of a plaintiff to assert his entire cause of action resulting from a single tort, and upon failure to do so he, in effect, renounces his right to recover other items of damages in subsequent actions." *Kirchner,* at 34, *citing Travelers Indemnity Co. v. Moore*, 304 Ky. 456, 201 S.W.2d 7, 10 (1947).

> merger or bar (see §§ 18, 19),[9] the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose.

Ison v. Thomas, 2007 WL 1194374 at *1 (Ky. App. 2007) (Abramson, J.) (pursuant to CR 76.12(7) the unpublished decision is not attached to this amicus curiae brief).

In expressly endorsing Singleton's successive court action to obtain additional relief arising out of the same alleged violation of law, for which Singleton obtained relief at the KDOL, the Opinion violates these principles.

II. THE OPINION IS CONTRARY TO THE COMMONWEALTH'S POLICY ENCOURAGING SETTLEMENT OF CLAIMS.

A. The Commonwealth's Public Policy Encouraging Settlement Was Established Long Ago.

The Opinion's rejection of the fundamental purpose of the KDOL-approved release here -- accepting the "payment in full" of back wages as a "satisfactory settlement . . . releasing this employer from any further liability for your claim" -- is contrary to the "public policy of this and every other state," long ago recognized by our highest court:

> to deny to a railroad company and one of its employe[e]s the power to agree upon a binding settlement of the amount of the damages to which the employe[e] is entitled for an injury suffered by him on account of the negligent act of the company, and to deny to the company the rights to pay the employe[e] the damages which the latter is willing to receive in settlement of his claim, and to the employe[e] the power and right to contract for such settlement and to receive payment, would compel all such adjustment to be made at the end of litigation and by the judgment of a court, which is contrary to the public policy of this and every other state.

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[9] The *Ison* court further explained that "[i]f the plaintiff prevails on his initial claim, other claims arising from the same transaction are said to merge with his judgment, and if the plaintiff loses initially, that judgment is said to bar any such subsequent claim." *Ison*, 2007 WL 1194374, at *2, *citing Restatement (Second) Judgments*, §§ 18, 19 (1982).

Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Carmody, 188 Ky. 588, 222 S.W. 1070, 1072 (1920).

Moreover, our courts have rejected notions that settlements should be scrutinized based upon which party cut a better deal. *See, e.g., Whitney v. Louisville & Nashville Railroad Co.*, 296 Ky. 381, 177 S.W. 2d 139, 141 (1944) ("It is the duty of the courts to encourage rather than discourage amicable settlements as a mode of adjusting justiciable differences no matter that one party may have got the best of the bargain."); *Posey v. Lambert-Grisham Hardware Co.*, 197 Ky. 373, 247 S.W. 30, 34 (1923) ("It is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims; and the nature or extent of the rights of each should not be nicely scrutinized.").

By reversing the trial court's Order giving effect to a KDOL supplied form "releasing this employer from any further liability for your claim," the Opinion ignores these important principles.

B. This Court Recently Reiterated The Commonwealth's Policy To Encourage Settlement, Even Of Statutory Claims.

Just this spring, this Court reiterated the principle that a release agreement -- specifically including a release of statutory claims brought under the KCRA -- "is effective to waive a plaintiff's right to bring a claim." *Humana Inc. v. Blose*, 247 S.W.3d 892, 892 (Ky. 2008). In *Blose*, this Court relied heavily upon *American General Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688 (Ky. 2002), which "held that the litigant's selection of the Workers' Compensation administrative process, and subsequent acceptance of benefits thereunder, precluded her from bringing suit for the same injuries and disabilities under the Kentucky Civil Rights Act." *Blose*, 247 S.W.3d at 895-896.

In *Hall*, the employee's mere receipt of workers' compensation benefits barred prosecution of a KCRA claim arising out of the same facts, even though the KCRA -- unlike the Workers' Compensation Act -- permits emotional distress damages for embarrassment and humiliation. *See, e.g., Meyers*, 840 S.W.2d at 817-818. *See also Toyota Motor Mfg., U.S.A., Inc. v. Epperson*, 945 S.W.2d 413, 415 (Ky. 1996) (noting different public policies underlying the KCRA and Workers' Compensation Act, with the latter limited to "affording financial protection to workers injured or killed in the course of employment.") (citation omitted).

Blose also relied on *Frear v. P.T.A. Industries,* 103 S.W.3d 99, 106 (Ky. 2003), in which this Court defined a release agreement as:

> a private agreement amongst parties which gives up or abandons a claim or right to the person against whom the claim exists or the right is to be enforced or exercised. In other words, a release is a discharge of a claim or obligation and surrender of a claimant's right to prosecute a cause of action.

Id., citing 66 Am.Jur.2D, *Release* §1 (2001). The "cause of action" here concerns the employer's alleged violation of KRS 337.065 by requiring employees to participate in a tip pool. Damages for this violation are set forth at KRS 337.990(5) (administrative remedy of "full payment to the employee by reason of the violation") and KRS 337.385 (damages available in circuit court action, including liquidated damages). The Opinion thus fails to distinguish between the cause of action, wherever prosecuted, and the damages available, wherever obtained.

Incongruously, the Opinion holds that the release at issue -- supplied by the KDOL -- "unambiguously applies only to amounts owed to Singleton pursuant to Bravo's violations of KRS 337.065, and does not extend to amounts which may be owed pursuant

to KRS 337.385." *Opinion,* slip op. at 7. This hyper-technical reading of a release obtained under the KDOL's auspices utterly ignores the salutary purposes of resolving claims at the administrative level, without the necessity of going to court.

Consistent with this Court's recognition that "the settlement of cases serves the dual and valuable purposes of reducing the strain on scarce judicial resources and preventing the parties from incurring significant litigation costs," *LaFleur v. Shoney's, Inc.*, 83 S.W.3d 474, 478 (Ky. 2002), failing to give effect to a release obtained by the KDOL would eviscerate that policy and virtually guarantee that all wage and hour matters under the Statute will be resolved in court.

CONCLUSION

For the foregoing reasons, the Chamber, KAM and Kentucky SHRM ask this Court to honor long-established principles favoring finality, encouraging settlement of disputes, enforcing settlement agreements, and against splitting causes of action. These *amici* respectfully request that the Court reverse the Court of Appeals' Opinion and reinstate the judgment entered by the Campbell Circuit Court.

Respectfully submitted,

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