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

**BRAVO! DEVELOPMENT, INC.**

**APPELLANT**

v.

**SCOT SINGLETON**

**APPELLEE**

**BRIEF OF DEFENDANT- APPELLANT BRAVO! DEVELOPMENT, INC.**

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**CERTIFICATE REQUIRED BY CR 76.12(6)**

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by United States Postal Mail on June \_\_, 2008: Clerk Samuel Givens, Jr., Commonwealth of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Fred A. Stine V, Campbell County Circuit Court, 330 York St., Newport, Kentucky 41071; Sherrill Hondorf, 221 Front St., #4, New Richmond, OH 45157, and Margo Grubbs, 327 West Pike Street, Covington, KY 41011.

  
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**I. INTRODUCTION**

This case presents the issue of whether an employee who elected to file a claim for unpaid wages with the Kentucky Department of Labor (“DOL”) and accepted a settlement resolving that unpaid wages claim may then file a court action pursuant to KRS 337.385(1) arising out of the same, settled claim for unpaid wages. In Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005) this Court decided that aggrieved employees have two distinct options to pursue redress of claims for unpaid wages: (1) an administrative claim filed with the DOL; or (2) a court action pursuant to KRS 337.385. This case presents the unique question of whether the employee may do both.

**II. STATEMENT CONCERNING ORAL ARGUMENT**

The Court’s decision in this case will have significant ramifications not only for employers and employees throughout Kentucky, but also for the DOL and the Kentucky court system. If allowed to stand, the Court of Appeals’ decision will result in aggrieved employees pursuing the same claim for unpaid wages first through a DOL administrative action and then judicially through a direct court action pursuant to KRS 337.385, where the possible monetary recovery is greater. If permitted to stand, the Court of Appeals decision will effectively eliminate the DOL’s ability to perform its mission of quickly and efficiently investigating and resolving wage claims. Employers will have little incentive to settle wage claims in a DOL proceeding if employees can accept a settlement but then immediately try to increase their monetary recovery on the “settled” claim through a court action seeking liquidated damages and attorneys’ fees. Fewer settlements will mean that the DOL or the employees themselves will be forced to pursue their wage claims in court, increasing the cost and burden on employers, employees, and the court system. Because of the far-reaching significance of the issues involved in this case,

Bravo! Development, Inc. ("BDI") believes it would be helpful for the Court to hear oral argument addressing the issues in this case.

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### III. STATEMENT OF THE CASE

On March 18, 2005, Appellee/Plaintiff Scot Singleton (“Singleton”) filed a claim for unpaid wages with the Kentucky Department of Labor (“DOL”) based upon what he claimed was BDI’s improper policy of requiring its food servers to remit or “pool” their gratuities for the benefit of other employees in violation of KRS 337.065.<sup>1</sup> This practice is commonly referred to as “tip pooling.” The DOL commenced an investigation of Singleton’s claim.

On May 13, 2005, while the DOL was investigating Singleton’s claim, Singleton filed a verified class action Complaint in Campbell Circuit Court seeking to recover damages, including unpaid wages, liquidated damages and attorneys’ fees, from BDI pursuant to KRS 337.385(1).<sup>2</sup> The Complaint was based upon the same alleged unlawful practice of “tip pooling” that was the basis for Singleton’s DOL claim. The Circuit Court dismissed the Complaint for lack of subject matter jurisdiction. Following this Court’s decision in Parts Depot, Inc., the Circuit Court held:

If an employee initially chooses to file his or her claim in a court, KRS 337.385 applies. If an employee chooses to file his or her claim with the Department of Labor, however, he or she must still exhaust that administrative process because Parts Depot left the statutory scheme of KRS 337.310 intact.

(Appellant App. at Ex. 7.) Because Singleton and the purported class elected to pursue their unpaid wages claim administratively with the DOL and because they had not exhausted that process, the Circuit Court dismissed their class action Complaint. (Id.)

The administrative process ultimately resulted in a negotiated settlement between BDI and the DOL, on behalf of Singleton and others, in an amount in excess of \$390,000.

In connection with that settlement, Singleton received a gross settlement award of \$4,139.08 in back wages. Singleton and the purported class had the option of rejecting the settlement award and going forward with the administrative process to adjudicate their claims, but they did not. Rather, Singleton and a majority of the purported class members accepted the settlement award, received their checks for back wages and signed a Receipt of Payment of Back Wages, which included a release. The release provided in relevant part:

Your acceptance of these back wages as marked for the period indicated above means you are accepting this amount as a **satisfactory settlement** and are releasing this employer **from any further liability for your claim** as indicated above. (Emphasis added.)

(R., Vol. 1, p. 53; Appellant App. at Ex. 8.) As noted above, Singleton's only claim was that BDI failed to pay wages to which he was lawfully entitled because it required its servers to "tip pool." The Receipt of Payment of Back Wages expressly released that unpaid-wage claim associated with the alleged violation of KRS 337.065. (Id.)

Despite having accepted the settlement of his unpaid wage claim, Singleton filed a second class action Complaint against BDI on February 2, 2006 in the Campbell Circuit Court. The second Complaint was again based upon the same alleged failure pay wages because of the unlawful "tip pooling" practice but, this time the Complaint sought only liquidated damages and attorneys' fees pursuant to KRS 337.385 -- not back pay. Again, the Circuit Court dismissed Singleton's Complaint, holding that: (1) Singleton made an election to pursue his claim administratively through the DOL and failed to exhaust that remedy, thereby stripping the court of subject matter jurisdiction; and (2) Singleton

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<sup>1</sup> A copy of KRS 337.065 is attached as Appellant App. at Ex. 5.

<sup>2</sup> A copy of KRS 337.385 is attached as Appellant App. at Ex. 6.



knowingly and voluntarily released BDI from any further liability with regard to that claim. (R., Vol. 2, pp. 152-54; Appellant App. at Ex. 2.) Singleton requested reconsideration of the dismissal order and following additional briefing, the Circuit Court confirmed the dismissal of Singleton's complaint. (R., Vol. 2, pp. 203-04; Appellant App. at Ex. 3.)

Singleton appealed and on September 21, 2007, the Court of Appeals reversed and vacated the Circuit Court's dismissal entry. The Court of Appeals held: (1) the settlement and release of Singleton's wage and hour claim by the DOL did not specifically release Singleton's "claim" for the liquidated damages and attorney fees he possibly could be awarded in an action under KRS 337.385(1); and (2) the doctrines of election of remedies and exhaustion of administrative remedies did not bar Singleton's claim for KRS 337.385(1). Singleton v. Bravo! Dev., Inc., No. 2006-CA-002163-MR, 2007 WL 2741945 (Ky. Ct. App. Sept. 21, 2007) (hereinafter, the "Singleton Decision"). (Appellant App. at Ex. 1.)

This Court then granted BDI's timely Motion for Discretionary Review.

#### IV. ARGUMENT

##### A. **Singleton's Lawsuit Under KRS 337.385 Is Barred By Operation of the Doctrine of Election of Remedies.**

In Kentucky, the doctrine of election of remedies provides: "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." Young v. Hammond, 139 S.W.3d 895 (Ky. 2004); Collings v. Scheen, 415 S.W.2d 589, 591 (Ky. 1967); Brown v. Diversified Decorative Plastics, LLC, 103 S.W.3d 108, 113 (Ky. Ct. App. 2003). The purpose of the doctrine of election

of remedies is to prevent more than one redress for a single wrong. Lamb v. Lamb, 375 S.E.2d 685, 687 (N.C. Ct. App. 1989).

As this Court held in Parts Depo, there are two “modes of redress” available to an employee whose right to be paid wages has been abridged by a violation of Kentucky’s wage and hour statutes (KRS 337.020 - 337.405): (1) an administrative process pursued by filing a complaint with the DOL; *or* (2) a judicial process pursued by filing a direction action in court. See Parts Depo, 170 S.W.3d at 359. In this case, Singleton first deliberately chose to pursue his claim through the administrative process, then made the “settled choice” of accepting payment of his unpaid wages and releasing BDI from further liability. Accordingly, his “later choice” of seeking judicial redress for the exact same unpaid wage claim (tip pooling) is barred by operation of the doctrine of election of remedies.

**1. There Are Two Processes Available to Redress a Claim for Unpaid Wages Resulting from a Violation of KRS 337.065(3), an Administrative Process and a Judicial Process.**

Kentucky’s wage and hour statutes, which are contained in KRS Chapter 337, govern, among other things, the employer/employee relationship in respect to the employer’s obligation to pay wages and overtime compensation to the employee. KRS 337.065(3) expressly provides that it is unlawful for an employer to *require*<sup>3</sup> employees to “participate in a tip pool whereby the employee is required to remit to the pool any gratuity, or any portion thereof, for distribution among employees of the employer.” In this case, Singleton claimed that he and other servers in the employ of BDI were required

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<sup>3</sup> KRS 337.065(4) provides that, under certain circumstances, employees may voluntarily enter into an agreement to divide gratuities among themselves.

to participate in a tip pool and, as a result, were paid less than the wages to which they were otherwise entitled. (Appellant App. At Ex. 9.)

Where an employer has violated, in one way or another, an employee's statutory rights to be paid wages to which he or she is entitled, the statutes provide two distinct modes or processes to seek redress of the abridgement of that right. First, an aggrieved employee may file an administrative complaint with the DOL, which investigates the claim and the questioned employment practice. The DOL is then empowered to make determinations, orders and decisions concerning the questioned employment practice to enforce the rights and obligations arising under KRS 337.020 to 337.405, including the issuance of an order that the employer must pay the unpaid wages. Pursuant to KRS 337.310, the DOL's orders and decisions may be appealed to an administrative hearing to be conducted in accordance with KRS Chapter 13B. (Hereinafter, this process is referred to as "the Administrative Process.") Significantly, under the Administrative Process, an employee may recover the unpaid wages but not liquidated damages. (KRS 337.990(4).)

Before this Court's decision in Parts Depo, it was not clear whether *all* claims for unpaid wages were within the exclusive jurisdiction of the DOL, requiring all such claims to be adjudicated in the Administrative Process and limiting the circuit courts to appellate review.<sup>4</sup> In Parts Depo, this Court held that the plain language of KRS 337.385 provided for a second distinct process for an employee to seek redress of a claim that he or she had been paid less than the wages to which he or she is entitled: a direct action in court. (Hereinafter, the direct court action set forth in KRS 337.385(1) and (2) is referred to as "the Judicial Process.") Applying the principle of statutory construction that a specific

statute takes precedence over a conflicting general statute, this Court held that KRS 337.385 specifically provides that an employee [pursuant to KRS 337.385(1)] or the commissioner [pursuant to KRS 337.385(2)] may file an action in court and that: “Nothing in [KRS 337.310] or in KRS Chapter 13B can be construed as conferring upon the Department of Labor exclusive jurisdiction to resolve all disputes pertaining to nonpayment of salary or wages.” See Parts Depo, 170 S.W. 3d 354.at 362. This Court held:

We now hold that KRS 337.385, the more specific statute, takes precedence over KRS 337.310, the general statute, whenever an employee, or the commissioner on the employee’s behalf, chooses to exercise the judicial remedy for recovery of unpaid wages. Id. at 361-362

Although this Court recognized a Judicial Process that is distinct from the Administrative Process, it was not called upon in Parts Depot to decide whether the two were mutually exclusive. The Court did recognize that the election of one process over the other might make a difference in the available monetary recovery to redress the claim. For example, the Court pointed out that the available monetary recoveries are different if the employee proceeds under KRS 337.385(1) than if the commissioner proceeds under KRS 337.385(2) (the latter may not recover liquidated damages). Id. at 358-359. Nothing in Parts Depot suggests that the Administrative Process and Judicial Process could be pursued sequentially, as here, where Singleton first elected to proceed administratively, secured a settlement of his claim, and then attempted to use the settled claim as a basis for pursuing the Judicial Process in the hope of recovering a larger monetary award (liquidated damages and attorneys’ fees).

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<sup>4</sup> This view was best expressed in Early v. Campbell County Fiscal Court, 690 S.W.2d 398 (Ky. Ct. App. 1985), which held that KRS 337.385(1) referred only to the appellate jurisdiction conferred on the circuit courts pursuant to KRS 337.310. The Early case was expressly overruled in Parts Depo.

That the two available modes or processes for redressing a violation of the wage and hour statutes resulting in unpaid wages are mutually inconsistent or contradictory is made plain by Singleton's effort to pursue both. The available monetary recoveries are different under the two processes of seeking redress, as are the procedures for adjudicating the claims.

**2. Singleton's Acceptance of Payment for His Unpaid Wages and His Release of His Claim for Violations of KRS 337.065 Constitutes a "Settled Choice."**

Here, Singleton made an "election" of pursuing the Administrative Process to redress his claim for unpaid wages. Following investigation of the claim by the DOL, Singleton voluntarily agreed to accept payment of the unpaid wages and to release BDI from liability for its alleged violation of KRS 337.065(3), which was the sole basis for his unpaid wage claim. Singleton pursued the Administrative Process to its end and voluntarily accepted the remedy/recovery available. He made a settled choice of the Administrative Process to the exclusion of the other available mode of redress -- the Judicial Process.

By pursuing his claim to resolution by settlement in the Administrative Process, Singleton obtained redress of the violation of his rights under KRS 337.065 just the same as if the parties had not settled but, instead, litigated the claim through to final adjudication. The case of McCabe v. Dawkins, 388 S.E.2d 571 (N.C. Ct. App. 1990) is on point. In that case, the plaintiff accepted a settlement in a will construction case and then sought to sue the lawyer who drafted the will for malpractice. The Court held:

Settlement of or judgment on the first action is inconsistent with suit in the second action when the relief demanded in the second action is a continuation of relief sought in the first action, [citations omitted] or if relief sought in the first action can redress the damage claimed in the

second action. . . . A second action is a continuation of the first action when plaintiff seeks to recover some alleged deficiency in the settlement or judgment of the first action. [Citations omitted]. If plaintiff accepts settlement, or judgment is rendered on his demand in the first action, such acceptance or judgment is a *final* redress of that action, regardless of whether the amount of relief is what plaintiff requested.

Id. at 572.

In the Singleton Decision, the Court of Appeals refused to conclude that Singleton's acceptance of the settlement was a "settled choice" of the Administrative Process such that his lawsuit would be barred by the doctrine of election of remedies. (Appellant App. at Ex. 1.) The Court of Appeals held that Singleton released his claim under KRS 337.065 for unpaid wages associated with tip pooling but did not release his "claim" for liquidated damages and attorney fees under KRS 337.385(1). Yet, the Court of Appeals confused a "claim for redress" -- meaning a violation of substantive rights -- with the "mode of redress," meaning the *monetary recovery* available to remedy the violation of substantive rights. Singleton had but *one claim for redress* -- BDI's failure to pay wages lawfully owed to him because of the unlawful tip pooling practice. KRS 337.020 through 337.405 contain no substantive, distinct, non-derivative claim for liquidated damages or attorney fees. (See Infra p. 14).

Below, the Court of Appeals incorrectly viewed the monetary recoveries available to redress the claim -- unpaid wages, liquidated damages and attorney fees -- as distinct "claims" themselves when, in fact, they are simply different remedies to redress the abridgement of one right -- the right to be paid wages lawfully owed. Liquidated damages and attorney fees are not substantive, statutory rights; they are available remedies for a violation of substantive, statutory rights. They are derivative of those statutory claims in that they may be recovered only if the substantive rights are violated.

This distinction is supported by the plain language of KRS 337.385(1). First, the statute expressly describes the kinds of violations of substantive rights it was directed to: “Any employer who pays an 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 . . . .*” [Emphasis added.] In other words, it is the employer’s violation of an employee’s substantive rights arising from the wage and hour statutes KRS 337.020 to 337.285 that triggers the employee’s right to seek redress. The statute then describes what recovery aggrieved employees may obtain (back pay and, possibly, liquidated damages and attorney fees).

Also, the statute clearly provides that the award of liquidated damages and attorney fees is within the discretion of the court. The statute contemplates that cases may arise in which the employer abridges the employee's right to be paid wages but, while being liable to pay the unpaid wages, may escape liability for liquidated damages and attorney fees: “[I]f 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 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.” Therefore, the Singleton Decision’s conclusion that Singleton did not make a “deliberate and settled choice” with respect to any potential remedies under KRS 337.385 is based upon the mistaken premise that liquidated damages and attorney fees are separate substantive rights.

Likewise, to the extent that the Singleton Decision held that Singleton's election was not a "deliberate and settled choice" because he may have lacked specific knowledge of the legal effect of his election, again it is mistaken. First, Singleton knowingly released his substantive wage claims when he signed the settlement agreement. Singleton claimed before the Court of Appeals that he did not know KRS 337.385 existed when he accepted the settlement offer. As the Circuit Court correctly concluded, however, "even if the Plaintiff did not know about KRS 337.385, it has been a long standing rule that such alleged ignorance would not render [Singleton's] settlement agreement invalid." (Appellant App. at Ex. 2.) (citing Barker v. Stearns Coal & Lumber Co., 163 S.W.2d 466 (Ky. 1942)).

In addition, the Circuit Court correctly ruled that Singleton indisputably knew *exactly* what he was relinquishing when he signed the settlement agreement and cashed his check. (Appellant App. at Ex. 2.) The Circuit Court noted that Singleton's original complaint, filed May 13, 2005, during the pendency of the DOL investigation, specifically sought "[t]o require Defendant to pay double the damages and attorney fees' pursuant to KRS 337.385 . . ." (Id.) Singleton signed a verification, attesting that the Complaint was true. Nearly two months later, Singleton executed the settlement and release. In exchange for his settlement check, Singleton, along with a majority of his purported class members, signed binding agreements wherein they "acknowledge[d] receipt of *payment in full* from Brio . . . for unpaid wages due [them] . . ." (R., Vol. 1, p. 53; Appellant App. at Ex. 8.) (emphasis added). They also unequivocally accepted the



respective amount as “satisfactory settlement” and released BDI from any “*further liability*” associated with their wage claims. Id. (emphasis added).<sup>5</sup>

The Circuit Court correctly saw through Singleton’s feigned ignorance. Applying the longstanding rule of Barker,<sup>6</sup> the Circuit Court correctly found that, even if Singleton did not know about KRS 337.385 -- which clearly was not the case -- such alleged ignorance did not render his settlement agreement invalid. (Appellant App. at Ex. 2.) By filing his wage claim with the DOL and accepting a settlement during the Administrative Process, Singleton made his election and accepted his remedy.

Another panel of the Kentucky Court of Appeals, in fact, has applied the doctrine of election of remedies to KRS Chapter 337. City of Frankfort v. Davenport, Nos. 2005-CA-00036-MR, 2005-CA-000048-MR, 2005-CA-000049-MR, 2006 WL 2380792, \*3 (Ky. Ct. App. Aug. 18, 2006). (Appellant App. at Ex. 10.) In Davenport, the employees initially filed a complaint with the DOL to recover overtime wages. Id. at \*1. Unlike Singleton, who settled his claim, the employees in Davenport exhausted the administrative process by pursuing their claims through an administrative adjudication and both sides appealed to the Circuit Court. The employees sought, among other things, liquidated damages and attorneys’ fees under KRS 337.385. Id. The Circuit Court refused to award such damages and the employees appealed. Id. at \*3. The Davenport Court rejected the employees’ appeal for liquidated damages and attorneys’ fees and held that the damages available under KRS 337.385 are only available in original judicial

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<sup>5</sup> Singleton was represented by counsel when he agreed to accept the settlement. His counsel undoubtedly informed him that, by signing the settlement agreement, he was releasing BDI from any *further liability*. It is this “further liability” that Singleton is trying to parse out of the settlement agreement now.

<sup>6</sup> Barker v. Stearns Coal & Lumber Co., 291 Ky. 184 (Ky. 1942) (stating that “[i]t is a sound and fundamental policy of government that one cannot be willfully ignorant of the law,” the court held that the

actions and not administrative appeals. Indeed, citing Parts Depot, the Court emphasized that Parts Depot distinguished the Judicial Process from the Administrative Process of KRS 337.310. Id. As a result, it found that employees were not entitled to liquidated damages and attorneys' fees under KRS 337.385 because they chose the Administrative Process of filing a complaint with the DOL. Id.

The statutory scheme set forth in KRS Chapter 337 of providing alternative, mutually exclusive administrative and judicial processes for seeking redress of statutory claims is not an uncommon one under Kentucky law. For instance, KRS Chapter 344, Kentucky's Civil Rights Law, authorizes alternative avenues of relief-- one administrative and one judicial. See Meyers v. Chapman Printing Co., 840 S.W. 2d 814, 820 (Ky. 1992). The election of remedies doctrine is codified in the Kentucky Civil Rights Act in KRS 344.270, which provides, in pertinent part: "A final determination by a state court or a final order of the commission of a claim alleging an unlawful practice under KRS 344.450 shall exclude any other administrative action or proceeding brought in accordance with KRS Chapter 13B by the same person based on the same grievance." The statute expressly provides that the courts do not have jurisdiction of a claim that is already pending before the commission. Aggrieved employees may withdraw their administrative claim before it is resolved and then proceed judicially.

Significantly, the remedies available to redress an unlawful practice under Chapter 344 are different under the administrative and judicial processes. KRS 344.230 sets forth the remedies available to an aggrieved employee whose claim is resolved through the administrative process before the Kentucky Human Rights Commission.

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defendant was charged with constructive knowledge of the law at issue and had therefore waived its procedural requirements).

KRS 344.450 provides different and additional remedies for employees who pursue their claims judicially (including the recovery of attorney fees). It has never been suggested, however, that the additional remedies provided in KRS 344.450 are actually substantive rights enabling an aggrieved employee to pursue an administrative claim to resolution and then pursue the additional remedies through a judicial action. In fact, Vaezkoroni v. Domino's Pizza, Inc., 914 S.W.2d 341 (Ky. 1995), specifically held that the election of remedies statute precluded an employee from pursuing the administrative process to resolution and then pursuing the judicial process in respect to the same substantive claims.

Nothing in Parts Depot or any other authority suggests that this same rule should not apply to the two alternative avenues of relief under KRS Chapter 337. Singleton elected his avenue of relief – he elected to file a charge with the DOL and he resolved and released his claim by settlement. If in hindsight, Singleton did not like his initial choice of the Administrative Process, he made no effort to withdraw that choice and made the affirmative choice to accept the settlement instead of rejecting it. That choice had the consequence of barring his later attempt to obtain any additional monetary recovery by filing a lawsuit based upon his settled claim.

Accordingly, Singleton's lawsuit is barred by the doctrine of election of remedies. He chose one of two available processes to pursue his claim and obtained redress of his claim administratively. The purpose of the doctrine of election of remedies is to prevent an aggrieved person from obtaining more than one redress for a single wrong and that is exactly what Singleton sought to do by filing suit under KRS 337.385(1) after accepting redress of his claim by way of settlement.

**B. The Court of Appeals Incorrectly Held That the Remedies of Liquidated Damages and Attorney Fees Are Substantive Wage Provisions. Rather, by Releasing His Substantive Wage Claim under KRS 337.065, Singleton Waived the Right to Recover those Additional Remedies.**

The Singleton decision failed to distinguish between the substantive wage and hour provisions of KRS 337.020 through 337.420 and one of the enforcement provisions, KRS 337.385. The Singleton decision concluded that Singleton's release did not include a waiver of the damages available under KRS 337.385 because that statute was not expressly identified within the four corners of the release. Singleton, 2007 WL 2741945 at \*3 (Appellant App. at Ex. 1). The Court further concluded that Singleton could properly maintain a court action for KRS 337.385 damages despite having settled his underlying wage claim under KRS 337.065. Id. at \*5.

KRS 337.385 does not provide a separate and independent cause of action; an employee cannot make a viable claim for damages under KRS 337.385 without there being an underlying claim for violation of one or more of the wage and hour statutes, KRS 337.020 through 337.420. As set forth above, Singleton had only one substantive claim -- an alleged a violation of KRS 337.065, a substantive wage provision prohibiting tip pooling. KRS 337.385 is one of the processes available to enforce the substantive wage and hour provisions. If an employee has been paid less in wages than he or she was entitled to, then he or she may elect to seek redress in court under KRS 337.385 and recover the damages provided in that statute.

Here, Singleton released and waived his substantive wage claim. Singleton's settlement expressly indicated that his unpaid wage claim was for "Remittance of Gratuity (337.065)" and states, in part: "Your acceptance of these back wages as marked for the period indicated above means you are accepting this amount as a satisfactory

settlement and are releasing this employer from any further liability for your claim as indicated above.” (R., Vol. 1, p. 53; Appellant App. at Ex 8.) Once Singleton settled his substantive claim under KRS 337.065, that claim, along with any right he had to recover further damages based on that substantive claim, including liquidated damages or attorneys’ fees under KRS 337.385, was extinguished. Thus, it is immaterial whether the enforcement provision of KRS 337.385 was mentioned within the “four corners” of the settlement agreement, since, upon settlement of Singleton’s KRS 337.065 claim, there was no longer a substantive claim to enforce.

KRS 337.385 is no different than the many other statutory provisions that provide a broad range of potential remedies that plaintiffs can (and often do) choose to forgo in exchange for a sum certain and to avoid the uncertainty of trial. For instance, the Age Discrimination in Employment Act (“ADEA”) provides for various remedies, as well as liquidated damages, in cases of willful violations. 29 U.S.C.A. § 626(b). A plaintiff who has knowingly waived and fully settled an age claim in exchange for money designated as back wages and compensatory damages cannot later file a complaint in a court asking the court to determine whether the alleged violation was “willful” and to award liquidated damages. Similarly, the hypothetical availability of liquidated damages in KRS 337.385 does not mean that Singleton is entitled to those damages, notwithstanding his settlement.

Singleton’s claim that, regardless of his settlement, the mere existence of KRS 337.385 entitles him to liquidated damages is belied by the plain language of the provision. KRS 337.385 provides, in relevant part, that where an employee properly pursues an action seeking liquidated damages, the employer may avoid imposition of such damages by showing “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 ..." (Appellant App. at Ex. 6.) Liquidated damages are thus not mandatory or automatic.

In short, the Singleton Decision stands the statutory scheme of KRS Chapter 337 on its head by effectively turning the enforcement provision of KRS 337.385 into a substantive wage provision which it is not. To recover the additional remedies of liquidated damages and attorney fees under KRS 337.385, Singleton must first prove the violation of a substantive wage provision. Here, Singleton cannot do that because his settlement agreement waived the only claim he has ever alleged, a violation of KRS 337.065. For this reason alone, Singleton's complaint was properly dismissed by the Circuit Court and the Court of Appeals' decision must be reversed.

**C. The Singleton Decision Improperly Construes the Statutory Structure of KRS Chapter 337.**

Allowing for dual recoveries on the same claim, which is precisely what the Singleton Decision does, is contrary to any reasonable construction of KRS Chapter 337. As this Court has noted: "The rule is that, in construing an act, it must be considered as a whole, and so construed, if possible as to give effect to every part thereof, and to produce a harmonious whole . . . ." Popplewell's Alligator Dock No. 1 v. Cabinet, 133 S.W. 3d 456, 466 n. 34 (Ky. 2004). Indeed, "[i]f there is any doubt from the language used by the legislature as to the intent and purpose of the law, then courts in interpreting the statute should avoid a construction which would be unreasonable and absurd in preference to one which is reasonable, rational, sensible and intelligent." Ex. Branch Ethics Comm'n

v. Stephens, 92 S.W. 3d 69 (Ky. 2002). In reversing the Circuit Court's decision, the Singleton Court failed to follow these fundamental statutory construction maxims.

The "unreasonable and absurd" nature of the Court of Appeals' construction of KRS Chapter 337 is plain from the dire consequences that would flow from that construction -- consequences that extend well beyond the parties in this case.

First, the Singleton Decision creates precedent that allows employees to circumvent a settlement that they knowingly and voluntarily accept through the Administrative Process and subsequently sue their employer for liquidated damages and attorneys' fees in court. Allowing employees to recover once from the DOL, then again through the court system, obliterates any incentive an employer has to cooperate and settle claims with the DOL. Regardless of any resolution of a matter in DOL proceedings, the specter of liquidated or other additional damages based on *the same matter* would always loom over an employer. Following the Singleton Decision, employers have no certainty that a settlement negotiated with an agency of the Commonwealth will in fact end a dispute between it and an employee.

Second, in one sweep, without action by the General Assembly, the DOL's authority to resolve wage-related disputes would be drastically altered. See 803 KAR 1:035(1) and 803 KAR 1:035(2).<sup>7</sup> Moreover, the confusion the Singleton Decision creates will dissuade most employers from participating in the Administrative Process for fear that they will be subject to a separate judicial action for liquidated damages and attorneys' fees and be forced to defend themselves in two separate actions. Simply put,

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<sup>7</sup> A copy of 803 KAR 1:035 is attached as Appellant App. at Ex. 11.

following the Singleton Decision, there is no finality on a claim adjudicated through the Administrative Process. Clearly, this was not the intention of the General Assembly.

Third, the Singleton Decision would serve only to clog the judicial system. It is not unreasonable to conclude that all wage claims that have been settled during the Administrative Process (and at least those that are not time-barred) are ripe to be filed in court in an effort to obtain the additional relief of liquidated damages and attorney fees. Worse, if the Court of Appeals is correct that remedies of liquidated damages and attorney fees are substantive wage provisions, then not just settled claims are ripe for additional litigation; so, too, are claims that have been litigated to final resolution (including appeal to the circuit court) in the Administrative Process. The courts will be awash in litigation of claims that even the litigants thought were final. This result would be devastating to Kentucky's judicial and administrative processes. See LaFleur v. Shoney's Inc., 83 S.W.3d 474, 478 (Ky. 2002) (“[T]he 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.”).

The Singleton Decision's flawed construction of the statutory structure of KRS 337 is amply demonstrated in the following statement in that Court's opinion:

Moreover, we note that [KRS 337.385] refers to “any action commenced to recover such unpaid wages or liquidated damages . . .[.]” The statute's use of the disjunctive “or” presupposes that the employee has recovered unpaid wages prior to filing his court action under KRS 337.385. *It stands to reason that in most cases the unpaid wages will have been recovered through the DOL administrative process.*

(Appellant App. at Ex. 1) (emphasis added). The entity now known as the Department of Labor was created in the 1940s by the Kentucky General Assembly. KRS 336.040. KRS



337.385 was enacted in 1974. BDI is unaware of *any* instances in all of those years prior to the Singleton decision in which a plaintiff-employee has settled a claim for unpaid wages through the DOL administrative process and then later requested, let alone received, liquidated damages despite the prior settlement. The reason for the absence of any such instances is plain: the Singleton decision runs contrary to any reasonable construction of the statutory structure of KRS Chapter 337. BDI urges this Court to reject the Singleton decision's "unreasonable and absurd" statutory construction and to reinstate the trial court's decision in this case.

V. CONCLUSION

The Singleton Decision should be reversed. KRS 337.020 through 337.420 contain Kentucky's substantive wage and hour provisions. An employee whose substantive wage and hour rights are violated may seek redress through one of two adjudicative processes: (1) by filing an administrative complaint with the DOL; or (2) by filing an action in court pursuant to KRS 337.385. Here, Singleton pursued the administrative process and accepted a resolution of his substantive claim by way of a settlement and release. The doctrine of election of remedies bars his subsequent lawsuit seeking additional remedies for the same substantive claim.

Liquidated damages and attorney fees are merely monetary remedies possibly available under KRS 337.385 for employees who elect to pursue redress of their wage claims through the judicial process. Liquidated damages and attorney fees are not themselves substantive rights. By settling and releasing BDI from liability for the alleged violation of his substantive rights, Singleton waived his rights to further remedies, including liquidated damages and attorney fees.

Finally, if permitted to stand, the Singleton decision may unravel every settlement the DOL has ever facilitated, effectively strip the DOL of its ability to investigate and resolve wage and hour disputes, and eliminate all finality on wage and hour claims adjudicated through the administrative process. That simply can not be what the General Assembly intended. The system created by the Singleton Decision – in which employees would “settle” their administrative wage claims and then sue for additional damages – is precisely the sort of “unreasonable and absurd” statutory construction that this Court has

cautioned against. See Ex. Branch Ethics Comm'n v. Stephens, 92 S.W.3d 69 (Ky. 2002).

Accordingly, Appellant respectfully urges this Court to reverse the Singleton decision and affirm the Circuit Court's Orders of June 23, 2006 and September 15, 2006 dismissing Appellee's complaint for liquidated damages and attorneys' fees.

Respectfully submitted,



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