

SUPREME COURT OF KENTUCKY
DOCKET NO. 2007-SC-0769-D

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

FILED

SEP 15 2008

SUPREME COURT CLERK

BRAVO! DEVELOPMENT, INC.

APPELLANT


v.

SCOT SINGLETON

APPELLEE

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

Respectfully submitted:



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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 September 15, 2008: Clerk Samuel Givens, Jr., Commonwealth of Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Fred A. Stine, V, Campbell County Circuit Court, 330 York St., Newport, KY 41071; Sherrill Hondorf, 221 Front St., #4, New Richmond, OH 45157, and Margo Grubbs, 327 West Pike St., Covington, KY 41011.


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STATEMENT OF POINTS AND AUTHORITIES

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- B. Liquidated Damages Are Not Mandatory When an Employee Recovers Unpaid Wages Through the DOL’s Administrative Process4

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I. PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

The purpose of this Brief is to respond to the Brief filed by Plaintiff/Appellee Scot Singleton (“Singleton”). This Reply Brief addresses and examines the specious arguments set forth in Appellee’s Brief that attempt to distract this Court from the central issue presented in this appeal – whether an employee who files a wage-hour claim with the Kentucky Department of Labor (“DOL”),¹ and accepts a settlement of that claim releasing his employer “from any further liability” for that claim, may subsequently maintain a court action under KRS 337.385(1) which seeks to impose additional liability on the employer for that same, settled claim.

II. ARGUMENT

Singleton’s Brief repeats certain false premises regarding KRS Chapter 337 over and over in the apparent hope that this Court will accept them as legitimate. However, Singleton’s flawed interpretation of Chapter 337 is completely inconsistent with the language, structure, and intent of that statute, all of which compel judgment in favor of Bravo! Development, Inc. (“BDI”).

A. Singleton’s DOL-Supervised Settlement of His Wage Claim Under KRS 337.065 Precludes Any Further Recovery on That Claim.

The first of these false premises is that the Receipt for Payment of Back Wages² -- in which Singleton voluntarily accepted payment of over \$4,000 and released BDI from liability for its alleged violation of KRS 337.065 -- was somehow not a settlement.

¹ 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 DOL within the Environmental and Public Protection Cabinet. For simplicity, we will continue to reference the agency as “DOL,” with such designation referring to the Kentucky Department of Labor before June 2, 2008, and the Kentucky Labor Cabinet after June 2, 2008.

² Attached as Exhibit 8 to Appellant’s Brief.

Incredibly, Singleton goes so far as to suggest that the Kentucky DOL does not have the authority to settle wage claims. (Appellee's Brief, 4). That would no doubt come as a shock to the DOL and all of the Kentucky employers and employees who have paid out and accepted millions of dollars over the years in DOL-supervised settlements.

The fact is, as the regulations governing the DOL administrative process note, that the DOL does have authority to settle claims between employers and employees; indeed, a DOL-supervised agreement between an employer and employee is specifically called a "settlement." See KAR 1:035 § 1(2). Moreover, the Receipt for Payment of Back Wages signed by Singleton states that "you are accepting this amount as a **satisfactory settlement and are releasing this employer from any further liability for your claim** as indicated above." (See Exh. 8, Appellant's Brief). In addition, the DOL's correspondence to Singleton enclosing the Receipt stated that "the employer has offered the net amount specified on the enclosed receipt for payment of back wages **as full settlement of all wage claims.**" (See Exh. 2, Appellee's Brief).

Moreover, as this Court noted in Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 358 (Ky. 2005), there are substantial similarities between the Kentucky statutory scheme for resolution of wage claims and the process employed by the U.S. Department of Labor ("USDOL"). As in Kentucky, the USDOL has authority to supervise settlements of wage claims through its administrative process, but has no authority to impose liquidated damages at the administrative level. 29 U.S.C. § 216(c). As in Kentucky, employees may forgo the USDOL's administrative process and file a wage claim directly in court. Id. at § 216(b). However, employees who accept payment of their full back wages and sign USDOL settlement forms are precluded from seeking any further damages (such as liquidated damages or attorneys' fees) in court on their

underlying wage claim. Id. at 216(c). Imagine the shock to the federal judicial system if the United States Supreme Court suddenly decided that the millions of employees who have settled their federal wage claims (nearly 1.5 million employees in just the last five years³) were free to file claims for liquidated damages and attorneys' fees in federal court despite signing USDOL-supervised settlement agreements. Singleton would have this Court impose that same sort of chaos on Kentucky's judicial system.

Singleton repeatedly attempts to bolster his claim that the agreement he signed was not a legitimate settlement by arguing that "no person, knowledgeable of his right to receive double what has been offered, would ever agree to a settlement for half that amount." (See Appellee's Brief, at 8, 19). Plaintiff's argument is clearly belied by the millions of individuals who have settled their federal wage claims through the administrative process despite having liquidated damages available to them through the federal court system and all of the individuals who have continued to settle their wage claims through the Kentucky DOL following this Court's decision in Parts Depot despite the potential availability of liquidated damages in a state court action.

The argument advanced by Singleton is all the more specious given the fact that a settlement is a voluntary resolution of a disputed claim, entered into only after both parties agree to do so. No one, not an employer, not the DOL, not even a court of law, can force an unwilling party to accept a settlement. Singleton obviously made the choice to settle his claim, rather than engage in an adversary proceeding with no guarantee of if or when any payment would be received.

³ See USDOL 2007 Statistics Fact Sheet, <http://www.dol.gov/esa/whd/statistics/200712.htm>.

From BDI's perspective, it paid nearly \$400,000 to Singleton and other BDI employees to resolve their wage claims under KRS 337.065. Each of those employees signed a Receipt for Payment of Back Wages similar to that signed by Singleton in which they agreed that their "acceptance of these back wages ... 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.**" The "claim ... indicated above" on the form is the employee's claim under KRS 337.065. Thus, once Singleton and the other BDI employees signed that form and accepted the payment specified in the form, their KRS 337.065 claims against BDI were forever settled, and they gave up any right to seek further damages from BDI on those claims.

One thing is certain: BDI would never have paid nearly \$400,000 to resolve its employees' claims in a DOL-supervised settlement, using the DOL's own form, if it had thought that its employees could subsequently obtain liquidated damages and attorneys' fees in court on that same settled claim. Indeed, it is difficult to imagine any employer entering into an administrative settlement through the DOL with the specter of another lawsuit for additional damages on the same claim hanging over its head.

From both Singleton's and BDI's views, they got what they bargained for at the time of the settlement. Singleton got his money without having to go through a lengthy and uncertain process, and BDI got finality. Nothing in Kentucky law either explicitly or implicitly permits such a final, executed settlement to be undone.

B. Liquidated Damages Are Not Mandatory When an Employee Recovers Unpaid Wages Through the DOL's Administrative Process.

The second false premise that is repeated several times in Appellee's Brief is that KRS 337.385(1) provides that liquidated damages are "mandatory" or "mandated" for all

wage claims, regardless of whether the claim is initially brought administratively or in court. Singleton repeatedly rails against the DOL for not enforcing its supposed statutory mandate under KRS 337.385(1) to impose liquidated damages on employers during the administrative process. Singleton's insistence as to the mandatory nature of liquidated damages and his unwarranted criticism of the DOL indicates a fundamental misunderstanding of Kentucky's wage statutes and regulations.

First, liquidated damages are not mandatory. KRS 337.385(1) provides that, where an employee properly pursues an action seeking liquidated damages, the employer may avoid imposition of such damages by showing the court that its act or omission was in good faith and that it had reasonable grounds for believing it was not committing a violation. Thus, even when permitted as a remedy, liquidated damages are not mandatory or automatic.

More importantly, there is no statutory or regulatory authorization whatsoever for the DOL to seek liquidated damages on behalf of an employee in a DOL administrative proceeding for a violation of KRS 337.065. The penalty provision of Chapter 337, KRS 337.990(6), provides only for a civil penalty and payment of the unpaid wages for violations of KRS 337.065. It does not provide for liquidated damages. Moreover, as this Court noted in Parts Depot, the DOL cannot pursue liquidated damages against an employer even when it files a lawsuit directly in court against an employer on behalf of an employee under KRS 337.385.⁴ Thus, contrary to Singleton's assertion, liquidated damages are clearly not mandatory for violations of KRS 337.065.

⁴ Id. at 358-59 ("Undoubtedly, the General Assembly included the liquidated damages provision in subsection (1) and omitted it from subsection (2) as an incentive for employees to hire their own attorneys and pursue their own claims, thereby relieving the commissioner of much of the burden of litigation.").

In addition, as this Court noted in Parts Depot, “KRS 337.385 is substantially similar to 29 U.S.C. § 216(b) of the federal Fair Labor Standards Act, which also authorizes a private cause of action by an employee against an employer to recover damages, including liquidated damages and attorney fees, for failure to pay wages owed for services rendered.” Id. at 358. Section 216(b), like KRS 337.385, includes the “mandatory” language that employers who violate wage provisions “**shall** be liable to the employee ... for their unpaid minimum wages or ... overtime compensation and ... liquidated damages.” In spite of this so-called “mandatory” language, employees who settle their claims for unpaid wages through the USDOL’s administrative process cannot obtain liquidated damages through that process and are prohibited from filing suit for liquidated damages or attorneys’ fees once they have accepted a settlement through the USDOL’s administrative process for full payment of their unpaid wages. 29 U.S.C. § 216(c). The same holds true under the “substantially similar” provisions of KRS 337.385.

In short, the primary logical underpinning of Appellee’s Brief – that liquidated damages are mandatory pursuant to KRS 337.385 when an employee recovers unpaid wages through the DOL’s administrative process or otherwise -- is undisputedly wrong. Rather, the only interpretation of KRS 337.385 that is consistent with the language of the statute, the DOL regulations, and Parts Depot is that the remedy of liquidated damages is limited to situations in which an employee brings his or her claim for unpaid wages initially in court. In contrast, Singleton’s interpretation of KRS 337.385 would create the absurd and unreasonable result of rendering the DOL administrative process a virtual nullity and forcing employers into the court system in order to achieve finality with respect to wage claims. Ironically, Singleton’s approach, which he claims protects

“workers’ rights,” would inflict the most harm on the vast numbers of individual employees with smaller wage claims, who, instead of being able to resolve their claims quickly and efficiently through the DOL’s administrative process, would be faced with the difficult task of finding an attorney to represent them in court on a small claim.

C. Liquidated Damages And Attorneys’ Fees Are Remedies, Not Substantive Rights.

The third patently false premise underlying both Singleton’s argument and the Court of Appeals’ decision is that liquidated damages are not a remedy. Playing the ultimate game of semantics, Singleton claims that the liquidated damages provided in KRS 337.385(1) are not really a remedy for BDI’s alleged failure to comply with KRS 337.065, but rather, an “additional liability” imposed by KRS 337.385 for violation of KRS 337.065. (See Appellee’s Brief, 13-14). However, as discussed above, when Singleton signed the Receipt of Payment of Back Wages, he specifically released BDI “**from any further liability**” for his KRS 337.065 claim. Therefore, whether liquidated damages are characterized (properly) as a remedy or (improperly) as an “additional liability” for violation of KRS 337.065, the result is the same – Singleton has released his right to pursue liquidated damages or any other remedy or additional liability related to his settled claim.

As explained more fully in Appellant’s Brief, Singleton, like the Court of Appeals, incorrectly views the monetary recoveries available under KRS 337.385 to redress a violation of KRS 337.065 -- 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. Once the underlying wage claim is satisfied -- as in this case -- there is no further statutory claim left for adjudication.

D. This Court Should Decline Singleton's Invitation to Judicially Rewrite Kentucky's Wage-Hour Statutes.

The fourth false premise repeated throughout Appellee's Brief is that the DOL ignored its "mandate" to enforce KRS 337.385(1) by not allowing him the opportunity to recover liquidated damages during the administrative process. As explained above, there is no such mandate in KRS 337.385(1) -- or anywhere else in Kentucky's statutory or regulatory scheme for enforcement of wage-hour violations. As this Court held in Parts Depot, KRS 337.385(1) authorizes an employee to bring an action **in court** against an employer for unpaid salary and wages. Id. at 359 n.3. Even a cursory reading of KRS 337.385(1) makes it plain that liquidated damages are available only in an action brought directly in court by an employee. Indeed, nearly every sentence in KRS 337.385(1) makes reference to "the court," and the section concludes with the statement: "Such action may be maintained **in any court of competent jurisdiction** by any one (1) or more employees for and in behalf of himself or themselves." (Emphasis added).

Singleton's unwarranted criticism of the DOL for not recognizing a supposed statutory mandate (to recover liquidated damages during the administrative process) that does not exist is representative of Appellee's entire argument. When boiled down to its essence, the relief sought by Singleton is for this Court to judicially rewrite Kentucky's wage-hour statutes to create new causes of action that the Legislature did not create. Moreover, the relief sought by Singleton is inconsistent with the statutory scheme the

Legislature did create. Reduced to its essence, by seeking a ruling from this Court that employees be allowed to obtain liquidated damages through the DOL administrative process, or to sue in court for liquidated damages and attorneys' fees on claims that have already been settled at the administrative level, Singleton is asking this Court to legislate from the bench -- an invitation this Court has repeatedly and consistently declined. See e.g., Com. ex rel. Cowan v. Wilkinson, 828 S.W. 2d 610, 614 (Ky. 1992) ("This Court cannot legislate by judicial fiat."); Com. ex rel. Telcom Directories, Inc., 806 S. W. 2d 638, 642 (Ky. 1991) ("It is not the role of this Court to legislate.").

E. The Court of Appeals' And Singleton's Construction of KRS 337.385 is "Unreasonable and Absurd."

By focusing on one word ("or") in KRS 337.385 and ignoring the overall statutory scheme of KRS Chapter 337, the Court of Appeals ignored a basic rule of statutory construction, "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, the Court of Appeals' and Singleton's strained interpretation of KRS 337.385 is reminiscent of the Biblical admonition, "Ye blind guides, which strain at a gnat, and swallow a camel." Matthew 23: 24, King James Bible. The Court of Appeals strains at a gnat (the word "or" in KRS 337.385(1)) while swallowing a camel whole by adopting an interpretation of that statute that would eliminate all finality on wage and hour claims adjudicated through the DOL's administrative process, obliterate any incentive for employers to settle such claims through the DOL, clog the judicial system, and allow employees to circumvent settlements that they entered into knowingly and voluntarily. As this Court recently

stated, "courts in interpreting a 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). It is difficult to imagine an interpretation of Kentucky's wage and hour statutes that is more unreasonable than that advocated by Singleton and set forth in the Court of Appeals' decision.

III. CONCLUSION

For the reasons set forth above, and in Appellant's Brief, Appellant respectfully urges this Court to reverse the Court of Appeals' 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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