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**KENTUCKY SUPREME COURT GRANTED DISCRETIONARY REVIEW:
APRIL 16, 2008
(FILE NO. 2007-SC-0769-D)**

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002163-MR

SCOT SINGLETON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 06-CI-00179

BRAVO DEVELOPMENT, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Scot Singleton appeals from an order of the
Campbell Circuit Court dismissing his class action complaint against Bravo
Development, Inc.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The complaint sought damages from Bravo pursuant to the liquidated damages and reasonable attorney fee provisions of KRS² 337.385. The circuit court dismissed the case on the basis that (1) Singleton had failed to exhaust his administrative remedies before the Kentucky Department of Labor, and (2) had settled in full any claim he may have against Bravo in the administrative proceedings when he accepted amounts due to him by Bravo for its having violated the gratuity pooling provisions of KRS 337.065.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2003 Singleton began employment at Bravo Development, Inc. d/b/a Brio Tuscan Grille (Bravo), in Newport, Kentucky, as a server. During the time he worked there he and his fellow servers were required to remit back to the restaurant 3% of their sales. This practice is called “tipping out” and is unlawful pursuant to KRS 337.065.

Singleton complained to restaurant management that the practice was unlawful, but management refused to correct the practice. In November 2004, Singleton filed a complaint with the Kentucky Department of Labor (DOL). DOL investigated the complaint and confirmed that the restaurant was engaging in the unlawful practice. Shortly thereafter Bravo made an offer “for payment of back wages as full settlement of all wage claims” to Singleton and his fellow servers. Believing the amount to be insufficient to fully compensate him for the unlawful withholding, Singleton rejected the offer and retained an attorney.

² Kentucky Revised Statutes.

On May 13, 2005, Singleton, on behalf of himself and the class of persons whose wages had been unlawfully taken by Bravo, filed a class action complaint in Campbell Circuit Court (Case No. 05-CI-00678). At some point after the filing, Bravo's books were reaudited and it was determined, as suspected by Singleton, that significantly more had been withheld in violation of KRS 337.065 than originally calculated and reflected in the original offers. As a result, revised offers of settlement were made by Bravo. On July 1, 2005, Singleton accepted the settlement as proposed by Bravo. As further discussed below, the scope of that settlement is sharply disputed. The record discloses that DOL completed its investigation of the matter on September 28, 2005, without issuance of a formal report on the matter.

In the meantime, Bravo moved to dismiss Case No. 05-CI-00678 on the basis that Singleton and the class had failed to exhaust their administrative remedies. The complaint was subsequently dismissed upon that basis.

His back wages having been recovered and the DOL having closed its investigation, on February 6, 2006, Singleton filed the present complaint in Campbell Circuit Court. The complaint was again prosecuted as a class action on behalf of Singleton and similarly situated current and former Bravo employees, and sought damages based upon the liquidated damages and attorney fee provisions of KRS 337.385.

On March 7, 2006, in lieu of an answer, Bravo filed a motion to dismiss pursuant to CR³ 12.02(a) (lack of jurisdiction over the subject matter) or, in the alternative, a motion for summary judgment pursuant to CR 56.

³ Kentucky Rules of Civil Procedure.

On June 23, 2006, the circuit court entered an order dismissing Singleton's class action complaint upon the basis that (1) Singleton had settled his claim in full through the DOL administrative process, and (2) it did not have subject matter jurisdiction over the claim because Singleton had elected to proceed through the DOL administrative process, had thereby elected his remedy, and had not exhausted his administrative remedies.⁴ Singleton subsequently filed, in effect, a motion to alter, amend, or vacate pursuant to CR 59.05. On September 15, 2006, the circuit court entered an order making minor clarifications to its June 23, 2006, order but otherwise denying the post judgment motion. This appeal followed.

DISCUSSION

Before us, Singleton presents various overlapping arguments contending that the circuit court erred in dismissing his claim. These arguments, however, may be categorized as (1) challenging the circuit court's determination that Singleton has waived his right to pursue KRS 337.385 damages because he settled his claim in connection with the DOL administrative proceedings, and (2) challenging the circuit court's determination that Singleton had elected his remedy by proceeding via the DOL administrative process, had failed to exhaust his administrative remedies, and, accordingly, it did not have subject matter jurisdiction over the cause. We will address Singleton's arguments, by way of general discussion, pursuant to the foregoing two categories.

WAIVER OF KRS 337.385 DAMAGES BY SETTLEMENT

⁴ The DOL administrative process is set forth in 803 KAR 1:030 and 803 KAR 1:035.

We first consider whether Singleton waived his right to pursue KRS 337.385(1) damages in a circuit court proceeding when, in connection with the DOL administrative proceedings, he accepted a check from Bravo company and signed a writing containing release of liability language. Singleton contends that the release applied only to KRS 337.065 gratuity pooling back pay amounts, whereas Bravo alleges that the release was a comprehensive release absolving it from any further liability relating to its KRS 337.065 violations, including KRS 337.385 liquidated and attorney fee damages. For the reasons stated below, we agree with Singleton.

As previously noted, upon a reauditing of the books of Bravo, a second offer was suggested by the restaurant as an amount which would compensate Singleton for amounts unlawfully withheld in connection with the appellee's gratuity pooling practice. Singleton accepted the check, and in connection therewith executed a "Receipt for Payment of Back Wages." The receipt provided, in relevant part, as follows:

RECEIPT FOR PAYMENT OF BACK WAGES

I, Scot Singleton, hereby acknowledge receipt of payment in full from Brio [] for unpaid wages due me as indicated by the Kentucky Revised Statute(a) marked below for the period beginning 1/1/02 through 3/31/05:

Non-payment of Wages _____ (337.020 & 337.055)	Overtime _____ (337.285)	Gross Amount <u>\$4,139.08</u>
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Withholding of Wages _____ (337.060)	Minimum Wage _____ (337.275)	Authorized [Ded.] <u>\$1821.95</u>
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[7 th] Day Overtime _____ (337.050)	Remittance of Gratuity <u>X</u> (337.065)	Net Amount [] <u>\$2317.13</u>
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Wage Discrim. Based _____ Rest Periods not Paid _____

on Sex (337.423) (337.365)

Cost of Medical Exam _____ Prevailing Wage _____
(336.220) (337.530 and/or 337.540)

....

NOTICE TO EMPLOYEE: 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.

....

A settlement agreement is a type of contract and therefore is governed by contract law. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003) (citing 15 AM. JUR. 2D, Compromise and Settlement § 9 (2000)). It is well established that construction and interpretation of a contract are questions of law for the court. *See Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893 (Ky. 1992). We review questions of law de novo and, thus, without deference to the interpretation afforded by the circuit court. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky.App. 1998).

As with any contract generally, the language of a release determines the parties' intentions. *See Woodruff v. Bourbon Stock Yards Co.*, 149 Ky. 576, 149 S.W. 960, 962 (1912). "When no ambiguity exists in the contract, we look only as far as the four corners of the document to determine the parties' intentions." *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 448 (Ky. 2005). "The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms." *Cantrell Supply, Inc. v. Liberty Mutual Insurance Co.*, 94 S.W.3d

381, 385 (Ky.App. 2002). “It is fundamental that the contract speaks for itself and makes manifest by its context the intentions of the parties thereto.” *Payne v. Bush*, 249 S.W.2d 789, 790 (Ky. 1952).

We believe that the release language of the foregoing writing 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. First, the writing is captioned as a “Receipt for Payment of Back Wages.” The “back wages” being paid in relation to the writing concern KRS 337.065 damages only.

Further, the first paragraph acknowledges “receipt of payment in full . . . for unpaid wages due [] **as indicated by the [statutes] marked below**[.] (Emphasis added). The only statute “marked below” is KRS 337.065. Similarly, the last paragraph, the release paragraph, provides “NOTICE TO EMPLOYEE: Your 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**.” (Emphasis added). The only “claim [] indicated above” is the claim for damages relating to KRS 337.065.

Moreover, the writing sets forth numerous statutes contained in KRS Chapter 337 which may be checked to indicate those statutory claims from which the employee is releasing the employer. Conspicuously absent from the list of options to check - and accordingly not checked - is KRS 337.385. Given the ease with which KRS 337.385 could have been included within the scope of the release (the statute need only

have been listed in the writing and checked) the four corners of the writing unambiguously limit the release to KRS 337.065 damages.

Based upon the foregoing, we believe the writing is unambiguous in its scope. The writing, by its own terms, limits itself to KRS 337.065 damages. As such, the circuit court erred in its determination that the writing released Bravo from any claims Singleton may have against it pursuant to KRS 337.385.

ELECTION OF REMEDIES/EXHAUSTION OF ADMINISTRATIVE REMEDIES

The circuit court's dismissal was also based upon its conclusion that Singleton had, by filing his original complaint, initiated proceedings through the DOL administrative process, thereby electing his remedy in that venue, and had failed to exhaust those remedies by seeking KRS 337.385 damages through the DOL process. Bravo argues in support of the circuit court's position. Singleton, however, argues that his claim for KRS 337.385 damages is properly maintained in Campbell Circuit Court and that the doctrines of exhaustion of administrative remedies and election of remedies do not apply in this case. Again, we agree with Singleton's position.

Construction of KRS 337.385

KRS 337.385(1) provides as follows:

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 jurisdiction by any one (1) or more employees for and in behalf of himself or themselves.** (Emphasis added).

The construction and application of statutes is interpreted de novo without deference to the interpretations adopted by the lower courts. *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 612 (Ky.2004). Where a statute is unambiguous, there is no need to defer to extrinsic evidence of legislative intent and public policy which the statute is intended to effect. A reviewing court cannot amend it by means of a so-called interpretation contrary to the plain meaning. *City of Louisville v. Fidelity & Columbia Trust Co.*, 245 Ky. 704, 54 S.W.2d 40 (1932).

The meaning of the language “[s]uch 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” is plain and unambiguous. Under this plain meaning, a private cause of action lies in circuit court for recovery of KRS 337.385 damages.

Moreover, we note that the statute 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.

As such, the statute contemplates the recovery of unpaid wages outside of the judicial process, followed by an action pursuant to KRS 337.385.

Bravo argues, however, that because Singleton filed a complaint with DOL relating to KRS 337.065 damages he thereby elected the administrative venue for pursuit of his KRS 337.385 damages as well, and, pursuant to the election of remedies and exhaustion of administrative remedies doctrines, is thereby precluded from seeking such damages in a judicial forum.

Election of Remedies

The doctrine of election of remedies “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.” *Collings v. Scheen*, 415 S.W.2d 589, 591 (Ky. 1967); *Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 113 (Ky.App. 2003).

The record discloses that the only deliberate and settled choice Singleton ever made with respect to KRS 337.385 damages was to pursue those damages by judicial process. Similarly, there is no evidence contained in the record that he ever pursued KRS 337.385 damages through the DOL administrative process. Hence, if anything, pursuant to the election of remedies doctrine Singleton is bound by his choice to pursue KRS 337.385 damages through the judicial process.

Further, we note that in opposition to Bravo's motion for summary judgment Singleton attached a letter from Leslie E. Renkey, General Counsel for the Environmental and Public Protection Cabinet, Office of Legal Services, Labor Legal Division. The letter is dated July 13, 2006, and is addressed to counsel of record for Singleton. The letter states, in relevant part, as follows:

This responds to your June 29, 2006, letter asking how the Labor Department applies the liquidated damages provisions of KRS 337.385 when considering entering into a settlement with the employer who has unlawfully withheld wages.

The statute authorizes liquidated damages by court action, not in settlements or other administrative proceedings under the provisions of the Department.
(Emphasis added).

Hence, DOL's position of record is that its administrative process does not provide for the recovery of KRS 337.385 damages, but, rather, such damages must be pursued through the judicial process. This position is consistent with the holding in *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354(Ky. 2005), wherein it was held that KRS 337.385 was the more specific statute and, accordingly, took precedence over the more general DOL jurisdictional statute, KRS 337.310. *Id.* at 361-362.

Based upon the foregoing, it appears that the 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.

Exhaustion of Remedies

The exhaustion of administrative remedies doctrine requires that a party pursue and exhaust all administrative remedies prior to seeking judicial relief. *Popplewell's Alligator Dock No.1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 471 (Ky. 2004). The exhaustion of administrative remedies is not required when continuation of an administrative process would amount to an exercise in futility. *Id.* at 471. As noted above, the DOL administrative process has been deemed by the agency as an unavailable venue for pursuing KRS 337.310 damages. Accordingly, such pursuance would be an exercise in futility, and the exhaustion of remedies doctrine is not applicable in the present case.

Moreover, as previously noted, Singleton never sought recovery of KRS 337.385 damages through the administrative process, and, accordingly, there is no remedy to exhaust.

Revocability of Election

In any event, even if the DOL process were an available venue for litigating Singleton's claim for KRS 337.385 damages and he initially elected to pursue those damages administratively, Kentucky law does not prohibit an employee from filing a civil action in the circuit court even though he had previously filed a complaint in an administrative forum. *Wilson v. Lowe's Home Center*, 75 S.W.3d 229, 235 (Ky.App. 2001). An irrevocable election does not occur unless it has caused an advantage to the plaintiff or a detriment to the defendant. *Id.* (citing *Riley v. Cumberland & Manchester R. Co.*, 234 Ky. 707, 29 S.W.2d 3, 4 (1930)).

Bravo has failed to cite us any prejudice accruing to it as a result of Singleton's claim for KRS 337.385 damages being litigated in circuit court as opposed to the DOL administrative forum. Thus, assuming, arguendo, that the DOL administrative process were available to pursue KRS 337.385 damages, because Bravo incurred no prejudice as a result of the switch in forums, the election of remedies doctrine does not apply in any event.

Jurisdiction

Based upon the foregoing discussion, the circuit court erred in determining that it did not have subject matter jurisdiction as a result of the election of remedies and exhaustion of administrative remedies doctrines.

CONCLUSION

For the foregoing reasons the judgment of the Campbell Circuit Court is vacated and this cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

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